

## **ANNEX A**

### **First Submissions by the Parties**

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## **ANNEX A-1**

### **FIRST WRITTEN SUBMISSION OF INDIA**

(19 November 2001)

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## I. INTRODUCTION AND SUMMARY OF ARGUMENT

1. On 16 March 1999, the United States Department of Commerce (USDOC) initiated anti-dumping proceedings against imports of cut-to-length carbon-quality steel plate (cut-to-length plate) from India. USDOC followed this initiation with an anti-dumping investigation, culminating in a final anti-dumping determination and an anti-dumping order published on 10 February 2000. The only Indian respondent was the Steel Authority of India, Ltd. (SAIL). During the investigation, SAIL made strenuous efforts to comply with the documentary and informational demands of USDOC, in particular with respect to data on SAIL's US sales. SAIL's US sales data<sup>1</sup> were timely, verifiable and appropriately submitted, but nevertheless were rejected by USDOC. Reacting to problems found with separately submitted information relating to other facts (SAIL's home market sales and cost of production), USDOC unilaterally decided that SAIL had failed to cooperate. It then decided to reject *all* information submitted by SAIL and instead have recourse to "total facts available"—thus arbitrarily assigning to SAIL the highest dumping margin alleged by the petitioner, 72.49 per cent.

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

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

4. The purpose of an anti-dumping investigation is "ensuring objective decision-making based on facts."<sup>2</sup> This purpose means that dumping margins must be determined— not created. It requires a fair measurement made in good faith. The investigating authority and the respondent must cooperate to gather the facts necessary to measure the margin of dumping as defined by the AD Agreement. As the Appellate Body recently found in its decision on *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*,<sup>3</sup> such cooperation is "a two-way process involving joint effort."<sup>4</sup> In this process, the investigating authorities must "strike a balance between the effort that they can expect interested parties to make in responding to questionnaires, and the practical ability of those interested parties to comply fully with all demands made of them by the investigating authorities."<sup>5</sup> Guided by the legal principle of good faith, the investigating authorities must not impose on exporters burdens which, in the circumstances, are not reasonable. And they may not reject information submitted in good faith by a

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

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

<sup>3</sup> WT/DS184/AB/R, AB-2001-2, circulated 24 July 2001, adopted 23 August 2001 (*Japan Hot-Rolled AB Report*).

<sup>4</sup> *Id.*, para. 104.

<sup>5</sup> *Id.*, para. 101.

foreign respondent— information that is verifiable, timely submitted, in the requested computer format, and usable without undue difficulties— simply because other categories of information have been deemed inadequate. Arbitrary action of this nature is excluded by the text, context, object and purpose of the AD Agreement, and interpretations of that agreement by panels and the Appellate Body.

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

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

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

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

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<sup>6</sup> Final Determination, 64 Fed.Reg. 73126, 29 December 1999, India Exhibit 17 ("Ex. IND-17"), at 73127.

<sup>7</sup> *Steel Authority of India, Ltd., v. United States*, CIT Slip. Op. 01-60 (22 May 2001) ("*SAIL v. United States*"), Ex. IND-20, at 14.

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

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

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

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

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<sup>8</sup> Section 782(e)(3), Ex. IND-26.

<sup>9</sup> Section 782(e)(4), Ex. IND-26.

<sup>10</sup> Final Determination, Ex. IND-17, at 73130.

<sup>11</sup> Section 782(e)(4), Ex. IND-26.

## II. KEY ISSUES IN THIS DISPUTE

1. Whether a permissible interpretation of Article 6.8 and Annex II, paragraph 3 of the AD Agreement allows investigating authorities, in calculating dumping margins, to reject verifiable and timely submitted information produced by foreign respondents that is in the requested computer format and is usable without undue difficulties.
2. Whether an objective and non-biased investigating authority could have concluded that the US sales data submitted by SAIL to USDOC did not meet the four conditions of Annex II, paragraph 3 of the AD Agreement.
3. Whether an objective and non-biased investigating authority could have concluded that SAIL did not act to the best of its ability, as set forth in Annex II, paragraph 5 of the AD Agreement, in submitting US sales data to USDOC.
4. Whether it is a violation of Article 6.8 of the AD Agreement read together with Annex II, paragraphs 3 and 5 for sections 776(a), 782(d) and 782(e) of the Tariff Act of 1930 to require USDOC to reject information otherwise acceptable under paragraphs 3 and 5 where a foreign respondent does not provide *other* usable information requested by USDOC.
5. Whether USDOC violated Article 15 of the AD Agreement by failing to explore the possibility of constructive remedies before levying final anti-dumping duties on imports of cut-to-length plate from SAIL.<sup>12</sup>

## III. STATEMENT OF FACTS

### A. PROCEDURAL HISTORY

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

14. On 4 October 2000 India requested consultations with the United States pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII of the GATT 1994 and Article 17 of the AD Agreement, concerning, *inter alia*, the United States anti-dumping investigation on cut-to-length plate from India and the levying of anti-dumping duties on that

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

<sup>13</sup> Notice attached as Ex. IND-2.

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

<sup>15</sup> Title 19 of the Code of Federal Regulations (19 CFR), sections 351-357.

<sup>16</sup> Ex. IND-17.

<sup>17</sup> Ex. IND-18.



product.<sup>18</sup> Consultations took place in Geneva on 21 November 2000. Since the consultations failed to settle the dispute, India, pursuant to Article XXIII:2 of GATT 1994, Article 6 of the DSU, and Article 17.4 of the AD Agreement, requested the establishment of a panel on 7 June 2001. The panel was established on 20 July 2001 and was composed on 26 October 2001.<sup>19</sup> Its organizational meeting took place on 5 November 2001.

## B. USDOC'S INVESTIGATION OF CUT-TO-LENGTH PLATE FROM INDIA

15. On 16 February 1999, the US Steel Group, Bethlehem Steel, Gulf States Steel, Ipsco Steel, Tuscaloosa Steel and the United Steel Workers of America submitted a petition for imposition of anti-dumping duties on certain cut-to-length carbon steel plate from India.<sup>20</sup> The petition alleged a dumping margin of 44.51 per cent, based on a comparison between the US price of the product and the home market price for a similar product. The US price was based on a single offer from an unrelated trading company, for plate produced by SAIL; the alleged home market price was based on a market research report, and was a single average figure.<sup>21</sup> The petition also presented a single alleged cost of production figure for all types of Indian cut-to-length plate regardless of thickness or width, calculated by adjusting the production costs of a US producer of plate for known differences between the US and Indian production costs. The petition alleged that Indian home market prices were below cost, based on a comparison of the market research report home market price with the calculated cost of production.<sup>22</sup> The petition then presented a constructed value for Indian plate, calculated by applying a profit figure to the cost of production figure. It alleged a dumping margin of 72.49 per cent based on a comparison of that constructed value with the same single offer of sale to the United States. On this basis, the petition requested a cost of production investigation of all Indian steelmakers who exported cut-to-length plate to the United States.

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

17. SAIL produces the plate subject to the investigation in three quasi-independent plants, and has six regional sales offices and 42 local sales offices.<sup>27</sup> At the time of the investigation, the plants each had different accounting systems, calculated standard costs differently, and tracked costs differently.<sup>28</sup>

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<sup>18</sup> WT/DS206/1, 9 October 2000, attached as Ex. IND-22.

<sup>19</sup> WT/DS206/3, 31 October 2001.

<sup>20</sup> Excerpts from public (non-confidential) version of the petition attached as Ex. IND-1.

<sup>21</sup> Ex. IND-1, at 9 and 14-15.

<sup>22</sup> Ex. IND-1, Exhibit 17, p. 15, item 7.

<sup>23</sup> Notice attached as Ex. IND-2.

<sup>24</sup> Excerpts from USDOC questionnaire to SAIL attached as Ex. IND-3.

<sup>25</sup> See SAIL case brief to USDOC at 4 (12 Nov. 1999), Ex. IND-14; SAIL moving brief to USCIT in *SAIL v. United States*, at 11 (15 Sept. 2000), Ex. IND-19.

<sup>26</sup> *Id.*

<sup>27</sup> See Ex. IND-6 at 2; Ex. IND-19 at 34.

<sup>28</sup> See Ex. IND-15 at 33-34.

Telephone problems in India meant that the three plants were sometimes inaccessible by phone, fax or email for days on end. Computers and photocopiers were, of course, in short supply.<sup>29</sup> Despite these handicaps, SAIL cooperated fully with the USDOC dumping investigation, submitting thousands of pages of documents, opening its doors for verification and investing substantial resources in responding to USDOC data demands on a tight time schedule.<sup>30</sup>

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

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

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

21. On 27 May 1999, USDOC issued its first supplemental questionnaire to SAIL, noting concerns regarding the completeness of SAIL's response and the methodology used by SAIL to report its product-specific costs of production.<sup>40</sup> Only a very few questions in this supplemental questionnaire addressed SAIL's US sales database or its response to Section C of the questionnaire. On 2 and 8 June 1999, SAIL filed a letter<sup>41</sup> and a lengthy submission, respectively, describing the logistical problems it faced in compiling some of the information requested by USDOC (regarding costs of production and home market

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<sup>29</sup> Id.; Ex. IND-21 at 8.

<sup>30</sup> USDOC hearing transcript, Ex. IND-16, at 33-34.

<sup>31</sup> Copy of SAIL Section C questionnaire response attached as Ex. IND-4.

<sup>32</sup> Ex. IND-4, cover letter from John Greenwald to Robert S. LaRussa, 11 May 1999, at 2.

<sup>33</sup> Id.

<sup>34</sup> Ex. IND-4 at C-53.

<sup>35</sup> Ex. IND-3 at C-2-C-40.

<sup>36</sup> Id. at C-1.

<sup>37</sup> Id.

<sup>38</sup> Id. at C-2-C-40.

<sup>39</sup> EX. IND-4 at C-2-C-53.

<sup>40</sup> Ex. IND-5.

<sup>41</sup> Ex. IND-6.

sales), and the manner in which SAIL normally maintained its cost data. None of the problems pointed out in the letter or submission concerned SAIL's US sales data.

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

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

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

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

- Product code and control number
- Specifications and grade
- Quality
- Various physical characteristics such as nominal thickness and nominal width
- Customer code

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

<sup>43</sup> See Ex. IND-14 at 6.

<sup>44</sup> Id. at 6-7; Ex. IND-13 at 13.

<sup>45</sup> Ex. IND-13 at 12-15.

<sup>46</sup> Ex. IND-2; Ex. IND-4; Ex. IND-13, at 13.

- Sale invoice date
- Sale invoice number
- Date of shipment
- Date of receipt of payment
- Quantity (weight) of merchandise sold
- Gross unit price
- Inland freight from plant to port of exportation
- Brokerage and handling expense in India
- Destination
- Duty drawback
- Credit expenses
- Indirect selling expenses in India
- Inventory carrying costs in India
- Packing costs
- Variable cost of manufacturing
- Total cost of manufacturing<sup>47</sup>

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

27. Meanwhile, on 29 July 1999, USDOC issued its preliminary determination of sales at less than fair value.<sup>48</sup> In that determination, USDOC concluded that it could not use any of SAIL's submitted data, and it therefore based its dumping margin determination on total facts available.<sup>49</sup> USDOC made no specific determination regarding SAIL's US sales database in the preliminary determination. Complaining about SAIL's failure to supply a consolidated electronic database for home market sales, USDOC found that SAIL did not act to the best of its ability to provide the information requested, and USDOC determined to employ adverse inferences in selecting the facts available to determine SAIL's margin.<sup>50</sup> However, recognizing SAIL's attempts to respond to the information requests, USDOC assigned SAIL the average of the two estimated margins included in the petition, which was 58.50 per cent.<sup>51</sup>

28. In September 1999, USDOC conducted a 21-day verification of SAIL's questionnaire responses – nine days of cost verification and twelve days of sales verification – at several of SAIL's plants and office locations.<sup>52</sup> SAIL made additional submissions on 1 September on the first day of verification consisting of a revised US sales computer tape<sup>53</sup> and a 30-page submission of minor corrections on 1 September 1999, the first day of the sales verification. SAIL also provided a 13-page submission of minor corrections on the first day of the cost verification.<sup>54</sup> These submissions were in response to

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<sup>47</sup> See Ex. IND-3 at C-2-C-40.

<sup>48</sup> Preliminary Determination, 64 Fed.Reg. 41202 (29 July 1999), Ex. IND-11.

<sup>49</sup> Id. at 41204.

<sup>50</sup> Id.

<sup>51</sup> Id.

<sup>52</sup> Ex. IND-13 at 1.

<sup>53</sup> The printout of this computer database is attached as Ex. IND-8. SAIL's US sales computer databases filed on 16 July, 17 August, and 1 September all had 28 fields of information.

<sup>54</sup> See Ex. IND-14 at 6.

USDOC's request (which it routinely makes in all AD investigations) that the respondent commence verifications with a presentation of "minor errors" that were discovered in its submitted data.<sup>55</sup> Finally, on 22 September 1999, after the verifications were completed, SAIL submitted a copy of all the documents collected by USDOC during the verifications, amounting to a total of 3345 pages.<sup>56</sup>

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

30. The only error in SAIL's US database that USDOC identified in its Sales Verification Report as one of its "significant findings" related to SAIL's incorrect reporting of one of the 28 fields of information—namely the reported width of plate that was 96 inches wide.<sup>61</sup> USDOC requested respondents to report width for individual transactions according to ranges of widths in inches. For example, if a particular transaction involved cut-to-length plate with a width less than or equal to 36 inches, "A" would be reported in the PLWIDTHU field. Likewise, if the merchandise in a given transaction was of a width greater than 36 inches but less than or equal to 72 inches, "B" would be reported in that field. In its series of width categories, the boundary between categories "C" and "D" is 96 inches.<sup>62</sup> SAIL's error consisted of the fact that it coded all sales with a width equal to 96 inches under category "D", but USDOC's definition of the categories provided that "C" should be reported in the PLWIDTHU field for merchandise with a width greater than 72 inches but less than or equal to 96 inches; "D" should have been reported only for sales of merchandise with a width greater than 96 inches.<sup>63</sup> Because of the popularity in the United States of steel plate with a width of exactly 96 inches, a large proportion of SAIL's reported US sales transactions were affected— 984 of a total of 1284 observations were reported with a "D" in the PLWIDTHU field, but should have had a "C".<sup>64</sup> The verification report of 3 November indicates that USDOC verifiers thoroughly investigated the width reporting error once it was discovered, and determined its scope.<sup>65</sup> They "checked multiple instances of this coding error," and

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<sup>55</sup> See USDOC sales verification outline, attached as Ex. IND-12, at 8, requesting SAIL to present "minor changes, if any, to the responses resulting from verification preparation."

<sup>56</sup> See Ex. IND-14 at 7.

<sup>57</sup> Ex. IND-13.

<sup>58</sup> Id. at 12-15.

<sup>59</sup> Included in Ex. IND-13.

<sup>60</sup> Id. at 8, 9, 13, 14.

<sup>61</sup> Id. at 5.

<sup>62</sup> Id. at 12; Ex. IND-3 at C-10.

<sup>63</sup> Id.

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

<sup>65</sup> Ex. IND-13 at 12.

concluded that it “appeared to be limited exclusively to products that had a width of 96 inches and to the US database.”<sup>66</sup> They also obtained a list of all the affected observations from SAIL.<sup>67</sup> This width coding error could have been easily corrected, using data in the record for this investigation, through methods routinely adopted by USDOC, such as the submission of a corrected database by the respondent company, or the insertion of a few lines of programming code in the appropriate place in USDOC’s margin calculation programme.<sup>68</sup>

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

- (1) Over-reporting of the freight expense incurred in shipping the merchandise from the plant to the port of export (Vizag).<sup>69</sup> This error not only was easily corrected by using data gathered by USDOC at verification, but in any event only hurt SAIL, by increasing the dumping margins that would be calculated on the basis of this data.
- (2) A small overstatement of the duty drawback earned by SAIL on the reported exports to the United States (less than 0.4 percentage points as calculated by the verifiers) because SAIL had erroneously included the entire amount of the drawback earned on the one contract that included shipments to Canada.<sup>70</sup> Again, this error would be easily corrected through the submission of a corrected database, or the insertion of a line of programming code in the appropriate place in the margin programme.<sup>71</sup>
- (3) An overstatement of the estimated number of days that merchandise shipped to the United States spent in inventory.<sup>72</sup> Thus, SAIL’s error was to overstate the time in inventory (45 days as compared to 30 days). However, this error not only was easily corrected by using the 30-day figure identified by the USDOC verifiers, but also would have been irrelevant for the calculation of SAIL’s dumping margins. The US sales in this case were so-called “export price” transactions (in which the foreign manufacturer/exporter sells directly to an unaffiliated party before importation into the United States), and when USDOC calculates dumping margins for export price transactions, it does not deduct inventory carrying expenses incurred in the country of export from US price.<sup>73</sup>
- (4) An understatement of the administrative charges incurred in the total labour cost per metric ton for gas slitting. Since this item was an administrative charge, it is an indirect

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<sup>66</sup> Id.

<sup>67</sup> Id.

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

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

<sup>70</sup> Id. at 31-32.

<sup>71</sup> Ex. IND-24 at para. 8.

<sup>72</sup> Id. at 32. USDOC’s sales verification report states that SAIL claimed that “the most conservative date in inventory [was] 45 days,” and then goes on to state that the verifiers noted that the number of days in inventory appeared to be closer to the same number (45). This is an error on the part of USDOC’s report; the actual figure identified by the USDOC verifiers was 30 days, not 45, as can be seen from the verification exhibits (S-15 and S-16) cited at this point in the verification report.

<sup>73</sup> Ex. IND-24 at para. 8.

selling expense. However, the US price in this case would have been calculated on the basis of the export price, not a constructed export price, and so indirect selling expenses of any sort were irrelevant.<sup>74</sup>

32. On 13 December 1999, USDOC issued a memorandum entitled “Determination of Verification Failure”.<sup>75</sup> This Memorandum reviews six “deficiencies” in SAIL’s sales data and eight in its cost data. Of these 14 “deficiencies,” only one concerned the US sales database: SAIL’s miscoding of transactions involving merchandise with a width of 96 inches under category “D”, rather than “C”.<sup>76</sup>

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

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

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

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<sup>74</sup> Id.

<sup>75</sup> Ex. IND-16.

<sup>76</sup> Id. at 3.

<sup>77</sup> Id. at 5.

<sup>78</sup> Id.

<sup>79</sup> Ex. IND-17.

<sup>80</sup> Id.

<sup>81</sup> Text of statutory provisions attached in Ex. IND-26.

<sup>82</sup> Ex. IND-14, Case brief, at 4-9; Ex. IND-15, Hearing transcript, at 33-34.

<sup>83</sup> Ex. IND-13 at 1.

<sup>84</sup> Ex. IND-14, Case brief at 4-9.

<sup>85</sup> See generally Ex. IND-4, 6, 7, 8, 13, 14, 15, 19.

36. USDOC issued a number of supplemental questionnaires to SAIL regarding the company's home market sales and cost of production data, in May through August 1999. Although at times SAIL missed those deadlines, it repeatedly informed USDOC that it was striving to submit the demanded information as promptly as possible, and explained in detail the logistical difficulties that it confronted.<sup>86</sup> Indeed, SAIL apprised USDOC of the problems it faced as early as 2 April 1999, when it was still struggling with the response to the initial questionnaire, and it repeated those concerns in submissions to USDOC on 10 May and 2 June.<sup>87</sup> Moreover, USDOC personnel were made very aware of SAIL's problems with equipment, resources, and infrastructure during the on-site verifications in September 1999, during which they visited several of SAIL's facilities in India.<sup>88</sup> Despite these problems, SAIL submitted thousands of pages of information and documents in response to USDOC's multiple supplemental questionnaires, as well as repeated resubmissions of its electronic databases.<sup>89</sup>

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

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

- computer and other problems with SAIL's home market sales and cost of production databases meant that SAIL had withheld information requested by USDOC;
- SAIL's problems assembling the home market sales and cost data demonstrated that SAIL had failed to provide information by the deadlines or in the form or manner requested; and

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<sup>86</sup> Id. at 7; Ex. IND-19, SAIL moving brief to USCIT in *SAIL v. United States*, at 31-34.

<sup>87</sup> Ex. IND-14, Case brief at 8; Ex. IND-6, SAIL letter to USDOC.

<sup>88</sup> Ex. IND-13 at 1-2.

<sup>89</sup> Ex. IND-14, Case brief at 6-8.

<sup>90</sup> Id., Case brief at 17.

<sup>91</sup> Id., Case brief at 8-9.

<sup>92</sup> Id., Case brief at 13-14.

<sup>93</sup> Id., Case brief at 14.

<sup>94</sup> Id., Case brief at 9-14.

<sup>95</sup> Id., Case brief at 21.

<sup>96</sup> Ex. IND-17 at 73131.



- the problems found at the sales verification (all of which related to the home market sales database, except for the width coding error discussed above) meant that information that had been provided could not be verified.<sup>97</sup>

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

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

39. The notice stated that “[i]t is the Department’s long-standing practice to reject a respondent’s questionnaire response *in toto* when essential elements of the response are so riddled with errors and inaccuracies as to be unreliable.”<sup>99</sup> Thus, USDOC refused even to consider using the US sales data, merely because of problems (including computer formatting) that had occurred in SAIL’s other data on home market sales and costs of production. USDOC stated: “The Department’s long-standing practice of filling in gaps or correcting inaccuracies in the information reported in a questionnaire response, often based on verification findings, is appropriate only in cases where the questionnaire response is otherwise substantially complete and useable. . . . To properly conduct an anti-dumping analysis which includes a sales-below-cost allegation, the Department must analyze four essential components of a respondent’s data: US sales; home market sales; cost of production for the home market models; and constructed value for the US models. Yet SAIL has not provided a useable home market sales database, cost of production database, or constructed value database.”<sup>100</sup>

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

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<sup>97</sup> Id. at 73127.

<sup>98</sup> Id.

<sup>99</sup> Id. at 73130.

<sup>100</sup> Id.

<sup>101</sup> Id. at 73131.

C. POST-DETERMINATION PROCEEDINGS

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

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

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

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<sup>102</sup> 65 Fed. Reg. 6624 (USITC 10 February 2000). See *Certain Cut-to-Length Carbon Steel Plate from France, India, Indonesia, Italy, Japan, and Korea*, Inv. Nos. 701-TA-387-391 (Final), USITC Pub. No. 3273 (Jan. 2000), [ftp://ftp.usitc.gov/pub/reports/opinions/PUB3273.PDF](http://ftp.usitc.gov/pub/reports/opinions/PUB3273.PDF).

<sup>103</sup> 65 Fed. Reg. 6585 (USDOC 10 February 2000), Ex. IND-18.

<sup>104</sup> Ex. IND-19.

<sup>105</sup> Id. at 23-28.

<sup>106</sup> Id.

<sup>107</sup> Id. at 16-23.

<sup>108</sup> Id. at 10, 29-34.

<sup>109</sup> *SAIL v. United States*, Ex. IND-20, at 7.

<sup>110</sup> Id., at 9.

<sup>111</sup> Id., at 11-13.

<sup>112</sup> Id. at 13-14, quoting USDOC.

<sup>113</sup> Id. at 18-19.

information requested but did not.<sup>114</sup> The issue was remanded to USDOC so that it could make specific findings or otherwise reconsider its decision to apply an adverse inference in choosing the basis on which to calculate a dumping margin.<sup>115</sup>

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

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

#### IV. STANDARD OF REVIEW

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

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

This standard may be summarized as follows: panels must examine whether the competent authority has evaluated all relevant factors; they must assess whether the competent authority has examined all the pertinent facts and assessed whether an adequate explanation has been provided as to how those facts support the determination;

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 15-19.

<sup>116</sup> Ex. IND-21.

<sup>117</sup> *Id.* at 10-12.

<sup>118</sup> *Id.* at 4-5.

<sup>119</sup> *Id.* at 12.

<sup>120</sup> Japan Hot-Rolled AB Report, paras. 55-62.

<sup>121</sup> *Id.*, at para. 55.

<sup>122</sup> *Id.*, at para. 56 (emphasis added).

and they must also consider whether the competent authority's explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations of the data. However, panels must not conduct a *de novo* review of the evidence nor substitute their judgement for that of the competent authority.<sup>123</sup>

48. With respect to panel examination of interpretations of the AD Agreement, the Appellate Body examined the criteria of Article 17.6(ii) and DSU Article 11 and found that both must be applied. The Appellate Body concluded that "[n]othing in Article 17.6(ii) of the AD Agreement suggests that panels examining claims under that Agreement should not conduct an 'objective assessment' of the legal provisions of the Agreement, their applicability to the dispute, and the conformity of the measures at issue with the Agreement."<sup>124</sup> It found that under Article 17.6(ii) "panels are obliged to determine whether a measure rests upon an interpretation of the relevant provisions of the Anti-Dumping Agreement which is *permissible under the rules of treaty interpretation* in Articles 31 and 32 of the *Vienna Convention*," and "a permissible interpretation is one which is found to be appropriate *after* application of the pertinent rules of the *Vienna Convention*."<sup>125</sup> According to the Appellate Body, "Article 17.6(ii) simply adds that a panel shall find that a measure is in conformity with the AD Agreement if it rests on one permissible interpretation of that Agreement."<sup>126</sup>

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

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

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

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

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<sup>123</sup> WT/DS192/AB/R, 8 October 2001 (*Pakistan Cotton AB Report*) at para. 74.

<sup>124</sup> *Japan Hot-Rolled AB Report*, para. 62.

<sup>125</sup> *Id.*, para. 60.

<sup>126</sup> *Id.*, para. 62.

information – that is, on the basis that the respondent failed to act to the best of its ability, or did not cooperate with the investigating authorities, in respect of *other* requested categories of information. This interpretation is supported by the ordinary meaning of the text of Article 6.8 and Annex II, paragraph 3, the context of other anti-dumping provisions, the object and purpose of the AD Agreement, and past interpretations by panels and the Appellate Body.

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

A. THE ORDINARY MEANING OF ARTICLE 6.8 AND ANNEX II, PARAGRAPH 3, WHEN READ IN THE CONTEXT OF OTHER AD PROVISIONS, REQUIRES INVESTIGATING AUTHORITIES TO USE ANY INFORMATION SUBMITTED BY A RESPONDING COMPANY THAT MEETS THE CONDITIONS OF ANNEX II, PARAGRAPH 3, FIRST SENTENCE.

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

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

54. As a panel recently found in the dispute on *Argentina – Definitive Anti-dumping Measures on Imports of Floor Tiles from Italy*, “an investigating authority may disregard the primary source information and resort to the facts available only under the specific conditions of Article 6.8 and Annex II of the AD Agreement. Thus, an investigating authority may resort to the facts available only where a party: (i) refuses access to necessary information; (ii) otherwise fails to provide necessary information within a reasonable period; or (iii) significantly impedes the investigation.”<sup>127</sup> Article 6.8 ensures that an investigating authority will be able to fill in gaps in an investigation and make determinations under the AD Agreement on the basis of facts available even in the event that an interested party is unable or unwilling to provide particular necessary information within a reasonable period.<sup>128</sup> However, as the Appellate Body has found, if verifiable information that can be used without undue difficulties is supplied “within a reasonable period”, “the investigating authorities *cannot* use facts available, but must use the information submitted by the interested party.”<sup>129</sup>

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<sup>127</sup> DS189/R, circulated on 28 September 2001, para. 6.20.

<sup>128</sup> *Japan Hot-Rolled Panel Report*, para. 7.51.

<sup>129</sup> *Japan Hot-Rolled AB Report*, para. 77.

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

All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by authorities, should be taken into account when determinations are made.

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

#### 1. “All information that is verifiable”

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

58. In two instances, panels have found that information was verifiable even though the investigating authorities refused to accept or verify the information during the investigation. In *Guatemala Cement II*, the investigating authorities were not able to verify information because Mexican respondents refused to permit access to their confidential information by verification teams that included advisors connected with the Guatemalan cement industry. The panel found that this refusal was justified because of the existence of a conflict of interest on the part of those advisors.<sup>132</sup> After examining the evidence, the panel found that even though the information in question was not verified, it was “verifiable” and should have been used instead of facts available.<sup>133</sup>

59. Similarly, in *Japan Hot-Rolled*, the panel found that USDOC improperly rejected the theoretical-to-nominal weight-conversion data submitted by NKK, one of the Japanese respondents, which was not verified but was capable of being verified. The Panel found that USDOC improperly rejected information that was submitted in “sufficient time to allow its verification and use in the calculation of NKK’s

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<sup>130</sup> Id., para. 81.

<sup>131</sup> New Shorter Oxford English Dictionary, Clarendon Press, 1993. USDOC in Ex. IND-21 at 11, n. 4, quoted the USCIT in *Bomont Indus. v. United States*, defining verification as follows: “Verification is like an audit, the purpose of which is to test information provided by a party for accuracy and completeness. . . .”

<sup>132</sup> *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS/156/R, 24 October 2000 [*Guatemala Cement II Panel Report*], para. 2.273.

<sup>133</sup> Id., at para. 2.274.

dumping margin.”<sup>134</sup> Accordingly, the panel (as affirmed by the Appellate Body) held that USDOC had improperly applied facts available under AD Article 6.8 because the conditions listed in Annex II, paragraph 3 had been met.<sup>135</sup>

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

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

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

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

64. Annex II, paragraph 7 is also useful context for interpreting Article 6.8 and Annex II, paragraph 3. Annex II, paragraph 7 focuses on *some* of the information submitted— not the entire mass of information provided (or not provided) by the responding company during the investigation. The first

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<sup>134</sup> *Japan Hot-Rolled Panel Report*, para. 7.59.

<sup>135</sup> *Id.*, at para. 7.59.

<sup>136</sup> *Japan Hot-Rolled AB Report*, para. 101 (applying principle of good faith in interpreting Annex II, paragraph 7 of the AD Agreement)

sentence indicates that authorities may have to base their findings “on information from a secondary source,” and “must check the information from other independent sources.” The immediate context for Annex II, paragraph 7 is paragraph 6 which provides that “if *information* is not accepted, the supplying party” should be informed of the reasons and “the reasons for the rejection of *such evidence or information* should be given in any published determinations.”

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

66. Decisions of earlier panels applying Article 6.8 and Annex II, paragraph 3 support the mandatory acceptance by investigating authorities of verified, timely submitted, and usable information. Both the *Guatemala II* and *Japan Hot-Rolled* panels focused on individual categories of information submitted by foreign respondents – not the entire body of information submitted or requested. In *Guatemala Cement II*, the panel found that Guatemalan investigating authorities improperly relied on facts available for home market cost data for the entire period of investigation. The panel found that cost data submitted by Mexican respondents met the conditions of Annex II, paragraph 3 for the period of the investigation and part of the extended period of investigation (“POI”). The fact that Mexican respondents did not provide any information on one period of the extended POI did not mean that Guatemala could reject submitted information for other periods. Guatemalan investigating authorities were only entitled to use facts available for that period of the extended POI for which the Mexican respondent submitted no cost data.<sup>138</sup>

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

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

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

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<sup>137</sup> *Japan Hot-Rolled Panel Report*, para. 7.65.

<sup>138</sup> *Guatemala Cement II Panel Report*, para. 2.277.



interest, credit and inventory carrying expenses; profit amounts; and discounts, rebates and other price adjustments.

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

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

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

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

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

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<sup>139</sup> New Shorter Oxford English Dictionary, Clarendon Press 1993.

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

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

75. In *Guatemala Cement*, the panel found that the Guatemalan authorities did not demonstrate that the cost information provided by the Mexican respondent could not be used without undue difficulties, noting that “there is no such explanation in the Ministry’s January 1997 resolution.”<sup>142</sup>

### 3. “submitted in a timely fashion”

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

In sum, a “reasonable period” must be interpreted consistently with the notions of flexibility and balance that are inherent in the concept of “reasonableness”, and in a manner that allows for account to be taken of the particular circumstances of each case. In considering whether information is submitted within a reasonable period of time, investigating authorities should consider, in the context of a particular case, factors such as (1) the nature and quantity of the information submitted; (ii) the difficulties encountered by an investigated exporter in obtaining the information; (iii) the verifiability of the information and the ease with which it can be used by the investigating authorities in making their determination; (iv) whether other interested parties are likely to be prejudiced if the information is used; (v) whether acceptance of the information would compromise the ability of the investigating authorities to conduct the investigation expeditiously; and (vi) the numbers of days by which the investigated exporter missed the applicable time-limit.<sup>143</sup>

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<sup>140</sup> *Japan Hot-Rolled Panel Report*, first submission of Japan paras. 98-99, panel findings paras. 7.33-7.34.

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

<sup>142</sup> *Guatemala Cement II Panel Report*, para. 2.277.

<sup>143</sup> *Japan Hot-Rolled AB Report*, para. 85.

**4. “supplied in a medium or computer language requested by the authorities”**

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

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

79. Thus, if a respondent does not maintain its accounts in a specified computer language, and presenting a response in that language would result in unreasonable additional cost and trouble, the anti-dumping authorities may not insist that the respondent do so. In that situation, the anti-dumping authorities also may not have recourse to facts available under Article 6.8 by finding that the respondent has significantly impeded the investigation by failing to respond in the preferred medium or computer language. Read in context with the provisions of Article 15, paragraphs 3 and 2 require investigating authorities to pay particular attention to the difficulties presented to firms from developing countries in responding in a particular computer medium or format. However, whenever information *has* been presented in the requested computer medium or format, and is verifiable, timely submitted and otherwise usable without undue difficulty, it must be taken into account in the investigation.

**5. Annex II, paragraph 5**

80. Annex II, paragraph 5 states as follows:

Even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability.

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

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

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

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

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

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<sup>144</sup> *Japan Hot-Rolled AB Report*, para. 81.

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

#### B. THE OBJECT AND PURPOSE OF THE AD AGREEMENT SUPPORT INDIA’S INTERPRETATION

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

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

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

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

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<sup>145</sup> *Japan Hot-Rolled Panel Report*, para. 7.55

<sup>146</sup> See *United States—Transitional Safeguard Measures on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R (8 October 2001), para. 120.

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

## VI. ARGUMENT

### A. THE FINAL AD ORDER LEVYING ANTI-DUMPING MARGINS OF 72.49 PER CENT ON SAIL'S EXPORTS OF CUT-TO-LENGTH PLATE VIOLATES ARTICLES 6.6, 6.8, 2.2, 2.4, 9.3 AND ANNEX II, PARAGRAPHS 3, 5 AND 7 OF THE AD AGREEMENT

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

#### 1. USDOC improperly applied facts available in violation of AD Agreement Article 6.8 and Annex II, paragraph 3 by rejecting timely, verifiable, and appropriately submitted US sales data provided by SAIL

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

##### *(a) SAIL's US sales database was timely submitted*

93. As discussed above in paragraphs 18-25, SAIL's US sales database, its responses to USDOC's questions on its US sales, and the corrections it provided to that data at the request of USDOC during verification were "supplied in a timely fashion," as required by Annex II, paragraph 3 of the AD Agreement. For example, USDOC issued its first "supplemental questionnaire" to SAIL on 27 May 1999.<sup>147</sup> Only a few minor questions in this questionnaire concerned SAIL's US sales database and questionnaire response; its primary focus was on SAIL's reported home market sales and cost of production data.<sup>148</sup> SAIL filed its response to the supplemental questionnaire by the 11 June deadline.<sup>149</sup>

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<sup>147</sup> Ex. IND-5.

<sup>148</sup> Id.

<sup>149</sup> Ex. IND-7. Prior to this deadline, SAIL had also filed lengthy submissions with USDOC, detailing difficulties it was having in gathering the necessary cost and home market sales data and organizing the data into the format required by USDOC. However, none of the problems discussed by SAIL in those submissions concerned the reporting of the US sales data. Ex. IND-6.

From June through August 1999 USDOC issued five more supplemental questionnaires, but none of these raised any questions concerning SAIL's US sales or its US sales database. Thus, USDOC's actions reasonably led SAIL to believe USDOC was satisfied with the US sales information as of 11 June, and the US sales database submitted on 16 June.

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

(b) *SAIL's US sales data were both verifiable and verified by USDOC*

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

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

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<sup>150</sup> Ex. IND-9; Ex. IND-17 at 73127, 73128.

<sup>151</sup> Ex. IND-4.

<sup>152</sup> Ex. IND-7.

<sup>153</sup> Ex. IND-16.

<sup>154</sup> Id.

<sup>155</sup> Id.

<sup>156</sup> Id. at 5 (emphasis added).

<sup>157</sup> Id. (emphasis added).

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

98. Indeed, the best evidence of the completeness and verifiability of SAIL's US sales database is the verification report issued by USDOC after the completion of the verification.<sup>160</sup> First, and most importantly from USDOC's perspective, the sales verification report confirms that SAIL's US sales database was a complete listing of its US sales transactions during the period of investigation – i.e., the 1284 transactions listed in SAIL's computer database, pursuant to the nine contracts, comprised the entire universe of shipments of the subject merchandise to the United States in that time period, and USDOC did not discover any unreported sales that should have been included in the database.

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

We found no unreported or incorrectly reported sales in the US sales listing [i.e., database] while performing the completeness tests described above. . . . In addition, during our review of detailed invoices covered by the contracts listed above, we found no

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<sup>158</sup> Id.

<sup>159</sup> Id.

<sup>160</sup> Ex. IND-13.

<sup>161</sup> Id. at 12-15.

<sup>162</sup> Id. at 14-15.

<sup>163</sup> Id. at 13.

<sup>164</sup> Id. at 13 ("The appropriate amount of Canadian sales within contract number 6159 was deducted from the total quantity and value for the nine contracts . . . to reconcile SAIL's records and the sales reported to the Department.") (citation omitted).

<sup>165</sup> Id. at 12.



unreported sales and found that all sales of subject merchandise covered by those contracts were within the POI and were reported correctly.<sup>166</sup>

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

101. The end result of this thorough review was that USDOC found very few problems with SAIL’s US sales database. In addition to finding that this database was complete, USDOC found no problems whatever for the great majority of the individual product characteristics and expense items reported in the 28 “fields” for SAIL’s US sales transactions.<sup>169</sup> Thus, of the items listed above, the verification report either stated that the verification team had “noted no discrepancies”<sup>170</sup> or implied as much through its silence regarding the following:

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

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

103. The only significant issue noted by the verification team was the miscoding of product width discussed above at paragraph 30. The team thoroughly investigated this minor error once it was discovered, and determined its scope; they “checked multiple instances of this coding error,” and concluded that it “appear[ed] to be limited exclusively to products that had a width of 96 inches and to the

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<sup>166</sup> Id. at 15 (citing Verification Exhibit S-8).

<sup>167</sup> Id. at 8-9, 14-15, 29-33.

<sup>168</sup> Id. at 14 (citing Verification Exhibit S-7, which consists of documentation for the “preselected” US sales that the USDOC verifiers chose for thorough review).

<sup>169</sup> Id. at 12-15.

<sup>170</sup> This phrase – “We noted no discrepancies” -- is the standard means by which USDOC communicates its conclusion that the verification of a particular item was successful. This has been a standard practice at USDOC for many years.

US database.”<sup>171</sup> They also obtained a list of all the affected observations from SAIL, included in verification exhibit S-8.<sup>172</sup> Thus, the exact extent of the miscoding was known and was on the record in this proceeding. The other minor issues found at verification<sup>173</sup> were so minor that they were not even mentioned in the “Summary of Significant Findings” at the beginning of the verification report. These items cannot seriously be considered as undermining the conclusion that SAIL’s complete submitted US sales database was verifiable.

(c) *SAIL appropriately submitted its US sales data so that it could “be used in the investigation without undue difficulties”*

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

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

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

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

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<sup>171</sup> Verification report, Ex. IND-14, at 12.

<sup>172</sup> Id.; this portion of Exhibit S-8 attached as part of Ex. IND-14.

<sup>173</sup> See para. 28 above.

<sup>174</sup> Ex. IND-5; Ex. IND-7.

<sup>175</sup> Ex. IND-7; revised version in Ex. IND-8.

<sup>176</sup> Ex. IND-8.

<sup>177</sup> Verification report, Ex. IND-13, at 12.

<sup>178</sup> Ex. IND-24.

<sup>179</sup> Because USDOC applied total facts available in determining SAIL’s dumping margins, there is no computer programme by which SAIL’s margins were calculated, so it is not possible to use a “SAIL-specific” computer programme for this example. However, as noted above, USDOC typically uses a standard computer programme for calculating dumping margins in concurrent investigations, and revises that standard programme to address the specific circumstances of the individual respondents. In this respect, the correction of the width coding error for SAIL could be viewed as simply a respondent-specific adjustment for SAIL of the standard programme.

merely insertion of the following twelve lines of programming language after line number 182 of the programme:

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

108. This revision would require no more than a few minutes of time by one of the experienced analysts employed by USDOC.<sup>181</sup>

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

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

- The average price of home market sales identified in the market research report submitted as Exhibit 15 of the petition for a group of products with a specified range of grades, widths, and thicknesses could be compared to the prices of the same and similar products in SAIL's US sales database, as the petition did.

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<sup>180</sup> Ex. IND-24.

<sup>181</sup> Id.

<sup>182</sup> SAIL case brief before USDOC, Ex. IND-14, at 13-14. During the investigation, SAIL offered three alternatives to demonstrate to USDOC that it could use the US sales data as well as data on home market sales and costs in the petition to calculate a final dumping margin. Id. at 14.

<sup>183</sup> Ex. IND-24.

- The constructed-value price that was calculated for a specific cut-to-length plate product in the petition could be compared to the prices of a narrow group of comparable US sales, and the prices of the remaining US sales comparable to the merchandise in the market research report could be compared to the average price of home market sales identified in that report.
- An average of the price in the market research report and the constructed-value price from the petition could be compared to the prices of the comparable US merchandise.

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

(d) *SAIL's US sales database was “supplied in a medium or computer language requested by the authorities”*

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

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

(e) *An unbiased and objective investigating authority evaluating the evidence could not have reached the conclusion that SAIL failed to provide necessary US sales data within a reasonable period*

114. Applying the appropriate standard of review under DSU Article 11 and AD Agreement Article 17.6, this Panel should find that an unbiased and objective investigating authority could not have reached the conclusion that SAIL refused access to, or otherwise failed to provide, necessary information relating to SAIL's US sales data within a reasonable period. In particular, the Panel should find that an

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<sup>184</sup> Ex. IND-20 at 11-12.

unbiased and objective investigating authority would have reached the conclusion that SAIL's US sales data complied with all of the conditions of AD Agreement Annex II, paragraph 3, first sentence. Because USDOC did not use SAIL's US sales data in calculating the dumping margin but instead used facts available from the petition, the Panel should find that the final AD order dated 10 February 2000 is inconsistent with the United States' obligations under Article 6.8 and Annex II, paragraph 3 of the AD Agreement.

**2. Assuming *arguendo* that SAIL's US sales data were not "ideal in all respects," USDOC violated Annex II, paragraph 5 by rejecting the data because SAIL acted to the best of its ability in providing the data**

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

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

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

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

119. In this case, no external evidence contradicts the conclusion that SAIL acted to the best of its ability, nor does any evidence raise concerns that SAIL applied anything less than its best efforts in preparing its US sales database. The Government of India submits that no objective and unbiased administering authority could reach a conclusion otherwise. In the domestic litigation concerning the final AD determination in this investigation, the CIT reversed USDOC's conclusion that SAIL had not acted to the best of its ability, and remanded the case to USDOC to reconsider that conclusion. Predictably, on

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<sup>185</sup> See paras. 25-28 above.

remand USDOC came to the same conclusion as before, but even with this opportunity for reflection, USDOC did not base its conclusion on any problems with the US sales database.<sup>186</sup>

**3. USDOC's application of adverse facts available in accepting the data in the petition for US sales violated Annex II, paragraph 7 because SAIL did not fail to cooperate with USDOC or otherwise withhold information related to its US sales**

120. Assuming *arguendo* that the Panel does not find that SAIL's US sales data should have been accepted by USDOC pursuant to Annex II, paragraphs 3 or 5, India presents an additional alternative claim that USDOC violated Annex II, paragraph 7. This claim is based on the fact that USDOC improperly applied "total" facts available and then "adverse" facts available against SAIL in concluding that SAIL had "failed to cooperate" in providing, *inter alia*, its US sales data. USDOC's conclusion could not have been based on a proper, unbiased and objective evaluation of the facts.

(a) *Interpretation of Annex II, paragraph 7*

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

It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate.

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

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

124. Paragraph 7 also provides for investigating authorities to examine whether a respondent cooperated in providing particular categories of information. Annex II, paragraph 7 focuses on *particular* information – not the totality of the information provided (or not provided) by the responding company. The first sentence indicates that authorities may have to base their findings "on information from a

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<sup>186</sup> Remand redetermination, Ex. IND-21.

<sup>187</sup> *Japan Hot-Rolled AB Report*, para. 99.

<sup>188</sup> *Id.*, para. 102.

<sup>189</sup> *Id.* para. 106 ("USDOC took no steps to assist KSC to overcome these difficulties, or to make allowances for the resulting deficiencies in the information supplied").

secondary source”, and “must check the information from other independent sources.” The immediate context for Annex II, paragraph 7 is paragraph 6 which provides that “if *information* is not accepted, the supplying party” should be informed of the reasons, and “the reasons for the rejection of *such evidence or information* should be given in any published determinations.”

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

(b) *SAIL cooperated fully with USDOC in providing its US sales information*

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

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

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

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

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<sup>190</sup> Final Determination, Ex. IND-17, at 73127-73128.

B. SECTIONS 776(A), 782(D) AND 782(E) OF THE TARIFF ACT OF 1930 VIOLATE ARTICLE 6.8 AND ANNEX II, PARAGRAPH 3 OF THE AD AGREEMENT

1. Introduction

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

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

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

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

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<sup>191</sup> Section 782(e)(3), Ex. IND-26.

<sup>192</sup> Section 782(e)(4), Ex. IND-26.

<sup>193</sup> Final Determination, Ex. IND-17, at 73130.



## 2. Operation of the US statutory scheme regarding “facts available”

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

If–

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

the administering authority . . . *shall*, subject to section 782(d), use the facts otherwise available in reaching the applicable determination under this title.<sup>194</sup>

135. The four conditions provided in section 776(a)(2) are specified (with “or”) in the alternative. For example, even if no information has been withheld, and the investigation has not been impeded, and the information has been fully verified, the Commerce Department nonetheless *must* (“shall”) use “facts available” if the information was submitted later than an arbitrarily-set deadline. Thus, if any one of these four conditions applies, USDOC must use facts available.

136. Section 782(d) provides as follows:

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

- (1) the administering authority . . . finds that such response is not satisfactory, or
- (2) such response is not submitted within the applicable time limits,

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<sup>194</sup> Section 776(a) (emphasis added), Ex. IND-26.

then the administering authority . . . may, subject to subsection (e), disregard all or part of the original and subsequent responses.<sup>195</sup>

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

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

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

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

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

140. Although the text of Sections 776(a) and 782(e) could be interpreted as applying to individual categories of information, USDOC and the CIT have not interpreted these provisions in that way. Instead, Section 776(a) has been interpreted as mandating the rejection of usable, verified, timely

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<sup>195</sup> Section 782(d), Ex. IND-26.

<sup>196</sup> Section 782(e) (emphasis added), Ex. IND-26.

submitted information where the respondent “withholds [other] information that has been requested by the administering authority” or “fails to provide such [other] information by the deadlines for submission of the information or in the form and manner requested.”<sup>197</sup>

### 3. Sections 776(a) and 782(e) are mandatory provisions

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

142. Sections 776(a) and 782(e), read together, mandate a violation of GATT/WTO obligations and prohibit WTO-consistent treatment of information submitted during an anti-dumping investigation. They must therefore be found as such to be inconsistent with those obligations.<sup>199</sup> As discussed immediately preceding, section 776(a) *mandates* use of the “facts otherwise available” whenever one of the four situations enumerated therein exists. While section 782(e) permits information to be nevertheless taken into account, section 782(e) requires the submitting party (*i.e.*, the foreign respondent) to prove that *all* five of the listed conditions are fulfilled. If it can only demonstrate four out of five, then USDOC cannot take the information into account. Thus, sections 776(a) and 782(e), read together, mandate use of “facts available” when the respondent has failed to provide information by the deadlines for submission of the information or in the form and manner requested. They are measures that will necessarily result in action inconsistent with GATT/WTO obligations.

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

144. The SAA constitutes a definitive interpretation of the statute as most recently amended in 1994. It comprises an exegesis of the WTO Agreement and the agreements annexed to it, a description of the changes made in US law and regulations to implement them, and a definitive policy statement of how the US authorities would administer the US law and regulations as thus changed.<sup>201</sup> The SAA describes itself as “an authoritative expression by the Administration concerning its views regarding the interpretation

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<sup>197</sup> Section 776(a)(2)(A) and (b), Ex. IND-26.

<sup>198</sup> Japan Hot-Rolled Panel Report, para. 7.192.

<sup>199</sup> See *United States – Anti-Dumping Act of 1916*, Appellate Body Report, WT/DS136/AB/R-WT/DS162/AB/R, adopted 26 September 2000, para. 88.

<sup>200</sup> SAA p. 869, Ex. IND-27 (emphasis added).

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

and application of the Uruguay Round agreements, both for purposes of US international obligations and domestic law” and states that “it is the expectation of Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement.”<sup>202</sup> As the panel found in *United States - Sections 301 - 310 of the Trade Act of 1974*, the “SAA thus contains the view of the Administration, submitted by the President to Congress and receiving its imprimatur, concerning both interpretation and application and containing commitments, to be followed also by future Administrations, *on which domestic as well as international actors can rely.*”<sup>203</sup>

145. USDOC and the CIT have treated sections 776(a) and 782(e) as mandating the use of facts available whenever the circumstances provided for in section 776(a) exist and any one of the conditions listed in section 782(e) is not met. Many USDOC determinations have described Section 776(a) as “requiring” USDOC to resort to facts available.<sup>204</sup> The CIT has held that “[Section 776(a)] sets forth four situations, any one of which *requires* Commerce to resort to ‘facts otherwise available.’”<sup>205</sup> The CIT has also held that all five criteria enumerated in section 782(e) must be met before its provisions apply; if any one of the criteria is not fulfilled, analysis of the others is unnecessary.<sup>206</sup> USDOC’s final determination on *Pasta from Italy*, describing the treatment of information submitted by the pasta exporter De Cecco, neatly describes USDOC’s view of the relationship between section 776(a) and section 782(e):

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

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<sup>202</sup> SAA p.1, quoted in *Japan Hot-Rolled Panel Report*, para. 7.198.

<sup>203</sup> WT/DS152/R, adopted 27 January 2000, para. 7.111 (emphasis added).

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

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

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

<sup>207</sup> *Pasta from Italy*, *supra* n. 204, at 30328-29 (emphasis added). See also *Roller Chain, Other than Bicycle from Japan: Final Results and Partial Rescission of Anti-dumping Duty Administrative Review*, 63 Fed.Reg. 63671, 63673, 16 November 1998, attached in Ex. IND-28 (“*Roller Chain from Japan - Final*”) (“Given that Kaga failed to provide the necessary information in the form and manner requested, even after being provided several opportunities to cure these deficiencies, the Department is required, under section 782(d), to apply, subject to section 782(e), facts otherwise available. We further determine that Kaga failed to satisfy several of the requirements enunciated by section 782(e) of the Act. . . . For the reasons stated above, the application of

**4. The two additional conditions for acceptance of information imposed by sections 782(e)(3) and 782(e)(4), read together with section 776(a), are inconsistent with AD Article 6.8 and Annex II, paragraph 3**

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

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

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

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

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

151. In addition, under Article 2.4 of the AD Agreement, the obligation to carry out a fair comparison lies on the investigating authorities, not on the exporters. The investigating authorities already require interested parties to produce information; to refuse to use the information unless an interested party demonstrates it acted to the “best of its ability” is to impermissibly limit rights and impose new obligations inconsistent with the Agreement.<sup>208</sup>

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section 782(e) of the Act does not overcome section 776(a)'s direction to use facts otherwise available for Kaga's submissions. Thus, the use of facts available is warranted in this case.”)

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

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

**5. Section 776(a) and 782(e), as interpreted by USDOC and the CIT, require USDOC to reject timely submitted, verified and usable information if *other* information is withheld or not submitted in the time, form or manner requested, and therefore violate Article 6.8 and Annex II, paragraph 3**

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

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

155. For instance, in the case of *Pasta from Italy*, the petitioner alleged sales below cost, and USDOC requested data on cost of production and constructed value. During the investigation, the respondent De Cecco tried and failed to develop a cost-accounting system that would meet USDOC’s standards. Six days before verification, De Cecco submitted a reconciliation of its submitted data to the records maintained in the normal course of business, then two days later USDOC decided that it was required to resort to facts available for De Cecco’s cost data. USDOC then found that as a consequence, De Cecco’s home market sales data were unusable because these sales could not be tested to determine whether they were above the cost of production. De Cecco’s constructed value data could not be used either, because they were part of the rejected cost data. USDOC then went to total facts available and assigned a margin from the petition.<sup>210</sup> Indeed, USDOC has stated repeatedly that “The Department’s prior practice has been to reject a respondent’s submitted information in toto when flawed and unreliable cost data renders any price-to-price comparison impossible.”<sup>211</sup> The final determination in the investigation of cut-to-length

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<sup>209</sup> Section 776(a)(2)(B), Ex. IND-26.

<sup>210</sup> *Pasta from Italy*, *supra* n. 204, at 30327, attached in Ex. IND-28.

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

plate from India similarly stated: “It is the Department's long-standing practice to reject a respondent's questionnaire response in toto when essential components of the response are so riddled with errors and inaccuracies as to be unreliable.”<sup>212</sup>

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

157. USDOC and the USCIT have also interpreted section 782(e)(4) to mandate rejection of verified, timely submitted information where USDOC has found that a respondent has not demonstrated that it has acted to the best of its ability in providing the information and meeting the requirements established by USDOC with respect to the information. A finding of this nature can be based on the mere fact of missing data, such as cost information.<sup>213</sup> Even an attempt to correct earlier mistakes can trigger a finding under section 782(e)(4).<sup>214</sup> If some data were missing or corrected, then, by triggering sections 782(e) and 776(a), this fact will lead to rejection of the other data that were submitted and even verified, in favour of total facts available and petition-based margins.

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

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*Plate from Mexico: Preliminary Results of Antidumping Duty Administrative Review*, 63 Fed.Reg. 48181, 48182 (9 September 1998), attached in Ex. IND-28.

<sup>212</sup> Final Determination, Ex. IND-17 at 73130.

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

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

<sup>215</sup> *Japan Hot-Rolled AB decision*, para. 83.

<sup>216</sup> See cases cited in footnote 211 above.

the petition. Thus, sections 776(a), 782(d) and 782(e) violate Annex II and Article 6.8 of the AD Agreement.

## **6. Conclusion**

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

### **C. SECTIONS 776(A), 782(D) AND 782(E) AS APPLIED TO THE ANTI-DUMPING INVESTIGATION OF CUT-TO-LENGTH PLATE FROM INDIA ARE INCONSISTENT WITH THE AD AGREEMENT**

160. Section III above has laid out the sequence of events during the USDOC investigation of cut-to-length carbon steel plate from India. The following section discusses in more detail how USDOC and the USCIT applied sections 776(a), 782(e) and 782(d) to this investigation, and the inconsistency of that application with the AD Agreement.

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

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

163. In statutory terms, USDOC made a positive determination to use facts available pursuant to section 776(a)(2)(A), (B) and (D). Section 776(a)(2)(A) is triggered when USDOC determines that an interested party or other person "withholds information that has been requested by the administering authority." Thus, USDOC found that the computer and other problems with SAIL's home market sales

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<sup>217</sup> Ex. IND-11 at 41204.

<sup>218</sup> Id. at 41203-04.

<sup>219</sup> Memorandum of Verification Failure, Ex. IND-16, at 5.

<sup>220</sup> Final Determination, Ex. IND-17, at 73127-28.



and cost of production databases meant that SAIL had withheld requested information. Similarly, with respect to section 776(a)(2)(B), USDOC found that SAIL's problems assembling the home market sales and cost data meant that SAIL had "fail[ed] to provide such information by the deadlines for the submission of the information or in the form or manner requested." With respect to section 776(a)(2)(D), USDOC found that the problems found at verification (which all related to the home market sales database, except for the coding errors for US sales) meant that SAIL had "provid[ed] such information but the information cannot be verified."<sup>221</sup> USDOC then went on to find that all of the five exceptions in section 782(e) to the use of "facts available" did not apply.<sup>222</sup>

164. To qualify for acceptance under section 782(e)(1), the "information" must be "submitted by the deadline established for its submission." USDOC found that "SAIL was given numerous extensions to submit accurate data which it failed to do. In fact the last submission of cost data filed on August 18, 1999, was a database which contained unreadable electronic versions of SAIL's cost of production which did not include any constructed value information."<sup>223</sup> In other words, USDOC interpreted the word "information" as meaning *all* the information requested in the case, and decided not to take into account the US sales data because of problems in the home market sales and cost data.<sup>224</sup>

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

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

167. Fourth, section 782(e)(4) requires that an interested party have "demonstrated that it has acted to the best of its ability in providing the information and meeting the requirements established by the administering authority . . . with respect to the information." USDOC determined that "with respect to section 782(e)(4), SAIL, as stated in the home market sales verification report, did not sufficiently verify the accuracy and reliability of its own data prior to submitting the information to the Department, thereby indicating that it did not act to the best of its ability to provide accurate and reliable data to the Department."<sup>227</sup> Again, USDOC interpreted "the information" to mean *all* information requested. It focused on the same problems in the home market sales and cost of production database as a justification for excluding *all* of the information submitted, including the US sales data, when it had earlier found the

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<sup>221</sup> Id. at 73127.

<sup>222</sup> Id. at 73127, 73131.

<sup>223</sup> Id. at 73127.

<sup>224</sup> Id. at 73130.

<sup>225</sup> Id. at 73127.

<sup>226</sup> Id.

<sup>227</sup> Id.

US sales data to be accurate and complete. USDOC interpreted SAIL's failure to accomplish total compliance with the complex USDOC questionnaire and to present totally correct answers to questions regarding all the categories of information as implying a failure by SAIL to check its data; this failure to check the data became a failure to "act to the best of its ability."

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

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

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

171. When SAIL appealed the final determination to the CIT, SAIL argued that the word "information" in section 782(e) applies to particular categories of information (such as the US sales data), as separate and distinct submissions of information.<sup>232</sup> USDOC argued in response that it had a "long standing practice" of using total facts available when there are "essential components of the response" that are inaccurate or unreliable, and that it had "disregarded all the responses in order to calculate what it

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<sup>228</sup> Id. (emphasis added).

<sup>229</sup> Id.

<sup>230</sup> Id. at 73127-28.

<sup>231</sup> Ex. IND-18.

<sup>232</sup> SAIL moving brief to the USCIT in *SAIL v. United States*, Ex. IND-19, at 15-23; *SAIL v. United States*, Ex. IND-20, at 4-6.

considered a more accurate dumping margin.”<sup>233</sup> USDOC also argued that the term “information” in section 782(e) meant *all* submitted responses by an interested party, not just a category within the responses.<sup>234</sup> USDOC argued to the CIT that it could not—consistent with US statutes and its own “long-standing practice”—calculate a final anti-dumping margin using only one part of the formula supplied by the respondent and one or several parts of the formula from other sources, including the petition. According to this interpretation of the US statutes and its own practice, USDOC believed it was required to use either *all* data from the respondent (subject only to the minor “filling of gaps” by USDOC) or *all* data from other non-respondent sources including the petition. USDOC’s interpretation of the AD Agreement allowed no middle ground.

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

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

**D. USDOC VIOLATED AD AGREEMENT ARTICLES 2.2, 2.4, 9.3, AND ARTICLE VI:1 AND 2 OF GATT 1994 BY APPLYING FACTS AVAILABLE AND ADVERSE FACTS AVAILABLE IN CALCULATING AND LEVYING FINAL ANTI-DUMPING DUTIES WITHOUT USING SAIL’S SUBMITTED US SALES DATA**

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

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<sup>233</sup> *SAIL v. United States*, Ex. IND-20, at 7.

<sup>234</sup> *Id.* at 9.

<sup>235</sup> *Id.* at 11-13.

<sup>236</sup> *Id.* at 13-14, quoting USDOC brief to the USCIT.

<sup>237</sup> *Id.* at 15-19.

<sup>238</sup> Ex. IND-21.

E. USDOC VIOLATED AD AGREEMENT ARTICLE 15 BY FAILING TO GIVE SPECIAL REGARD TO THE SITUATION OF INDIA AS A DEVELOPING COUNTRY WHEN IT APPLIED FACTS AVAILABLE IN RELATION TO SAIL'S US SALES DATA

175. USDOC also violated AD Article 15 by failing to give special regard to India's status as a developing country when considering the application of anti-dumping duties. The second sentence of Article 15 of the AD Agreement required USDOC to "explore" the "possibilities of constructive remedies provided for" by the AD Agreement, "before applying anti-dumping duties" to exports from a developing country such as SAIL's exports in this case. Article 15 requires investigating authorities in developed countries to provide "notice or information" to respondents from developing country Members concerning the opportunities for exploring alternative remedies other than anti-dumping duties.<sup>239</sup> As the panel held in *India Bed Linens*, pure passivity by developed country investigating authorities is not sufficient to satisfy the obligation to "explore" possibilities of constructive remedies.<sup>240</sup> Rather, the "exploration of possibilities must be actively undertaken by the developed country authorities with a willingness to reach a positive outcome."<sup>241</sup> Article 15 imposes "an obligation to actively consider, with an open mind, the possibility of [a constructive remedy] prior to imposition of an anti-dumping measure that would affect the essential interests of a developing country."<sup>242</sup>

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

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

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

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

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<sup>239</sup> *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R (30 October 2000), para. 6.238.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*, para. 6.233.

<sup>242</sup> *Id.*

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

## VII. CONCLUSION AND REQUEST FOR RULINGS AND RECOMMENDATIONS

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

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

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

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

## ANNEX A-2

### FIRST WRITTEN SUBMISSION OF THE UNITED STATES

(10 December 2001)

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## EXHIBITS

- US-1. *USDOC Initial Antidumping Questionnaire to SAIL*, Sections A, B, C and D, dated 17 March 1999.
- US-2. *Petition of U.S. Steel Group, Bethlehem Steel Corporation, Gulf States Steel, IPSCO Steel Inc. and Tuscaloosa Steel*, dated 16 February 1999 (excerpts).<sup>1</sup>
- US-3. *Cost Verification Report*, dated 4 November 1999.
- US-4. *Sales Verification Report*, dated 4 November 1999.
- US-5. *Memoranda Granting Extensions*, dated 14, 16, and 30 April 1999.
- US-6. *Letter from SAIL's Counsel to USDOC Re: Breakdown and Extension Request*, dated 11 May 1999.
- US-7. *Letter from SAIL's Counsel to USDOC Re: Late Filing*, dated 11 May 1999.
- US-8. *USDOC First Deficiency Questionnaire to SAIL*, dated 27 May 1999.
- US-9. *USDOC Second Deficiency Questionnaire to SAIL*, dated 11 June 1999.
- US-10. *Letter from SAIL to USDOC*, dated 16 June 1999.
- US-11. *USDOC Memorandum to File: Conversations with SAIL's Counsel*, dated 7 July 1999.
- US-12. *USDOC Third Deficiency Questionnaire to SAIL*, dated 18 June 1999.
- US-13. *Letter from SAIL to USDOC Re: Late Filing*, dated 28 June 1999.
- US-14. *Letter from USDOC to SAIL Re: Return of Untimely Information*, dated 7 July 1999.
- US-15. *Letters from Counsel for Domestic Producers to USDOC Re: Request Cancellation of Verification*, dated 6 July 1999 and 20 August 1999.
- US-16. *DOC Memorandum Re: Preliminary Determination Facts Available for SAIL*, dated 29 July 1999.
- US-17. *USDOC Fourth Deficiency Questionnaire to SAIL*, dated 2 August 1999.
- US-18. *USDOC Fifth Deficiency Questionnaire to SAIL*, dated 3 August 1999.
- US-19. *Letter from USDOC to SAIL Re: Granting of Extension of Time*, dated 16 August 1999.

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<sup>1</sup> All documents are either Public or Public Versions.

- US-20. *Letter from DOC to SAIL Re: Final Request for Useable Database*, dated 12 July 1999.
- US-21. *USDOC Memorandum to the File re: Ex-Parte Meeting with Counsel for SAIL Regarding Possible Suspension Agreement*, dated 31 August 1999.
- US-22. Commerce Regulation 19 C.F.R. § 351.308.
- US-23. Statement of Administrative Action pages 864 -865 and 868 -871.
- US-24. *USDOC Addendum to Verification Report*, dated 10 November 1999.
- US-25. *USDOC Determination of Verification Failure Memorandum*, dated 13 December 1999.

## I. INTRODUCTION

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

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

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

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

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

## II. PROCEDURAL BACKGROUND

6. On 16 February 1999, Commerce received an antidumping petition from a group of domestic steel producers alleging that certain cut-to-length carbon-quality steel plate products (“steel plate”) from India and other countries were being dumped in the United States, and were thereby injuring a US industry.<sup>1</sup> In addition to alleging injurious dumping, the petition provided information demonstrating

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

reasonable grounds to believe or suspect that sales in India were made at prices below the cost of production (“COP”).<sup>2</sup>

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

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

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

10. On 29 December 1999, Commerce published its Final Determination of Sales at Less Than Fair Value (“*Final Determination*”).<sup>8</sup> The dumping margin for SAIL in the *Final Determination* was 72.49 per cent.<sup>9</sup>

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

12. On 10 February 2000, Commerce published its antidumping duty order in this case.<sup>11</sup>

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

14. On 4 October 2000, India requested consultations with the United States pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”), Article 17 of the Agreement on Implementation of Article VI of the GATT 1994 (“AD Agreement”), Article 30 of the Agreement on Subsidies and Countervailing Measures (“SCM Agreement”), and Article XXII of the

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<sup>2</sup> *Id.* at 12969.

<sup>3</sup> *Id.* at 12963.

<sup>4</sup> *Id.* at 12965-66.

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

<sup>6</sup> *Id.* at 41205.

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

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

<sup>9</sup> *Id.* at 73131.

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

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

GATT 1994, with respect to, *inter alia*, the US Department of Commerce's final antidumping determination on cut-to-length steel plate from India.<sup>12</sup> The United States and India held consultations in Geneva on 21 November 2000, but were unable to resolve the dispute.

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

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

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

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

### **III. FACTUAL BACKGROUND**

#### **A. APPLICATION OF FACTS AVAILABLE WITH REGARD TO SAIL**

##### **1. Major Deficiencies in SAIL's Questionnaire Response**

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

20. From 12 April 1999 through 11 May 1999, SAIL submitted responses to the questionnaire. SAIL's failure to submit necessary information began early in the proceeding. For example, SAIL filed its 11 May 1999 database submission – including its reported US sales – late because of what it described as a

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<sup>12</sup> WT/DS206/1, 9 October 2000.

<sup>13</sup> *USDOC Redetermination on Remand* (27 September 2001)(Exh. IND-21).

<sup>14</sup> WT/DS206/2, 8 June 2001.

<sup>15</sup> WT/DS206/3, 31 October 2001.

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

<sup>17</sup> *Memoranda Granting Extensions*, dated 14, 16, and 30 April 1999, (Exh. US-5).

“breakdown” in the computer programme being used by its US counsel to prepare the computer disk.<sup>18</sup> SAIL also indicated in its narrative response that “some of the data requested by the Department is still being collected (because, *e.g.*, it is available only in handwritten form). As soon as these data are available we will submit them to the Department and revise the diskette accordingly.”<sup>19</sup>

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

there are two deficiencies which are major and need to be emphasized here. The first deficiency is that the response is substantially incomplete to the point where we may not be able to use the information contained therein to calculate a margin. Repeatedly throughout the questionnaire response you make the statement that certain data are unavailable and will be submitted later. For example, you only reported a subset of all your home market sales, and we cannot determine which sales have been reported. Because of your repeated failure to provide the information requested by the questionnaire, and incompleteness of your responses to other questions, we are unable to adequately analyze your company’s selling practices. The questions in the attachment are limited accordingly. We anticipate having further questions once your questionnaire response is more complete.

The second deficiency is that you failed to respond adequately to the entire section III of section D, which requires an explanation of the response methodology. Indeed, almost your entire response to this section is contained in Exhibits 9 and 10, which are not responsive to the questions in this section. Moreover, you have not provided product-specific cost information. This information is essential for an adequate analysis of your company’s selling practices. After reviewing the attached questions that relate to section D of the questionnaire, please contact the official in charge of the investigation to discuss possible ways to provide more product-specific cost information.<sup>24</sup>

22. On 3 and 8 June 1999, SAIL submitted certain clarifications supplementing its questionnaire responses submitted on 26 April and 10 May 1999. On 11 June 1999, Commerce issued a second deficiency questionnaire covering Sections A-C of SAIL’s questionnaire response.<sup>25</sup> Commerce requested that SAIL provide more specific information on variables reported in its home market, US sales and cost

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6).<sup>18</sup> *Letter from SAIL’s Counsel to USDOC Re: Breakdown/Extension Request*, dated 11 May 1999 (Exh. US-6).

<sup>19</sup> *Letter from SAIL’s Counsel to USDOC*, dated 11 May 1999 (Exh. US-7).

<sup>20</sup> *USDOC First Deficiency Questionnaire to SAIL*, dated 27 May 1999 (Exh. US-8).

<sup>21</sup> *Id.* at Attach. 1, pp. 1-4.

<sup>22</sup> *Id.* at pp. 4-10.

<sup>23</sup> *Id.* at pp. 10-15.

<sup>24</sup> *Id.* at cover letter from DOC to SAIL.

<sup>25</sup> *USDOC Second Deficiency Questionnaire to SAIL*, dated 11 June 1999 (Exh. US-9) (“*Second Deficiency Questionnaire*”).

databases.<sup>26</sup> This *Second Deficiency Questionnaire* also identified inconsistencies between SAIL's narrative explanation and its reported databases, inaccurate control numbers ("CONNUMs"),<sup>27</sup> and other necessary information.<sup>28</sup> Commerce further granted SAIL's request for an extension to provide its response to this deficiency questionnaire.<sup>29</sup>

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

## **2. Commerce's Actions to Assist SAIL**

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

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

## **3. SAIL's Untimely Submissions**

26. On 29 June 1999, SAIL made three submissions. The first two submissions were in response to Commerce's *Third Deficiency Questionnaire* and had been due the previous day, 28 June. SAIL's

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

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

<sup>28</sup> *USDOC Second Deficiency Questionnaire* at Attach. II.

<sup>29</sup> *Id.* at cover letter.

<sup>30</sup> *Letter from SAIL to USDOC*, dated 16 June 1999 (Exh. US-10).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *USDOC Memorandum to File: Conversations with SAIL's Counsel*, dated 7 July 1999 (Exh. US-11).

<sup>34</sup> *Id.* at Attachment.

<sup>35</sup> *USDOC Third Deficiency Questionnaire to SAIL*, dated 18 June 1999 (Exh. US-12).

<sup>36</sup> *Id.* at Attachment I.

counsel explained that its courier had been unable to deliver the submissions to Commerce.<sup>37</sup> The third submission responded to Commerce's *First Deficiency Questionnaire* and had been due 18 June 1999. SAIL did not provide any explanation for why this third submission was untimely filed. In accordance with its own regulations (19 C.F.R. § 351.302(d)), Commerce explained that it must return all three submissions to SAIL as untimely.<sup>38</sup> Commerce cautioned SAIL that:

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

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

The first deficiency, which was raised to your attention in our letter of 27 May 1999, is that you still have not provided product-specific costs, nor adequately demonstrated that such costs cannot possibly be derived from SAIL's accounting records. Without product-specific costs it is impossible to determine whether home market sales are being made at prices below production costs, whether any adjustment for physical differences in merchandise is warranted, and, where appropriate, whether constructed value has been properly calculated.

The second deficiency is that your electronic database submissions have proven seriously deficient and are currently unusable. We have made repeated requests and have yet to receive the supporting documentation that customarily accompanies electronic database submissions, including hard-copy examples of the database. Most troubling is that after devoting significant amounts of time and attention to your tapes, we have had to ask you to resubmit them on three separate occasions due to database flaws which prevent the files on these tapes from loading. Because such a large amount of data is reviewable only in electronic form, your repeated failure to provide usable electronic databases has prevented us from adequately evaluating SAIL's selling practices.<sup>40</sup>

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<sup>37</sup> Letter from SAIL to USDOC Re: *Late Filing*, dated 28 June 1999 (Exh. US-13). SAIL stated that:

Our messenger left our offices at 4:30pm on Monday, 28 June, to file the enclosed submissions. He returned at 5:30 p.m. saying that he arrived at the Commerce Department too late to gain entry. The problem, as he described it, was a combination of traffic congestion and refusal by the police to allow him to park near the Commerce Department.

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

<sup>39</sup> *Id.* at 2.

<sup>40</sup> *Id.* at 1.



28. On 6 July 1999, domestic producers submitted comments regarding deficiencies in SAIL's questionnaire responses. Domestic producers argued that SAIL should not be permitted to submit a new cost response and that any scheduled verification be cancelled.<sup>41</sup>

#### 4. Continued Actions by Commerce to Assist SAIL

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

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

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

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

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

We have determined that the use of facts available is appropriate for SAIL for purposes of this preliminary determination. Although SAIL filed a questionnaire response, it contained numerous errors. Moreover, because of the problems with the electronic databases that SAIL submitted, its questionnaire response cannot be used to calculate a reliable margin at this time. Section 776(a)(2)(B) of the Act provides that the administering authority shall use facts otherwise available when an interested party "fails to provide such information by the deadlines for the submission of the information or in the form and manner requested." Therefore, the use of facts available is warranted in this case.<sup>45</sup>

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

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

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

<sup>44</sup> *Id.* at Attach. I.

<sup>45</sup> *Preliminary LTFV Determination* at 41203.

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

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

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

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

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

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

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

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 41203-04.

<sup>48</sup> *Id.* at 41204.

<sup>49</sup> *USDOC Fourth Deficiency Questionnaire to SAIL*, dated 2 August 1999 (Exh. US-17).

<sup>50</sup> *USDOC Fifth Deficiency Questionnaire to SAIL*, dated 3 August 1999 (Exh. US-18).

<sup>51</sup> *Letter from USDOC to SAIL Re: Granting of Extension of Time*, dated 16 August 1999 (Exh. US-19).

<sup>52</sup> See, e.g., *USDOC Verification Outline for SAIL*, dated 12 August 1999 (Exh. IND-12).

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

<sup>54</sup> *SAIL Corrected US Sales Database, computer printout*, dated 1 September 1999 (Exh. IND-8).

## 6. The Sales Verification

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

SAIL had under-reported home market prices for a significant percentage of sales.

SAIL double-counted sales made by the Rourkela Steel Plant.

SAIL was unable to demonstrate that the quantity and value of home market sales were properly reported.

The reporting of plant sales was incorrect in nearly every possible way -- quantity and value were under-reported, prices and adjustments were inaccurate, and sales of prime and non-prime merchandise were mixed up.<sup>55</sup>

Commerce also stated that it found “numerous coding errors in the home market database.”<sup>56</sup>

39. Commerce also discovered errors in the US sales database. Commerce explained that “[w]hile testing US sales for model match purposes, we found an incorrectly reported model match criterion.”<sup>57</sup> Commerce further noted that this error affected a preponderance of SAIL’s export sales to the United States. Commerce also explained that SAIL had failed to report certain product control numbers in the cost of production database. According to Commerce, the missing control numbers were related to the primary type of steel plate exported by SAIL to the United States during the period of investigation. Commerce later explained that it was difficult for its verification team to evaluate whether the reporting of product specification/grade was accurate because SAIL had prepared no supporting verification exhibits.<sup>58</sup>

## 7. The Cost Verification

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

Company officials stated that the total cost of manufacture (TCOM), and the variable COM (VCOM) on the COP tape submitted 17 August 1999, are incorrect. There is no way to establish a meaningful correlation between the TCOM and VCOM on the tape and the underlying cost data and sources documents. On the first day of verification, SAIL presented a completely revised COP tape, as part of the correction presented in exhibit C-3. It was not clear the extent to which this tape should be considered “new information”. Accordingly, we did not accept it. . . .

Although the COP tape was incorrect, and a new revised COP tape was not accepted, we proceeded with verification because the {sic} cost information underlying the reported per-unit COP was still verifiable--that is the actual average cost for plates and normalized

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<sup>55</sup> *Sales Verification Report*, dated 4 November 1999 (Exh. US-4) (public version) at 4-5.

<sup>56</sup> *Id.* at 5.

<sup>57</sup> *Id.* at 5, 12.

<sup>58</sup> *USDOC 10 November 1999 Addendum to Verification Report*, Exh. US-24 (public version) at 1.

plates at each plant . . . and the data underlying the indices developed by SAIL for calculating product-specific costs . . . .<sup>59</sup>

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

## **8. Determination of Verification Failure**

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

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

[w]henver serious problems arise at verification we must determine whether the problems can be isolated and perhaps dealt with by the selective use of adverse inferences or are so significant as to undermine the integrity of the whole response.<sup>63</sup>

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

[a]t verification one of the primary goals is to ensure that all home market sales were reported meaning that all sales are reported and that the prices and adjustments are reported correctly in the sales listing. An integral part of ensuring the proper reporting of sales is verifying the negative, i.e., looking for unreported sales (or discounts). This requires reconciling the company's records for sales of subject merchandise to the reported quantity and value.

As detailed in the Sales Verification Report, the problems encountered were such that we could not ensure that home market sales were properly reported. We have no way of knowing how many sales of subject merchandise may have been made in the home market. The fact that SAIL could not tie the reported quantity and value for sales of subject merchandise to the company's financial records and that prices were under-reported for a significant percentage of home market sales undermines the credibility of SAIL's records. Taken together these problems resulted in our inability to establish that home market sales were properly reported.<sup>64</sup>

Regarding SAIL's COP/CV data, Commerce stated that:

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<sup>59</sup> *Cost Verification Report*, dated 4 November 1999 (Exh. US-3) (public version) at 2.

<sup>60</sup> *Id.* at 2-3.

<sup>61</sup> Transcript of Hearing at USDOC (18 November 1999) (Exh. IND-15).

<sup>62</sup> *USDOC Determination of Verification Failure Memorandum*, dated 13 December 1999 (Exh. US-25).

<sup>63</sup> *Id.* at 4.

<sup>64</sup> *Id.* at 4-5.

[o]n the first day of verification SAIL company officials stated that the cost tape submitted was inaccurate and could not be tied to existing books and records. In addition, SAIL failed even to submit Constructed Value ("CV") data for US sales. Thus, there is no useable COP or CV data on the record. Despite the fact that the aggregate product-specific COP data were inaccurate, and there were no CV data at all, we nevertheless reviewed the [sic] underlying components of the aggregate costs. Here too we find widespread errors and inaccuracies.<sup>65</sup>

44. Finally, in describing several errors in the US sales database, Commerce explained that:

[w]hile these errors, in isolation, are susceptible to correction, when combined with other pervasive flaws in SAIL's data, these errors support our conclusion that SAIL's data on the whole is unreliable.<sup>66</sup>

## 9. The Final Determination

45. Commerce provided a comprehensive summary of these facts and its decision to base its margin calculation upon adverse facts available in the *Final Determination*:

[T]he use of facts available is appropriate for SAIL for purposes of the final determination, pursuant to section 776(a)(2)(A), (B), and (D) of the Act. With respect to subsection (A), at verification the Department discovered that SAIL failed to report a significant number of home market sales; was unable to verify the total quantity and value of home market sales; and failed to provide reliable cost or constructed value data for the products. See Home Market and United States Sales Verification Report ("Sales Report"), dated 3 November 1999; see also Cost of Production and Constructed Value Verification Report ("Cost Report"), dated 3 November 1999. With regard to subsection (B), SAIL was provided with numerous opportunities and extensions of time to fully respond to the Department's original and supplemental questionnaires, as well as ample time to prepare for verification. However, even with numerous opportunities to remedy problems, SAIL failed to provide reliable data to the Department in the form and manner requested.

With respect to section 776(a)(2)(D) of the Act, we note that as a result of the widespread problems encountered at verification, SAIL's questionnaire responses could not be verified. See Sales Report and Cost Report. See Memorandum to the File: Determination of Verification Failure ("Verification Memo"), dated 13 December 1999.<sup>67</sup>

46. In addition, Commerce addressed the statutory requirement that parties be advised of deficiencies in their submissions:

With respect to section 782(d), we gave SAIL numerous opportunities and extensions to submit complete and accurate data. As stated in the Preliminary Determination, SAIL's questionnaire and deficiency questionnaire responses were found to be substantially deficient and untimely for purposes of calculating an accurate antidumping margin. See

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<sup>65</sup> *Id.* at 5.

<sup>66</sup> *Id.*

<sup>67</sup> *Final Determination* at 73126-27.

Preliminary Determination. However, subsequent to the preliminary determination we issued two additional questionnaires and further extensions to SAIL presenting it yet additional opportunities to submit a complete and accurate electronic database. Nevertheless, the Department found at verification that the final submission was again substantially deficient . . . .Therefore the Department may ``disregard all or part of the original and subsequent responses," subject to subsection (e) of section 782.<sup>68</sup>

47. In a separate section of the *Final Determination*, Commerce specifically addressed SAIL's comments that Commerce should determine that the company cooperated to the best of its ability:

SAIL has consistently failed to provide reliable information throughout the course of this investigation. At the preliminary determination we relied on facts available because widespread and repeated problems in SAIL's questionnaire response rendered it unuseable for purposes of calculating a margin. These problems recurred despite our numerous and clear indications to SAIL of its response deficiencies. Even though we rejected use of SAIL's questionnaire response at the preliminary determination, because the company was seemingly attempting to cooperate, albeit in a flawed manner, we continued to collect data after the preliminary determination in an attempt to gather a sufficiently reliable database and narrative record for verification and for use in the final determination. The Department also rejected petitioners' request that verification be cancelled in light of the response deficiencies. However, as evidenced by the summary below, SAIL was unable to provide the Department with useable information to calculate and determine whether sales were made at less than fair value.<sup>69</sup>

48. Commerce then proceeded to summarize in detail the deficiencies in the previously-identified areas of completeness, timeliness, and workability of computer tapes and the fact that SAIL failed verification.<sup>70</sup>

49. Commerce disagreed with SAIL's characterization that its US sales were accurate, timely submitted, and verified:

In fact, the US sale database contained certain errors, as revealed at verification. See Sales Report; see also Verification Memo. Moreover, we disagree with SAIL that we are required by the Act to use SAIL's reported US prices. SAIL cites to [judicial and administrative cases] as support for the contention that the Department does not resort to total facts available if there are deficiencies in the respondent's submitted information. It is the Department's long-standing practice to reject a respondent's questionnaire response in toto when essential components of the response are so riddled with errors and inaccuracies as to be unreliable. See *Steel Wire Rod from Germany*. SAIL's argument relies on a mischaracterization of our practice with respect to so-called ``gap-filler" facts available. SAIL argues that the Department should fill in the record for home market sales, cost of production, and constructed value as if there were a mere ``gap" in the response, as opposed to the entire record. Thus respondent's arguments and citations to these cases are inapposite. In each of the above-mentioned cases, the majority of the information on the record was verified and useable; there were only certain small areas of

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<sup>68</sup> *Id.* at 73127.

<sup>69</sup> *Id.* at 73129-30.

<sup>70</sup> *Id.* at 73130.

information which required the Department to {use} facts otherwise available to accurately calculate a dumping margin. The Department's long-standing practice of filling in gaps or correcting inaccuracies in the information reported in a questionnaire response, often based on verification findings, is appropriate only in cases where the questionnaire response is otherwise substantially complete and useable. In contrast, in this case, SAIL's questionnaire response is substantially incomplete and unuseable in that there are deficiencies concerning a significant portion of the information required to calculate a dumping margin. To properly conduct an antidumping analysis which includes a sales-below-cost allegation, the Department must analyze four essential components of a respondent's data: US sales; home market sales; cost of production for the home market models; and constructed value for the US models. Yet SAIL has not provided a useable home market sales database, cost of production database, or constructed value database. Moreover, the US sales database would require some revisions and corrections in order to be useable. As a result of the aggregate deficiencies (data problems and SAIL's responses), the Department was unable to adequately analyze SAIL's selling practices in a thorough manner for purposes of measuring the existence of sales at less than fair value for this final determination. *See Sales Report and Cost Report.*<sup>71</sup>

50. Finally, regarding SAIL's argument that US law, specifically section 782(e) of the Act, required Commerce to utilize SAIL's US sales data in calculating a dumping margin, Commerce explained that:

Section 782(e) of the Act states that the Department shall not decline to consider information deemed "deficient" under section 782(d) provided that subsections (1), (2), (3), (4), and (5) of section 782(e) are met. In the instant investigation, record evidence supports the finding that SAIL did not meet these requirements . . . . With regard to each respective subsection of 782(e): (1) SAIL did not provide information in a timely manner; (2) the information submitted could not be verified; (3) essential components of the information (*e.g.*, home market sales and cost information) are so incomplete that it cannot be used as a reliable basis for reaching a determination; (4) SAIL did not act to the best of its ability in providing the information and meeting the requirements established by the administering authority; and (5) the information cannot be used without undue difficulties. Accordingly, we are applying a margin based on total facts available to SAIL in the final determination.<sup>72</sup>

51. As a result, Commerce determined that SAIL's information was unusable and not a reliable basis upon which to calculate a margin. Moreover, because Commerce determined that SAIL did not act to the best of its ability, it used an adverse inference in selecting the highest margin alleged in the petition as facts available.

52. SAIL subsequently challenged the *Final Determination* at the CIT.

## **10. The Remand Determination**

53. On 26 May 2001, the CIT affirmed Commerce's decision to reject SAIL's information as unusable and use facts available in determining an antidumping duty margin for SAIL. The CIT

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<sup>71</sup> *Id.* at 73130.

<sup>72</sup> *Id.* at 73130-31.

remanded the decision, however, for further explanation as to Commerce's basis for determining that SAIL had failed to act to the best of its ability. Contrary to India's contention, the CIT did not "reverse" Commerce's determination that SAIL had not acted to the best of its ability; it simply remanded the case for further explanation by Commerce on this point.

54. Commerce filed its explanation with the CIT on 27 September 2001.<sup>73</sup> In that determination, Commerce summarized the factual and legal basis for its finding that SAIL had failed to act to the best of its ability.

55. First, Commerce explained its finding that SAIL possessed the necessary information and that it had the ability to provide the information in compliance with Commerce's information requests. Commerce explained its information collection process as follows:

Although responding to the antidumping questionnaire can be a demanding exercise, it is tailored so that it can be completed by companies that keep audited records of their sales and costs. Every year, Commerce sends essentially the same questionnaire to dozens of foreign producers, and the great majority of these respondent companies is able to provide the necessary information. Although Commerce modulates the level of detail and (importantly) the type of computerization required in order to accommodate each company's unique circumstances, in the main, Commerce solicits much the same type of information from each company. As a general matter, it is reasonable for Commerce to conclude that, if companies with fewer resources can respond fully and adequately to an antidumping questionnaire in a timely manner, a company with the resources and expertise of SAIL, that does not inform the Department otherwise in a timely fashion, is also capable of doing so.<sup>74</sup>

56. Commerce also explained that the respondent ultimately controls the information necessary for an anti-dumping determination:

It should be noted that Commerce has very limited knowledge of the actual extent of a respondent's ability to comply with requests for information. It is the respondent, not Commerce, that possesses the necessary information and knowledge of the company's operations and records. Therefore, it is incumbent on the respondent to demonstrate why it is incapable of providing requested information in a timely manner. Commerce cannot rely on mere assertions of vague "difficulties" or inability to comply as a basis for concluding that a respondent acted to the best of its ability.

That is why the Department requires the reason why a party has failed to provide requested data. Without a specific, compelling explanation, Commerce generally has no means of discerning if a respondent is truly incapable of complying. If there was some circumstance beyond SAIL's control that prevented it from responding adequately and in a timely manner, it did not offer any such explanation. SAIL has not demonstrated that its failure to respond accurately is excused "because it was not able to obtain the requested information, did not properly understand the question asked, or simply overlooked a particular request." Mannesmannrohren-Werke AG v. United States, 77 F.Supp. 2d 1302, 1316 (CIT 2000) (Mannesmann I). The information that SAIL failed to

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<sup>73</sup> *USDOC Redetermination on Remand* (September 27, 2001) (Exh. IND-21).

<sup>74</sup> *Id.* at 2-3.



provide was within its own control. Moreover, SAIL was provided with substantial guidance on the questions asked, and its failure was more comprehensive than the simple oversight of a particular request.<sup>75</sup>

57. Commerce again summarized the facts of its attempt to obtain necessary information from SAIL:

During the underlying investigation, SAIL did advise Commerce that it was experiencing difficulties in gathering and submitting the requested information. Typically, however, these difficulties were offered to justify requests for additional time to submit information (which the Department repeatedly granted) and were often accompanied by assurances that the information would be forthcoming. For example, in its 11 May 1999, database submission -- which was filed late due to a computer "breakdown" -- SAIL indicated that "some of the data requested by [Commerce] is still being collected (because, e.g. it is available only in handwritten form). As soon as these data are available we will submit them to the Department and revise the diskette accordingly." Def. Ex. 5, C.R. 7. Thus, in the underlying proceeding, SAIL's reference to handwritten records was given as an example of why it needed additional time. SAIL did not indicate that it would be unable to provide a usable database; on the contrary, it promised that such a database would be forthcoming. As a result, we disagree with SAIL's suggestion, Pl.'s Mem. Supp. Mot. J. Agency R. at 32, that its identification of these logistical difficulties demonstrates that it could not comply with the information requests. In Commerce's view, the record demonstrates that SAIL could comply with the request for data, and SAIL never offered any valid explanation of circumstances that rendered it incapable of complying with those requests.

In the underlying proceeding, the Department repeatedly requested that SAIL remedy deficiencies in its response and SAIL gave every indication that it would comply with the agency's information requests. Where information was not provided initially, SAIL indicated that it would be submitted as soon as it became available and that unuseable computer tapes would be revised accordingly. See, e.g., Def. Ex. 5, C.R. 7; see also Def. Ex. 11, C.R. 17 (SAIL submitted revised computer tapes and stated that all home market sales made during the period were provided). At SAIL's behest, Commerce took the unusual step of permitting the submission of significant amounts of information after the preliminary determination; SAIL assured Commerce that this new data could be verified. Def. Ex. 25, C.R. 33. All of these representations suggest that SAIL itself believed it could comply with the requests for information. In such circumstances, it is reasonable for Commerce to conclude that SAIL had assessed its own operations and knew that it could fulfill its representations. This Court has held that it is "reasonable for Commerce to charge [a respondent] with knowledge of its own operations." Mannesmannrohren-Werke AG v. United States, Slip Op. 00-126 (CIT 5 October 2000) (Mannesmann II). Therefore, even accepting that SAIL's efforts were made in good faith "does not relieve its burden to respond to the best of its ability, and its 'ability' includes possessing knowledge of its business operations." Id.<sup>76</sup>

58. Finally, Commerce addressed SAIL's suggestion that it could not provide the necessary information:

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<sup>75</sup> *Id.* at 3.

<sup>76</sup> *Id.* at 3-4 (footnotes omitted).

To conclude that SAIL tried its best but simply could not report accurate information about its home market sales or production costs is not credible. SAIL is one of the largest integrated steel producers in the world, with significant expertise in many areas and significant resources at its disposal. For example, SAIL has an established accounting system and its books are audited annually by a large team of public accountants. See, e.g., SAIL Section A Response, C.R. 5, at Exhibit A-9 (SAIL Annual Report). Moreover, because SAIL is predominantly owned by the Indian Government, SAIL is accountable for a variety of additional Government accounting requirements. Based on the information available to Commerce, we conclude that SAIL had the ability to comply with the information requests. In sum, SAIL is and should be accountable for the information recorded in its books and records. To conclude otherwise would allow respondents to provide only the most rudimentary information, without regard to the information actually required for an investigation. More importantly, to allow a respondent to select the information it will submit provides a major incentive for self-serving behaviour – supplying information that is generally favorable while claiming that it cannot supply information that might prove unfavourable to respondent . . . .

This investigation may have been SAIL's "first real brush with US antidumping law," [] but SAIL has provided us with no information that indicates it could not comply with the information requests made by Commerce. Thus, it is reasonable for Commerce to conclude that SAIL had the resources and ability to comply with Commerce's questionnaire but inexplicably failed to do so.<sup>77</sup>

#### B. COMMERCE'S CONSIDERATION OF SAIL'S PROPOSED SUSPENSION AGREEMENT

59. In a letter dated 29 July 1999, SAIL submitted a proposed agreement to suspend<sup>78</sup> the investigation to "address any problems that might be caused by imports of {cut-to-length} plate from India."<sup>79</sup> On 31 August 1999, a meeting was held with counsel for SAIL, Commerce's Assistant Secretary for Import Administration and other officials to discuss the antidumping suspension agreement proposal from India.<sup>80</sup> During the meeting, the Department stated that it "would consider the respondent's request, but noted that suspension agreements are rare and require special circumstances."<sup>81</sup> The Department also discussed the fact that "the requisite circumstances may not exist at the present time," and eventually denied the request.<sup>82</sup>

#### IV. STANDARD OF REVIEW

60. The AD Agreement is unique among the WTO agreements in providing its own standard for a WTO panel's review of an anti-dumping determination by an investigating authority. That standard is set forth in Article 17.6 in two parts: the first concerns review of questions of fact and the second concerns

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<sup>77</sup> *Id.* at 4-5 (footnotes, citations omitted).

<sup>78</sup> Note that a suspension agreement is otherwise known as a price undertaking.

<sup>79</sup> *Letter from SAIL's Counsel to USDOC Re: Request for a Suspension Agreement*, dated 29 July 1999 (Exh. IND-10).

<sup>80</sup> *USDOC Memorandum to the File re: Ex-Parte Meeting with Counsel for SAIL Regarding Possible Suspension Agreement*, dated 31 August 1999 (Exh. US-21).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

review of issues of law. In its submission, India acknowledges this concept.<sup>83</sup> However, India also claims that another standard, described in *United States - Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, also applies. As explained below, this is an incorrect reading of the WTO agreements. Furthermore, India states that Article 17.6 requires this Panel to effectively ignore the policies and procedures underlying US law and its application, thereby distorting the standard of review which this Panel is to apply. The proper standard is described below.

A. REVIEW OF AN AUTHORITY'S ESTABLISHMENT AND ASSESSMENT OF THE FACTS:  
PANELS MAY NOT ENGAGE IN *DE NOVO* REVIEW

61. Article 17.6(i) of the AD Agreement provides that:

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

62. In other words, a panel may not conduct its own *de novo* evaluation of the facts if the authority's establishment of the facts is proper and its evaluation of the facts is unbiased and objective. As articulated by the Appellate Body in *United States - Antidumping Measures on Certain Hot-Rolled Steel Products from Japan* ("*Hot-Rolled AB Report*"), pursuant to Article 17.6(i) and Article 11 of the DSU, both of which require an "objective" assessment of the facts, "the task of panels is simply to review the investigating authorities' 'establishment' and 'evaluation' of the facts."<sup>84</sup>

63. In order to 'establish' and "evaluate" the facts, Article 17.6(i) notes that a panel must determine (1) if the establishment of the facts on the record was "proper," given the overall investigation or review under scrutiny by the panel and (2) if the investigating authority's determination, based upon the facts on the record, was unbiased and objective.<sup>85</sup> "Proper," as defined by the Oxford Standard Dictionary, means "suitable" or "appropriate."<sup>86</sup> Thus, a panel must review all of the facts on the record and determine if the investigating authority appropriately considered the facts of the record and applied those facts in an objective, unbiased manner in making its final determination.

64. Once a panel makes an objective assessment of the investigating authority's establishment of the facts, pursuant to 17.6(i), it is well established that even if a panel disagrees with an agency's findings, as long as the investigating authority's findings are based upon properly-applied facts and its decision has been made in an objective, unbiased manner, then the panel may not substitute its judgment for that of the investigating authority.<sup>87</sup> This applies even if the panel – had it stood in the shoes of that authority originally– might have decided the matter differently.

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<sup>83</sup> First Submission of India at para. 49.

<sup>84</sup> *United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, Report of the Appellate*, WT/DS184/AB/R, adopted 23 August 2001, para. 55 ("*Hot-Rolled AB Report*"). See also *Article 21.5 Recourse Decision, Mexico-Anti-Dumping Investigation of High Fructose Corn Syrup ("HFCS AB Report") From the United States*, WT/DS132/AB/RW, adopted 22 October 2001, para 130. Article 11 of the DSU imposes upon panels a comprehensive obligation to make an "objective assessment of the matter."

<sup>85</sup> See *Hot-Rolled AB Report*, para 55.

<sup>86</sup> *The New Shorter Oxford English Dictionary*, Clarendon Press, Oxford (1993) (definition III).

<sup>87</sup> See *Hot-Rolled AB Report*, para. 56.

65. Several panels have stressed that a panel review is not a substitute for proceedings conducted by national investigating authorities, and that the role of panels is not to conduct a *de novo* review of the factual findings of a national investigating authority. This standard of review has been articulated by both WTO panels and GATT panels:

[T]he Panel was not to conduct a *de novo* review of the evidence relied upon by the United States authorities or otherwise to substitute its judgment as to the sufficiency of the particular evidence considered by the United States authorities.<sup>88</sup>

This concept is extremely important because, as noted in *Thailand - H-Beams from Poland*, “the aim of Article 17.6(i) is to prevent a panel from ‘second-guessing’ a determination of a national authority when the establishment of the facts is proper and the evaluation of those facts is unbiased and objective.”<sup>89</sup>

66. In reviewing the facts of the record, WTO panels are directed to look to the entire administrative record of an investigation. India argues that the Panel is required to review SAIL’s US sales data specifically, apply the four conditions of Annex II, paragraph 3 only to that data, and then to make its determination exclusively based upon that analysis. This is a misreading of the AD Agreement. Article 17.6(i), on its face, applies to all of the “facts of a matter,” and does not affirmatively segregate between respondent-selected segments of submissions. Thus, this Panel must “examine whether the evidence relied upon by the [investigating authority] was sufficient, that is, whether an unbiased and objective investigating authority evaluating that evidence” could properly have reached its determination.<sup>90</sup>

**B. REVIEW OF AN AUTHORITY’S INTERPRETATION OF THE AD AGREEMENT: PANELS MUST RESPECT MULTIPLE, PERMISSIBLE INTERPRETATIONS**

67. Article 17.6(ii) applies to the legal standard of review:

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

68. In reviewing legal questions that turn on the proper meaning to be ascribed to the AD Agreement, subparagraph (ii) of Article 17.6 provides that, where a relevant provision of the AD Agreement is subject to more than one permissible interpretation, a WTO panel shall find the anti-dumping measure in question to be in conformity with the Agreement if it is based on any of those permissible interpretations.

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<sup>88</sup> *Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup (“HFCS”) from the United States*, WT/DS132/R (Jan. 28, 2000), para. 7.56. The HFCS panel was citing from *Guatemala-Anti-Dumping Investigation Regarding Portland Cement From Mexico*, WT/DS60/R, adopted 19 June 1998. The language is actually taken from *United States - Measures Affecting Import of Softwood Lumber from Canada*, SCM/162BISD40S/358, adopted 27-28 October 1993, para. 335.

<sup>89</sup> *Thailand - Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, Report of the Appellate Body, WT/DS122/AB/R, adopted 12 March 2001, paras. 117-18 (“*Thailand H-Beams from Poland*”).

<sup>90</sup> HFCS, para. 7.57.

69. Thus, Article 17.6(ii) reflects a deliberate choice by the negotiators to recognize the possibility of multiple interpretations. In this sense, Article 17.6(ii) constitutes an admonition to panels to take special care, as clearly stated in Articles 3.2 and 19.2 of the DSU, not to add to the obligations of Members.

70. In sum, Article 17.6(ii) instructs panels that, if the terms of the Agreement admit of multiple permissible interpretations, they must find an authority's action conforms with the AD Agreement if it conforms to one of those interpretations. Thus, the relevant question in every case is not whether the challenged determination rests upon the best or the "correct" interpretation of the AD Agreement, but whether it rests upon a "permissible interpretation" (of which there may be many).

71. India does not disagree with the above analysis, but by citing to *Transitional Safeguard Measure on Combed Cotton Yarn From Pakistan* ("Yarn from Pakistan"),<sup>91</sup> attempts to add to the obligations of investigating authorities, pursuant to Article 11 of the DSU, in determining if the investigating authority has "complied with their obligations." Article 1.2 of the DSU, however, provides that "special or additional rules and procedures on dispute settlement contained in covered agreements" shall prevail over the more general rules and procedures of the DSU to the extent of any differences. As explained previously, the AD Agreement is unique among the WTO Agreements in that it contains a specified "standard of review." Therefore, the decision in *Yarn From Pakistan* is irrelevant, because the Panel in that case had no special standard of review provision to apply.

72. Thus, in applying the *Textiles Agreement* in *Yarn From Pakistan*, the Appellate Body was enunciating the standard pursuant to DSU Article 11 for an "objective" review of the facts. In the case at hand, however, Articles 17.6(i) and (ii) of the AD Agreement provide for the standard of review by which a panel should make its determination. The Appellate Body has never stated that in addition to the requirements of Article 17.6, a panel reviewing a measure under the AD Agreement must also implement the test articulated in *Yarn From Pakistan*.

73. In summary, this Panel should review the entire record and all of the facts contained therein. In that context, this Panel should assess whether Commerce's application of facts available in this investigation was conducted in an unbiased and objective manner. Furthermore, this Panel should determine, based upon the complete record, whether the United States' legal analysis is a permissible interpretation of its obligations under the AD Agreement.

## V. LEGAL ARGUMENT

### A. INTRODUCTION

74. Customary rules of interpretation of public international law, as reflected in Article 31(1) of the Vienna Convention, provide that a treaty "shall be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty *in their context and in the light of its object and purpose*" (emphasis added). The purpose of treaty interpretation is, as stated in Article 31 of the Vienna Convention, to give effect to the intention of the parties to the treaty as expressed in their words read in context.

75. Article VI of the GATT 1994 ("Article VI") authorizes WTO Members to impose anti-dumping duties in order to remedy injurious dumping. The object and purpose of Article VI is to provide a remedy to Member countries that are faced with dumped imports that cause or threaten material injury. Article VI:1 states that "dumping . . . is to be condemned if it causes or threatens material injury to an established

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<sup>91</sup> WT/DS192/AB/R, adopted 8 October 2001, para. 74 ("*Yarn from Pakistan*")

industry . . . or materially retards the establishment of a domestic industry." Given the object and purpose of Article VI and the AD Agreement, which authorizes a remedy for injurious dumping, the provisions of these agreements must be interpreted so as to allow investigating authorities to obtain and analyze all information necessary to the antidumping analysis.

76. Article VI and the AD Agreement require that a determination of dumping must be based on detailed information involving prices in the domestic market of the exporting country ("normal value") and export prices to the market of the investigating authority.<sup>92</sup> The dumping determination must include, where alleged, an analysis of cost information to determine whether sales in the domestic market of the exporting country are below the cost of production ("COP"). Only when all of this information is accurately provided can the administering authority perform an accurate calculation of a dumping margin. Based on these requirements, Commerce's questionnaire requests of information necessary for the dumping analysis, including general information concerning the company's corporate structure and business practices; the merchandise under investigation that it sells; the sales of that merchandise in all markets; the home market sales listings; the US sales listings; and information regarding the cost of production of the foreign like product and the constructed value of the merchandise under investigation. This information, which is necessary for any dumping determination, is normally within the control of the responding parties whose sales are the subject of the anti-dumping investigation.

77. Thus, in light of the object and purpose of Article VI and the AD Agreement, authorizing Members to remedy injurious dumping, the provisions at issue must be interpreted to allow investigating authorities to request, require and obtain the necessary information from interested parties. The interpretation advanced by India would give ultimate control to responding parties over what information investigating authorities may analyze.

78. The goal of an anti-dumping investigation is "ensuring objective decision-making based on facts."<sup>93</sup> In order for investigating authorities to *make* objective decisions based on facts, they must have *access* to those facts. An interpretation of the AD Agreement that would encourage parties to selectively provide necessary information would frustrate the goal of objective decision-making and nullify the effectiveness of the Article VI remedy. At some point, investigating authorities must have the discretion to reject questionnaire responses in their entirety when responding parties fail to provide critical information that authorities need to conduct antidumping investigations.

#### B. TEXTUAL ANALYSIS OF THE AD AGREEMENT

79. In this section of our submission, we analyze the provisions of the AD Agreement relevant to this dispute, that is, Article 6.8 and Annex II. As will be shown, the ordinary meaning of Article 6.8 and Annex II of the AD Agreement support the interpretation of the United States as reflected in its statutory provisions and its actions with respect to SAIL in the antidumping duty investigation at issue.

80. Article 6.8 of the AD Agreement permits the application of facts available when a party fails or refuses to provide necessary information in an anti-dumping investigation. Annex II of the AD Agreement then sets out the criteria which investigating authorities should take into account before applying facts available. As we demonstrate below, taken together, Article 6.8 and Annex II allow investigating authorities to make preliminary and final determinations, in whole or in part, on the basis of facts available, which could lead to a result which is less favorable to the party than if the party had

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<sup>92</sup> See, e.g., Article VI:1 of GATT 1994; Article 2 of the AD Agreement.

<sup>93</sup> *Hot-Rolled Panel Report*, para. 7.55.

cooperated and provided the necessary information. These provisions of the AD Agreement provide investigating authorities with a feasible method for calculating antidumping margins when information in control of responding parties is missing, untimely, or unreliable because a party either refuses access to it or otherwise does not timely provide it.

**1. Article 6.8 of the AD Agreement**

81. Article 6.8 of the AD Agreement provides as follows:

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

*(a) Information*

82. A fundamental issue in this dispute is the proper interpretation of the term “information” as used in Article 6.8 and Annex II of the AD Agreement. The ordinary meaning of the term “information,” which is not defined in the AD Agreement, is a “communication of the knowledge of some act or occurrence” and “knowledge or facts communicated about a particular subject, event, etc.; intelligence, news.”<sup>94</sup>

83. Article 6.8 of the AD Agreement uses the term “necessary information.” The ordinary meaning of the term “necessary” is “[t]hat cannot be dispensed with or done without; requisite; essential; needful.”<sup>95</sup> The “necessary” or “requisite” or “essential” information for conducting an antidumping investigation includes prices of the subject merchandise in the domestic market of the exporting country, export prices of the subject merchandise, and, in appropriate circumstances, cost of production information and constructed value information. Because dumping is defined in Article 2.1 of the AD Agreement based on a comparison of the export price with the normal value, in the ordinary course of trade, all of this information constitutes “necessary” information for purposes of making a dumping determination.<sup>96</sup>

84. Throughout its First Written Submission, India claims that Commerce was wrong to examine the sufficiency of all of the information necessary for the conduct of its investigation. Instead, India argues that Commerce was obligated to focus on certain “categories of information” -- a term which does not appear anywhere in the AD Agreement. Nothing in the AD Agreement requires an administering authority to evaluate distinct “categories” of information separately for purposes of determining whether it is permissible to use facts available for a dumping determination.

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<sup>94</sup> The New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993.

<sup>95</sup> The New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993.

<sup>96</sup> Article 2.1 of the AD Agreement states:

For the purpose of this Agreement, a product is to be considered as being dumped, ie. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

85. It is also relevant to consider the meaning of the term “information” in terms of the overall purpose of the AD Agreement. As stated by the *Hot Rolled* panel:

One of the principal elements governing anti-dumping investigations that emerges from the whole of the AD Agreement is the goal of ensuring objective decision-making based on facts.<sup>97</sup>

To the extent that “objective decision-making based on facts” is accepted as a goal of the AD Agreement, the Agreement should be interpreted in a manner that would achieve that goal. The only way to achieve “objective decision-making based on facts” is to interpret the AD Agreement in a manner which encourages the parties in possession of the facts (in this case the responding interested parties) to provide that information to the investigating authorities in a timely and accurate manner. Conversely, an interpretation which would encourage responding interested parties to provide only partial information would be inconsistent with that goal and is not to be preferred.

86. The purpose of the objective standard for decision-making is to permit neutral determinations to be made without bias toward either the party that could be subject to duties or the party being injured by any dumping. When investigating authorities rely on facts available, it is not possible to determine whether those facts are advantageous to the responding party because the information necessary to determine or even estimate that party’s actual margin of dumping is not available. Thus, an interpretation of the AD Agreement that would allow responding parties to selectively provide information and require investigating authorities to use that information could encourage such selective responses and thereby defeat the underlying purpose of “objective decision-making based on facts.”

87. India’s interpretation of the term “information” to mean “categories of information” cannot be squared with the goal of “objective decision-making based on facts.” Under India’s interpretation, responding interested parties would be able to select what information they want to supply to the investigating authorities. India’s interpretation would, in fact, encourage responding interested parties to distinguish between helpful and harmful information and to provide only that select information which will not have negative consequences for them.

88. Moreover, India’s interpretation would often lead to absurd results. For example, under India’s interpretation of the AD Agreement, if a responding party submitted only its COP data, omitting home market and export sales information, Commerce would be required to include that data in its calculations. Such information would be impossible to use, however, because in the absence of actual home market prices, it would be unknowable whether the actual home market sales were above cost and therefore appropriate for determining normal value (pursuant to Article 2.2.1 of the AD Agreement), or below cost, such that constructed value should be used to determine normal value (pursuant to Article 2.2 of the AD Agreement). Such an interpretation would be absurd and, as such, should be avoided.

89. Furthermore, India’s interpretation adds language to the text that is not there. The Appellate Body has noted that panels must look to the ordinary meaning of the text of an Agreement in determining the obligations set forth by that provision: “The fundamental rule of treaty interpretation requires a treaty interpreter to read and interpret the words actually used by the agreement under examination, and not

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<sup>97</sup> *Hot-Rolled Panel Report*, para. 7.55.



words which the interpreter may feel should have been used.”<sup>98</sup> The Appellate Body has further noted, “[A] treaty interpreter is not entitled to assume that such usage [of particular terms] was merely inadvertent on the part of the Members who negotiated and wrote that Agreement.”<sup>99</sup>

90. It is an investigating authority's ability to apply facts available in cases where responses are substantially incomplete which provides an incentive for responding parties to supply complete information. While the goal of antidumping proceedings is “ensuring objective decision-making based on facts,”<sup>100</sup> allowing the parties submitting information to control that decision-making by controlling the production of information would run counter to the object and purpose of the AD Agreement to encourage participation in antidumping proceedings in order to permit the calculation of accurate antidumping margins.

91. When a respondent provides grossly inadequate and unreliable information pertaining to the overall dumping margin calculation, Article 6.8 permits the investigating authority to use the facts available to determine the existence of dumping. Although certain portions of information may appear acceptable in isolation, when the nature and extent of deficiencies on the whole are substantial, it calls into question the reliability of the entire response. Article 6.8 provides that in such circumstances, the authority may rely on facts available.

92. Thus, consistent with the proper interpretation of “necessary information” in Article 6.8, it would be permissible for a fair and objective investigating authority to conclude that a party's failure to provide the necessary information for the calculation of accurate dumping margins would constitute the non-provision of necessary information such that, even with some limited data, it was necessary and appropriate to use facts available for the entire dumping determination.

*(b) Preliminary and final determinations*

93. Article 6.8 of the AD Agreement provides that, when certain conditions have been met, “preliminary and final determinations, affirmative or negative, may be made on the basis of facts available.” (emphasis added). In its First Written Submission to this Panel, India has ignored this language of the AD Agreement which explicitly provides for the use of facts available as to the ultimate determination of dumping.

94. Throughout the AD Agreement, the text distinguishes between “preliminary and final determinations” and individual pieces of information which may need to be determined. For example, Article 12 of the AD Agreement provides for “Public Notice and Explanation of Determinations.” Therein, Article 12.2 specifically addresses any “preliminary or final determination” and the required contents of such determinations. Further, Article 12.2.1 of the AD Agreement provides for a public notice of the imposition of provisional measures, including, in particular, “preliminary determinations on dumping and injury,” distinguishing such preliminary determinations from the “matters of fact and law” and from the “methodology used in the establishment and comparison of the export price and the normal value” in subsection (iii) of Article 12.2.1.

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<sup>98</sup> *EC - Measures Concerning Meat and Meat Products* (“*EC-Hormones AB Report*”), WT/DS48/AB/R, adopted 13 Feb. 1998, para. 181 (“*EC-Hormones AB Report*”).

<sup>99</sup> *Id.* at para. 164.

<sup>100</sup> *Hot-Rolled Panel Report*, para. 7.55.

95. Similar to subsection (iii) of Article 12.2.1, various subparts of Article 2 refer to the particular items which need to be determined in order to reach a preliminary or final determination:

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|---------------|---|---|
| Article 2.2   | – | “the margin of dumping shall be determined”   |
| Article 2.2.1 | – | “if the authorities determine that such sales are made within an extended period of time”                                       |
| Article 2.2.2 | – | “the amounts {for administrative, selling and general costs and for profits} may be determined”                                 |
| Article 2.3   | – | under particular conditions, “export price may be constructed {...} on such reasonable basis as the authorities may determine.” |

96. The use of the term “preliminary and final determinations” in Article 6.8 should be given its ordinary meaning within the context of the AD Agreement. As used in the AD Agreement, the term “preliminary and final determinations” refers to the ultimate finding of dumping. Where the drafters of the AD Agreement wanted to refer to the particular items that may need to be determined in order to reach a preliminary or final determination, specific reference was made.

97. Notably, India ignores this language in Article 6.8 in its efforts to have the Panel interpret that Article as applying to “categories of information.” Nevertheless, this plain language of Article 6.8 plainly permits the use of facts available as the basis for “preliminary and final determinations” when an interested party has failed to provide necessary information.

## **2. Annex II of the AD Agreement**

98. With respect to Annex II of the AD Agreement, paragraphs 1, 3, and 5 are relevant to this dispute. We discuss each in turn.

### *(a) Paragraph 1*

99. Paragraph 1 of Annex II to the AD Agreement provides:

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

100. Paragraph 1 of Annex II provides the basic guidance in the AD Agreement for obtaining the participation of responding interested parties. The first sentence provides that the authorities, as soon as possible, should contact the parties, advise them of the information required from them for the investigation, and advise them of the manner in which to submit that information. The second sentence then provides that the investigating authorities should advise the responding interested parties of the consequences of not providing the required information – that the investigating authorities *will be free* to make determinations on the basis of the facts available, including, in particular, those facts contained in the application for the initiation of the investigation.

(b) *Paragraph 3*

101. Annex II, paragraph 3 of the AD Agreement provides:

All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties and which is supplied in a timely fashion, and, where applicable, supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made. If a party does not respond in the preferred medium or computer language but the authorities find that the circumstances set out in paragraph 2 have been satisfied, this should not be considered to significantly impede the investigation.

102. Annex II, paragraph 3 contains a number of conditions which, if met, indicate that the authorities “should take that information into account.” Those conditions are:

- (i) the information is verifiable;
- (ii) the information is appropriately submitted so that it can be used . . . without undue difficulties;
- (iii) the information is supplied in a timely fashion; and
- (iv) the information, where applicable, is supplied in a medium or computer language requested by the authorities.

Only if all four of these conditions are met does the AD Agreement provide that the information should be taken into account. If the information fails to meet any one of these conditions, Annex II, paragraph 3 does not provide any obligation on the authorities to further consider, or otherwise take into account, the information.

(i) **The information “should be taken into account”**

103. India claims that if the four conditions of Annex II, paragraph 3 are met, the investigating authorities must use the information to calculate the antidumping margin. Once again, India is reading language into the text.<sup>101</sup> In actuality, that provision simply states that, if the four conditions are met, then the information “should be taken into account.” “Must use” and “should be taken into account” are not synonymous terms.

104. Annex II, paragraph 5 uses similar language, stating that even if information is not ideal in all respects, this fact alone “should not justify the authorities from disregarding it, providing the interested party has acted to the best of its ability.” (emphasis added).

105. The ordinary meaning of the term “should” differs greatly from the terms “must” or “shall.” The former word implies a suggested course of action, while the latter terms impose a mandatory obligation on Members.

106. As the panel recognized in *United States - Anti-dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip From Korea*,<sup>102</sup> the ordinary meaning of “should” does not impose mandatory obligations upon Member states. Therein, the Panel rejected the argument that the

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<sup>101</sup> *EC-Hormones AB Report*, para. 181.

<sup>102</sup> WT/DS179/R, adopted 1 February 2001, para. 6.93 (“*SSPC from Korea*”).

term “should” was the equivalent of the word “may,” but agreed that in its ordinary meaning, it was a permissive rather than mandatory term.<sup>103</sup>

107. Thus, the language of Annex II, paragraphs 3 and 5, urges the investigating authority to take into account, or not disregard, information on the record which meets the criteria of those provisions; however, the ordinary meaning of both of these provisions does not require Members to utilize that information.

(c) *Paragraph 5*

108. Paragraph 5 of Annex II of the AD Agreement states that

Even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it provided the interested party has acted to the best of its ability.

109. Paragraph 5 incorporates the principle that perfection is not the standard, that information with correctable errors should not be disregarded where the respondent has acted to the best of its ability.

110. The phrase “may not be ideal in all respects” is particularly relevant to this dispute. It implies that the information in question is either “ideal” in most respects or nearly ideal across the board. Nevertheless, paragraph 5 indicates that there will be situations in which the investigating authority would be justified in disregarding the information.

111. Again, the use of the term “should” in this paragraph, as indicated above, indicates that this is not a mandatory obligation in the AD Agreement.

112. The phrase “provided the interested party has acted to the best of its ability” is also particularly relevant. Where the interested party has acted to the best of its ability, the fact that they were unable to provide information which was ideal in all respects should not justify disregarding that information. On the other hand, where the conditions for making a determination based on the facts available otherwise apply, the clear implication of paragraph 5 is that an investigating authority would be justified in disregarding information that is not ideal in all respects if a party has failed to act to the best of its ability. Similarly, if the information is far from ideal in most respects, paragraph 5 would have no bearing, even if the interested party has acted to the best of its ability.

(d) *Conclusion*

113. In short, the AD Agreement provides that when a party refuses or otherwise does not supply necessary information (including the provision of incomplete, untimely or unreliable information), or significantly impedes the investigation, the investigating authority is free to use the facts available to make its determination. However, in such a case, where information was provided which is verifiable, appropriately submitted so that it can be used without undue difficulty, supplied in a timely fashion, and supplied in the requested medium, it should be taken into account, although it need not be used to

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<sup>103</sup> *SSPC from Korea* at para. 6.93 (footnote omitted). The Panel stated that the term “should” was not the equivalent of “may,” because there would be no effective disciplines on the methodology selected. Thus, the Panel found that the term “should” provided an authorization for a specified, but non-mandatory, act. *See id.* at para. 6.94 and accompanying notes.

calculate the margin. Additionally, even though information may not be ideal in all respects, the authorities should not disregard it if the interested party acted to the best of its ability. Conversely, if a party has failed to act to the best of its ability, then an investigating authority would be justified in disregarding information that is not ideal in all respects.

114. As we will demonstrate below, both the statute implementing the United States' WTO obligations and the final determination of the Department of Commerce with respect to SAIL are consistent with this interpretation of the AD Agreement.

**C. THE "FACTS AVAILABLE" PROVISIONS OF THE US STATUTE DO NOT VIOLATE US WTO OBLIGATIONS**

115. India seeks to have this Panel find that sections 776(a), 782(d), and 782(e) of the Act "as such" violate Article 6.8 and Annex II, paragraph 3 of the AD Agreement.<sup>104</sup> Its entire argument is premised on a misinterpretation of both the obligations provided for in Article 6.8 and Annex II and those in US law. As we explain below, where the AD Agreement creates obligations pertaining to the use of the facts available, the US statute is consistent with those obligations. Where the AD Agreement leaves discretion with Members, the statute provides particular criteria that limit the Department's discretion to use the facts available in place of a respondent's submitted data. Since the US statute does not mandate WTO inconsistent action, there is no basis for the Panel to conclude that the statute violates the AD Agreement.

**1. Under Established WTO Jurisprudence, the Legislation of a Member Violates That Member's WTO Obligations Only If the Legislation Mandates Action That Is Inconsistent With Those Obligations**

116. It is well established under GATT and WTO jurisprudence that legislation of a Member violates that Member's WTO obligations only if the legislation *mandates* action that is inconsistent with those obligations or precludes action that is consistent with those obligations. If the legislation provides discretion to administrative authorities to act in a WTO-consistent manner, the legislation, as such, does not violate a Member's WTO obligations.

117. The Appellate Body has explained that "the concept of mandatory as distinguished from discretionary legislation was developed by a number of GATT panels as a threshold consideration in determining when legislation as such – rather than a specific application of that legislation – was inconsistent with a Contracting Party's GATT 1947 obligations."<sup>105</sup> This doctrine has continued under the WTO system, as panels and the Appellate Body have continued to apply the mandatory/discretionary distinction in considering whether a Member's legislation is WTO - consistent.

118. Most recently, the panel in the *Export Restraints* case applied the doctrine in concluding that certain provisions of the US countervailing duty law did not mandate action inconsistent with provisions

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<sup>104</sup> Although India cites to three provisions in the heading to section VI.B. of their First Written Submission, the text of that section challenges only the consistency of sections 776(a) and 782(c) with the AD Agreement. See India's First Written Submission at paras. 130-59. Nevertheless, we discuss all three provisions for purposes of completeness.

<sup>105</sup> *United States - Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, Report of the Appellate Body adopted 26 September 2000, para. 88 ("*US 1916 Act AB Report*").

of the *Agreement on Subsidies and Countervailing Measures*.<sup>106</sup> The Panel in *Export Restraints* described the mandatory/discretionary distinction as a “classical test” with longstanding historical support.<sup>107</sup>

## **2. Sections 776(a), 782(d), and 782(e) of the Act Do Not Mandate WTO Inconsistent Actions**

### *(a) The Meaning of the Facts Available Provisions Is a Factual Question That Must Be Answered by Applying US Principles of Statutory Interpretation*

119. A central question in this dispute is the following: Do sections 776(a), 782(d), and 782(e) of the Act mandate that Commerce reject submitted information in a manner inconsistent with Article 6.8 and Annex II of the AD Agreement? If they do not, then India’s challenge to the US statute “as such” must fail.

120. It is an accepted principle that questions concerning the meaning of municipal law are questions of fact that must be proven.<sup>108</sup> Likewise, it is equally well-established that municipal law consists not only of the provisions being examined, but also domestic legal principles that govern the interpretation of those provisions.<sup>109</sup> While the Panel is not bound to accept the interpretation presented by the United States, the United States can reasonably expect that the Panel will give considerable deference to the United States’ views on the meaning of its own law.<sup>110</sup>

121. For purposes of ascertaining the meaning of sections 776(a), 782(d), and 782(e) of the Act as a matter of US law, US courts and agencies must recognize the longstanding and elementary principle of US statutory construction that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.” *Murray v. Schooner Charming Betsy*, 6 US (2 Cranch) 64, 118 (1804). While international obligations cannot override inconsistent requirements of domestic law, “ambiguous statutory provisions . . . [should] be construed, where possible, to be consistent with international obligations of the United States.”<sup>111</sup>

### *(b) Section 776(a) of the Act Does Not Mandate WTO- Inconsistent Action*

122. A comparison of section 776(a) of the Act and Article 6.8 of the AD Agreement reveals that the two provisions are largely identical, and that section 776(a) does not mandate any action that is inconsistent with Article 6.8. Article 6.8 states that:

In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made

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<sup>106</sup> *United States – Measures Treating Export Restraints as Subsidies*, WT/DS194/R, adopted 23 August 2001, paras. 8.4 – 8.131.

<sup>107</sup> *Id.* at para. 8.9.

<sup>108</sup> See, e.g., *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, paras. 64, 73-74, and cases and authorities cited therein.

<sup>109</sup> See, e.g., *United States - Section 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000, para. 7.108 & n. 681 (“US 301”).

<sup>110</sup> US 301, para. 7.19.

<sup>111</sup> *Restatement (Third) of the Foreign Relations Law of the United States*, § 114 (1987) (copy attached as US-13); and US 301, note 681, in which the panel recognized the existence of what is known in the United States as “the *Charming Betsy* doctrine”.

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

Section 776(a) in turn reads as follows:

If–

- (1) necessary information is not available on the record, or
- (2) an interested party or any other person–
  - (A) withholds information that has been requested by the administering authority or the Commission under this title,
  - (B) fails to provide such information by the deadlines for the submission of the information or in the form and manner requested subject to subsections (c)(1) and (e) of section 782,
  - (C) significantly impedes a proceeding under this title, or
  - (D) provides such information but the information cannot be verified as provided in section 782(i),

the administering authority and the Commission shall, subject to section 782(d), use the facts otherwise available in reaching the applicable determination under this title.<sup>112</sup>

123. As a side by side comparison of the two provisions demonstrates, the section 776(a)(2)(A) requirement to use the facts available if an interested party “withholds” information does not mandate WTO inconsistent action because Article 6.8 explicitly permits Members to use the facts available when an interested party “refuses access to” information.

124. Similarly, the fact that section 776(a)(2)(B) requires use of facts available if an interested party “fails to provide information” by the relevant deadline does not mandate WTO inconsistent action because Article 6.8 permits a Member to use the facts available if an interested party “does not provide” information within a reasonable period.

125. Moreover, the requirement in section 776(a)(2)(C) to use facts available if a party significantly impedes an authority’s investigation does not mandate WTO inconsistent action because it is plainly permissible under Article 6.8 for a Member to resort to facts available in such situations.

126. Additionally, the requirement in section 776(a)(2)(D) to disregard information that cannot be verified and use the facts available does not mandate WTO inconsistent action because only “verifiable” information should be taken into account under Article 6.8 and paragraph 3 of Annex II of the AD Agreement.

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<sup>112</sup> Section 776(a) (emphasis added) (Exh. IND-26).

127. Finally, section 776(a) makes the use of facts available, when any one of these conditions have been met, subject to section 782(d) of the Act. Thus, the reference here to section 782(d) does not mandate WTO inconsistent action because it limits the otherwise WTO-consistent ability to use the facts available.

128. In sum, section 776(a) of the Act only requires use of the facts available in circumstances that are consistent with Article 6.8, therefore, it does not *mandate* rejection of information in a manner inconsistent with Article 6.8 of the AD Agreement. This reading of section 776(a) is further confirmed by the Statement of Administrative Action, interpreting section 776(a).<sup>113</sup>

(c) *Section 782(d) of the Act Does Not Mandate WTO Inconsistent Action*

129. India claims (at para. 137) that section 782(d) of the Act does not modify the basic requirements in section 776(a) pertaining to the facts available. India's point is irrelevant because, as already discussed, section 776(a) does not mandate WTO inconsistent action. The same is true with respect to section 782(d) of the Act. Section 782(d) provides:

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

(1) the administering authority . . . finds that such response is not satisfactory, or

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

then the administering authority . . . *may*, subject to subsection (e), disregard all or part of the original and subsequent responses.<sup>114</sup>

130. The use of the word "may" alone demonstrates that section 782(d) of the Act is discretionary and does not *mandate* rejection of any information that would otherwise be acceptable pursuant to Article 6.8 and Annex II of the AD Agreement. As a discretionary provision, section 782(d) cannot violate US WTO

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<sup>113</sup> With respect to section 776(a) of the Act, the SAA provides that:

New section 776(a) requires Commerce and the Commission to make determinations on the basis of the facts available where requested information is missing from the record or cannot be used because, for example, it has not been provided, it was provided late, or Commerce could not verify the information. Section 776(a) makes it possible for Commerce and the Commission to make their determinations within the applicable deadlines if relevant information is missing from the record. In such cases, Commerce and the Commission must make their determinations based on all evidence of record, weighing the record evidence to determine that which is most probative of the issue under consideration. The agencies will be required, consistent with new section 782(e), to consider information requested from interested parties that: (1) is on the record; (2) was filed within the applicable deadlines; and (3) can be verified.

<sup>114</sup> Section 782(d) (emphasis added) (Exh. IND-26).



obligations.<sup>115</sup> This reading of section 782(d) is confirmed by the Statement of Administrative Action, interpreting section 782(d) of the Act.<sup>116</sup>

(d) *Section 782(e) of the Act Does Not Mandate WTO Inconsistent Action*

131. Finally, nothing in section 782(e) of the Act mandates WTO inconsistent action. Under 782(e):

(e) *Use of Certain Information.*--In reaching a determination under section 703, 705, 733, 735, 751, or 753 the administering authority . . . *shall not decline to consider information that is submitted by an interested party* and is necessary to the determination but does not meet all the applicable requirements established by the administering authority or the Commission if--

- (1) the information is submitted by the deadline established for its submission,
- (2) the information can be verified,
- (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,

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<sup>115</sup> Moreover, the text of section 782(d) is substantively identical to paragraph 6 of Annex II, which states:

If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons thereof and have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation. If the explanations are considered by the authorities as not being satisfactory, the reasons for rejection of such evidence or information should be given in any published findings.

Nothing in this language mandates the rejection of information that is otherwise consistent with Article 6.8 and Annex II.

<sup>116</sup> With respect to section 782(d) of the Act, the SAA (Exh. US-23) provides (at 865) that:

New section 782(d) requires Commerce and the Commission to notify a party submitting deficient information of the deficiency, and to give the submitter an opportunity to remedy or explain the deficiency. This requirement is not intended to override the time-limits for completing investigations or reviews, nor to allow parties to submit continual clarifications or corrections of information or to submit information that cannot be evaluated adequately within the applicable deadlines. If subsequent submissions remain deficient or are not submitted on a timely basis, Commerce and the Commission may decline to consider all or part of the original and subsequent submissions. Pursuant to new section 782(f), Commerce and the Commission will provide, to the extent practicable, a written explanation of the reasons for not accepting information.

Nothing in the interpretive language calls into question the obvious discretionary nature of section 782(d).

(4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority or the Commission with respect to the information, and

(5) the information can be used without undue difficulties.<sup>117</sup>

132. The United States explained above that section 776(a) of the Act cannot mandate WTO inconsistent action because it only requires use of the facts available in circumstances that Article 6.8 permits. Section 782(e) further ensures this result by requiring the Department to consider information that would otherwise be rejected under section 776(a), if five conditions are met. In this way, section 782(e) serves to *reduce* the likelihood that the Department will resort to the facts available in a particular case; it does not *require* the Department to use the facts available in a WTO inconsistent manner. Moreover, as noted above, the discretionary provision of section 782(d) is made subject to section 782(e). Thus, even if the five requirements of section 782(e) are not met, the decision to disregard the information would remain discretionary pursuant to section 782(d). Therefore, since nothing in section 782(e) requires the Department to reject information submitted by an interested party, it cannot be viewed as *mandating* action that would be inconsistent with Article 6.8 and Annex II.

133. In addition, the factors identified in section 782(e), with one exception, are substantively identical to the factors contained in Annex II, paragraphs 3 and 5, of the AD Agreement. The first factor in section 782(e) refers to “information submitted by the deadline established for its submission;” paragraph 3 of Annex II refers to “information . . . which is supplied in a timely fashion.”

134. The second factor in section 782(e) refers to information that can be “verified;” Annex II, paragraph 3, refers to “information which is verifiable.”

135. The fourth factor in section 782(e) refers to cases in which a party “has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority . . . with respect to the information”; similarly, Annex II, paragraph 5 of the AD Agreement refers to an interested party that “has acted to the best of its ability.”

136. The fifth factor of section 782(e) refers to information that “can be used without undue difficulties;” similarly, Annex II, paragraph 3 identifies information “which is appropriately submitted so that it can be used in the investigation without undue difficulties.”

137. Only the third factor of 782(e) – that information is “not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination” – has no identical analogue in the text of the AD Agreement, although it is plainly consistent with the goal of “objective decision-making based on facts.”<sup>118</sup>

138. Moreover, the third factor of section 782(e) does not mandate WTO inconsistent action because paragraphs 3 and 5 of Annex II are permissive (*i.e.*, non-mandatory). Paragraph 3 is the primary analogue to section 782(e) and it provides a list of factors which, if met, lead to a permissive result (the information “should be taken into account”). Similarly, paragraph 5 provides a condition which, if met, also leads to a permissive result (the information “should not” be disregarded). With the inclusion of the third factor of

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<sup>117</sup> Section 782(e) (emphasis added) (Exh. IND-26).

<sup>118</sup> *Hot-Rolled Panel Report*, para. 7.55; *see also* Article 6.6 (investigating authorities must satisfy themselves as to accuracy of submitted information.)

section 782(e), the United States has simply clarified how it will exercise the discretion addressed in paragraphs 3 and 5. Specifically, the United States has clarified that if the conditions of paragraphs 3 and 5 have been met, along with one additional condition which is axiomatic in the AD Agreement, the United States will forego its discretion and it “*shall not decline*” to consider the information. On the other hand, if the conditions of section 782(e) have not been met then the consideration of the information will be determined pursuant to section 776(a), subject to the discretion of section 782(d), both of which, as discussed above, are WTO consistent.

139. In sum, in light of the plain language of section 782(e), which specifically *limits* Commerce’s discretion to reject information submitted by an interested party and closely tracks the text of Annex II, there is no basis for the Panel to conclude that section 782(e) of the Act *mandates* rejection of information that would otherwise be acceptable pursuant to Article 6.8 and Annex II of the AD Agreement.<sup>119</sup>

(e) *The Regulations Implementing Sections 776(a), 782(d), and 782(e) of the Act Confirm That These Provisions Do Not Mandate Rejection of Information In a Manner Inconsistent With Article 6.8 and Annex II of the AD Agreement*

140. Finally, the text of the pertinent provision of Commerce’s regulations, 19 C.F.R. § 351.308, makes plain that application of facts available is a discretionary exercise, not a mandatory one. The relevant sections of the regulation provide as follows:

(a) Introduction. The Secretary may make determinations on the basis of the facts available whenever necessary information is not available on the record, an interested party or any other person withholds or fails to provide information requested in a timely manner and in the form required or significantly impedes a proceeding, or the Secretary is unable to verify submitted information. . . .

(b) In general. The Secretary may make a determination under the Act and this Part based on the facts otherwise available in accordance with section 776(a) of the Act.

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<sup>119</sup> With respect to Section 782(e) of the Act, the SAA provides (at 865):

New section 782(e) directs Commerce and the Commission to consider deficient submissions if the following conditions are met: (1) the information is submitted within the established deadline; (2) the information is verifiable to the extent that verification is required; (3) the information is sufficiently complete to serve as a reliable basis for reaching a determination; (4) the party has acted to the best of its ability in supplying the information and meeting the requirements established by the agencies; and (5) the agencies can use the information without undue difficulties. Commerce and the Commission may take into account the circumstances of the party, including (but not limited to) the party’s size, its accounting systems, and computer capabilities, as well as the prior success of the same firm, or other similar firms, in providing requested information in antidumping and countervailing duty proceedings. “Computer capabilities” relates to the ability to provide requested information in an automated format without incurring an unreasonable extra burden or expense.

Thus, the SAA confirms that section 782(e) of the Act does not mandate rejection of WTO-consistent information, but rather provides restraints on Commerce’s ability to disregard insufficient submissions under certain circumstances.

[. . .]

(e) *Use of certain information.* In reaching a determination under the Act and this Part, the Secretary will not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the Secretary if the conditions listed under section 782(e) of the Act are met.<sup>120</sup>

The use of the discretionary "may" throughout the regulations implementing section 776(a), 782(d), and 782(e) of the Act supports the conclusion that the statutory provisions are not mandatory in nature and cannot violate US WTO obligations.

(f) *India's Argument is Based on a Misinterpretation of Sections 776(a), 782(d), and 782(e) of the Act*

141. In arguing that the US statutory provisions relating to the use of facts available violate the AD Agreement "as such," India misinterprets both Article 6.8 and Annex II and sections 776(a), 782(d), and 782(e) of the Act. The United States has already explained how India misinterprets Article 6.8 and Annex II (e.g., by interpreting the term "information" to mean "categories of information" and "should take into account" as "must use"). Accordingly, this section of our submission will focus on India's misinterpretation of US law.

142. India claims that the interaction between sections 776(a) and 782(e) mandate WTO inconsistent action by "establishing two additional conditions" that allegedly "expand the extent to which USDOC can and must use 'facts available' instead of information actually submitted."<sup>121</sup> India's interpretation is flawed on several grounds. First, section 776(a) only requires the use of facts available where it is permissible to do so under Article 6.8. We explained this point in detail above.

143. Second, the conditions in section 782(e) do not expand the extent to which the Department must, or even may, use the facts available. India's entire argument on this point (at paras. 146 - 152) is based on a false premise. Contrary to India's assertion, section 782(e) *contracts* the Department's ability to use the facts available by *requiring* it to consider information that meets the five statutory criteria ("shall not decline to consider").<sup>122</sup> By requiring the Department to consider submitted information, section 782(e) makes mandatory the permissive obligation to consider information as found in paragraph 3 of Annex II (information "should be taken into account"). Thus, to the extent that section 782(e) is "mandatory" at all, it is mandatory in a way that exceeds WTO obligations.

144. Third, India claims that the third condition of section 782(e) – that the information not be "so incomplete that it cannot serve as a reliable basis for reaching the applicable determination" – does not appear in paragraph 3 of Annex II and has not been imposed by earlier panel and Appellate Body reports. Neither point indicates that section 782(e) mandates WTO inconsistent action. The absence of the third condition from paragraph 3 of Annex II simply reflects that the provision accomplishes a different purpose than section 782(e): paragraph 3 of Annex II only establishes what an authority "should" do, while section 782(e) establishes what the Department "shall" do. The absence of any panel or Appellate

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<sup>120</sup> 19 C.F.R. § 351.308 (2000), Exh. US-22.

<sup>121</sup> India's First Written Submission, para. 147.

<sup>122</sup> India misrepresents section 782(e) when it claims that the provision merely "permits" the Department to take information into account. See India's First Written Submission at para. 142.

Body decisions on this point is easily explained by the fact that previous “facts available” cases have involved only minor gaps in a respondent’s submitted information. This is the first time a panel has been faced with a situation where a respondent has failed to provide the overwhelming majority of information needed to calculate an antidumping margin.

145. Finally, India admits that “the text of Sections 776(a) and 782(e) could be interpreted as applying to individual categories of information.”<sup>123</sup> We have discussed at length why India is wrong to interpret “information” to mean “categories of information,” and we have explained why adopting such an interpretation would undermine the goal of “objective decision-making based on facts.” Nonetheless, if it is possible to interpret the statute in such a manner, then there is no basis to conclude that the statute mandates WTO inconsistent action.

**3. The Panel Should Reject India’s Attempt to Challenge the Department’s Application of Section 776(a), 782(d), and 782(e) Based on USDOC “Practice”**

146. Finally, in addition to challenging sections 776(a), 782(d) and 782(e) of the Act “as such,” India also seeks to challenge the provisions based on USDOC “practice.”<sup>124</sup> This attempted challenge to US “practice” consists of nothing more than individual applications of the US “facts available” provisions. As the panel noted in *Export Restraints*, administrative agencies are free under US law to depart from past “practice” if a reasoned explanation is given for doing so,<sup>125</sup> and US “practice” therefore does not have “independent operational status” that can independently give rise to a WTO violation.<sup>126</sup> Given India’s admission that “the text of Sections 776(a) and 782(e) could be interpreted as applying to individual categories of information,”<sup>127</sup> there is no basis for its argument that sections 776(a), 782(d) and 782(e) “as interpreted” violate Article 6.8 and Annex II, paragraph 3.

147. Furthermore, even if “practice” could be considered as a measure, India’s claims regarding US facts available “practice” still would not be properly before this Panel. As the United States noted before the DSB in response to India’s first and second requests for a panel, India did not identify US facts available “practice” in its consultation request and the United States and India did not consult with respect to US “practice.”<sup>128</sup> Accordingly, India’s claim fails to conform to Articles 4.7 and 6.2 of the DSU and must be rejected for that reason alone.

**D. THE DEPARTMENT’S FACTS AVAILABLE DETERMINATION WITH REGARD TO SAIL WAS CONSISTENT WITH ARTICLE 6.8 AND ANNEX II OF THE AD AGREEMENT**

148. In its first submission to the Panel, India has selectively portrayed the factual record relevant to Commerce’s use of facts available. As demonstrated below, the full record evidence shows that Commerce’s reliance on facts available for SAIL was consistent with Article 6.8 and Annex II of the AD Agreement.

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<sup>123</sup> India’s First Written Submission at para. 140.

<sup>124</sup> India’s First Written Submission at paras. 153-159.

<sup>125</sup> *United States – Measures Treating Export Restraints as Subsidies*, WT/DS194/R, 29 June 2001, para. 8.126.

<sup>126</sup> *See id.*

<sup>127</sup> India’s First Written Submission at para. 140.

<sup>128</sup> *See* WT/DSB/M/106, 17 July 2001, para. 50; WT/DSB/M/107, 11 September 2001, para. 126.

**1. Commerce gave SAIL notice of the information required at the outset of the investigation, consistent with Article 6.1 of the AD Agreement**

149. In order to collect the information necessary for an anti-dumping investigation, Commerce issued its standard antidumping questionnaire to SAIL.<sup>129</sup> In this questionnaire, Commerce requested general information concerning SAIL's corporate structure, business practices, and the merchandise under investigation (cut-to-length steel plate) that it sells. Commerce also requested listings of its sales in India and in the United States. Because the petition contained reasonable grounds to believe or suspect that SAIL had sold steel plate below its cost of production in the home market, it was necessary for Commerce to request information regarding the cost of production of the foreign like product and the constructed value of the merchandise under investigation. Consistent with Article 6.1.1 of the AD Agreement, Commerce gave SAIL more than 30 days for reply to the questionnaire.

**2. Commerce identified deficiencies in SAIL's response and gave multiple opportunities to cure, consistent with Article 6.1 of the AD Agreement**

150. Throughout the course of the investigation, Commerce identified deficiencies in SAIL's questionnaire responses and gave SAIL multiple opportunities to cure the deficiencies. For example, after careful review of SAIL's initial questionnaire responses, Commerce promptly notified SAIL that "there are two deficiencies which are major and need to be emphasized here."<sup>130</sup> First, Commerce noted that SAIL's failure to provide necessary information meant that its responses could not be used to calculate an antidumping margin:

The first deficiency is that the response is substantially incomplete to the point where we may not be able to use the information contained therein to calculate a margin. Repeatedly throughout the questionnaire response you make the statement that certain data are unavailable and will be submitted later. For example, you only reported a subset of all your home market sales, and we cannot determine which sales have been reported. Because of your repeated failure to provide the information requested by the questionnaire, and incompleteness of your responses to other questions, we are unable to adequately analyze your company's selling practices.

As a result, Commerce explained that its *First Deficiency Questionnaire* was necessarily limited by SAIL's incomplete submissions and that further questions would be required once SAIL's questionnaire response became more complete.<sup>131</sup>

151. In addition to the general overall incompleteness of SAIL's responses, Commerce noted a second major deficiency: that SAIL's section D response, in which it was required to provide Cost of production data, was overwhelmingly incomplete.<sup>132</sup> Commerce stated that SAIL failed to provide any explanation of its response methodology and did not provide product-specific cost information.<sup>133</sup> In addition to these

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<sup>129</sup> USDOC *Initial Antidumping Questionnaire to SAIL*, Sections A, B, C and D, dated 17 March 1999 (Exh. US-1)(excerpts).

<sup>130</sup> USDOC *First Deficiency Questionnaire to SAIL*, dated 27 May 1999 (Exh. US-8).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* This information was requested in Section D of the initial questionnaire.

major discrepancies, Commerce notified SAIL of numerous deficiencies and areas requiring clarification in sections A-D of its questionnaire response.<sup>134</sup>

152. The information SAIL provided in response to these questions continued to be deficient. Commerce's 11 June 1999, *Second Deficiency Questionnaire* identified omissions in the information necessary for its investigation.<sup>135</sup> Commerce requested that SAIL provide more specific information on variables reported in its home market, US sales and cost databases. Commerce's request also identified inconsistencies between SAIL's narrative explanation and its reported databases, inaccurate product control numbers necessary for product matching, and other necessary information.<sup>136</sup>

153. On 18 June 1999, Commerce issued a *Third Deficiency Questionnaire* which focused on SAIL's failure to provide product-specific costs.<sup>137</sup> Subsequent to the *Third Deficiency Questionnaire*, Commerce orally advised SAIL's counsel of additional deficiencies, and memorialized these requests in writing.<sup>138</sup>

154. In response to SAIL's cost data submission that was filed just prior to the preliminary determination, Commerce issued a *Fourth Deficiency Questionnaire* on 2 August 1999, that identified continued deficiencies in those costs.<sup>139</sup> In its 3 August 1999, *Fifth Deficiency Questionnaire*, Commerce advised SAIL that there continued to be deficiencies in the section A, B, and C responses.<sup>140</sup> In fact, there was necessary information that was asked in the original questionnaire that SAIL had yet to provide. See, e.g., Question 4: "As requested by the original questionnaire issued on 17 March 1999, please respond to Question 1-h of Section A."<sup>141</sup>

155. In all, Commerce issued at least five major supplemental requests for information, on 27 May, 11 June, 18 June, 2 August, and 3 August 1999; in addition, there were oral requests (memorialized in writing) made during Commerce's attempts to assist SAIL. Nevertheless, by late August 1999, as Commerce was preparing for on-site verification of SAIL's information, SAIL had still not provided significant information necessary for the Department's antidumping analysis. For example, SAIL had not provided product-specific cost information, despite having been asked for such information five months previously in the initial questionnaire.<sup>142</sup> To a large extent, Commerce's efforts to identify deficiencies and give SAIL an opportunity to fix them were to no avail.

### **3. Commerce made significant efforts to provide SAIL with sufficient time to provide necessary information**

156. Acting in good faith, Commerce made significant efforts to provide SAIL with sufficient time to provide the necessary information. Commerce granted SAIL's requests for information on the initial questionnaire response.<sup>143</sup> In addition, SAIL requested – and was granted – multiple extensions for its

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<sup>134</sup> *Id.*

<sup>135</sup> *USDOC Second Deficiency Questionnaire to SAIL*, dated 11 June 1999 (Exh. US-9).

<sup>136</sup> *Id.* at Attach. II.

<sup>137</sup> *USDOC Third Deficiency Questionnaire to SAIL*, dated 18 June 1999 (Exh. US-12).

<sup>138</sup> *USDOC Memorandum to File: Conversations with SAIL's Counsel*, dated 7 July 1999 (Exh. US-11).

<sup>139</sup> *USDOC Fourth Deficiency Questionnaire to SAIL*, dated 2 August 1999 at Attachment I (Exh. US-17).

<sup>140</sup> *USDOC Fifth Deficiency Questionnaire to SAIL*, dated 3 August 1999 (Exh. US-18).

<sup>141</sup> *Id.*

<sup>142</sup> *USDOC First Deficiency Questionnaire to SAIL*, dated 27 May 1999 (Exh. US-8).

<sup>143</sup> See *Memoranda Granting Extensions*, dated 14, 16, and 30 April 1999 (Exh. US-5)

supplemental questionnaire responses, the effect of which was to grant significant additional time for SAIL to respond to the initial request for necessary information.<sup>144</sup>

157. In addition to the extensions of time that SAIL actually requested, it also unilaterally granted itself extensions. For example, on 29 June 1999, SAIL filed a response to Commerce's *First Deficiency Questionnaire* that had been due more than two weeks earlier. In rejecting the submission as untimely, Commerce warned SAIL that

repeated throughout your submissions is the statement that certain data are unavailable and will be supplied later. These statements are not substitutes for extension requests under 352.302 of the Department's regulations.<sup>145</sup>

158. During the investigations, SAIL never claimed that it could not provide the information. While it advised Commerce that it was experiencing difficulties in gathering and submitting the requested information, these difficulties were typically offered to justify additional time to submit information (which the Department repeatedly granted) and were often accompanied by assurances that the information would be forthcoming. For example, in its 11 May 1999, database submission, SAIL represented that

some of the data requested by [Commerce] is still being collected (because, e.g. it is available only in handwritten form). As soon as these data are available we will submit them to the Department and revise the diskette accordingly.

159. SAIL never indicated that it would be unable to provide a usable database; on the contrary, it promised that such a database would be forthcoming. Yet much of this information still had not been provided by the time of the preliminary determination.<sup>146</sup>

160. Another example of Commerce's significant efforts to assist SAIL was its decision to accept major submissions of information after the preliminary determination. For example, Commerce issued its *Fourth Deficiency Questionnaire* on 2 August 1999, two weeks after the preliminary determination.<sup>147</sup> This action arguably disadvantaged other interested parties who rely on the preliminary determination to identify issues that will be raised in subsequent briefing.

#### **4. Commerce was unable to satisfy itself as to the accuracy of SAIL's information**

161. At no point during the investigation process was Commerce fully able to satisfy itself that SAIL's information was accurate. A significant part of the problem was that SAIL's databases remained unusable throughout the proceeding; SAIL even attempted to provide a final workable computer tape during the on-site verification – too late to be used, because Commerce officials would have had no opportunity to analyze the tape prior to conducting verification.

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<sup>144</sup> See, e.g., *Letter from USDOC to SAIL Re: Granting of Extension of Time*, dated 16 August 1999 (Exh. US-19).

<sup>145</sup> *Letter from USDOC to SAIL Re: Return of Untimely Information*, dated 7 July 1999 (Exh. US-14).

<sup>146</sup> *DOC Memorandum Re: Preliminary Determination Facts Available for SAIL*, dated 29 July 1999, at Attach. I & II (Exh. US-16).

<sup>147</sup> *USDOC Fourth Deficiency Questionnaire to SAIL*, dated 2 August 1999 (Exh. US-17).



162. More significantly, however, was that SAIL was unable to demonstrate the accuracy of its own information. At the on-site sales verification, Commerce discovered, *inter alia*, that SAIL failed to report a significant number of home market sales and failed to report accurate gross unit prices.<sup>148</sup> Commerce was unable to verify the total quantity and value of home market sales. During the on-site cost verification, SAIL was unable to reconcile costs of production to its audited financial statements.<sup>149</sup> It also became clear that SAIL had failed to provide constructed value information on the costs of products produced and sold to the United States.<sup>150</sup> SAIL's US sales database also contained errors; Commerce found that "[w]hile these errors, in isolation, are susceptible to correction, when combined with other pervasive flaws in SAIL's data, these errors support our conclusion that SAIL's data on the whole is unreliable."<sup>151</sup>

**5. Commerce did not have necessary information to make its final dumping determination**

163. At the time of the *Final Determination*, when Commerce should have had all the information necessary to conduct a definitive anti-dumping analysis, SAIL's information was filled with fatal gaps and could not be verified. Its home market sales database remained seriously deficient, as SAIL had failed to report all of its home market sales and gross unit prices. No workable cost of production or constructed value database was ever provided. SAIL made relatively few export sales to the United States, and yet even this data contained errors. At no point did SAIL indicate that the missing information was not in its control or possession. In fact, SAIL had repeatedly indicated that it would be able to provide the information and that it could be verified. In the end, however, SAIL was able to do neither.

**6. Commerce's determination that SAIL had not acted to the best of its ability prior to disregarding SAIL's information was unbiased and objective**

164. The facts of the record indicate that SAIL had the ability to provide the necessary information but failed to do so. SAIL is one of the largest integrated steel producers in the world, and its records reflect that it has an established accounting system that is audited annually.<sup>152</sup> All of SAIL's representations during the anti-dumping proceeding suggest that SAIL itself believed it could comply with the requests for information. Given the facts on the record, an unbiased and objective investigating authority would be justified in concluding that SAIL had failed to act to the best of its ability in providing the information requested.

**7. The affidavit of Albert Hayes constitutes extra-record evidence that was never presented to the Department and thus is not properly within the scope of the Panel's review**

165. In its first written submission, India seeks to support its arguments using extra-record evidence that SAIL did not make available to Commerce during the antidumping investigation at issue.<sup>153</sup> Under the standard of review which applies to a panel's review of an investigating authority's final dumping determination, this extra-record evidence is not properly part of the factual record before the Panel. For

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<sup>148</sup> *Sales Verification Report*, dated 4 November 1999 (Exh. US-4) (public version) .

<sup>149</sup> *Cost Verification Report*, dated 4 November 1999 (Exh. US-3) (public version).

<sup>150</sup> *Id.*

<sup>151</sup> *USDOC Determination of Verification Failure Memorandum*, dated 13 December 1999 (Exh. IND-16).

<sup>152</sup> *USDOC Redetermination on Remand* (September 27, 2001) (Exh. IND-21).

<sup>153</sup> India's First Written Submission, paras. 30 & n. 68, 110-111, and Exh. IND-24.

this reason, the affidavit of Albert Hayes is not properly part of the record of this proceeding. The Panel should disregard both the affidavit and the arguments that India makes on the basis of the affidavit.<sup>154</sup>

(a) *Under Article 17.5 of the AD Agreement, a panel's review of an investigating authority's final dumping determination is limited to the facts presented to the investigating authority*

166. Article 17.6 of the AD Agreement establishes a special standard of review that applies when panels examine final dumping determinations for conformity with WTO rules. Under Article 17.6(i), the role of a panel with respect to the facts in such matters is to determine "whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective." The "facts" of the matter referred to in Article 17.6(i) are "the facts made available in conformity with the appropriate domestic procedures to the authorities of the importing Member" under Article 17.5(ii).<sup>155</sup> The Appellate Body has noted the "clear connection" between these two provisions and observed that "Articles 17.5 and 17.6(ii) require a panel to examine the facts made available to the investigating authority of the importing Member."<sup>156</sup>

167. Given the plain language of these provisions, it would not be proper for a panel to review an antidumping determination on the basis of evidence that was not made available to the investigating authority during the underlying investigation. The *United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ("Hot-Rolled Panel Report") Panel discussed this point in detail:

It seems clear to us that, under this provision, a panel may not, when examining a claim of violation of the AD Agreement in a particular determination, consider facts or evidence presented to it by a party in an attempt to demonstrate error in the determination concerning questions that were investigated and decided by the authorities, unless they have been made available in conformity with the appropriate domestic procedures to the authorities of the investigating country during the investigation. . . . [Article 17.5(ii)] is a specific provision directing a panel's decision as to what evidence it will consider in examining a claim under the AD Agreement. Moreover, it effectuates the general principle that panels reviewing the determinations of investigating authorities in anti-dumping cases are not to engage in *de novo* review.<sup>157</sup>

As the panel noted, it is "not the panel's role to collect new data or to consider evidence which could have been presented to the decision maker but was not."<sup>158</sup>

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<sup>154</sup> Specifically, paras. 107, 108, 110, and 111.

<sup>155</sup> The administrative record is the information presented during the investigation, in accordance with Article 17.5(ii) of the AD Agreement. The "appropriate domestic procedures" of the United States investigating authorities – the Department and the United States International Trade Commission – are detailed in 19 U.S.C. § 1516a(b)(2)(A), which states that the record consists of all information "presented to or obtained by . . . the administering authority . . . during the course of the administrative proceedings, . . . ; and a copy of the determination, all transcripts or records of conferences or hearings, and all notices published in the Federal Register."

<sup>156</sup> *Thailand - H-Beams from Poland* at paras. 117-18.

<sup>157</sup> *United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products From Japan*, WT/DS184/R, adopted 23 August 2001, para. 7.6 ("Hot-Rolled Panel Report").

<sup>158</sup> *Hot-Rolled Panel Report*, para. 7.7, citing *United States-Definitive Safeguard Measures on Importation of Wheat Gluten from the European Communities*, WT/DS166/R, adopted 19 January 2001, para. 8.6 ("*United States - Wheat Gluten*").

(b) *The Panel must disregard the affidavit of Albert M. Hayes*

168. The Hayes affidavit is an especially good example of the reasons why the AD Agreement does not permit panels to review determinations using evidence that was never presented to the investigating authority. Mr. Hayes is an employee of the law firm that is representing the government of India in this matter. His affidavit was prepared especially for purposes of supporting India's arguments in this case, more than two years after Commerce issued its final determination. His views, therefore, are neither timely nor objective.

169. Furthermore, the law firm representing India in this case did not represent SAIL in Commerce's antidumping investigation. As a result, Mr. Hayes was not involved in the investigation itself, and he has no first-hand experience with the issues that arose during the investigation. He did not testify before Commerce, and he did not otherwise provide his "professional opinion" during the antidumping investigation. SAIL never submitted his methodologies to the Department, and the methodologies themselves were not subject to scrutiny by the Department or other interested parties.

170. Although SAIL did assert in its administrative brief to the agency that Commerce could modify its programming language to address SAIL's failure to provide accurate information on the record, it did not explain how that "correction" could be made.<sup>159</sup> The suggestions offered by Mr. Hayes now, as well as his three proposed "alternative" margin calculations, were never on the record of the investigation and Commerce did not have the opportunity to consider this information during the proceeding.<sup>160</sup>

171. Neither Mr. Hayes' affidavit nor the evidence contained therein was part of "the facts made available in conformity with the appropriate domestic procedures to the authorities of the importing Member" during the Department's antidumping investigation. As such, it would not be permissible under Articles 17.5(ii) and 17.6(i) for the Panel to take them into account when it reviews the Department's determination.

## **8. Conclusion**

172. Based on the facts as presented to the agency, Commerce met all of its obligations under the AD Agreement prior to relying on total facts available. Commerce notified SAIL of the required information and granted it ample opportunity to present that information as provided in Article 6.1, a fact that India does not dispute.

173. Commerce also informed SAIL of the reasons that its supplied information could not be accepted, with at least five deficiency questionnaires, and additional oral requests for data that were memorialized in writing. Pursuant to those questionnaires, SAIL was provided multiple opportunities to revise, correct, and complete that information. Finally, SAIL was afforded a further opportunity to explain its position in written briefs to Commerce and participated in a public hearing. All of these actions by Commerce are consistent with Annex II, paragraph 6, a point not in dispute by India.

174. Commerce's efforts to verify the accuracy of the information supplied by SAIL prior to basing its findings on that information were consistent with Articles 6.6, 6.7 and Annex I of the AD Agreement. India never disputed that Commerce's verification procedures were proper.

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<sup>159</sup> Exh. IND-14 at 2.

<sup>160</sup> SAIL did propose three "alternative" calculations in its administrative brief to the agency, but none of those proposed calculations are the same calculations as those now described by Mr. Hayes.

175. Commerce's decision to rely on facts available was consistent with Article 6.8 of the AD Agreement. When all of the facts of record are examined here, as set forth above, it is clear that SAIL did not provide necessary information within a reasonable period. The absence of this necessary information substantially hindered Commerce's ability to conduct an antidumping duty investigation. Thus, Commerce's determination to apply facts available was consistent with Article 6.8 of the AD Agreement.

176. Commerce's determination not to rely on SAIL's information was consistent with paragraph 3 of Annex II. Paragraph 3 of Annex II requires that information "should be taken into account" if it is verifiable, can be used without undue difficulties, is supplied in a timely fashion, and, where applicable, is supplied in a medium or computer language requested by the authorities. None of these conditions applied here. First, as described above, SAIL's information could not be verified.<sup>161</sup> Second, SAIL's information could not be used without undue difficulty.<sup>162</sup> Third, SAIL's information was untimely.<sup>163</sup> Finally, despite indicating that it could submit workable electronic databases, SAIL was unable to do so.<sup>164</sup> Therefore, there was no obligation on the part of Commerce to take SAIL's information into account.

177. Commerce's determination not to rely on SAIL's information was also consistent with paragraph 5 of Annex II. Paragraph 5 of Annex II states that even though information "may not be ideal in all respects," it should not be disregarded provided that the submitting party acted to the best of its ability. SAIL's information certainly was not ideal in any respect. Nevertheless, because it failed to act to the best of its ability, there was no bar to Commerce's decision to disregard the information.

178. In sum, the full record evidence shows that Commerce's reliance on facts available for SAIL in this investigation was consistent with Article 6.8 and Annex II of the AD Agreement.

E. THE DEPARTMENT'S FACTS AVAILABLE DETERMINATION WITH REGARD TO SAIL DID NOT VIOLATE AD AGREEMENT ARTICLES 2.2, 2.4, 9.3, AND ARTICLE V:1 AND 2 OF GATT 1994

179. According to India, Commerce's failure to use SAIL's US sales data resulted in the levying of an antidumping margin that violated various provisions of the AD Agreement and GATT 1994 related to making a fair comparison and imposing a duty not to exceed the margin of dumping.<sup>165</sup> These allegations are 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 when SAIL had failed to provide a substantial amount of the necessary information for that determination. Because India's claims based

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<sup>161</sup> See *USDOC Determination of Verification Failure Memorandum*, dated 13 December 1999 (Exh. IND-16).

<sup>162</sup> *Final Determination* at 73130 (SAIL's cost submission "was not only incomplete, but also riddled with inaccuracies to the point where SAIL's data remains unuseable") (Exh. IND-17).

<sup>163</sup> See, e.g., *Cost Verification Report*, dated 4 November 1999 (Untimely cost database not accepted) (Exh. US-3) (public version).

<sup>164</sup> *Final Determination* at 73130 ("Regarding computer tapes, repeated technical problems with the submitted data resulted in our inability to load, run, and analyze the data, despite a significant amount of time and attention from the Department") (Exh. IND-17).

<sup>165</sup> India's First Written Submission at para. 174.

on Article 6.8 and Annex II of the AD Agreement are misplaced, India's reliance on Articles 2.2, 2.4, 9.3 and Article VI:1 and 2 of GATT 1994 likewise must fail.<sup>166</sup>

F. INDIA HAS FAILED TO ESTABLISH THAT THE DEPARTMENT'S CONDUCT OF ITS ANTIDUMPING INVESTIGATION VIOLATED ARTICLE 15 OF THE AD AGREEMENT

180. In addition to its broad challenge to the Department's use of the facts available, India claims (at paragraphs 175-178) that the Department violated Article 15 of the AD Agreement by allegedly failing to give "special regard" to India's status as a developing country Member when it applied the facts available in calculating an antidumping margin for SAIL. India's argument misinterprets the requirements of Article 15 and misstates the facts of the case as they pertain to this issue. Accordingly, there is no basis for the Panel to find that India has established a *prima facie* case of violation of Article 15.

1. Textual Analysis of Article 15 of the AD Agreement

181. Article 15 of the AD Agreement is composed of two sentences. The first sentence states that:

It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement.

182. As India argued to the panel in the *Bed-Linens* case, the first sentence of Article 15 does not impose any specific legal obligation on developed country Members.<sup>167</sup> It does not create an obligation to elect undertakings in lieu of antidumping duties, and it does not require developed country Members to impose such duties at less than the full extent of dumping. It also does not create an obligation to use different antidumping calculation methodologies based on whether the imports at issue originate in a developed country Member or a developing country Member. By its plain terms, the first sentence of Article 15 applies solely to the application of antidumping measures, not to the calculation of antidumping margins. Since India focuses its argument on the second sentence of Article 15, we will not discuss the first sentence further.

183. The second sentence of Article 15 states that:

Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties when they would affect the essential interests of developing country Members.

There are three aspects of the second sentence of Article 15 that govern the substantive obligation contained therein. First, the obligation itself is limited to "exploring" the "possibility" of constructive

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<sup>166</sup> India's claim that SAIL's margin was overstated is particularly specious. It is not possible to know what SAIL's actual dumping margin was because SAIL failed to provide the information necessary to calculate SAIL's margin. Moreover, paragraph 7 of Annex II of the AD Agreement expressly provides that if an interested party does not cooperate and thus relevant information is being withheld, this situation could lead to a result which is less favorable to the party than if the party did cooperate.

<sup>167</sup> See *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*"). The panel itself offered no views on the matter, observing that "[t]he parties are in agreement that the first sentence of Article 15 imposes no legal obligations on developed country Members." *Id.* at n. 85.

remedies before applying antidumping duties. Nothing in the provision requires Members to accept such remedies in lieu of applying antidumping duties.<sup>168</sup>

184. Second, the obligation in the second sentence of Article 15 pertains solely to a developed country Member's consideration of remedies other than the application of antidumping duties. There is no basis in the text of the provision for an interpretation that would require a Member to consider alternative methodologies for calculating antidumping margins.<sup>169</sup> As the *Bed-Linens* panel concluded when it rejected India's argument that a Member must explore constructive remedies before imposing provisional measures, the term "anti-dumping duties" in Article 15 "refers to the imposition of definitive anti-dumping measures at the end of the investigative process."<sup>170</sup>

185. Finally, the obligation to explore constructive remedies arises only when the application of antidumping duties in a particular case "would affect the essential interests" of the developing country Member at issue. This conclusion is inescapable in light of the explicit language of the provision. To read the language otherwise – for example, by interpreting it to require Members to explore the possibility of constructive remedies in all investigations involving developing country Members – would ignore the strict limiting clause and thus violate the principle of interpretation known as the principle of treaty effectiveness (whereby an interpreter is not to assume that terms in a text are purely redundant and have no meaning).<sup>171</sup> The inclusion of the limiting clause is a critical part of the negotiated balance of rights and obligations underlying Article 15 that cannot be ignored.

186. Accordingly, when a developing country Member seeks the application of Article 15 in an antidumping investigation, it must first demonstrate to the investigating authority that there are "essential interests" implicated in the case that would be affected by the application of antidumping duties.<sup>172</sup> If it

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<sup>168</sup> See *Bed-Linens*, para. 6.233 (noting that "the concept of 'explore' clearly does not imply any particular outcome. . . . Article 15 imposes no obligation to actually provide or accept any constructive remedy that may be identified and/or offered."); see also *EC-Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, ADP/137, 4 July 1995 (hereinafter "*Cotton Yarn*"), in which a GATT panel interpreting the second sentence of Article 13 of the GATT Antidumping Code (Article 15's historical predecessor), concluded that:

If the application of anti-dumping measures "would affect the essential interests of developing countries," the obligation that then arose was to explore the "possibilities" of "constructive remedies." It was clear from the words "possibilities" and "explored" that the investigating authorities were not required to adopt the constructive remedies merely because they were proposed.

*Cotton Yarn*, para. 584 (emphasis added). The panel also found that "there was no obligation to enter into the constructive remedies, merely to consider the possibility of entering into constructive remedies." *Id.*, para. 589.

<sup>169</sup> See *Bed-Linens*, para. 6.228 (noting that "Article 15 refers to 'remedies' in respect of injurious dumping.").

<sup>170</sup> *Bed-Linens*, para. 6.231 (emphasis added).

<sup>171</sup> As the Appellate Body has noted, "one of the corollaries of the 'general rule of interpretation' in the Vienna Convention is that interpretation must give meaning and effect to all terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility." *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, at 21.

<sup>172</sup> The term "essential" implies a very high standard for the level of national interest which the developing country Member must demonstrate would be affected by the application of antidumping duties. For example, since the payment of antidumping duties will always have some negative effect on one or more producer/exporters in a

fails to do so, the obligation in the second sentence is not triggered, and the Member conducting the investigation is under no obligation to explore alternatives to the imposition of antidumping duties.

**2. There is No Basis to Conclude that the Department Violated Article 15 because India Never Claimed that Applying Antidumping Duties to SAIL Would Affect Its Essential Interests**

187. India claims (at paras. 175-178) that the Department violated Article 15 by allegedly failing to consider exploring the possibility of applying a price undertaking or other alternative remedy to SAIL in lieu of applying antidumping duties. As the record of the Department's investigation demonstrates, however, neither SAIL nor India ever suggested to the Department that applying antidumping duties to SAIL would affect India's essential interests. For that matter, neither party ever suggested that India had essential interests that were implicated by the investigation. SAIL's letter to the Department raising the possibility of entering into a suspension agreement also makes no reference to India's (or its own) essential interests.<sup>173</sup> Accordingly, there is no legal basis for the Panel to conclude that the Department has acted inconsistently with Article 15 by applying antidumping duties to SAIL.

**3. Notwithstanding India's Failure to Demonstrate that Applying Antidumping Duties to SAIL Would Affect India's Essential Interests, the Department Did Explore the Possibility of Constructive Remedies**

188. In spite of its failure to demonstrate that applying antidumping duties to SAIL would affect its essential interests, India argues (at para. 176) that the Department violated the second sentence of Article 15 by failing to explore the possibility of a suspension agreement (undertaking) in lieu of applying antidumping duties to SAIL. Even if the Department was obliged to make such an exploration in the present case, the factual record of the investigation demonstrates that it did so.

189. As we explain in the Factual Background section of this submission, SAIL's outside legal counsel filed a letter with the Department on 30 July 1999 that raised the possibility of entering into a suspension agreement. The Department then invited SAIL to meet with Department officials to discuss the matter. On 31 August 1999, SAIL's outside legal counsel met with the Assistant Secretary for Import Administration – the ultimate decision maker in the case – and expressed their views. The Assistant Secretary noted that Commerce would consider the request. He also noted that suspension agreements are rare and require special circumstances – circumstances which he believed might not exist at the present time in the case. Although India fails to note that the meeting took place, the Department memorialized its contents in an 31 August 2001 *ex parte* memorandum to the file. A copy of that memorandum is attached to this submission.<sup>174</sup>

190. As the complainant on this matter, India has the burden of establishing a *prima facie* case of violation of Article 15. It has failed to do so. Its claim (at para. 177) that the Department's mind was "closed" to the possibility of a suspension agreement is contradicted by record evidence demonstrating that the Department met with SAIL to discuss its suspension agreement proposal and that the Department stated it "would consider" the proposal. Its claim that the Department was unwilling to consider an

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Member country, a situation which would affect the "essential" interests of the Member itself must mean something significantly more than that.

<sup>173</sup> Letter from SAIL's Counsel to USDOC Re: Request for a Suspension Agreement, dated 29 July 1999 (Exh. IND-10).

<sup>174</sup> USDOC Memorandum to the File re: Ex-Parte Meeting with Counsel for SAIL Regarding Possible Suspension Agreement, dated 31 August 1999 (Exh. US-22).

agreement because of opposition from the domestic industry and the US Congress is not supported by the administrative record, and SAIL did not suggest during the investigation that the *ex parte* memorandum was in any way inaccurate or incomplete. Its claim that the Department “did not treat SAIL any differently . . . when it issued final anti-dumping duties” is irrelevant because Article 15 “imposes no obligation” on developed country Members to accept “constructive remedies” even if they are identified or offered.<sup>175</sup> Finally, its suggestion that the Department was required to make a written response to SAIL’s proposal finds no support in the text of Article 15.<sup>176</sup>

191. For all of these reasons, there is no factual or legal basis to find that the Department has acted inconsistently with Article 15.

## V. CONCLUSION

192. For the foregoing reasons, the United States respectfully submits that India’s claims are without merit and the Panel should reject them.

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<sup>175</sup> *Bed-Linens*, para. 6.233.

<sup>176</sup> India also suggests that the Department should have raised the possibility of applying a “lesser duty” to SAIL. United States law has no “lesser duty rule,” and the AD Agreement does not require Members to offer such a remedy if they decide against accepting a suspension agreement. *See* Article 9.1 of the AD Agreement (stating that the amount of an antidumping duty is to be left to the authorities of importing Members).