

## **ANNEX D**

### **Oral Statements, First and Second Meetings**

Content		Page
Annex D-1	Oral Statement of the United States	D-2
Annex D-2	Oral Statement of India	D-7
Annex D-3	Third Party Oral Statement of the European Communities	D-27
Annex D-4	Third Party Oral Statement of Chile	D-29
Annex D-5	Oral Statement of the United States at the Second Meeting of the Panel	D-32
Annex D-6	Oral Statement of India at the Second Meeting of the Panel	D-38

## ANNEX D-1

### ORAL STATEMENT OF THE UNITED STATES

(23 July 2002)

1. Mr. Chairman, members of the Panel, on behalf of the United States delegation, I would like to thank you for providing this opportunity to comment on certain issues raised by India in its First Written Submission. We do not intend to offer a lengthy statement today; you have our written submission, and we will not repeat all of the comments that we made there. We will be pleased to receive any questions you may have at the conclusion of our statement.

2. Mr. Chairman, before beginning, I want to comment briefly on India's new claim with respect to "special circumspection." In light of the Panel's ruling that it will not consider this claim, and in light of the fact that we have not seen these arguments before, we will not today respond in detail. However, for the record I want to note that the US authorities did, in fact, corroborate the offer. Also for the record, we wish to note that we contest and disagree with the factual and legal arguments India has made today regarding the new claim.

3. I would like to emphasize at the outset a few points regarding the standard of review under Article 17.6 of the AD Agreement. First, panels may not conduct *de novo* evaluation of the facts. Unless a panel finds that the authorities' establishment of the facts before it was improper, or that their evaluation of those facts was biased and unobjective, the evaluation should not be overturned, even if the panel would have reached a different determination had the same facts been before it in the first instance. (1<sup>st</sup> US sub., ¶¶61 -¶66).

4. Second, panels must uphold the investigating authorities' interpretations of the AD Agreement if those interpretations are permissible. Where there are several permissible interpretations of an AD Agreement provision, a panel must not impose its preferred interpretation on the Member concerned. To do so would be to add impermissibly to the obligations to which the WTO Members have agreed. (1<sup>st</sup> US sub., ¶¶67 -¶73).

5. The central issue in this case relates to the US authorities' reliance on facts available – as provided for in Article 6.8 and Annex II of the AD Agreement – in its anti-dumping investigation of steel plate imports from India.

6. The AD Agreement provides that Members have the right to impose remedial duties if dumped imports are injuring their domestic industry. To invoke that right, a Member must first conduct an investigation to determine if dumping and injury exist. That dumping investigation, as prescribed by the AD Agreement, requires a great deal of information, most of which can only be obtained from the exporters. The position advocated by India in this case would place respondent exporters in total control of what data is used in the dumping calculation and make a meaningful investigative process impossible. Such an interpretation of the AD Agreement is, therefore, inconsistent with its object and purpose.

7. In contrast, the United States' interpretation of the AD Agreement is consistent with its object and purpose and preserves the balance of rights and obligations it establishes. Specifically, it is the view of the United States that, consistent with the AD Agreement, an investigating authority may determine that an exporter's response is so substantially flawed that it cannot form a reliable basis for a dumping calculation. In such a case, rejection of the entire response is warranted. The case now before you is such a case.

8. Article 6.8 of the AD Agreement provides that, in such circumstances, “preliminary and final determinations . . . may be made on the basis of the facts available”. In this case, the US authorities relied on the facts available only after 1) providing numerous opportunities and making extensive efforts to assist the Indian respondent to provide usable data; 2) advising the Indian respondent repeatedly and specifically that the use of facts available would be required if it did not provide the necessary information; and 3) fully explaining its reasons for using facts available in its published determinations. In short, the US authorities’ reliance on facts available in this case complied with Article 6.8 and Annex II of the AD Agreement.

9. As the Appellate Body stated in the *Japan Hot-Rolled* case, the goal of an anti-dumping investigation is “ensuring objective decision-making based on facts.” But in order for investigating authorities to *make* objective decisions based on facts, they must have *access* to those facts. The goal of an anti-dumping duty investigation is frustrated when a responding party does not provide the necessary information. As a result, the AD Agreement’s authorization to use facts available when the necessary facts are not provided is absolutely essential to the ability of an investigating authority to conduct an anti-dumping investigation.

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

11. India is seeking just such an interpretation in this case. India is asking the Panel to require the US authorities to use some – but not much – of the information submitted by the Indian respondent because – in India’s view – this information was good enough to be used. But the US authorities could not – and the Panel should not – focus on just a fraction of the information before it and ignore the rest of it. India and the Indian respondent concede that the home market sales, cost of production, and constructed value information that the Indian respondent supplied was completely unusable. And yet, India claims that the AD Agreement required the US authorities to use the US pricing information that the respondent did provide to calculate an anti-dumping margin, notwithstanding that this data itself also was flawed and represented only a fraction of the information necessary for an anti-dumping analysis.

12. Article 31 of the Vienna Convention provides that a treaty provision shall be interpreted in accordance with the ordinary meaning of its terms in their context and in light of its object and purpose. India’s arguments are not based on the actual text of Article 6.8 and Annex II of the AD Agreement, but on terms that India would have this Panel read into the Agreement. For example, India argues that Annex II, para. 3 creates obligations with respect to “categories” of information, even though the term “categories” does not appear in the text. Similarly, India argues that Annex II, para. 3 addresses what types of information authorities “must use,” when in fact it only addresses what they “should take into account.” As we discuss in our First Written Submission, at paragraph 88, adopting India’s interpretation would lead to absurd results. Panels should disfavour such interpretations.

13. India’s interpretation is also contrary to the object and purpose of the AD Agreement in that it effectively undermines the ability of an investigating authority to take action to offset injurious dumping. Stripped to its essence, India’s argument is that the AD Agreement permits respondents to provide only that information that supports their interests, and requires investigating authorities to use that information. If India’s argument were credited, no respondent would ever submit information

detrimental to its interests. If its home market prices or its costs of production were high, it would never provide a home market sales database or a cost submission. Conversely, if its export prices were low, it would never submit those export sales. The AD Agreement would be seen as providing for and protecting such behaviour. There is no basis for such an interpretation in the text of the AD Agreement. The role of this Panel is to interpret the language actually used in the AD Agreement, not the language that India wishes were used.

### **The Information Necessary for an Anti-Dumping Investigation**

14. At the center of this dispute is the meaning of the term “information” as used in Article 6.8 and Annex II of the Agreement. The word “information” is a general term and its interpretation depends on its context. Article 6.8 of the AD Agreement states that an investigating authority may apply facts available in its anti-dumping calculations if parties fail to provide “necessary” information. In the context of the AD Agreement, which defines dumping based on a comparison of the export price with the normal value, in the ordinary course of trade, the “necessary” information for conducting an anti-dumping investigation includes prices of the subject merchandise in the domestic market of the exporting country, export prices of the subject merchandise, and, in appropriate circumstances, cost of production information and constructed value information.

15. Like most investigating authorities, those in the United States are highly dependent on a respondent to provide the information necessary for an accurate and reliable anti-dumping analysis; they cannot force a respondent to provide the information. But while investigating authorities cannot control the quantity or quality of information provided by a respondent, they can – and must – assess the facts of each case to determine whether a respondent has supplied the necessary information that allows the investigating authority to carry out its analysis in an accurate manner. At times, a respondent may provide all of the necessary information, save minor instances in which the data is unavailable or outside of its control. At other times, a respondent may refuse to supply information altogether.

16. In the case of the Indian respondent, the information that it did provide was completely unusable. Even after the US authorities gave the Indian respondent multiple opportunities to cure deficiencies, the information submitted remained completely unusable. Despite the fact that the US authorities issued their standard questionnaire and at least five major supplemental requests for information, at the time the Final Determination was due, the US authorities were still missing information they had requested of the Indian respondent more than six months earlier. (1st US Sub. 150-155). Furthermore, when the computer databases provided by the Indian respondent proved unworkable, US Department of Commerce staff made extensive efforts to assist the Indian respondent in addressing the deficiencies, but to no avail. (1<sup>st</sup> US Sub. 24, 29). The Indian respondent insisted that its information could be verified with its own books and records but – after a careful on-site examination – this proved not to be the case. Even the US sales data upon which the Indian respondent – and now India – relies had flaws and was of no use standing by itself. In the end, the Indian respondent did not provide the information necessary for the US authorities to accurately conduct an anti-dumping analysis. The authorities were required to analyze the necessary information but were prevented from doing so. At some point, when a responding party fails to provide the information necessary for conducting an antidumping investigation, investigating authorities must have the ability to reject that party’s questionnaire response in its entirety and use the facts available.

17. The decision to rely entirely on facts available is not always necessary. In cases in which a small amount of necessary information is missing or cannot be used, the investigating authority can determine a fairly accurate anti-dumping margin by applying “facts available” in a correspondingly limited manner. However, in cases such as this one, in which a substantial portion of the necessary information is either missing, unusable, or unverifiable, a respondent cannot change the overwhelming, collective flaws in the information by merely breaking up the information into pieces and then asking the authority to focus on individual pieces or “categories” of information.

Investigating authorities must review all of the necessary information in such a case before determining how to apply the facts available. The European Communities has stated in its submission that “data requested in an anti-dumping investigation, and which is necessary for a determination, cannot be seen as isolated pieces of information.” (EC Third Party Sub. ¶ 10.) We agree entirely.

18. Article 6.8 and Annex II of the AD Agreement provide the parameters in which investigating authorities may determine whether the specific facts presented require the application of facts available. India’s interpretation of Article 6.8 and Annex II of the AD Agreement seeks to narrow the parameters in which “facts available” may be applied and, thereby, significantly restrict an investigating authority’s ability to conduct an anti-dumping investigation. India’s interpretation would upset the careful balance between the interests of investigating authorities and exporters that is reflected in the AD Agreement.

19. In this case, the US authorities’ decision to apply facts available with regard to the Indian respondent is consistent both with the relevant provisions of the AD Agreement and with this essential balance between the interests of investigating authorities and exporters. As the Appellate Body recently explained in *Japan Hot-Rolled*, at para. 102:

In order to complete their investigations, investigating authorities are entitled to expect a very significant degree of effort - to the “best of their abilities” - from investigated exporters. At the same time, however, the investigating authorities are not entitled to insist upon *absolute* standards or impose *unreasonable* burdens upon those exporters.

The factual evidence demonstrates that the US authorities did not insist upon absolute standards or impose unreasonable burdens upon the Indian respondent. They did not insist on perfection nor did they ask for information that the Indian respondent did not control. But left without the information necessary for an anti-dumping determination, the US authorities had no alternative to the use of facts available.

20. In sum, if the Panel were to adopt the interpretation of “information” that India seeks to graft onto the AD Agreement – one that applies the facts available criteria of Article 6.8 and Annex II to one “category” of information but ignores the collective absence of the information necessary for an anti-dumping analysis – responding parties would be given ultimate control over what information investigating authorities may analyze, contrary to the essential balance between the interests of investigating authorities and exporters that is reflected in the AD Agreement.

### **India’s Challenge to the US Statute**

21. I’d like to turn now briefly to discuss India’s claim that the facts available provisions in US law “as such” violate WTO obligations. It is well-established under WTO practice that a Member’s legislation “as such” can violate WTO obligations *only* if the legislation *mandates* action that is inconsistent with those obligations or precludes action that is consistent with those obligations.

22. As we explained in considerable detail in our First Written Submission (at paras. 120–146), nothing in the US statutory facts available provisions mandates WTO-inconsistent action. On the contrary, the US provisions largely mirror the AD Agreement and, where differences exist, US law does not conflict with the principles and criteria set forth in the Agreement.

### **The Article 15 Claim**

23. I will briefly discuss India’s claim that the United States violated Article 15 of the AD Agreement by allegedly failing to explore the possibilities of constructive remedies during the anti-dumping investigation. As the European Communities noted in its submission (at ¶ 13), Article 15

only applies where a developing country Member demonstrates that its “essential interests” would be affected by the imposition of anti-dumping duties on the product at issue. India never even claimed – much less demonstrated – that its “essential interests” would have been affected by the imposition of anti-dumping duties on SAIL’s exports. In addition, the facts demonstrate in any event that the US authorities did actively explore the possibility of a price undertaking in this case. India’s claims to the contrary fail to establish a *prima facie* case of inconsistency with Article 15.

### **New Information**

24. We would also like to comment briefly on India’s reliance on testimony that was not presented to Commerce and, thus, is not part of the facts made available to the investigating authority. We explained in our First Written Submission, at paragraphs 168-171, why considering such material would be inconsistent with Article 17.5(ii) of the AD Agreement, which requires that panels examine the matter before them based upon the facts made available to the authorities of the importing Member

25. Today’s presentation by Mr. Hayes only proves our point. Mr. Hayes is an employee of the law firm that is representing India in this proceeding. And, with respect, his views are those of an advocate, not those of a disinterested expert. His comments should be taken in that light. Mr. Hayes’ views were not part of the facts made available to Commerce, and they are not properly part of the record for the Panel’s review. The affidavit in question was never submitted to, and therefore never considered by, Commerce in making its final determination. As an employee of the law firm which currently represents India, Mr. Hayes was never involved in the challenged investigation and his arguments, which do not appear on the record, have been created two years after Commerce’s final determination. Thus, his views are neither timely, nor objective. In addition to declining to consider this information, the Panel should also decline to consider any arguments provided by India which rely upon this information.

26. We would also note that, contrary to the suggestions of India at paragraph 85 of its oral statement, while the United States has not engaged on the substance of the new information presented by Mr. Hayes, the United States has in no way conceded any of his points.

### **Conclusion**

27. Our purpose today was to focus on the primary fundamental issue before the Panel: that investigating authorities must be permitted to carry out their responsibilities in a fair and unbiased manner and should not be required to conduct their anti-dumping analyses in a manner determined by the respondent. This principle is supported by the text of Article 6.8 – which authorizes the use of facts available – and by the criteria of Annex II. When, as in this case, a respondent has substantially failed to provide the information necessary for an anti-dumping analysis, investigating authorities are authorized by Article 6.8 to reject the limited information supplied and apply instead the facts available.

28. This concludes our presentation today. Rather than respond further to the particular comments made by India on a point-by-point basis at this time, we would welcome the opportunity to address areas of concern or interest to the Panel in response to questions.

## ANNEX D-2

### ORAL STATEMENT OF INDIA

(23 January 2002)

#### I. INTRODUCTION BY THE HEAD OF THE INDIAN DELEGATION

1. On behalf of the Government of India, I would like to begin by thanking the Chairman, the members of the Panel, and the Secretariat for taking on this task. India looks forward to working with you and with the delegation of the United States during this proceeding. My delegation today consists of myself and Mr. M.K. Rao of the Permanent Mission of India to the WTO, Mr. Jha and Dr. Dhawan of the Steel Authority of India Ltd., and Scott Andersen, Neil Ellis, and Albert Hayes of the law firm of Powell, Goldstein, Frazer & Murphy.

2. Mr. Chairman, I would like to begin by setting our presentation today into context. Mr. Andersen will then present additional remarks, followed by Mr. Ellis. Mr. Hayes will also make a statement concerning certain technical aspects of USDOC's investigation. India has presented a detailed First Submission to the Panel. We assume that the Panel has read the submission and been briefed by the Secretariat. India will focus today on presenting additional arguments and to responding to the key arguments made by the United States in its First Submission. India will provide a full response in its rebuttal submission.

3. We are here today because of an anti-dumping proceeding conducted by the US Department of Commerce in 1999 regarding the exports of cut-to-length steel plate by the Steel Authority of India Ltd., or SAIL. During the investigation SAIL made strenuous efforts to comply with the extensive documentary and informational demands of the USDOC, in particular with respect to SAIL's data on US sales. SAIL's US sales data were timely, verifiable and appropriately submitted, but nevertheless the USDOC rejected them. Reacting to problems with separately-submitted information relating to other facts, USDOC unilaterally decided to reject *all* information submitted by SAIL and had recourse to "total facts available"—arbitrarily assigning to SAIL the highest dumping margin alleged by the US domestic industry petitioner, 72.49 per cent.

4. These anti-dumping duties have eliminated the largest export market for Indian cut-to-length plate in the world. Indian exports of this product to the United States have entirely ceased.

5. India has brought this complaint because the application of facts available in this case, as well as the statutory provisions that provided for this application of facts available, violated the rights of India under the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* ("AD Agreement"), Article VI of GATT 1994, and the WTO Agreement. Investigating authorities must not impose on exporters burdens which, in the circumstances, are not reasonable. They may not reject information submitted in good faith, that is verifiable, timely submitted, in the requested computer format, and usable without undue difficulties, simply because other information was deemed inadequate.

6. Our first submission has also demonstrated that the US statutory provisions regarding use of the "facts available" impose additional conditions, which go beyond those permitted under the AD Agreement. On their face and as interpreted by the US authorities, these provisions result in rejection

of timely, verifiable and usable information because a respondent has failed to demonstrate to the satisfaction of the US authorities that it acted to the best of its ability in providing *other* information.

7. The US authorities also violated Article 15 of the AD Agreement, by failing to give special regard to SAIL's status as a developing country producer, and by levying final anti-dumping duties without exploring the possibility of an alternative constructive remedy, such as a price undertaking or a lesser duty. SAIL submitted a written proposal to the US authorities for an undertaking, and other than a perfunctory meeting described in a short "*ex parte*" meeting memorandum, there is nothing in the record indicating that the authorities ever explored in good faith the possibilities of other constructive remedies.

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

9. The United States has not met many of India's arguments in its first submission, but has simply tried to change the subject. The United States has suggested that India's arguments would lead to manipulation by respondents in anti-dumping investigations. But there is no evidence of such manipulation in this case, and indeed there was none. The record shows that despite many obstacles, SAIL continued to work diligently to respond to USDOC's enormous data requests.

10. India must ask, what does the trading system have to fear from requiring anti-dumping authorities to take into account the verifiable, usable and timely data actually submitted by respondents? Why did the USDOC not use actual data, rather than the conjectures that its own domestic industry has presented? Any threat presented by the use of real data would be far overshadowed by the threat to the trading system from permitting investigating authorities to operate in such a rule-free manner. The Uruguay Round opened a new era for the trading system. All Members of the WTO, and their anti-dumping authorities, are accountable internationally for their actions. It is no longer acceptable for an anti-dumping authority to use the excuse of flaws in one set of data to arbitrarily reject unrelated data that respondents have submitted, and to use "facts available" instead. We urge the Panel to use this occasion to render justice in this particular case and for this particular exporter, and to contribute to the clarification of the rule of law in the WTO. Mr. Andersen will now present India's arguments on a new issue and responding to arguments made by the United States in its First Submission.

## **II. DISCUSSION**

11. Mr. Chairman and Members of the Panel, the first part of our statement will discuss India's alternative claim under AD Agreement Annex II, paragraph 7 regarding USDOC's failure to exercise special circumspection in using the US sales information in the petition to calculate the dumping margin in this investigation. The remainder of our statement today will focus primarily on rebutting the key points made by the United States in its First Submission. This is a long statement and we encourage the Members of the panel to ask questions during our presentation. We are here to assist you in understanding the measures and claims at issue and our arguments. India's rebuttal submission will provide a full response to the US First Submission and the points raised at this first meeting of the Panel with the parties.



A. INDIA'S ALTERNATIVE CLAIM UNDER ANNEX II, PARAGRAPH 7 REGARDING THE USDOC'S FAILURE TO EXERCISE SPECIAL CIRCUMSPECTION IN USING INFORMATION IN THE PETITION

12. India presents now arguments regarding its alternative claim that USDOC failed to exercise "special circumspection" when it used a single price *offer* by a company not affiliated with SAIL as the entire basis for the US prices in calculating the dumping margin. The relevant AD provision is Annex II, paragraph 7, which provides the legal framework for this claim:

If the authorities have to base their findings . . . on information . . . supplied in the application for the initiation of the investigation, they should do so with special circumspection. In such cases, the authorities should, where practicable, check the information from other independent sources at their disposal, such as . . . official import statistics and customs returns . . .

13. It is significant that the text uses the phrase "special" circumspection. This indicates that the drafters of this provision required authorities to take particular care before applying facts available. The record shows that it was "practicable" for USDOC to check the official import statistics. In fact, USDOC claims to have examined the offer in the petition against such statistics.

14. The public version of the petition that launched the investigation of cut-to-length plate from India included no information regarding actual sales by SAIL into the United States for the purpose of calculating the estimated US price. Instead, the petition provided information on a "price offering to unaffiliated purchasers"<sup>1</sup> – that is, an offer to sell cut-to-length plate from an unaffiliated company for shipment into the United States. The petitioners stated in the petition that "in the absence of more definitive information, Petitioners assume the offer was accepted and the sale consummated on the date of the offer."<sup>2</sup> There is no evidence in the record that petitioners or the USDOC ever sought or obtained information as to whether there ever was a sale pursuant to this offer. The public version of the petition lists the price offered by this non-affiliated company as \$251 per ton -- this is found in handwriting in the upper left corner of page 12 of India Exhibit 1.

15. At both the preliminary and final determinations, USDOC used this single *offer* as the entire basis for the US sale price in calculating the dumping margin ultimately applied to SAIL. The petition also calculated a constructed value of \$372 as one of its two proposed bases for normal value. This figure is shown in Figures 4 and 5 (which follow page 18) of the public version of the petition. The huge difference between the very low US price of \$251 and the constructed value of \$372 resulted in the 72.49 per cent margin, as shown on page 18 and Figure 5 of the petition. Given the significance of the US sales price to this very high margin, USDOC could be expected to use special circumspection in its use of this price offer of \$251. So what did USDOC do?

16. The USDOC's Final Determination states that "[p]etitioners' calculated export price was based on US price offerings, with deductions taken for international movement charges." The corroboration of petitioners' information was explained *in toto* as follows: "We compared this with information from US Customs and found them consistent."<sup>3</sup>

17. There was a slightly more expanded description of USDOC's "corroboration" of the price in the single price offer. I am handing you a copy of India Exhibits 30 and 31. India Exhibit 30 is a USDOC Memorandum dated 19 July 1999. It appears to be the only basis for the corroboration of the export price that was used for *both* the preliminary and final investigation. At page 2 of the

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<sup>1</sup> USDOC Initiation Notice, Ex. IND-2 at 12963.

<sup>2</sup> Ex. IND-1 at 11.

<sup>3</sup> USDOC Final Determination, Ex. IND-17 at 73128.

document, it first concludes that SAIL's US price information cannot be used because not all of SAIL's information was reliable. This is practice of "total facts available" at work. The Memorandum then states:

The only other secondary information readily available was Customs statistics covering the relevant HTS categories for the period of investigation. We compared the US prices, and international movement charges, in the petition *with the average unit values*, and relevant international movement charge data, *in the relevant HTS categories and found them consistent. Thus we were able to corroborate the information in the petition.*<sup>4</sup>

18. But what does the record evidence show about the comparison of the single unaffiliated offer price of \$251 with the unit price of Indian imports in the relevant HTS categories in Customs statistics? India Exhibit 31 provides the answer. This exhibit was originally Exhibit 8 from the public version of the petition. It tabulates official US Customs data. The first page contains US Customs data on imports under the relevant HTS subheadings into the United States from India; it also provides the c.i.f. value for each subheading and for all subheadings combined -- which in 1998 was \$48,080,899. We have performed the unit value calculations that petitioners declined to include but which USDOC claims it performed -- dividing the total c.i.f. value by the number of tons. This calculation derives an average unit c.i.f. value for all three HTS subheadings of \$354/short ton.<sup>5</sup> Thus, the US Customs Service's price per ton, as reported in an exhibit in the petition itself, is \$103 per ton *more* than the price per ton in the single offer listed in the public version of the petition. This US Customs information from *actual* imports during the period of investigation clearly contradicts the validity of the extremely low price listed in the single offer in the petition. Thus, USDOC's conclusion that the information in this single offer was "corroborated" by the Customs data is simply not correct.

19. Given this very large disparity between the single offer price and the Customs data *and* the fact that the petition itself had only *assumed* that the offer by a non-affiliated party allegedly to sell SAIL's steel was consummated, a reasonable authority exercising "special circumspection" could be expected to have requested Customs to provide it with a list of the individual entries of imports from India. This information is readily available. A request for and examination of such data would have revealed if the *offer* evolved into a *sale*. But there is no discussion in any document in the record showing that USDOC took any efforts to check the information of the single offer for sale with entry-specific information in official US Customs import statistics. It would appear from the record that USDOC took no steps to corroborate whether this offer stayed an offer or became a sale.

20. Of course, even under USDOC's total facts available practice, it was required to exercise special circumspection in reviewing the price offer in the petition before using it as the basis for the US price. USDOC could -- and should -- have included SAIL's verified *actual* US sales information within its examination. If the Panel turns to India Exhibit 13, I would like to take a few minutes to review the information on SAIL's US Sales data that was in front of USDOC when they were required to make the "special circumspection" review prior to the Final Determination in December 1999. Exhibit 13 is the Verification Report of SAIL's US Sales. [Review of pages 12-15 of Verification Report].

21. Thus, at the end of the verification -- and months before the final determination -- USDOC had available to it complete and accurate information for the entire period of investigation for (1) the prices for all of SAIL's sales to the US market, (2) all 28 relevant characteristics of SAIL's plate

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<sup>4</sup> USDOC Memorandum, "Corroboration of Data Contained in the Petition for Assigning an Adverse Facts Available Rate," at 2 (19 July 1999) (emphasis added) (attached hereto as Ex. IND-30).

<sup>5</sup> See Petition, Exhibit 8 (attached hereto as Ex. IND-31).

products sold to the United States, and (3) assurance that there were no additional sales that were unaccounted for.

22. USDOC could have used this information in its "special circumspection" review in at least two ways. First, if USDOC had spent 5 minutes scanning the copy of the complete listing of SAIL's 1284 sales (set out in India's Exhibit 8), it would have easily determined that there were no sales of plate at a price of \$251 per ton. It would have found no sales even at prices of \$300 per ton. Indeed, the *lowest* price in the entire period of investigation for SAIL into the United States was \$305 per ton. This evidence demonstrates that the single offer in the petition for \$251 per ton was simply never consummated as an actual "sale" during the period of investigation.

23. Second, USDOC should have used SAIL's actual pricing information to discover that the weighted average price for all of SAIL's US sales during the period of investigation was \$346 per ton. This information was calculated on the basis of SAIL's verified US sales data on the record, as set forth in India Exhibit 8. Mr. Hayes will discuss these calculations later. This \$346 price per ton is very close to the \$354 unit value price that is derived from the Customs data shown in the petition. Thus, if USDOC did in fact examine the US Customs data as it claims it did, the only thing that data corroborated is the accuracy of SAIL's verified information -- not the \$251 offer in the petition.

24. In conclusion, no investigating authority acting in good faith and in an objective manner could have used the single offer price of \$251 as the sole basis for a dumping margin in the face of overwhelming evidence that the *actual* export prices were much, much higher. USDOC did not act with "special circumspection" when it used the offer in the petition as the basis for the US sales price in calculating the AD margin. Thus, if for purposes of argument, the Panel finds that USDOC is justified in applying facts available -- an argument the Panel knows well that India strongly opposes -- USDOC could only have used the information from US Customs (in conjunction with SAIL's actual prices) as the basis for the US price in calculating the dumping margin.

#### B. "SHOULD" AND "SHALL" IN ANNEX II, PARAGRAPH 3

25. I would now like to respond to arguments made by the United States in their First Submission. Many of the key legal issues in this dispute concern the basic question of when and how investigating authorities must use information submitted by foreign respondents that is verified, timely submitted, and can be used without undue difficulty. While this dispute presents some new aspects of this issue, guidance for the Panel's work has already been provided by the interpretations of Article 6.8 and Annex II, paragraph 3 by previous panels, particularly the *Japan Hot-Rolled* panel as affirmed by the Appellate Body.

26. The *Japan Hot-Rolled* panel and the Appellate Body decision in that case have interpreted Article 6.8 and Annex II, paragraph 3 as requiring investigating authorities to use information submitted by foreign respondents that meets the four conditions of Annex II, paragraph 3. For instance, the Appellate Body affirmed the panel's finding that the USDOC's failure to use the Japanese respondent's information on weight conversion, which met the four Annex II, paragraph 3 criteria, was a violation of Article 6.8 and Annex II, paragraph 3.

27. India's argument in paragraphs 53-79 of its first submission follows and develops that authoritative guidance, in arguing that Annex II, paragraph 3 is a *mandatory* provision, and information meeting all four conditions *must* be used by investigating authorities in connection with calculating the anti-dumping margin.

28. The United States tries carefully to ignore the Appellate Body's decision in *Japan-Hot Rolled*. In paragraphs 103-107 of its First Submission, the United States instead argues that the use of the word "should" in the text of Annex II, paragraph 3 means that investigating authorities are not

*required* to use information meeting all the criteria of Annex II, paragraph 3 when they calculate dumping margins. This argument is without merit.

29. While the Appellate Body in *Japan Hot-Rolled* did not directly address the "should" versus "shall" issue, it found regarding the weight conversion issue that there was an affirmative requirement that USDOC use such information even though the language of Annex II, paragraph 3 uses the word "should." This finding is consistent with the Appellate Body's decision in *Canada – Measures Affecting the Export of Civilian Aircraft*, in which the Appellate Body noted that the word "should" "can also be used to express a duty or obligation." Thus, the Appellate Body held that the word "should" in Article 13.1 of the DSU was used in a normative, rather than a merely exhortative sense, finding that Members "are under a *duty and an obligation* to respond promptly and fully to requests made by panels for information under Article 13.1 of the DSU."<sup>6</sup> Japan agrees with this point in its Third Party submission in the present case.

30. The context of Annex II, paragraph 3 also supports the conclusion that the word "should" in this provision creates a duty to use information meeting the stated criteria. The most important context is the last sentence of AD Agreement Article 6.8, which provides that the "provisions of Annex II *shall* be observed in the application of this paragraph." Treating these provisions as discretionary, as the United States suggests, would render the term "shall" in Article 6.8 a nullity and alter the meaning of Article 6.8.

#### C. INTERPRETATION OF THE PHRASE "ALL INFORMATION WHICH" IN ANNEX II, PARAGRAPH 3

31. Another key issue on which the United States and India differ is whether the AD Agreement permits investigating authorities to cast aside *some* information that actually meets the four conditions of Annex II, paragraph 3, solely because the foreign respondent either cannot or failed to provide *other* requested information. India argues that such conduct by investigating authorities is impermissible; the United States generally argues that unless *all* necessary information requested in an anti-dumping investigation is submitted in a timely, verifiable, and usable manner, then *none* can be accepted.

32. For the answer to this question, India turns to the phrase "all information which" in Annex II, paragraph 3. The United States has not addressed the meaning of this phrase in its First Submission. The reference to "all information" in Annex II, paragraph 3 is unqualified: it states that "all information which" meets the specified four conditions should be taken into account when determinations are made. The ordinary meaning, read in its context, of this phrase "all information which" is that *any* information meeting the four conditions must be used in the calculation of an anti-dumping margin. In effect, the phrase "all information which" limits an investigating authority's ability to use information *other* than that supplied by the respondent if the respondent's information meets the four conditions of Annex II, paragraph 3.

33. Nothing in the text of Annex II, paragraph 3 suggests that *all* (or even *most*) of the information requested from foreign respondents must meet the four conditions of Annex II, paragraph 3 before *any* of the information that does meet those four conditions can be used in calculating an anti-dumping margin. The European Communities agree with India on this point, noting that "the use of the word 'all' in paragraph 3 of Annex II, implies that any information which does meet the conditions set out therein should be taken into account. The Appellate Body's interpretation in *Japan Hot-Rolled* confirms that an investigating authority's ability to reject data supplied is circumscribed."<sup>7</sup>

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<sup>6</sup> WT/DS70/AB/R, para. 187 (emphasis added).

<sup>7</sup> Third Party Submission of the European Communities, 17 December 2001, at para. 9.

34. Read literally, the phrase “all information which” in Annex II, paragraph 3 could mean any of the pieces of information requested in an anti-dumping investigation. However, India recognizes that it may not be reasonable to expect an investigating authority to conduct a separate examination of each of the four conditions in Annex II, paragraph 3 for thousands of individual pieces of information submitted by a respondent. India does not insist upon an interpretation of Annex II, paragraph 3 that would require investigating authorities to use any piece of information provided by foreign respondents, no matter how small and isolated. India’s First Submission used the qualifying term “categories” of information for exactly this reason. The United States correctly points out that the term “category” is not a term found in the AD Agreement. However, what is important here is not the exact term used. Rather, what is important is the need to interpret the Agreement in good faith, in a way that ensures the use of information meeting the four criteria of Annex II, paragraph 3.

35. As an example of a “category” of information, India would offer the weight conversion factor information at issue in the *Japan Hot-Rolled* dispute. The *Japan Hot-Rolled* panel found that although the foreign respondent provided weight conversion factor information after USDOC deadlines, USDOC should have used it in order to create a consistent basis of measurement among sales which were made sometimes on the basis of actual weight and other times on the basis of theoretical weight.

36. Larger “categories” of information are those recognized by USDOC, which structures its questionnaires and its verification around US sales, home market sales, cost of production for the home market products, and constructed value for the US products. Indeed, in the underlying Final Determination, USDOC identified these four categories, which it termed “four essential components of a respondent’s data”.<sup>8</sup> Despite the United States’ assertions, India is merely recognizing the same groups or categories of information as USDOC. We are here today because USDOC refused to take into account an entire category of information—SAIL’s US sales data.

#### D. THE UNITED STATES IMPROPERLY INTERPRETS ANNEX II, PARAGRAPH 1

37. The only textual support that the United States cites in support of its total facts available practice is Annex II, paragraph 1 and Article 6.8. Paragraph 100 of the US First Submission misinterprets Annex II, paragraph 1. The paragraph has two distinct sentences. The first refers to “the information required from any interested party” and requires the authorities to specify the manner in which “that information” should be structured: this first sentence clearly applies to *all* of the information requested. But the second sentence requires the investigating authority to provide a warning to interested parties that “if information is not supplied within a reasonable time, then the authorities will be free to make determinations on the basis of the facts available . . . .” The warning of the second sentence becomes relevant only for whatever information is *not* supplied in the structure and manner requested. It does not apply to *all* of the information requested unless a respondent refuses to provide any information.

38. The United States interprets the second sentence of Annex II, paragraph 1 as permitting investigating authorities to apply total facts available. Paragraph 100 of its First Submission states the following:

The second sentence then provides that the investigating authorities should advise the responding interested parties of the consequences of not providing *the* information -- that the investigating authorities *will be free* to make determinations on the basis of

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<sup>8</sup> Ex. IND-17 at 73130.

facts available, including, in particular, those facts contained in the application for the initiation of the investigation.<sup>9</sup>

The panel will see that the United States added the article “the” before the word “information” in its interpretation. But the US submission does not reflect the actual text of the second sentence, which says “if information is not supplied”. In the second sentence of Annex II, paragraph 1, unlike the first sentence, the words “the” and “that” do not qualify the word “information”. Nor does the qualifier “all”, “all necessary” or “necessary” appear. Yet the United States interprets the second sentence of Annex II, paragraph 1 as if those words were there.

39. The absence of any such qualifier in the second sentence of paragraph 1, Annex II is important, because it indicates that facts available will only be appropriate for the particular sub-set of requested information that does not meet the other requirements of Annex II. This interpretation is consistent with the Appellate Body's interpretation that Annex II requires the use of particular information that meets the requirements of Annex II, paragraph 3. This interpretation is also consistent with the text of Annex II, paragraph 3 (“all information *which*” meets the four conditions), and Annex II, paragraph 6 (“*such* evidence”). Like these other provisions of Annex II, paragraph 1 anticipates that “facts available” may be used to complete the record where data are missing or fail to meet the criteria of paragraph 3—but not to substitute for the actual data submitted by a respondent that meets those criteria.

E. THE UNITED STATES IMPROPERLY INTERPRETS THE MEANING OF “NECESSARY INFORMATION” IN AD AGREEMENT ARTICLE 6.8

40. Although it ignores the term “all information which” in Annex II, paragraph 3, the United States does focus on the term “necessary information” in AD Agreement Article 6.8. The United States interprets this term at paragraph 83 of its First Submission as meaning *all* information necessary to calculate a dumping margin. If *any* “necessary” information is not provided by a foreign respondent, the United States interprets Article 6.8 and Annex II, paragraphs 1, 3, 5, and 7 as giving it the discretion to disregard *all* of the information provided.

41. It is important to keep in mind where the United States’ argument leads. The US interpretation of “necessary information” would require that when a dumping margin is calculated, either *all* of the necessary information must be obtained from the foreign respondent or *all* of the necessary information must be through the use of “facts available”. In the case of USDOC, the latter option almost always means that the necessary information is obtained from the petition filed by the interested domestic industry. For USDOC, it seems that there is no middle ground of calculating margins by matching necessary information from verified, timely produced, and usable information provided by the interested foreign party with necessary information from the petition.

42. India disagrees with this interpretation of the term “necessary information”. The text of the last sentence of Article 6.8 requires that “the provisions of Annex II *shall* be observed in the *application* of this paragraph”. The United States ignores this sentence in its Article 6.8 analysis. Because Article 6.8 cannot be applied except in conformity with Annex II, paragraph 3, it follows that Article 6.8 cannot be applied to allow investigating authorities to reject the use of information that meets the four conditions of Annex II, paragraph 3. To permit an interpretation of Article 6.8 that would override the provisions of Annex II, paragraph 3 would render that paragraph a nullity and would be contrary to the very terms of the last sentence of Article 6.8. The United States’ interpretation of “necessary information” is also inconsistent with the second sentence of Annex II, paragraph 1 (discussed above) and the second sentence of Annex II, paragraph 6, as discussed in India's First Submission at paragraph 62.

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<sup>9</sup> US First Submission, para. 100 (emphasis added).

43. What then is the meaning of the term “necessary information” in Article 6.8? India submits that it means that investigating authorities have the authority to apply facts available to calculate margins where information necessary to do so has not been provided in an acceptable manner (*i.e.*, consistent with Annex II, paragraphs 3, 5) by a foreign interested party. India agrees with the description of the panel in *Japan Hot-Rolled* as to how Article 6.8 should function: “Thus, Article 6.8 ensures that an investigating authority will be able to *complete* an investigation and make determinations under the AD Agreement on the basis of *facts* even in the event that an interested party is unable or unwilling to provide necessary information within a reasonable period.”<sup>10</sup>

#### F. US NON-TEXTUAL RATIONALE FOR ITS TOTAL FACTS AVAILABLE ARGUMENT

44. The primary rationale the United States uses to justify its application of so-called “total facts available” under Article 6.8 is not based on the text of the AD Agreement. As noted, the United States did not even refer to Annex II, paragraph 3 in interpreting Article 6.8. Instead, the United States relies on arguments based on assertions about policy, at paragraphs 85-92 of its First Submission. The United States starts off in paragraph 85 by arguing that the object and purpose of the AD Agreement is “objective decision-making based on facts”, and that the Agreement should be interpreted in a manner that would achieve that goal. The United States then argues that the *only* way to achieve this object and purpose of the AD Agreement is to arm investigating authorities with the ability to reject all facts provided by foreign respondents if such respondents fail to provide certain “necessary” facts. The United States more delicately describes this as “encourag[ing] . . . responding interested parties to provide that information to the investigating authorities in a timely and accurate manner.”<sup>11</sup> Neither of these arguments has any merit. We will now address them in turn.

##### 1. Ensuring objective decision making based on facts

45. India can certainly endorse the statement by the *Japan Hot-Rolled* panel that the object and purpose of the Anti-Dumping Agreement is “ensuring objective decision-making based on facts.” Indeed, the merits of this statement are all the more evident when one recalls the factual context in which this statement was made. In the *Japan Hot-Rolled* dispute, the United States argued that it needed the ability to impose “facts available” from the petition, in order to motivate foreign interested parties to comply with requests for information in a timely fashion. The panel rejected that argument, based in part on the rationale that investigating authorities must use verifiable information from foreign interested parties in order to ensure objective decision-making based on the factual data provided by foreign respondents, not limited facts supplied by petitioners. Having lost this point with the *Hot-Rolled* panel, the United States tries to use that panel decision in the current case, but in doing so, the United States turns that panel decision on its head. That is, the United States uses the *Hot-Rolled* panel decision to justify the same type of behavior rejected by the *Hot-Rolled* panel – *i.e.*, USDOC's refusal to consider verified, timely produced information that can be used to calculate a margin.

46. “Objective decision-making based on facts” means that investigating authorities must seek, obtain, and use information from interested foreign parties that meets the criteria of Annex II, paragraph 3, within the time constraints of an investigation. But interpreting Article 6.8 of the AD Agreement as authorizing investigating authorities to discard information meeting the four conditions of Annex II, paragraph 3, allegedly in order to compel foreign producers to supply other information, would give USDOC the power to “destroy the village in order to save it”. This is not and cannot be consistent with the purpose of the Agreement – to calculate margins “based on facts”.

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<sup>10</sup> WT/DS184/R, para. 7.51.

<sup>11</sup> US First Submission, para. 85.

**2. Existing remedies under the AD Agreement provide sufficient incentive to encourage cooperation without creating an implicit authority to apply total facts available**

47. The United States' second rationale for its "total facts available" practice is that the AD Agreement cannot be interpreted in a way that would encourage the interested foreign party to "provide only partial information" (para. 85), allow them to "provide only that select information which would not have negative consequences for them" (para. 87), and "allow the parties submitting the information to control" the decision-making (para. 90).

48. India appreciates and understands the concerns expressed by other WTO Members that investigating authorities need to preserve the tools available to them to foster cooperation and the provision of information from interested foreign parties. However, India believes that the AD Agreement already provides more than sufficient remedies to encourage balanced cooperation between investigating authorities and foreign interested parties, without broadening their scope with the draconian new remedy of "total facts available". The existing remedies encourage cooperation and decision-making based on objective facts *without* discarding information provided by respondents that meets the criteria of Annex II, paragraph 3 and that would contribute to the calculation of accurate dumping margins.

49. As the Members of the Panel know, there are very real and adverse consequences for foreign respondents who do not provide requested information. These consequences are derived from the application of facts available under Article 6.8, as interpreted by Annex II, in particular Annex II, paragraph 1, second sentence, and adverse facts available pursuant to paragraph 7, last sentence.

50. In practical terms, the "facts available" provisions in the AD Agreement give investigating authorities the ability to use alternative sources of information not provided by foreign respondents—including, of course, the application submitted by the domestic industry. As the AD Agreement provides, an anti-dumping investigation normally is initiated in response to an application submitted by or on behalf of the domestic industry. There is an obvious incentive for the domestic applicants to seek the highest dumping margins possible, because they are claiming injury by reason of the allegedly dumped imports. The United States correctly noted this fact in one of the statements it made to the panel in the *Japan Hot-Rolled* dispute:

Paragraph 1 [of Annex II] explicitly states that the consequences of failing to cooperate in the investigation include making a determination on the basis of the facts in the application for the initiation filed by the domestic industry. While the information in the application must be substantiated, *it is generally understood that applicants will document the highest degree of dumping that the available evidence will support*. Accordingly, while the information in the application is not *necessarily* adverse to the respondents, *it is generally presumed to be adverse*.<sup>12</sup>

51. In commenting on the substantiation of the information in the petition, the United States also correctly provided the *Japan Hot-Rolled* panel with the following description of the present requirements in the AD Agreement:

Applicants [under AD Article 5.2] must include "such evidence as is reasonably available to the applicant" of dumping. There is no requirement that the evidence be complete, and no requirement that applicants strive to obtain exonerating information. Similarly, Article 5.3 requires only that investigating authorities "examine the accuracy and adequacy of the evidence provided . . . to determine whether there is

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<sup>12</sup> WT/DS184/R, Annex A-2, First Submission of the United States at Part B, paragraph 62 (emphasis added except "necessarily") (footnote 136 deleted but discussed below).



sufficient evidence to justify the initiation of the investigation.” Investigating authorities are not required to determine whether the evidence submitted by the applicants is balanced before determining whether to initiate an investigation.<sup>13</sup>

52. Article 5 of the AD Agreement does not require applicants to provide *all* the information at their disposal. Rather, the requirement of Article 5.2 is for information to be supplied that is “reasonably available to the applicant”. The only price information required is “information on prices” in the home and export markets under Article 5.2(iii), not *all* the information on prices. And the investigating authorities are only required to examine the “accuracy and adequacy of the information provided”, not whether the information provided represents all the available information. Indeed, USDOC’s practice, as evident in this case, is to confirm the validity of a petition merely by checking off its contents to make sure that all the required pieces of information are present—but not to corroborate or challenge the quality or accuracy of that information.

53. As the United States properly recognizes, there is every incentive for an applicant domestic industry to include in its application the information on home market sales, cost of production, and export sales that will result in the highest possible dumping margins. Thus, the information in the application is far from neutral.

54. This permissible manipulation of facts by applicant industries is part of a careful balance in the AD Agreement. Article 5 allows the domestic industry to file a petition that is biased in its favor, and it does not require investigating authorities to insist that the petition include contrary evidence. And Annex II, paragraph 1 allows authorities to make determinations on the basis of information in that petition if “information is not supplied” by the foreign interested party. But the counterbalance to these provisions are the limitations on the use of facts available found in Annex II, paragraphs 3, 5 and 7. The Appellate Body’s interpretation of Annex II, paragraph 3 in *Japan Hot-Rolled* established the proper balance by requiring the investigating authority to use information submitted by the foreign interested party that meets the four conditions of that provision. The United States’ interpretation that even verified, timely produced and usable information may be disregarded because other information is not supplied would completely upset this balance.

55. Mr. Chairman, I apologize for the length of this discussion, and if it contains information and argument that may appear too obvious to some of the Panel’s Members. But the inherent bias of the petition for anti-dumping duties is a fact that must be taken into account in response to the United States “policy” argument that the threat of “total facts available” is necessary to deter interested foreign parties from withholding information. This argument is not correct. In fact, the AD Agreement provides at least three *existing* means to encourage interested foreign parties to cooperate with requests to submit necessary information.

56. First, if an interested foreign party does not or fails to provide information regarding particular necessary information, then the investigating authorities have the authority under Article 6.8 to apply facts available in place of the missing information. This may properly include information from the petition that is presumed to be adverse—not neutral—to the interested foreign party.

57. Second, if an interested foreign party does not or fails to provide complete information regarding an important category of information (which could include one or more of what the USDOC refers to as the “essential components of a respondent’s data”), then depending on the circumstances, it may be appropriate for investigating authorities to find that they cannot use the partial information for that category “without undue difficulties”. Assuming that the authorities also

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<sup>13</sup> WT/DS184/R, Annex A-2 at note 136 (emphasis added).

find that the interested party did not use its best efforts in attempting to supply the complete information, then the application of facts available may be appropriate as to the entire category of information.

58. This can be demonstrated through some examples. If a foreign respondent provided information only on a portion of its export sales showing that prices were well above the prices alleged in the petition but refused to provide information on the remaining export sales, the investigating authorities may be justified in finding that they cannot use the submitted export sales information "without undue difficulty". Similarly, if a foreign respondent provided information on all export sales but did not provide information on a number of necessary characteristics of such sales (for example, their physical characteristics or the prices at which they were sold), the investigating authorities may be justified in finding that they cannot use that information without undue difficulty because it is too incomplete.

59. Third, India, unlike Japan in the *Hot-Rolled* case, is not arguing that investigating authorities cannot make *adverse* inferences against respondents who impede the investigation or withhold information from investigating authorities. India agrees with the United States and the European Communities that there are instances in which adverse facts available may be appropriate where a foreign respondent has impeded the investigation or otherwise acted in a manner that suggests bad faith. It is an important incentive to encourage foreign respondents to respond to requests for information.

60. In sum, these three remedies have a significant effect in encouraging foreign respondents to produce information. Respondents who are experienced in anti-dumping matters know fully well that domestic petitioners have carefully selected information in the petition to ensure the appearance of significant dumping margins. And they also know that investigating authorities will not hesitate to use such information, including the information most adverse to respondents that impede an investigation.

61. Finally, India notes that the aggressive use by USDOC of "total facts available" has discouraged some respondents from even undertaking the enormous investment of time and effort required to submit the vast quantities of information demanded by investigating authorities. This result is contrary to the United States' professed goal in applying total facts available, of "ensuring objective decision-making based on facts". Foreign interested parties who may wish to cooperate may simply not be able to provide complete information on one of the four "essential" components of USDOC's questionnaire. If they know that their inability to provide information on, for example, cost of production, will lead to a rejection of all of the verified, timely submitted and usable information they provide on US sales and home market sales, then what is their incentive to provide *any* information? Given the very significant costs and effort required to respond to and participate in a US anti-dumping investigation, the United States' "total facts available" penalty may well lead many respondents simply to give up and not provide any information.

G. US ARGUMENTS CONCERNING INDIA'S CLAIMS THAT SECTIONS 776(A) AND 782(E) ARE PER SE VIOLATIONS OF AD ARTICLE 6.8 AND ANNEX II, PARAGRAPH 3

62. We now turn to the United States' arguments concerning India's claims challenging Sections 776(a) and 782(e) of the US anti-dumping statute as such (per se). India refers the Panel to paragraphs 130-159 of its First Submission. The basic argument is that Section 782(e) is a mandatory, not discretionary provision, because it requires USDOC to impose additional criteria on respondents beyond the four factors in Annex II, paragraph 3, before their information can be used to calculate a dumping margin. As India has argued in its First Submission, these additional provisions have been

interpreted by USDOC and the US Court of International Trade to provide the mandate for application of total facts available inconsistent with Article 6.8 and paragraph 3 of Annex II.

63. The United States responds to these arguments regarding Section 782(e) by relying on the same two arguments it used regarding Article 6.8 and Annex II, paragraph 3: first, that the use of the word “should” in Annex II, paragraph 3 authorizes USDOC to refrain from using information that meets the four conditions of that paragraph, and second, that Article 6.8 provides authority for investigating authorities to reject all facts provided if some necessary information is not supplied by the foreign respondents. As we have already discussed, neither of these arguments has merit. Should the Panel agree with India on these two points, such a finding would have obvious implications for the United States’ arguments regarding Section 776(a) and Section 782(e).

64. The United States also argues in paragraphs 132 and 143 of its First Submission that “section 782(e) *contracts* the Department’s ability to use the facts available by *requiring* it to consider information that meets five statutory criteria. . . . Thus, to the extent that section 782(e) is ‘mandatory’ at all, it is mandatory in a way that exceeds WTO obligations”.<sup>14</sup> This argument is not correct. As the Appellate Body has found, Annex II, paragraph 3 creates mandatory obligations and permits investigating authorities to impose *only* four conditions that must be met by foreign respondents before their submitted information must be used by investigating authorities. WTO Members are required to ensure that any legislation addressing facts available prevents investigating authorities from imposing *additional* conditions on foreign respondents that make it easier to apply facts available. While Section 782(e) may contract USDOC’s ability to use facts available, the fundamental problem is that *it does not contract that ability enough*. This is because it imposes two additional conditions that foreign respondents must meet *before* they can be assured that USDOC will use their submitted information and not the facts submitted by the petitioning domestic industry. These two additional conditions are found in Sections 782(e)(3) and (4).

65. Turning first to subsection 782(e)(3), it provides that “the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination”. The United States admits that subsection 782(e)(3) is not found in Annex II, paragraph 3. It first argues that this condition is “plainly consistent with the goal of ‘objective decision-making based on facts’”.<sup>15</sup> As I have already described, the United States has used this “goal” to justify its entire argument that Article 6.8 permits the rejection of verified and timely submitted facts that can be used in the calculation of anti-dumping duties. The United States then argues that this reference to completeness of the information in subsection 782(e)(3), despite its absence in Annex II, paragraph 3, “simply reflects that the provision accomplishes a different purpose than section 782(e)”.<sup>16</sup> Yet the United States has not explained the nature of this “different purpose” or why the United States has any right to impose additional criteria not provided in Annex II, paragraph 3. As India’s First Submission has explained,<sup>17</sup> the imposition of any additional barrier to the use of actual information from foreign respondents is inconsistent with the provisions on use of facts available in Annex II, paragraph 3. The United States finally argues that Annex II, paragraph 3 uses the word “should” not “shall,” apparently suggesting that the United States is free to impose as many additional restrictions as it sees fit on the use of facts actually submitted by foreign respondents.<sup>18</sup> Once again, the United States ignores the guidance of the Appellate Body’s decision in *Japan Hot-Rolled* in making this argument.

66. The second additional requirement imposed on interested foreign respondents is subsection 782(e)(4), dealing with the best efforts of a respondent in providing information. India addressed this

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<sup>14</sup> US First Submission at para. 143 (emphasis in original).

<sup>15</sup> US First Submission at para. 137.

<sup>16</sup> US First Submission at para. 144.

<sup>17</sup> India First Submission at paras. 148-149, 154-156.

<sup>18</sup> US First Submission at paras. 138, 144.

provision in detail in paragraphs 81-86, 150 and 157 of its First Submission. The United States does not address India's textual arguments, nor does it address the fact that neither the Appellate Body nor any of the prior panels that have examined Article 6.8 and Annex II, paragraph 3 ever included "best efforts" as an additional condition that foreign respondents must meet before their information could be used. Instead, the United States simply states that Annex II, paragraph 5 includes a similar reference to "best efforts". But this argument conflates the conditions imposed by paragraphs 3 and 5 of Annex II. In sum, there is no legitimate basis for the United States to require interested responding parties to demonstrate that they have used their best efforts in addition to the other four conditions of Annex II, paragraph 3.

67. The United States argues at paragraph 120 of its First Submission that the Panel should give considerable deference to the United States' views on the meaning of its own law. India generally agrees that certain deference regarding the meaning of municipal law should be granted to the WTO Member whose law is being interpreted. Indeed, consistent with this principle, India would expect that this Panel will pay very close attention to the United States Court of International Trade decisions and the decisions of the USDOC that are referenced in India's exhibits 28 and 29. The decisions set out in those exhibits highlight very clearly both (1) the mandatory nature of Section 776(a) and Section 782(e), and (2) the WTO-inconsistent manner in which they have been interpreted and applied by the USCIT and the USDOC respectively.<sup>19</sup>

68. In addition, the interpretation by the US Congress contained in the Statement of Administrative Action (SAA) excerpted in India Exhibit 27 and referenced in paragraphs 143-144 of India's First Submission makes it clear that Section 776(a) is a mandatory provision which requires USDOC to make determinations on the basis of facts available where information is missing from the record, has been provided late or cannot be verified. The SAA also confirms that respondents are required to meet every one of the five conditions in Section 782(e) before their information can be used in an investigation.

#### H. AD AGREEMENT ARTICLE 15

69. We turn now to Article 15 of the Anti-Dumping Agreement. The United States argues at paragraph 186 of its First Submission that Article 15 requires that a developing country respondent or its government must demonstrate to the investigating authority during the investigation that there are "essential interests" of their country that would be implicated by the imposition of dumping duties. India strongly objects to this argument. It is an unfortunate attempt by a developed WTO Member to read additional restrictions into a provision that already provides little benefit in terms of legal effect or certainty to developing countries such as India.

70. It is inconceivable that USDOC could *not* have been aware that the proposed imposition of anti-dumping duties in excess of 70 per cent would affect the "essential interests" of India. India, like many developing countries, is dependent on export markets to create employment. USDOC collected information during the investigation indicating that SAIL employed over 150,000 workers in over 40 facilities spread across India: this evidence is in the factual record. USDOC knew that imposition of high dumping duties would close off the US market to SAIL, negatively affecting both employment in India and the receipt of foreign exchange for India. USDOC employs thousands of civil servants with a keen knowledge of international trade and an understanding of the importance of export markets for developing countries. Indeed, in this investigation alone, USDOC investigators spent over 20 days directly experiencing the importance of trade and export sales to SAIL in discussions with many of SAIL's employees. There can be no serious question that USDOC was unaware of the importance of the US cut-to-length steel plate market to one of India's largest employers at the time that it should have been examining in detail India's request that it explore a suspension agreement.

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<sup>19</sup> See India First Submission at para. 145.

71. In addition, contrary to the United States' assertion, there is no requirement in Article 15 of the Agreement that either SAIL or the Indian Government transmit official statements or information to USDOC on behalf of India. Anti-dumping investigations involve private parties, not governments, and the Government of India was not an interested party in the US anti-dumping investigation on cut-to-length plate. The United States' reading of Article 15 would appear to require that a developing country private respondent must have its government initiate government-to-government contacts before the private respondent can seek a suspension agreement. The language of the Article simply does not support the imposition of any such requirement.

72. The text of Article 15 provides that "[p]ossibilities of constructive remedies . . . shall be explored before applying anti-dumping duties" and that "special regard must be given by developed country Members to the situation of developing country Members". The phrasing of Article 15 indicates that these duties arise even when the developing country interested party or its government is silent. The investigating authority must determine in each case whether imposing anti-dumping duties would affect the essential interests of developing country Members, and if so must take the action required by Article 15.

73. The United States also provided with its First Submission an *ex parte* memorandum to USDOC's file, US Exhibit 21. This document does not constitute evidence that USDOC seriously explored constructive alternative remedies in good faith. The term "explore" is defined as "examine, scrutinize, search out",<sup>20</sup> and requires a rigorous and thoughtful examination. It means something more than a single meeting memorialized in a short paragraph in one document.

74. US Exhibit 21 states simply that USDOC said it "would consider the respondents' request, but noted that suspension agreements are rare and require special circumstances," expressing doubt as to whether those existed in this case. There is nothing in the record that USDOC actually considered the suspension request; for example, no calculations or economic analysis were provided demonstrating the impact a suspension agreement might have on the US domestic industry. The memorandum does not refer to any communication with or comments received by the domestic industry concerning India's request. It provides no analysis of whether there were "special circumstances" that applied to India's request, no discussion of what such "special circumstances" might be, and nothing to indicate that USDOC sought to explore SAIL's proposed suspension agreement in a give-and-take dialogue with SAIL. The limited discussion in US Exhibit 21 and the absence of any other documentation on this subject provided to India or in the file suggest that USDOC did not in fact "explore" SAIL's proposed suspension agreement, within the meaning of this term in Article 15. Indeed, a reasonable interpretation of US Exhibit 21 is that USDOC briefly went through the motions of hearing SAIL's request, and that it never had any intention of taking additional action on that request. This is simply not enough to reach the level of exploring constructive remedies in good faith.

### **III. INDIA'S SECOND ALTERNATIVE CLAIM UNDER ANNEX II, PARAGRAPH 7 THAT USDOC IMPROPERLY APPLIED ADVERSE FACTS AVAILABLE**

75. The United States argues at length that India failed to cooperate with the USDOC in the submission of data regarding its home market sales and cost of production. Indeed, much of the United States' submission focuses on this point. India's position is that the Panel need not make any findings on India's alternative claims that the United States violated Annex II, paragraph 7 with respect to its findings that SAIL did not cooperate in the preparation and submission of the cost and home market databases. However, in the event that the Panel believes it necessary to make findings on this point, the following evidence supports the finding that SAIL cooperated with USDOC in all

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<sup>20</sup> New Shorter Oxford Dictionary, Vol.1 at 889.

aspects of the investigation and at no time concealed or failed to make considerable efforts to provide the information requested.

76. The fact that SAIL was not able to provide the requested home market sales and cost data in the formats required by USDOC does not indicate a failure to cooperate, but rather shows the extreme difficulties that SAIL faced in attempting to provide the data within the extremely tight time constraints imposed by USDOC. India would like to remind the Panel that SAIL produces CTL plate in 3 quasi-independent plants in different locations in India, and it has 6 regional sales offices and 42 local sales offices scattered throughout the country.<sup>21</sup> USDOC demanded that SAIL prepare and submit a complete home market sales database, which required that SAIL obtain and organize the sales data from all of these sales locations, and cost data from all 3 plants, even though its US sales were of merchandise produced at only one of those plants. This requirement imposed a logistical nightmare on the company. Furthermore, during the time period covered by this investigation (calendar year 1998), each of the three plants at which CTL plate was produced had a different accounting system, calculated standard costs differently, and tracked costs differently.<sup>22</sup> And the limitations in the communications and transportation infrastructure in India created serious difficulties as well. Telephone problems meant that the three plants were sometimes inaccessible by phone, fax or e-mail for days on end. Computers and photocopiers were in short supply.<sup>23</sup>

77. SAIL repeatedly pointed out these difficulties to USDOC.<sup>24</sup> Nonetheless, it cooperated fully with the USDOC in preparing the home market sales and cost data. Its anti-dumping “team” spent weeks at various company locations, and disrupted the normal sales and production routines of numerous personnel in order to obtain and organize the data demanded by USDOC. The company submitted literally thousands of pages of information, and repeatedly submitted its computer databases, struggling to convert its information into the required computer formats. In addition, SAIL opened its doors for grueling on-site verifications by USDOC personnel at several of company locations, which lasted for weeks.<sup>25</sup> Another measure of the degree of SAIL’s cooperation is the sheer number of company officials who participated in the sales verifications, as seen in USDOC’s sales verification report.<sup>26</sup>

78. The United States submission highlights the six questionnaires issued to SAIL on the cost and home market sales databases<sup>27</sup> and suggests these represented cooperative efforts by USDOC to assist the company. This assertion simply defies reality. Nothing in these multiple questionnaires constituted an effort to assist SAIL. To the contrary, the repeated information demands placed on SAIL and USDOC’s refusal to accept SAIL’s data in the formats maintained in the normal course of business imposed additional burdens on a developing country respondent. Nevertheless, SAIL never abandoned its efforts to satisfy USDOC and strove to respond to each of those questionnaires.

79. The United States also asserts that USDOC’s conclusion that SAIL did not cooperate was valid because “SAIL is one of the largest integrated steel producers in the world, and its records reflect that it has an established accounting system that is audited annually”.<sup>28</sup> However, the company’s size, in light of its communications and data retrieval difficulties, imposed an enormous burden, not an advantage, on SAIL. It is misleading to suggest that SAIL’s size in itself means that it failed to cooperate or withheld information. Moreover, SAIL’s annual audits are based on its cost and

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<sup>21</sup> India First Submission ¶ 17; Ex. IND-6 at 2; Ex IND-19 at 34.

<sup>22</sup> India First Submission ¶ 17; Ex. IND-15 at 33-34.

<sup>23</sup> India First Submission ¶ 17; Ex. IND-15 at 33-34; Ex IND-21 at 8.

<sup>24</sup> Ex. IND-4, cover letter; Ex. IND-6; Ex. IND-7, cover letter; Ex. IND-14 at 7-9.

<sup>25</sup> India First Submission ¶ 17; Ex. IND-16 at 33-34.

<sup>26</sup> Ex IND-13 at 41-46.

<sup>27</sup> US First Submission ¶¶ 150-155.

<sup>28</sup> US First Submission ¶ 164, citing USDOC Redetermination on Remand, Ex IND-21.

sales reporting systems used in the normal course of business. The fact that the company is audited did not make it easier for SAIL to generate the new product-specific cost data demanded by USDOC, nor did it mean that SAIL's failure to provide those data to the USDOC's satisfaction is evidence that the company failed to cooperate.

80. The United States also condemns SAIL for its statements to USDOC that it was trying to fulfill the data requests and that information would be forthcoming.<sup>29</sup> These statements, however, are evidence of the company's good faith – not that it was withholding evidence or failing to cooperate. The United States' position apparently is that a respondent must inform USDOC up front that it cannot satisfy its information demands. But such a statement would only lead USDOC to declare sooner that the respondent is non-cooperative and to apply "adverse facts available" to determine dumping margins. It is not realistic to expect a foreign respondent to communicate a message to the investigating authority that would be likely to trigger such a negative reaction.

#### J. AFFIDAVIT OF ALBERT HAYES

81. The United States has asserted that the affidavit of Albert Hayes, provided by India as Exhibit 24, constitutes "extra-record evidence" that should be disregarded by the panel. India disagrees. The views in the affidavit, and the views that Mr. Hayes will express today, constitute not new facts but analysis of the facts that were before USDOC during the investigation. The United States cannot seriously maintain that a WTO Member cannot raise a new *argument* before a WTO panel on the ground that USDOC did not have the opportunity to consider and address that argument in the underlying administrative proceeding. The Appellate Body in the *US–Lamb* dispute has made it clear that neither a WTO Member nor a panel is obliged to limit itself to the arguments made by the interested parties to administering authorities.<sup>30</sup> The GATT panel decision in *Atlantic Salmon* likewise rejected the United States' position in the context of a review of new arguments attacking the US. Anti-dumping measure.<sup>31</sup> The rationale for allowing new arguments is compelling – the WTO dispute settlement process is a government-to-government process, and governments have different interests to protect and pursue in WTO proceedings than those of the interested private parties in the underlying anti-dumping investigations. Thus, the suggestion by the United States that India errs in presenting different analyses and arguments demonstrating how the USDOC could have used SAIL's verified and timely produced US sales data is without merit.

82. Moreover, the Hayes affidavit does not present new evidence. The affidavit is clear on its face that it is an analysis of actual data that was before USDOC and in the USDOC record, including the sales verification report, Verification Exhibit S-8, and the petition. Mr. Hayes' analysis utilizes USDOC's computer program in use in the parallel cut-to-length plate investigations in 1999 to illustrate how USDOC *could* have used SAIL's US sales data. This is an important element of India's burden of proof in establishing a claim under Article 6.8 and Annex II, paragraph 3. USDOC improperly did not make use of its standard computer tool in determining SAIL's margins because USDOC applied its total facts available doctrine and disregarded all the data submitted. However, the standard computer program used by USDOC (and presumably similar to those used by many other WTO Member investigating AD officials) is a mechanical, result-neutral calculation device that is applied to data, and does not alter the data that were before USDOC. Whether the actual USDOC program from 1999 or some other calculating device is used is not important – the key point is that the Panel be in a position to assess whether USDOC could have used SAIL's US sales data "without undue difficulty". In India's view, this is best done by using the actual tool that USDOC *should* have used in 1999.

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<sup>29</sup> US First Submission ¶¶ 158-159, 164.

<sup>30</sup> WT/DS177/AB/R, para. 113.

<sup>31</sup> See BISD 41S/229, 360, paras. 347-351, and BISD 41S/576, 664, paras. 216-220.

83. The first issue that Mr. Hayes addresses, which is set out in paragraphs 6 and 7 of his affidavit, relates to USDOC's statement in the Final Determination that SAIL's US sales data was "susceptible to correction". India agrees with this statement, and Mr. Hayes' analysis demonstrates exactly how easily and quickly USDOC could have made such a correction, *based on evidence already in the record*. In fact, SAIL argued to USDOC that any errors to the US sales data were immaterial and that the SAIL's US sales data could have easily been used in combination with information in the petition.<sup>32</sup> Mr. Hayes' affidavit indicates just how easily this evidence could have been used by USDOC.

84. Mr. Hayes's analysis also provides three alternative methodologies that could have been used to combine information on home market sales and cost of production in the petition with the SAIL's actual US sales data. This analysis is based solely on evidence in the record

85. Mr. Hayes' analysis reflects substantial experience, largely gained during his many years on the staff of USDOC, in calculating dumping margins using data submitted by foreign respondents and USDOC's computer programs. The United States does not and cannot assert that Mr. Hayes does not have this expertise, nor has it contested the merits of Mr. Hayes' analysis. It does not deny that the standard computer program for calculating margins in the 1999 cut-to-length plate investigations is the one set out in Annex 1 to India's Exhibit 24. It does not deny that it is possible to calculate a margin using information from the petition and SAIL's actual US sales data. And it does not suggest that the three alternative methodologies proposed by Mr. Hayes would not allow the calculation of dumping margins.

86. The United States' arguments that Mr. Hayes works for a law firm and was not involved in the investigation are irrelevant to the admissibility of his analysis. He is not adding new facts to the record, but rather is presenting an analysis of the facts that are already on the record. The calculation of dumping margins can be a complex matter, requiring substantial expertise. Complaining parties, particularly developing countries, should have equal access to analytic expertise, just as they now have equal access to legal assistance in WTO dispute settlement. Being able to present alternative analyses is essential to their ability to enforce those provisions in the AD Agreement that turn on legal interpretation of the investigative process, such as the provisions at stake in this dispute. India does not believe that the United States could possibly seek or justify maintaining a monopoly on such expertise in panel proceedings. Thus, the Panel should deny the United States' request.

87. Finally, India does not deny that Mr. Hayes' analysis was prepared for use in this dispute. But all expert testimony in judicial proceedings throughout the world is prepared in this way. India encourages the Panel to consider Mr. Hayes' analysis and to review his methodologies that use the evidence in the record.

#### **IV. STATEMENT OF ALBERT HAYES**

Mr. Chairman and Members of the Panel. My name is Albert M. "Chip" Hayes. As explained in my affidavit, which is attached to India's First Submission as Exhibit 24, from 1984 to 1987 and again from 1989 to 1998, I was employed as an import compliance trade analyst with the USDOC. During my tenure with the USDOC, I worked on more than 20 different anti-dumping duty proceedings, through all stages of their life cycles, such as investigations, administrative reviews, sunset reviews, litigation and revocation. My work included more than 35 on-site verifications at respondents' locations throughout the world. I also worked on the development and revision of computer programs used to analyze the respondent companies' submitted data and to calculate dumping margins on the basis of those data. In doing so, I frequently had occasion to make

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<sup>32</sup> Ex. IND-14 at 10, 14 (12 November 1999).



adjustments to the data submitted by the respondent companies on the basis of information discovered at verification, through the use of the computer programs used to analyze the data.

89. Since October 1998, I have been employed as a senior trade analyst for the law firm of Powell Goldstein Frazer & Murphy LLP. In this capacity, I have closely reviewed the questionnaire responses and computer databases submitted to the USDOC by SAIL in the 1999 investigation of cut-to-length carbon steel plate from India. I have also reviewed the exhibits gathered by the USDOC at the verifications of SAIL in that investigation, as well as the USDOC's verification reports and determinations.

A. EASE OF CALCULATING SAIL'S DUMPING MARGINS USING SUBMITTED US SALES DATA

90. The following are my opinions regarding the USDOC's ability to use the US sales data submitted by SAIL. The USDOC can use any number of commercially available tools to calculate dumping margins, including spreadsheet programs such as Excel, Lotus, or Dbase. It can also use stronger data-processing software such as SPSS or SAS [Statistical Analysis System], which is a commercially developed and publicly-available programming language that is commonly used by USDOC. While I could go into the details of the language that USDOC could use to modify its standard program to calculate margins on SAIL's US sales by employing home-market and constructed value data from the petition, perhaps it is clearest to see the ease of any such calculation by performing it. I have done so by combining SAIL's US sales data from India's Exhibit 8 with the data in the chart from the petition that calculated a dumping margin using constructed value as normal value.

91. To do this I have created a new exhibit, India Exhibit 32. This is an addendum to SAIL's US sales database, which is included in our First Submission as Exhibit 8. In this addendum, I have calculated the total price, expense, and quantity data for all of SAIL's US sales during the period of investigation. These calculations are all based on the data in India's Exhibit 8. These data were determined by USDOC to be accurate and complete in its verification report. From these figures I then derived a weighted-average gross US price of \$346 per ton, and a weighted-average net US price of \$325 per ton. The net US price was calculated by subtracting movement expenses from gross US price, in the same manner as was done in the petition.

92. I have also prepared India Exhibit 33, the first page of which is a copy of the original Figure 5 from the public version of the petition, found in India Exhibit 1. This Figure 5 shows a constructed value of \$372, which is used to calculate SAIL's dumping margin.

93. My calculation of the dumping margin using SAIL's US data and the constructed value from the public version of the petition is shown on the second page of Exhibit 33. I substituted the weighted-average net US price of \$325 from Exhibit 32 into the box for US price in Figure 5. I kept the constructed value figure of \$372 the same. The resulting average dumping margin is 14.26 per cent. In calculating this margin, I used exactly the same methodology as that used by petitioners and USDOC when they calculated SAIL's dumping margins. The only difference was to substitute SAIL's actual weighted average US price of \$346 in place of the single offer of \$251.

94. I would note that this 14.26 per cent margin is based on the petition's worst-case scenario because it, in effect, applies the high constructed value to every US transaction in SAIL's US response. Options B and C in my affidavit, which use some variation of applying both the constructed value and home-market price as normal value, would calculate lower margins.

**B. USING INFORMATION BOTH FROM FOREIGN INTERESTED RESPONDENTS AND THE PETITION DOES NOT LEAD TO "ABSURD" RESULTS**

95. I would also like to comment on the argument made by the United States that calculating a dumping margin using some information from foreign respondents and some information from the petition would lead to absurd results. First, as USDOC has recognized, there are four basic components in an anti-dumping investigation -- home market sales, cost of production for products sold in the home market, export sales, and constructed value for exported products. USDOC collects, organizes and examines all of the thousands of pieces of information it receives through these four basic categories. The accuracy and completeness of each category or component of information can be and is established on its own merits, rather than with reference to other components of information. Therefore, as I have demonstrated above and in my affidavit, it is not difficult to combine information from the petition with information from the interested foreign party to calculate dumping margins.

96. The United States asserts that combining information from foreign respondents with information provided by the domestic industry in the petition would lead to absurd results. In my opinion, this is not correct. In the example cited by the United States in paragraph 88 of its First Submission, in which only cost of production information is submitted by a respondent, that information could still be used (1) to compare to home market price data contained in the petition, and (2) to derive constructed value for comparison to US price data in the petition. Because such comparisons would be based on accurate, verified, objective cost data, they would necessarily give more accurate and objective results than relying only on the data in the petition. If there are any absurdities in this case, they would involve the discarding of an entire category of accurate, verified information in favor of information contained in the petition.

97. The same is true with the example provided by the European Communities in paragraph 10 of their Third Party Submission. In my opinion, the EC's claim that it would not be possible to determine whether submitted home market sales are in the "ordinary course of trade" if cost data are not *also* submitted, is not correct. Cost data from other sources -- in particular, the petition -- could be used to determine if the home market sales were at prices above the merchandise's cost of production, and hence in the "ordinary course of trade". Once again, because the home market sales data would be accurate, verified, and objective, they would necessarily give more accurate and objective results than would result from their entire rejection and reliance solely on the petition to obtain the dumping margins, as the USDOC did in this case.

## ANNEX D-3

### THIRD PARTY ORAL STATEMENT OF THE EUROPEAN COMMUNITIES

(24 January 2002)

#### 1. INTRODUCTION

1. On behalf of the European Communities, let me express first our appreciation for the opportunity to submit our views in this dispute. This dispute raises an important systemic question. The question before the Panel is to what extent can an investigating authority reject data submitted when part of that data submitted has been determined to be inadequate. As is customary, the European Communities will limit its comments to the systemic issues raised and will not attempt to apply its interpretation to the particular facts of the proceeding presently before the Panel.

2. The United States have proposed a diametrically opposite interpretation to that proposed by India, and supported by Japan. The United States argues that an investigating authority should be entitled to reject all data submitted where part of the data submitted is inadequate, while India and Japan consider that the investigating authority may only reject the specific information which is regarded as inadequate. The European Communities submits that neither of these positions is correct. That is because the Anti-Dumping Agreement is concerned with establishing a balance between the interests of exporters and the interests of domestic competitors affected by dumped imports. Finding that an investigating authority may exclude all data where only part of the data is inadequate alters that balance in favour of the domestic interests seeking protection. Finding that an investigating authority must take into account all data other than the part which is inadequate alters the balance in favour of exporters.

3. The European Communities submit that it is important to recognise that the data requested of interested parties in an anti-dumping investigation is not atomised, it does not consist of independent sets of data which have no link to one another. Consequently, failure to provide one set of data may affect the validity of other elements of data provided, which may justify rejecting data which otherwise would be perfectly acceptable. The most obvious example of such linked information would be domestic sales data, which cannot be accepted as being in the "ordinary course of trade" in the sense of Article 2.2 unless data on cost or production, selling, general and administrative costs is also provided. Pursuant to the interpretation put forward by India and supported by Japan, an investigating authority would be required to accept data on domestic sales, even if no data has been provided on cost of production etc. Following such an interpretation would thus allow an exporter to totally control an anti-dumping investigation, by submitting only information conducive to arriving at a favourable result for the exporter, while deliberately excluding data which might have a prejudicial effect on the final result. As is clear from the rules on use of information available, and the effects of non-co-operation, the Anti-Dumping Agreement attempts to ensure that anti-dumping duties are calculated on the basis of objectively established facts.

4. As the Panel is aware, the Appellate Body has already interpreted paragraph 3 of Annex II. In *United States – Hot Rolled Steel*, the Appellate Body concluded:

[A]ccording to paragraph 3 of Annex II, investigating authorities are directed to use information if three, and, in some circumstances, four, conditions are satisfied. In our

view, it follows that if these conditions are met, investigating authorities are *not* entitled to reject information submitted, when making a determination<sup>1</sup>.

5. The use of the word “all” in paragraph 3 of Annex II, implies that any information which does meet the conditions set out therein should be taken into account. The Appellate Body’s interpretation clearly states that an investigating authority’s ability to reject data supplied is circumscribed.

6. However, the European Communities have already noted that different sets of data are linked and that failure to provide one part of such a set of linked data might make it impossible to use other data. In such a situation, the final sentence of paragraph 7 of Annex II contemplates that non-co-operation, which leads to “relevant information” being withheld, can result in a determination which is less favourable than had co-operation occurred. Were an exporter able to select the information provided, and an investigating authority obliged to accept only such selected information, this provision would be rendered a nullity, because non-co-operation would possibly result in a result more favourable to the exporter concerned.

7. The European Communities note that Paragraph 3 provides that information must be accepted which can be used without “undue difficulties”. Investigating authorities might find it “unduly difficult” to use data when other related sets of data have not also been provided, making it necessary to reject data which would otherwise be acceptable according to paragraph 3.

## **2. CONCLUSION**

8. The European Communities thus consider that Article 6.8 and paragraph 3 of Annex II, when read together, do not provide authority for a Member to automatically reject all data where some of the data provided by that exporter has been rejected. On the other hand, it might be questionable depending on the circumstances of the case and taking into account the specific character of the relevant information, whether all the conditions of paragraph 3 have been met where an exporter provides some information, but not related information. The European Communities submit that the Panel should take into account this necessary balance when interpreting these provisions of the WTO Anti-Dumping Agreement.

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<sup>1</sup> Appellate Body Report, , *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, para. 81.

## ANNEX D-4

### THIRD PARTY ORAL STATEMENT OF CHILE

(24 January 2002)

1. Chile would like to thank the Panel for this opportunity to express our views in this dispute. We are making use of the rights provided for in article 10 of the Dispute Settlement Understanding, since we have a systemic interest in the correct application of the provisions contained in both Article VI of GATT 1994 and the Anti-Dumping Agreement (hereinafter, AD). All this is meant to avoid the abusive use of anti-dumping measures as protectionist barriers to trade.

2. Chile will not comment on the facts challenged by India nor the details of the investigation carried out by the United States authorities. We will concentrate our comments on three issues: the mandatory character of paragraphs 3 and 5 of Annex II of the AD; the meaning and scope of Article 6.8 and Annex II of the AD; and the fact that Ministers in Doha recognised that article 15 of the AD needs clarification.

#### **Paragraphs 3 and 5 of Annex II are mandatory provisions.**

3. Chile shares India's and Japan's interpretation of paragraph 3 of Annex II in the sense that it obliges the investigating authority to use the information provided by the interested party if such information fulfils the conditions set out in that paragraph. Furthermore, Chile agrees on the binding nature of paragraph 5 of Annex II. Which, in any case, has been well established by other Panels.

4. Chile's understanding is grounded on the Spanish version of the AD. When translated to English paragraph 3 reads: "[All information] shall be taken into account when determinations are made." In Spanish: *deberá tomarse en cuenta*. That gives a mandatory and binding character to the need to take into account the information provided by the interested party when the requirements of that paragraph are fulfilled. The English version says "should", which means "*debería*" in Spanish, a conditional tense.

5. Moreover, the Spanish version of paragraph 5 of Annex II reads: *no será justificación*, meaning "it will not justify". Again, a mandatory and binding obligation for something that in the English version is not. Should not means "*no debería*" in Spanish.

6. The Marrakesh Agreement establishing the WTO from which the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 is an integral part, was done in the English, French and Spanish languages, each text being authentic. According to article 33 of the Vienna Convention, when a Treaty has been authenticated in two or more languages, the text is equally authoritative in each language and it is presumed that the terms of the Treaty have the same meaning in each authentic text. Then, when a comparison of the authentic texts discloses a difference of meaning the meaning which best reconciles the text, having regard to the object and purpose of the treaty, shall be adopted.

7. In the *Mavrommatis* case, the Permanent Court of International Justice stated that, where two versions possessing equal authority exist, one of which appears to have a wider bearing than the other, it is bound to adopt the more limited interpretation which can be made to harmonise with both

versions and which, as far as it goes, is doubtless in accordance with the common intention of the Parties<sup>1</sup>.

8. Despite the United States arguments in its submission, in practice it gives a mandatory character to both paragraphs 3 and 5 of Annex II. Section 782(e) of the Tariff Act of 1930 provides that meeting the conditions there mentioned – which the United States recognises that closely tracks Annex II – the investigating authority shall not decline to consider the information submitted by the interested party.

9. Consequently the Panel can not but confirm that paragraphs 3 and 5 of Annex II of the AD are mandatory and binding as it is clearly drafted in the Spanish version of the Agreement being the most limited and restrictive of the versions. Such conclusion, no doubt, is in accordance with the common intention of the members as reflected in those mandatory provisions such as Article 6.8 of the AD. Further more, in the present case, the US legislation incorporates this mandatory obligations in Section 782(e).

#### **Article 6.8 and Annex II of the Anti-Dumping Agreement.**

10. Without commenting the facts and the arguments of the disputing parties, Chile would like to highlight some elements regarding the use of "facts available", envisaged in article 6.8 of the AD that must be read together with Annex II.

11. "Facts available" is a tool that the AD gives to the investigating authority in exceptional cases and under qualifying circumstances. Article 6.8 represents a delicate balance between the duty of an authority to investigate an alleged dumping situation and the duty of co-operation the interested party must provide. A balance between the need of the authority to have all the relevant information in time – to avoid disruptions and delays – and the obligation of the interested party to provide facts that in some sectors, industries and countries are not easily at hand or not always in the means or formats required by the investigative authority. A balance between the pressure sometimes needed to get the help of the interested party avoiding that it becomes a sanction against actions that may not constitute dumping.

12. Chile considers that the use of "facts available" must be done in an unbiased and objective way and in exceptional cases. As exceptional as anti dumping measures are. Article 6.8 provides some hints on when to use "facts available"

- (a) Regarding necessary information. That is to say information relevant to the investigation and without which the investigating authority might not establish the existence or margins of dumping.
- (b) Whenever such information is not facilitated within a reasonable period, that is to say taking into account the specific situations in each individual case.
- (c) Whenever the interested party significantly impedes the course of the investigation. A delay in the submission of part of the information might not be a serious hindrance. Unless there is proof to the contrary the industry's good faith must be presumed.

13. Therefore, the authority shall not make use of the "facts available", if it can make an objective and impartial decision based on the information provided by the interested party, even though such information might be incomplete, submitted out of date or the investigation might have been hindered.

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<sup>1</sup> Publications of the Permanent Court of International Justice Series A No. 2, 30 August 1924 Page 19.

14. If the authority is forced to use the “facts available”, it should do so in an objective and impartial way, evaluating it and comparing it with the information submitted by the interested party and not accepted by the authority. The final phrase of paragraph 1 of Annex II states that the facts contained in the application for the initiation of the investigation by the domestic industry are not the only source of information. On the contrary, an objective and impartial authority should be grounded on other facts, starting with the information submitted by the interested party and that the authority rejected. Besides, in certain cases, mainly commodities and even steel, prices, production structures and market and competition conditions are internationally known and they do not generally change from one market to another. The authority should consequently take into consideration these prices and conditions.

15. Likewise, the dumping margins alleged by the home industry must be used with extreme caution, since they do not always correspond to reality and are quite often exaggerated in order to motivate the authority to initiate an investigation. Just to give some examples. While the American industry claimed a 41.78 per cent dumping margin on Chilean salmon exports, the final determination varied among the investigated companies between a 0.16 and a 10.69 per cent. More recently, it was claimed that Chilean frozen raspberry exports were being dumped into the American market with margins between 8.87 and 60.26 per cent. The preliminary ruling of the USDOC only found margins between 0 and 5.54 per cent.

16. This is twice as valid whenever there are incentives for the industry to request antidumping investigations. For example, the Continuing Dumping and Subsidy Offset Act of 2000, better known as the Byrd Amendment, contested by Chile and several other WTO members, provides a strong incentive to petitioners to exaggerate the dumping levels. The higher the margin, the greater the duties assessed and distributed among the petitioners.

17. The dumping margins claimed by the home industry are not verified. If the authority rejects information concerning the investigated company on the grounds that it cannot be verified, it would be illogical for it to use home industry’s claimed margins that were never verified.

18. Can the investigating authority totally trust the home industry’s claimed margins? Chile does not believe so.

19. Consequently, Chile believes that the application of the “facts available” must be analysed individually for each specific case. An objective and impartial authority cannot apply the same parameters measures to all situations.

20. Therefore, Chile kindly requests the Panel to keep in mind these considerations when analysing the issues raised in this dispute.

## **ARTICLE 15**

21. Given the different interpretations of article 15 of the AD, Chile would just like to remind the Panel that the Ministers, gathered in Doha, recognised that while article 15 is a mandatory provision some clarification is needed for its operationalization. In that sense, they instructed the Committee on Anti-Dumping to examine the issue and draw up appropriate recommendations on how to operationalize this provision<sup>2</sup>. Consequently, in view of so clear a mandate, Chile believes that the Panel should refrain from ruling on this matter.

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<sup>2</sup> WT/MIN(01)/W/10 Par. 7.2.

## ANNEX D-5

### ORAL STATEMENT OF THE UNITED STATES AT THE SECOND MEETING OF THE PANEL

(26 February 2002)

1. Mr. Chairman, members of the Panel, the United States appreciates this opportunity to comment on the issues that remain outstanding in this dispute. We intend to limit our statement today to several key points. We will be pleased to receive any questions you may have at any time during our statement or during the course of this second meeting.
2. Mr. Chairman, we now have the benefit of two rounds of briefing and responses to thorough and pointed questions. At this stage in this proceeding, the fundamental issue in this dispute has become clear: whether an investigating authority is required to use a small portion of a respondent's submitted information, when the overwhelming portion is either missing or inaccurate and unverifiable, and the remaining portion is inaccurate and its use would present undue difficulties. This proceeding has been useful in identifying why the answer is "no". Even now, more than two years after the fact, India's struggle to present its submitted data in the best possible light, based on information and arguments not submitted to Commerce, has only resulted in India's concession that an ever-shrinking portion of that information may even be theoretically usable. Moreover, even the theoretical use of this limited information would have posed undue difficulties, as significant corrections would have to have been made to the US database.
3. Mr. Chairman, members of the Panel, while we have addressed the standard of review under Article 17.6 of the AD Agreement before, (1<sup>st</sup> US sub., ¶¶61 -¶73) comments by India in its Second Submission compel us to reiterate one point. Commerce, the US investigating authority, made its "facts available" determination in this case based on *all* the facts made available to it. *All* of these facts – as established and evaluated in the underlying investigation – informed Commerce's conclusion that, *inter alia*, 1) the Indian respondent, Steel Authority of India ("SAIL"), failed to provide the information necessary for an anti-dumping analysis; 2) its information was unverifiable; 3) what information it did provide was inaccurate, and certainly could not be used without undue difficulty; and 4) SAIL failed to act to the best of its ability in providing the necessary information that was within its own control.
4. India's strategy in this dispute has been to limit its focus – and insist that the Panel limit its focus – to *only* those facts most favourable to its case. India ignores the information that was actually necessary to conduct an anti-dumping analysis, and focuses only on the Indian respondent's export sales; in short, India ignores the forest for the tree. For example,
  - India focuses exclusively on what it views as the "usable" aspects of the Indian respondent's export prices; but India ignores the explicit linkages between all of the "necessary information" needed to calculate an accurate anti-dumping margin, namely export prices, home market prices, cost of production, and constructed value. India ignores the fact that SAIL's own questionnaire responses reflected these explicit linkages. (In SAIL's export price response, for example, SAIL referred Commerce to its cost of production response for cost information needed to measure differences in physical characteristics between products. *See, e.g.,* Ex. US-28.)



- India places great emphasis on the statement in the sales verification report that Commerce “found no discrepancies” with respect to some of the individual items examined in the US sales database; but India ignores the fact that Commerce did find very significant discrepancies throughout SAIL’s responses, including in the US sales database, and concluded that SAIL failed verification due to the unreliability of its data and its failure to reconcile most of its reported information to its own books and records.
- India – through its successive “affidavits” – has sought to give evidence on how computer programming might have been developed to allow the export prices for a minuscule subset of the Indian respondent’s US sales data to be compared to the normal value alleged in the petition; but India ignores the fact that the underlying purpose of Commerce’s exercise – to calculate an accurate dumping margin for SAIL – could not be achieved at all, and certainly not without undue difficulties, where substantially all of SAIL’s information was missing or unusable.

5. In determining whether Commerce properly established the facts in this case and acted as an unbiased and objective investigating authority, the Panel must consider the *entire* administrative record to be relevant to its examination, not just that portion of the record viewed as “pertinent ” by India. As the Appellate Body stated in *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel, and H-Beams from Poland*, “[t]here is a clear connection between Articles 17.6(i) and 17.5(ii). The facts of the matter referred to in Article 17.6(i) are ‘the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member’ under Article 17.5(ii)”.<sup>1</sup> Thus, all the facts established during the underlying investigation are relevant to the Panel’s assessment in this case.

6. The importance of reviewing the entire record in this case is apparent given that Commerce’s “facts available” determination was based on substantial flaws throughout SAIL’s information. As recognized in Commerce’s *Verification Failure Memorandum*, “there were substantial problems with both sales and cost data so as to undermine the integrity of the whole response”.<sup>2</sup> The entire record of this case demonstrates that SAIL’s reporting failures were pervasive, notwithstanding efforts by Commerce to assist the company through numerous extensions of time and multiple opportunities to correct its submissions. While it is the nature of anti-dumping investigations – involving as they do the commercial behavior of firms – to necessitate the submission of detailed information, here the record is comparatively small, as it relates entirely to SAIL, the single respondent at issue in this dispute. India is incorrect that the Panel’s review of this matter will be “unworkable” if it considers any facts beyond that subset viewed favourably by India. The Panel should ignore India’s “advice” and examine the entire record – all the pertinent facts – to assess whether Commerce’s establishment of those facts was proper and that its evaluation of SAIL’s information was unbiased and objective.

7. When viewed in their entirety, the facts support Commerce’s conclusion that SAIL’s information failed verification and that SAIL’s information could not be used without undue difficulties.

### **SAIL’s Information Is Not Verifiable Because It Failed On-Site Verification**

8. The parties have discussed at length the meaning of the term “verifiable”. Verification is an important tool for an investigating authority to use to assure itself of the accuracy of information, in accordance with Article 6.6 of the AD Agreement. As the United States has already explained, where information is subjected to verification but its accuracy and completeness cannot be demonstrated, the

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<sup>1</sup> WT/DS122/AB/R, para. 117.

<sup>2</sup> *Verification Failure Memorandum*, Ex. US-25 at 4.

information can no longer be said to be “verifiable”.<sup>3</sup> In the case of SAIL, an explicit factual finding was made that its information was inaccurate and incomplete and, therefore, failed verification.<sup>4</sup>

9. Initially, it is important to note that Commerce’s decision even to conduct verification demonstrates Commerce’s extraordinary effort to work with SAIL. It had been apparent that, despite numerous opportunities, SAIL had failed to fill very significant gaps in the information necessary to make an anti-dumping determination. Nevertheless, in response to SAIL’s renewed pledges that it had filled these gaps, Commerce proceeded with verification. In spite of this and previous pledges, SAIL’s databases remained unusable throughout the proceeding. At the on-site sales verification, Commerce discovered, *inter alia*, that SAIL failed to report a significant number of home market sales and failed to report accurate gross unit prices.<sup>5</sup> The total quantity and value of home market sales was unverifiable. During the on-site cost verification, which included verification of the cost information referenced in SAIL’s US database, SAIL was unable to reconcile its reported costs of production to its audited financial statements.<sup>6</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>7</sup> Furthermore, SAIL’s US database contained significant 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>8</sup> In the Final Determination, Commerce again noted that “the US sales database contained errors that, while in isolation were susceptible to correction, however when combined with the other pervasive flaws in SAIL’s data” lead to the conclusion that it could not be relied upon”. This phrase “in isolation” is important but is almost always omitted from India’s references to Commerce’s finding. But the phrase makes clear that Commerce’s determination regarding the usability of the data was not made – nor was it required to be made – by examining select “categories” of information in isolation. This was appropriate: as the EC has explained, “the data requested in an anti-dumping investigation, and which is necessary for a determination, cannot be seen as isolated pieces of information”.<sup>9</sup>

10. Notwithstanding the *Verification Failure Memorandum* – which states explicitly that SAIL’s information failed verification – India asserts that “conclusions concerning the verifiability of information must take place within the particular component of information undergoing the verification process”.<sup>10</sup> But Commerce was obligated to satisfy itself as to the accuracy of the information supplied by SAIL upon which it was to base its determination; it was not obligated to assess the accuracy of SAIL’s information based only on selected facts that favoured SAIL. The anti-dumping calculation represents the sum of an investigating authority’s examination of the necessary information: export prices and normal value, and, where appropriate, cost of production and constructed value. Commerce’s verification outlines and reports and its *Verification Failure Memorandum* reflect the linkages throughout this information. For example:

- In the preliminary determination to use facts available, Commerce explained that SAIL’s failure to provide product-specific costs meant that “it is questionable whether the reported COP, CV, and difmer data is a reliable measure of fair value”. In other words, Commerce found that flaws in cost data implicated the US sales database.<sup>11</sup>

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<sup>3</sup> See, e.g., US Answers to Panel’s 25 January 2002 Questions at para. 92-93.

<sup>4</sup> *Verification Failure Memorandum*, Ex. US-25.

<sup>5</sup> *Sales Verification Report*, Ex. US-4.

<sup>6</sup> *Cost Verification Report*, Exh. US-3.

<sup>7</sup> *Id.*

<sup>8</sup> *Verification Failure Memorandum*, Exh. US-25, at 5 (emphasis added).

<sup>9</sup> 3<sup>rd</sup> Party Submission of the EC at ¶10.

<sup>10</sup> India’s Second Submission at ¶70.

<sup>11</sup> *Preliminary Facts Available Memorandum*, Ex. US-16 at Attach. I.

- SAIL was notified in the cost verification outline that it would be required to demonstrate that the variable and total manufacturing costs (“VCOM” and “TCOM”) reported in the US database were consistent with the amounts reported in its COP and CV information.<sup>12</sup> But SAIL was unable to do so, admitting at verification that the VCOM and TCOM were incorrect.<sup>13</sup>
- Even SAIL’s own data reflected these linkages: its US sales questionnaire response refers the reader to its cost of production response for data relevant to adjustments for physical differences. See *SAIL Questionnaire Response*, Ex. US-28.

India is simply incorrect to state that the record demonstrates “the lack of any meaningful connection between the US sales database and the other information supplied by SAIL”. India Rebuttal Brief at ¶85. SAIL actually relied upon some of these linkages in its questionnaire responses.

11. Notwithstanding India’s effort to suggest that the Panel would have reached different conclusions had the Panel itself conducted the verification of SAIL’s data, the proper question in this dispute is whether Commerce fulfilled its obligations in reaching the conclusions that it reached. Faced with a comprehensive verification failure on the part of the Indian respondent, a failure that is well-documented by the on-site verification reports and *Verification Failure Memorandum*, an unbiased and objective investigating authority could reasonably conclude that the Indian respondent’s information was not verifiable, regardless of the apparent accuracy of individual pieces of information when viewed alone.

#### **SAIL’s Information Cannot Be Used Without Undue Difficulties**

12. At the first meeting, Mr. Chairman, the Panel identified one of the key issues in this dispute: whether SAIL’s information could have been used without “undue difficulties”. We note that the question of undue difficulties need not even arise if it is determined that Commerce was correct in determining that SAIL failed verification. On this basis alone, Commerce would have been justified in disregarding all of SAIL’s reported information under Annex II, Paragraph 3, of the AD Agreement. In any event, as we explained in our 18 February 2002 submission, even based on India’s own criteria, an unbiased and objective investigating authority could readily conclude that SAIL’s information could not be used without undue difficulties. First, in determining the completeness of the information provided by SAIL, an unbiased and objective investigating authority could reasonably conclude that the failure to provide usable home market, export price, cost of production, and constructed value information meant that the information necessary for the calculation of a dumping margin was incomplete. Second, in determining the extent to which some small pieces of information provided by SAIL could be identified and used with other information to calculate a dumping margin, an unbiased and objective investigating authority could reasonably conclude that too much of SAIL’s information was missing to calculate a margin. Third, in assessing the amount of the necessary information provided by SAIL that could be used, an unbiased and objective investigating authority could reasonably conclude that without any usable home market, cost of production, and constructed value information, and with export price information containing significant flaws, Commerce had almost none of the information necessary for conducting an anti-dumping analysis. Fourth, in determining the amount of time and effort required to use SAIL’s information, an unbiased and objective investigating authority could reasonably conclude that it would involve a great deal of time and effort to address the unusable home market, export price, cost of production, and constructed value information and to identify any small pieces of data that might have been usable. Finally, in assessing the accuracy of alternative information that could be used, an unbiased and objective investigating authority could reasonably conclude that the facts available as provided in the petition are no less accurate and reliable than the information submitted by the respondent. Commerce did not

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<sup>12</sup> See *Cost Verification Outline*, Ex. US-32 at 9.

<sup>13</sup> *Verification Failure Memorandum*, Ex. US-25, at 3.

have usable information from SAIL and, therefore, there is no way to know whether the facts available relied upon by Commerce are more or less reliable vis-a-vis SAIL's information. Only by providing the necessary information could SAIL guarantee a result that would accurately reflect SAIL's own selling practices. But it did not do so. For these reasons, SAIL's information could not be used without undue difficulties.

### **The Second "Affidavit": India's New Theories for Using SAIL's US Database**

13. At the first meeting and in our submission, we have explained the ways in which the first "affidavit" submitted by India is flawed in many respects. In addition to offering new facts, the first "affidavit" offers three flawed options: 1) option 1 would have Commerce use a below-cost price as normal value, contrary to the requirement that sales be in the ordinary course of trade; 2) option 2 would have Commerce compare export prices to a normal value based on different products without making an adjustment for those differences, contrary to the requirement in Article 2.4 of the AD Agreement that adjustments be made for physical differences; and 3) option 3 would have Commerce calculate a margin for SAIL using a small subset of SAIL's US database.

14. Together with its answers to Panel questions, India has now submitted a second "affidavit" from its representative in this dispute purporting to describe the ease with which pieces of SAIL's information can be manipulated to calculate a dumping margin. After making undisclosed changes to SAIL's database, counsel to India now concludes that over 30 per cent of SAIL's export sales are identical to the merchandise upon which the petition based constructed value. Therefore, without any additional consideration of the remaining 70 per cent of US sales, India's view is that Commerce need only have taken that subset of the US sales database that would not be impacted by the missing cost information, and then make corrections based on the errors discovered at verification.

15. First, we disagree with India's assertion that 30 per cent of the merchandise sold to the United States is identical to the merchandise upon which the CV in the petition is based. The "affidavit" does not demonstrate how the 30 per cent figure was determined. Based on our examination of SAIL's US sales data, as it was submitted on 1 September 1999, to Commerce, less than one percent of the US sales appears to be identical to the product upon which the normal value in the petition was based. With less than one percent matching to the NV, with adjustments needing to be made before anything else in the US database might be utilized, and recognizing the breadth of the errors found throughout the rest of SAIL's data, the question becomes: was it proper for Commerce to reach the common sense conclusion that – without the necessary information to calculate an accurate margin for SAIL – it was consistent with the AD Agreement for Commerce to decide not to undertake further efforts and undue difficulties and, instead, to make its *Final Determination* based on the facts available in the petition. In our view, an objective and unbiased investigating authority could properly have come to this conclusion.

16. And India's theories are just as flawed as those offered previously. India makes much of the fact that US law makes adjustments for differences in physical characteristics to normal value, which is true. But this ignores the more important point that Article 2.4 *requires* that such an adjustment be made between export prices and normal value and India concedes that SAIL's data (including its US sales database) did not permit Commerce to do so. Commerce made this point in the underlying investigation and has raised this point again in response to India's proposal that Commerce compare SAIL's US prices to the normal value in the petition, even though possibly as many as 99 per cent of those sales would have required a difmer adjustment.

17. The second "affidavit" also repeats errors from the first "affidavit:" proposing that Commerce create an average NV based in part on a price that the petition evidences is below SAIL's cost of production and, hence, not in the ordinary course of trade; in accordance with Art. 2.2.1. of the AD Agreement, Commerce is entirely within its rights to disregard such a price.

18. India's presentation of these new theories continues to highlight the fact that, even though India suggests that these theories should have been obvious to Commerce during the investigation, they were not sufficiently obvious to SAIL for it to have presented them at that time; moreover, even with the benefit of hindsight, the theories have not been so obvious that India has not had to revise and refine them over the course of this proceeding. Finally, India's presentation of its theories underscores its recognition that even less of SAIL's anti-dumping database is arguably usable than India asserted at the outset of this proceeding. All of which begs the question: if an investigating authority is charged with making a timely anti-dumping determination based on a fair comparison of export prices and normal value based on sales in the ordinary course of trade, and is faced with information that is unusable for such a determination, is that authority obligated to make every correction, manipulation, and presumption required to find whether there is any small subset of that information that may be accurate, verified, and usable without undue difficulties. We find no such obligation in the AD Agreement; indeed, where there has been such a failure to cooperate, Annex II, paragraph 7 anticipates a result less favourable to a respondent than if it had provided the necessary information.

### **India's Challenge to the US Statute**

19. The "facts available" provision of the US statute mandates *use* of information under specified conditions; it does not require the *rejection* of information. To illustrate this point, in response to the Panel's request, we offered at least two examples of administrative cases in which Commerce accepted information even though it did not satisfy each of the conditions of section 782(e) of the US statute. India's response has been to dismiss these cases as irrelevant, while at the same time citing one of the cases – *Steel Bar from India* – for the proposition that Commerce could accept a flawed database. No doubt there are more cases that would rebut India's claim but the more salient point is this: the US legislation "as such" can violate WTO obligations *only* if the legislation *mandates* action that is inconsistent with those obligations or precludes action that is consistent with those obligations. (1<sup>st</sup> US sub., ¶116-¶118). The "facts available" provision of the US statute does neither and, therefore, India has shown no violation of WTO obligations here.

### **Conclusion**

20. Our purpose today has been twofold: to focus on the interpretative issues that remain in dispute and also to highlight the fact that in this case – more than many – the facts are very important to the Panel's decision. We believe strongly that the Panel should evaluate India's claim in the context of how Commerce acted throughout the entire underlying proceeding. Viewed in this light, the record reveals an investigating authority making extraordinary efforts to cooperate with a respondent, dedicating what may have been unprecedented efforts to assist the respondent, but nevertheless lacking the information necessary for making its anti-dumping determination. In such circumstances, the authority, in an unbiased and objective manner, may base its determination entirely on facts available. That is exactly what Commerce did in this case.

21. This concludes our presentation today. We would welcome the opportunity to address areas of concern or interest to the Panel in response to questions. Thank you.

## ANNEX D-6

### ORAL STATEMENT OF INDIA AT THE SECOND MEETING OF THE PANEL

(26 February 2002)

Mr. Chairman and Members of the Panel:

1. On behalf of the Government of India, I would like to begin by again thanking the Chairman, the members of the Panel, and the Secretariat for continuing to work in addressing the measures and claims at issue in this dispute. India looks forward to working with you and with the delegation of the United States during the remainder of this proceeding. My delegation today consists of myself and Mr. M.K. Rao of the Permanent Mission of India to the WTO, Mr. Jha and Dr. Dhawan of the Steel Authority of India Ltd., and Scott Andersen, Neil Ellis, and Albert Hayes of the law firm of Powell, Goldstein, Frazer & Murphy.

#### Introduction

2. Mr. Chairman and Members of the Panel, you have a great number of submissions before you, and it may seem at this point that this has become a complicated case. But the essence of this dispute is straightforward and has only one basic theme: whether investigating authorities may discard information that is timely submitted, verifiable, and usable when they determine the margin of dumping. This basic legal issue— which has been largely resolved in the *Japan Hot-Rolled* case— permeates all of India's claims relating to the three groupings of measures at issue in this case:

- the final anti-dumping order;
- the statutory provisions— section 782(e)(3) and (4), and sections 776(a), 782(d), and 782(e)— which India has challenged both *per se* and as applied in the final anti-dumping order; and
- USDOC's long-standing practice of applying total facts available, which India challenges as applied in the final anti-dumping order.

3. There are pertinent facts that support India's basic claims in this dispute. India has addressed these facts extensively in its various submissions and will discuss some of them again here today. They include the following:

- USDOC's own verifiers found this US sales information to be accurate, complete and reliable, with only a very few minor errors, on the basis of a long and comprehensive verification process. USDOC based its conclusion that all of SAIL's information failed verification on problems in the home market and cost of production databases - not on any uncorrectable problems in the US sales database.
- While the United States as a litigant now presents *post hoc* evaluations questioning the usability of this verified US sales information, in the Final Determination USDOC

concluded that SAIL's US sales data were "useable" if corrections and revisions were made to the data. USDOC also concluded in the Final Determination that these errors were "susceptible to correction."

- These conclusions by USDOC were correct. SAIL's US sales data is easily usable in combination with the normal value information in the petition. Any adjustments and corrections to the US sales data necessary to permit its use are simple to make and consistent with the type of adjustments USDOC frequently does make.
- SAIL acted to the best of its ability in assembling and producing the US sales information that USDOC verified. There is no evidence, nor does the United States allege, that SAIL withheld information or acted in bad faith to prevent the production of any other information during the investigation.
- When it was time for USDOC to make a final determination, SAIL's verifiable and usable data US sales data represented one-half of the information USDOC needed to calculate a dumping margin – the other half being the information needed for normal value.
- Yet at that critical time, notwithstanding SAIL's cooperation and efforts in producing its US sales information, USDOC refused to cooperate by examining SAIL's US sales data to determine whether it could be used in combination with the normal value information in the petition. Instead, it used the single price offer of \$251 in the petition as the sole basis for the export price in calculating a dumping margin of 72.49 per cent.

4. Mr. Chairman and Members of the Panel, we will address the key legal and factual issues for each of the measures and claims asserted by India during this dispute and also respond to arguments raised by the United States. As we head into the details, India requests you to keep the basics in mind: that SAIL's US sales data were verifiable, that SAIL's US sales data were usable to calculate a dumping margin, that USDOC was required under the AD Agreement to use SAIL's US database and that USDOC ignored that requirement. In addition, USDOC did not make a "fair comparison" when it discarded SAIL's actual US sales information and used instead a fictitious offer price of \$251 that predictably resulted in a huge dumping margin. That dumping margin has closed off the US market to SAIL's cut-to-length plate for more than two years.

5. Mr. Andersen will now present the argument for the Government of India.

## **I. INDIA'S CLAIMS REGARDING THE FINAL ANTI-DUMPING MEASURE**

### **A. INTERPRETATIVE ISSUES REGARDING ARTICLE 6.8 AND ANNEX II, PARAGRAPH 3**

6. The key legal provisions in this proceeding are Article 6.8 and Annex II, paragraph 3. While the parties have made extensive submissions on the interpretation of these provisions, the central question is quite straightforward: Do Article 6.8 and Annex II require investigating authorities to use a respondent's timely-submitted, verifiable information where *other* information submitted by the respondent is not usable? In reviewing this issue, the Panel should bear in mind that it has already been addressed and resolved in India's favour by the panel and the Appellate Body in the *Japan Hot-Rolled* dispute.

7. The Appellate Body in *Japan Hot-Rolled* described the nature and function of Article 6.8 in the following terms: "Article 6.8 identifies the circumstances in which investigating authorities may overcome a lack of information, in the responses of the interested parties, by using "facts" which are otherwise "available" to the investigating authorities." According to the Appellate Body, "if information is, in fact, supplied 'within a reasonable period', the investigating authorities *cannot use facts available, but must use the information submitted by the interested party*."<sup>1</sup> The Appellate Body then went on to explain the relationship between Article 6.8 and Annex II as follows:

Like Article 6.8, paragraph 1 of Annex II indicates that determinations may *not* be based on facts available when information is supplied within a 'reasonable time' but should, instead, be based on the information submitted. Neither Article 6.8 nor paragraph 1 of Annex II expressly addresses the question of when the investigating authorities are entitled to *reject* information submitted by interested parties, as USDOC did in this case. In our view, paragraph 3 of Annex II of the *Anti-Dumping Agreement* bears on this issue. . . Thus, according to paragraph 3 of Annex II, investigating authorities are directed to use information if three, and in some circumstances, four, conditions are satisfied. In our view it follows that if these conditions are met, investigating authorities are *not* entitled to reject information submitted, when making a determination.<sup>2</sup>

8. This interpretation by the Appellate Body either disposes of or, at a minimum, provides very helpful guidance in addressing many of the issues raised by the United States in this dispute.

9. First, the United States repeatedly ignores Annex II, paragraph 3 in interpreting Article 6.8. However, Article 6.8 describes the situations in which investigating authorities may have recourse to facts available, but does not address the question *when* information submitted by a respondent may be rejected. Instead, the Appellate Body's ruling makes it clear that Annex II, paragraph 3 governs that determination. India notes that the Appellate Body's interpretation is fully consistent with the text of Article 6.8, which stipulates that "the provisions of Annex II *shall* be observed in the application of this paragraph."

10. Second, the language of Annex II, paragraph 3 is *mandatory* -- investigating authorities are "*not entitled to reject information submitted when making a determination*" that meets the four conditions of the paragraph. This unequivocal holding by the Appellate Body disposes of the United States' argument that Annex II, paragraph 3 is discretionary because it contains the term "should." The Appellate Body first cited the text of Annex II, paragraph 3 and then used the compulsory terms "must use" (regarding Article 6.8) and "not entitled" (regarding Annex II, paragraph 3) to interpret this provision. There can be no doubt that the Appellate Body considered Annex II, paragraph 3 as imposing mandatory, not optional, obligations on investigating authorities.

11. Third, the Appellate Body's statement that investigating authorities are "directed to use information" meeting the four conditions of Annex II, paragraph 3, also controls the meaning of the phrase "should be taken into account when making a determination." Through its repeated use of terms such as "must use", "are directed to use information" and "not entitled to reject information submitted when making a determination" in interpreting Article 6.8 and Annex II, paragraph 3, the Appellate Body does not contemplate that information could be simply "considered" but *not* used, as the United States has argued.<sup>3</sup> Rather, information from a respondent that meets the four conditions of Annex II, paragraph 3 must be "used" in a substantive sense when making a "determination," either of dumping, under Article 2, or of injury, under Article 3.

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<sup>1</sup> WT/DS184/AB/R, para. 77 (emphasis added, except "cannot").

<sup>2</sup> WT/DS184/AB/R, paras. 79-81 (emphasis in original).

<sup>3</sup> US Answer to Question 4, paras. 10-11.



12. Fourth, the Appellate Body has ruled that individual pieces of information -- such as the "weight conversion factor" at issue in the *Japan Hot-Rolled* case-- must be separately examined under Annex II, paragraph 3, and, if they meet the conditions of the paragraph, they must be "used" in the determination. This undermines the United States' assertions that investigating authorities have the discretion to decide whether or not to use particular pieces of information that meet the requirements of Annex II, paragraph 3 because *other* information does not meet those requirements.

13. Fifth, the Appellate Body ruling demonstrates that Article 6.8 and Annex II provide a methodology to fill gaps when some necessary information is not properly provided by a foreign respondent. Thus, the Appellate Body described Article 6.8 as identifying "the circumstances in which investigating authorities may *overcome a lack of information*, in the responses of the interested parties, by using 'facts' which are otherwise 'available' to the investigating authorities."<sup>4</sup>

14. Contrary to the United States' assertions, therefore, Article 6.8 does not grant an investigating authority *carte blanche* to use "total" facts available without going through the steps provided in Annex II. The United States takes issue with India's argument that Annex II, paragraph 3 requires that portions, categories, components -- whatever term one prefers -- of information that meet the requirements of the paragraph 3 must be used. But the United States states in paragraph 24 of its Second Written Submission that "applying the guidelines in Annex II, an investigating authority may determine that it is appropriate to use all, some or none of the information provided by the exporter, depending on the facts of the case." Given that the United States accepts that the use of "some" information may be appropriate, its repeated objections to India's use of terms such as "categories" and "portions" to describe that "some" are unavailing. After all, the United States' own practice of using "partial" facts available involves nothing more than using *some* portions of respondents' data and replacing others. Presumably, the United States' authority to do this is also derived from Article 6.8 and Annex II.

15. In its Second Written Submission, the United States attempts to read the phrases "necessary information" and "preliminary and final determinations" as absolute concepts that entitle the investigating authority to bypass the guidelines of Annex II, paragraph 3 and resort to "total" facts available. These arguments cannot be sustained. India notes that Article 6.8 refers to "necessary information." It does not say "*all* necessary information" and it does not say "*any* necessary information." Again, as the United States seems to accept with its partial facts available practice, this provision clearly contemplates situations where some necessary information is available from the respondent and some is not. This conclusion is reinforced by the language of Annex II, paragraphs 3 and 5, both of which also contemplate that there may be some information that is usable and some that is not. But nothing in this language supports the United States' leap in logic to the conclusion that once USDOC determines that some necessary information is missing, it is then free -- at its sole discretion -- to reject information that is not missing and that meets the requirements of Annex II, paragraph 3.

16. Similarly, and again contrary to the United States' arguments, the reference to "preliminary and final determinations" in Article 6.8 does not imply that investigating authorities may reject information that meets the requirements of Annex II, paragraph 3. The word "determination" as used in Article 6.8 and throughout the Anti-dumping Agreement refers to two kinds of findings -- the

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<sup>4</sup> WT/DS184/AB/R, para. 77 (emphasis added). The *Japan Hot-Rolled* panel reached a similar conclusion, stating that:

Thus, Article 6.8 ensures that an investigating authority will be able to complete an investigation and make determinations under the AD Agreement on the basis of facts even in the event that an interested party is unable or unwilling to provide necessary information within a reasonable period.

WT/DS184/R, para. 7.51.

determination of dumping, under Article 2, and the determination of injury, under Article 3. The mere fact that Article 6.8 refers to the use of facts available in making a “determination” of dumping or injury, under Articles 2 and 3 respectively, cannot possibly mean that USDOC is free not to follow the guidelines of Annex II, paragraphs 3-7 in deciding what information to use in making those determinations.<sup>5</sup>

17. Finally, the United States’ reliance on Annex II, paragraph 1 is also misguided. In paragraphs 29-32 of its Second Written Submission, the United States repeats its argument that the statement in the second sentence of Annex II, paragraph 1, that the investigating authorities may be free to use facts available, including facts taken from the application, means that the investigating authority may base its determination entirely on facts available and reject information that meets the requirements of Annex II, paragraph 3. However, just as nothing in the phrases “necessary information” and “determination” limit the applicability of Annex II, paragraph 3, likewise nothing in the language of paragraph 1 permits the investigating authorities to ignore the mandatory guidelines of paragraph 3.

18. In sum, the United States’ position is contrary to the Appellate Body’s interpretation of the relevant provisions of the Agreement in the *Japan – Hot-Rolled* case. The Appellate Body described Articles 6.1, 6.8 and Annex II as “establish[ing] a coherent framework for the treatment, by investigating authorities, of information submitted by interested parties.”<sup>6</sup> In India’s view, this means that an investigating authority is required to treat information submitted by interested parties in the manner called for under that “coherent framework.” As we have seen, in the Appellate Body’s view, that “coherent framework” includes a mandatory requirement that information submitted by a respondent must be used if it meets the requirements of Annex II, paragraph 3. In this case, in contrast, the United States seeks authority to be able to pick and choose what parts of the “coherent framework” it will apply. For the reasons India has given, this position is inconsistent with both the text and purpose of Article 6.8 and Annex II.

#### B. THE UNITED STATES’ *POST HOC* EVALUATION OF THE FACTS

19. Mr. Chairman, we do not believe that India needs to add anything to its already extensive demonstration that the United States as a litigant is now re-evaluating the facts regarding the verifiability and usability of SAIL’s US sales data. This effort by the United States is totally improper under the Panel’s standard of review under AD Agreement Article 17.6(i).<sup>7</sup> The Panel should strongly condemn such *post hoc* rationalizations, and disregard the United States’ new evaluations of facts.<sup>8</sup>

20. In sum, the Panel should find that USDOC properly evaluated the following facts in the anti-dumping investigation: (1) that SAIL’s “US sales database would require some revisions and corrections in order to be useable”, and (2) that the revisions and corrections needed make SAIL’s US database useable were “susceptible to correction.” Any contrary new evaluations as to the “unusability” or alleged impossibility of correcting SAIL’s database such as those proposed by the

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<sup>5</sup> This conclusion is supported by the text of Article 12.2.1(iii), which requires authorities to give public notice of, *inter alia*, “the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2.”

<sup>6</sup> WT/DS184/AB/R, para. 82.

<sup>7</sup> See India Rebuttal Submission, paras. 25-42; India Comments on US Answers, paras. 2-7.

<sup>8</sup> These new evaluations are found, for example, in the United States’ Answers to Panel Questions 7-10, 14-16, and 18. They are also seen in paragraphs 40-41, 47-48 of the United States’ Second Submission -- specifically, the entire paragraph 40; the first, third and fourth sentences of paragraph 41; the indented clause in the fifth sentence of paragraph 47; and the second, third, fifth, and sixth sentences of paragraph 48.

United States as a litigant in this case should be rejected as *post hoc* evaluations not consistent with Article 17.6(i) of the Agreement.

C. INDIA'S CLAIMS UNDER ARTICLE 6.8 AND ANNEX II, PARAGRAPH 3

21. India would now like to address the key factual aspects of its claim under Article 6.8 and Annex II, paragraph 3. Reduced to its essence, this claim is whether SAIL's US sales information met the four conditions of Annex II, paragraph 3. As the Panel knows, there is no dispute about two of the four conditions -- SAIL's US sales information was timely submitted, and it was in the computer format requested by USDOC. Therefore, the only two issues before the Panel are: (1) whether this information was either verified or verifiable, and (2) whether it was usable in combination with the normal value information in the petition to calculate a dumping margin.

22. As a preliminary matter, in assessing USDOC's evaluation of the elements of "verifiable" and "without undue difficulty" in Annex II, paragraph 3, it is important to keep in mind three key obligations imposed on USDOC by the AD Agreement. The first is the requirement to make an "objective evaluation of the facts" under Article 17.6(i). The Appellate Body in *Japan Hot-Rolled* indicated that an "objective examination of the facts" includes the manner in which evidence is "inquired into" and "subsequently evaluated." The Appellate Body suggested that any such inquiry and evaluation "must conform to the dictates of the basic principles of good faith and fundamental fairness" -- *i.e.*, in an unbiased manner, they must be conducted without favoring the interests of any interested party, or group of interested parties in the investigation.<sup>9</sup>

23. A second obligation related to the notion of "fundamental fairness" is the duty of investigating authorities to act "cooperatively" during all phases of the investigation -- including in their decisions regarding the acceptance of information and in calculating a dumping margin. The Appellate Body in *Japan Hot-Rolled* stated that "cooperation" is a two-way process, requiring effort by both the foreign interested party *and* the investigating authority.<sup>10</sup> In the context of the present dispute, SAIL was required to cooperate in collecting and producing a US sales database, and in making all source documents related to that US sales database available for USDOC's examination.

24. For its part, USDOC was required to "cooperate" by undertaking a similar level of effort to examine whether SAIL's US sales database was verifiable independently-- not just in the event that other data supplied by SAIL were also verifiable. And USDOC was required to "cooperate" by making efforts to use SAIL's US sales data to calculate margins by comparing the data to the normal

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<sup>9</sup> The Appellate Body in *Japan Hot-Rolled* evaluated the expression "objective examination" in Article 3.1 of the AD Agreement in the following manner:

The word "examination", relates, in our view, to the way in which the evidence is gathered, inquired into and subsequently *evaluated*; that is, it relates to the conduct of the investigation generally. The word "objective", which qualifies the word "examination", indicates essentially that the "examination" process must conform to the dictates of the basic principles of good faith and fundamental fairness. In short, an "objective examination" requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favoring the interests of any interested party, or group of interested parties in the investigation. The duty of the investigating authorities to conduct an "objective examination" recognizes that the determinations will be influenced by objectivity, or any lack thereof, of the investigative process.

WT/DS184/AB/R, para. 193 (emphasis added).

<sup>10</sup> WT/DS184/AB/R, para. 104 ("Article 6.13 thus underscores that 'cooperation' is, indeed, a two-way process involving joint effort").

value information in the petition. This meant making any corrections that were susceptible to correction, using facts available to fill gaps where information was not available, and employing USDOC's demonstrated procedural flexibility to use information (as demonstrated in its *Stainless Bar* decision). But "cooperation" does *not* mean simply referring to a "long-standing practice" of total facts available as the sole rationale for not conducting a separate examination of the "verifiability" and "usability" of SAIL's US sales data. Such an evaluation reflects no cooperation at all.

25. Third, USDOC is bound by Article 6.8 and Annex II, paragraph 3. As India has argued, these provisions required USDOC to conduct a separate examination of particular information -- be it categories, sets, components or just pieces -- to determine whether it was "verifiable" and "usable." We now examine USDOC's evaluation of the facts as to whether SAIL's US sales database was "verifiable" and "usable without undue difficulties", in light of these three related obligations.

#### 1. SAIL's US sales information was "verifiable"

26. India's position on the legal requirements imposed by the term "verifiable" has been set forth in detail in its Rebuttal Submission and Answers to the Panel's questions.<sup>11</sup> To sum up, "verifiable" in Annex II, paragraph 3 means that information must be capable of being verified. The term "verifiable" does not mean that every item in the database must be actually compared against source document, but rather that the database is in a form which enables it to be compared to the relevant source documents. But the standard for "verifiable" data is not perfection, as the United States now suggests. It is the rare database that survives a one-week verification without any minor errors being found. Rather, if the examination of the source documents reveals no significant systemic problems with reporting, accuracy, completeness, or reliability of the reported information, then the database is capable of being verified and therefore "verifiable." Mr. Hayes will address this point later in this statement.

27. USDOC found that all of SAIL's information "failed verification."<sup>12</sup> The United States argues that this finding of verification failure "rebutts any assertion that information was able to be verified or proved to be true."<sup>13</sup> This argument has no merit. Its logic would require the Panel to simply accept any conclusory finding by USDOC on verification without determining under AD Article 17.6(i) "whether [the authorities'] evaluation of those facts was unbiased and objective." The Panel must examine the pertinent facts of the record to determine if an unbiased and objective authority could have concluded that SAIL's US sales data was not verifiable. The starting point is the Final Determination, where, in evaluating whether *all* of SAIL's information produced in the investigation "can be verified" under section 782(e)(2), USDOC stated that "we were not able to verify SAIL's questionnaire response due to the fact that essential components of the responses (*i.e., the home market and cost databases*) contained significant errors."<sup>14</sup> The Memorandum of Verification Failure contains a separate "verifiability" finding for SAIL's US sales, which concludes that the isolated errors in that database were "susceptible to correction . . . ."<sup>15</sup>

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<sup>11</sup> India Rebuttal Submission, paras. 66-73.

<sup>12</sup> Verification Failure Memorandum, Ex.IND-16.

<sup>13</sup> United States Second Written Submission, para. 38.

<sup>14</sup> Ex. IND-17 at 73127 (emphasis added).

<sup>15</sup> The full text is as follows:

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

28. The only real evaluation of the facts of SAIL's US sales data is set forth in the Sales Verification Report, which describes the evaluation of SAIL's US database in comparison with the company's source documents. I do not intend to review in detail all of the different ways in which the computerized data in SAIL's US sales database were found to be, with a few minor exceptions, accurate and complete. USDOC's evaluation is set out in pages 8-15, and its statements speak for themselves.

29. Nevertheless, the United States now claims that USDOC's repeated "no discrepancy" findings in the verification report are not significant because the verification was only a "spot check."<sup>16</sup> This new conclusion (which is not found in any contemporaneous statements by USDOC) is belied by the facts of this case. *Every* verification is a "spot check" to some extent. No one pretends in this case that USDOC looked at every single source document concerning SAIL's US sales database that SAIL could have put before the USDOC investigators. But USDOC's verification of SAIL's US sales data took over one week and was very thorough.<sup>17</sup> The Panel should keep the following facts in mind when assessing the United States' new argument:

30. First, SAIL entered into only nine contracts to ship steel to the United States during the entire period of investigation. USDOC officials examined all nine contracts during the verification.<sup>18</sup> One of these contracts was taken by USDOC as a verification exhibit,<sup>19</sup> and is set forth in India Exhibit 40. Like the other eight contracts, this contract reflects a base price covered by the contract.<sup>20</sup> In the case of Exhibit 40, the base price is \$345 per ton, with additions of \$5 to \$30 per ton for "extras" in accordance with industry practice. In other words, USDOC verifiers were able to determine simply from these nine contracts the most important aspect of the US sales database— the lowest price for all of SAIL's plate shipped to the United States. None of those prices was even remotely close to the \$251 price in the petition.

31. Second, unlike many verifications in which only a limited spot-check audit takes place, USDOC stated here that "we were able to test the accuracy of the reporting for a *large* number of individual sales transactions."<sup>21</sup> Even the United States admits that "SAIL made relatively few export sales."<sup>22</sup> Thus, during the course of the one-week verification process, computer data entries for a "large number of individual sales transactions" were *verified* against actual source documents and found to be accurate.

32. Third, the source documents for SAIL's US sales database were maintained in only three company locations, all of which were visited by USDOC's sales verification team – Calcutta, New Delhi, and Vizag.<sup>23</sup> USDOC's verifiers thoroughly reviewed many of the source documents related to the US sales data and had access to all the relevant source documents.

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Ex. IND-16 at 5 (emphasis added).

<sup>16</sup> United States Second Submission, para. 39.

<sup>17</sup> The USDOC sales verifiers were in India for over two weeks. At least the first half of that period was spent on the verification process for SAIL's US sales data. The remaining portion was spent reviewing SAIL's home market sales.

<sup>18</sup> Sales Verification Report, at 13 (Ex. IND-13) ("During the POI, SAIL had nine contracts that covered all sales made to the US").

<sup>19</sup> It was included as pp. 46-67 of Verification Exhibit S-7.

<sup>20</sup> Ex. IND-40 at 19.

<sup>21</sup> Ex. IND-13 at 14.

<sup>22</sup> United States First Submission, para. 163. By way of comparison, SAIL had over 100,000 sales of cut-to-length plate in its home market during the period of investigation. See Sales Verification Report at 34 (Ex. IND-13).

<sup>23</sup> Ind. Ex.-13 at 8. The New Delhi office maintained all the export negotiation documents for the 9 contracts and the Calcutta office maintained the documents for the execution of the 9 contracts. The Vizag

33. As the Panel knows from reviewing pages 8-15 in the Sales Verification Report, USDOC verifiers examined a wide range of source documents, all of which repeatedly confirmed the accuracy of SAIL's US sales database. SAIL's US sales database was found to have very few inaccuracies, and none that were not susceptible to correction. Contrary to the US arguments, the repeated findings of "no discrepancies" between SAIL's reported computer data and the source documents establish that the information reviewed was verifiable. These findings certainly do not support USDOC's unsupported conclusion in the Verification Failure Memorandum that SAIL's US sales data -- along with all the other data supplied by SAIL -- failed verification. India refers the Panel to India's earlier arguments describing this successful verification in detail.<sup>24</sup>

34. The Sales Verification Report also demonstrates that there was little, if any, connection between the source documents for SAIL's cost of production and home market sales databases and the source documents used to verify SAIL's US sales database.<sup>25</sup> The following facts show that the problems identified in home market database were unique to that database, and did not affect the verifiability of SAIL's database: (1) the number of home market sales -- well over 100,000 transactions<sup>26</sup> -- was enormous by comparison to the US sales database (1284 transactions under 9 contracts); (2) home market sales were produced at three plants, and were sold from those locations as well as over 40 sales branch offices, while US sales were through a single, centralized system and produced at a single plant; (3) some of the stockyards from which home market deliveries were made had no computerized data entry capabilities, requiring manual recordkeeping and data transfers to SAIL's offices;<sup>27</sup> (4) some shipments from the plants were diverted to stockyards and then sold to home market customers, resulting in double-counting of the transactions;<sup>28</sup> (5) some home market stockyard sales added premiums for high-quality merchandise, which were not reported to USDOC.<sup>29</sup>

35. Even in its verification failure memorandum, USDOC concluded that the "several errors" in SAIL's US sales database were "susceptible to correction." The phrase "susceptible to correction" means that USDOC *knew* that there was information in the record from which those errors could be corrected. This conclusion is demonstrated by examining the facts with respect to the only error in the US sales database that USDOC deemed to be "significant" - the width coding error. When that error was discovered at verification, USDOC noted that SAIL provided it with a list of all the affected observations in the sales database, that it "checked multiple instances of the coding error," and that the error "appears to be limited exclusively to products that had a width of 96 inches and to the US database."<sup>30</sup> And indeed, the "correct" information was provided to USDOC by SAIL and attached to the verification report as exhibit S-8 (now part of India Exhibit 13). Thus, USDOC had in the record the "correct," accurate and reliable information concerning the width characteristics of SAIL's US sales during the verification. USDOC quite properly concluded that this error was "susceptible to correction" because the information needed to correct it was already in the record.<sup>31</sup>

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branch office handled the shipping documents for the 9 contracts, and copies of those documents were returned to Calcutta.

<sup>24</sup> India has addressed this Sales Verification Report in detail in its Rebuttal Submission, paras. 74-81, and its First Submission, paras. 25-33, 95-111.

<sup>25</sup> India Answer to Panel Question 28, paras. 48-53; Rebuttal Submission para. 85.

<sup>26</sup> See Sales Verification Report at 34 (Ex. IND-13) (showing home market sales observations well over 100,000).

<sup>27</sup> Sales Verification Report at 21 (Ex. IND-13).

<sup>28</sup> Verification Report at 17-18. By contrast, SAIL's US sales had no such problems.

<sup>29</sup> Verification Report at 23-24. By contrast, SAIL's US sales had no such pricing premiums.

<sup>30</sup> Sales Verification Report at 12 (Ex. IND-13).

<sup>31</sup> The other, non-significant errors were either easily correctable or irrelevant. See India's Comments on US Answers at paras. 10-18.

36. USDOC's own contemporaneous conclusion that these errors in SAIL's US sales database were "susceptible to correction" also demonstrates that the real standard for verifications is not perfection. The United States now argues that any "discrepancies" found during the verification compel a conclusion of non-verifiability.<sup>32</sup> This is incorrect. Respondents in a US antidumping investigation submit very large amounts of data in response to USDOC's questionnaires, and often under very tight time deadlines. In this situation, errors are inevitable. Indeed, as Mr. Hayes will explain shortly, given the volume and complexity of the information that must be submitted, it would be almost unheard of for USDOC *not* to uncover errors in a respondent's database.

37. No respondent's data is perfect, and that is not what a verification is intended to ascertain. The fact that errors were discovered in SAIL's US sales database does not mean that it did not pass verification or was not "verifiable." That determination must be made on the basis of the significance and correctability of the errors. In this case, as India has described in detail, the errors found by USDOC in the US sales database were small, easily corrected, and did not address core issues, such as the completeness of the database. These were precisely the sort of errors that USDOC routinely discovers at verifications and routinely corrects, either by requesting the respondent to submit a revised computer database or by itself revising the computer program as necessary. Therefore, the United States cannot now assert that these small errors were the cause of its conclusion that SAIL failed verification completely.

38. In conclusion, USDOC's "verification failure" finding was inconsistent with Article 6.8 and Annex II, paragraph 3 because the pertinent facts for *SAIL's actual US sales data*, as opposed to facts relating to home market and cost of production databases, pointed to only one conclusion -- that SAIL's US sales database was verifiable. Accordingly, this Panel should find that no unbiased and objective investigating official could have found that SAIL's US sales data was not verifiable.

## **2. Statement of Mr. Hayes Concerning USDOC Verification Practice**

39. In the nearly fourteen years that I was an analyst for the Department, I conducted in excess of 35 verifications, both abroad and in the United States. Since leaving the Department I have been involved in seven additional verifications. The data that I have dealt with in these forty-plus verifications has run the gamut from very complex, voluminous data to fairly simple, short datasets. In no instance in any of these forty-plus verifications did I find no discrepancies whatsoever between the source data and the database submissions. The nature of these discrepancies ranged from simple errors in the calculations of factors used to determine adjustment amounts, to missing sales due to an inability to identify and isolate sales of subject merchandise. While my verifications as an analyst revealed some discrepancies and errors, only in a few cases were the errors extensive enough to result in the failure of verification.

40. As an analyst, I was aware of the extent of the detailed information that the Department required of respondents. It was generally understood that it was impossible to examine all of the information from any given respondent during a verification, except in the most simple cases such as one instance where there were only two sales to the United States. I saw it as my responsibility to examine the completeness of the information, the accuracy of the information, and the reliability of the information. I generally expected to find errors in submissions during verification. In fact, I

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<sup>32</sup> US Second Written Submission, para. 39. In addition, the United States notes that "verification is the equivalent of an audit in which information is 'spot-checked' for reliability. At verification, Commerce determined that SAIL's US sales database contained discrepancies, a fact that India itself has recognized." It then leaps to the conclusion, "In sum, SAIL's information did not satisfy the first condition of Annex II, paragraph 3, that it be verifiable." United States Second Written Submission, para. 39. This conclusion is unfounded. While it is true that errors were found in SAIL's US database, those errors did not mean that the database did not pass verification or was not "verifiable".

found it suspicious if the response I was verifying was flawless on first examination of the data. On those occasions, I would dig deeper until I found errors, which I inevitably did.

41. Once I found errors in a submission, it was essential to assess whether they worked to the respondent's benefit or detriment, how complicated they were, how extensive they were, and how correctable they were. This was an essential part of the verification process. This assessment was essential to ensure that the dumping margin calculation would use accurate, reliable data. When I found errors, I decided whether to ask a respondent to provide me with the means to correct the errors, or whether I could easily make the correction myself. Ultimately I had to determine whether errors could be easily isolated and corrected, or whether the errors were so extensive and complicated that they essentially required a new response.

42. To determine the extent and complexity of errors, I ascertained whether I could determine exactly which transactions were affected by a particular error, whether the error could be corrected programmatically (for instance, an adjustment based on a factor) or with an electronic update (or file) that could be easily examined during and after verification, and whether the change was identical for all affected transactions or more complex.

**3. SAIL's US sales information could be used without undue difficulties to calculate a dumping margin with the normal value information in the petition**

43. We turn now to another key issue before the Panel: whether SAIL's US sales information could have been used "without undue difficulties" to calculate a dumping margin in combination with the normal value information in the petition. As India has provided extensive argumentation on this point,<sup>33</sup> I will only summarize key points.

44. First, India has proposed several factors that would shed some light on the obligations imposed by the "undue difficulties" condition in Annex II, paragraph 3.<sup>34</sup> There may well be other factors to consider, but India hopes that it has provided the Panel with food for thought. Regardless of which criteria, if any, the Panel ultimately adopts, there is no doubt on the facts of this case that SAIL's US sales data were usable "without undue difficulties."

45. Second, the question facing the Panel is whether SAIL's US sales information could have been used together with the information in the petition on normal value to calculate a dumping margin without undue difficulties. The United States has acknowledged that it is "not necessarily unsound" in all cases for the calculation of a dumping margin to be based on a comparison of normal value calculated on the basis of facts available and export price calculated on the basis of verified information.<sup>35</sup> During the investigation, SAIL urged USDOC to use its US sales database with the normal value information in the petition.<sup>36</sup> Similarly, India has consistently advocated that USDOC could and should have made the same comparison.

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<sup>33</sup> See India's First Submission, paras. 104-111; India's Rebuttal Submission, paras. 11-64; India's Comments on the US Answers, paras. 2-18; and Mr. Hayes' two affidavits.

<sup>34</sup> See India's First Submission, paras. 71-73; India's Rebuttal Submission, paras. 14-22. The United States criticizes India's provision of additional criteria. India offered the additional criteria in its Rebuttal Submission in response to the Panel's questions at the First Meeting of the Panel with the parties regarding undue difficulty and because this is a key aspect of this case. While the United States has criticized the application of these criteria to particular pieces of information (such as SAIL's US sales data), it has not proposed alternative criteria for such an evaluation.

<sup>35</sup> US Answers to Panel's Question 7.

<sup>36</sup> Ex. IND-14 at 14.



46. Third, the standard of review under Agreement Article 17.6(i) requires the Panel to focus on USDOC's December 1999 evaluation of the usability of SAIL's US database. In the Final Determination, USDOC found that "SAIL has not provided a useable home market sales database, cost of production database, or constructed value database," but it did not make the same "not usable" finding regarding SAIL's US sales database. Instead, it held that "the US sales database would require some revisions and corrections in order to be useable."<sup>37</sup>

47. What, then, are the "revisions and corrections" to the "US sales database" referred to in USDOC's Final Determination? In this regard, the only other reference to the expression "US sales database" in the Final Determination states that "the US sales database contained certain errors, as revealed at verification. *See Sales Report; see also Verification Memo.*"<sup>38</sup> Thus, the factual support for the conclusion that the "US sales database" contained "certain errors" is to be found in these two reports.

48. The Verification Failure Memorandum identifies only "several errors" in the "US sales database" as "detailed in the Sales Verification Report." The Sales Verification Report, in turn, identifies four errors: the width coding error, inland freight, duty drawback, and the missing CONNUMs for certain products. In light of the United States' new arguments, it is significant that neither the Sales Verification Report nor the Verification Failure Memorandum mentions difmer (VCOM or TCOM) as an "error" to the US sales database. Instead, the verification failure report and the Final Determination mention it under "cost."<sup>39</sup> As India has argued, this is not surprising, because VCOM and TCOM are adjustments to normal value -- not export price.<sup>40</sup> Therefore, contrary to the new arguments of the United States, the "revisions and corrections" to the US sales database identified in the Final Determination do not include any alleged "errors" for VCOM or TCOM.<sup>41</sup>

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<sup>37</sup> Final Determination, Ex. IND-17, at 73127.

<sup>38</sup> *Id.* at 73130.

<sup>39</sup> Ex. IND-16 at 3; Ex. IND-17 at 73130 ("and SAIL failed to provide constructed value data on the costs of products produced and sold to the United States").

<sup>40</sup> India Rebuttal Submission paras. 44-49.

<sup>41</sup> The United States is correct that the VCOMU and TCOMU used for the difmer adjustment were requested as part of the US sales questionnaire as set forth in India Exhibit 4 at C-49 to C-50. This is USDOC's practice. But what the United States does not point out is the first statement in the "narrative" portion of the USDOC's questionnaire for fields 53 and 54: "If you are submitting the full cost of production in response to section D of this questionnaire, no additional narrative description [in the US sales response] is required." Accordingly, SAIL's response was simply, "Please see SAIL's response to Section D of the Department's Questionnaire." Section D is SAIL's response to the Cost of Production section of the Questionnaire. Throughout the rest of the investigation, both USDOC and SAIL treated the VCOMU and TCOMU as cost of production information. This is demonstrated by the very first two paragraphs of the cost verification report (Summary of Findings), which describe the TCOM and VCOM data provided by SAIL:

Company officials stated that the total cost of manufacture (TCOM), and the variable COM (VCOM) on the COP tape submitted 17 August 1999, are incorrect. There is no way to establish a meaningful correlation between the TCOM and VCOM on the tape and the underlying cost data and source documents. On the first day of verification, SAIL presented a completely revised COP tape, as part of the correction presented in exhibit C-3. It was not clear the extent to which this tape should be considered "new information". Accordingly, we did not accept it. An excerpt of this revised tape is contained on page 7 of exhibit C-3.

Although the COP tape was incorrect and a new revised COP tape was not accepted, we proceeded with verification because the certain cost information underlying the reported per-unit COP was still verifiable--that is the actual average cost for plates and normalized plates at each plant (attachment 5 and 6 from the 17 August 1999 submission) and the data underlying the indices developed by SAIL for calculating product-specific cost (Ferroalloy, Thickness, and Yield adjustments identified in attachment 7-9 from the 17 August 1999 submission).

This discussion demonstrates clearly that USDOC and SAIL treated TCOM and VCOM as cost data, not as US sales data. Not surprisingly, nothing in the Sales Verification Outline (India Exhibit 12) or the Sales Verification Report refers to "VCOMU" or "TCOMU." Moreover, in the Verification Failure Memo and the

49. Having identified the "revisions and corrections" to the "US sales database", the Panel must next consider how difficult it would be to make the necessary revisions and corrections for these four errors. USDOC made an evaluation of this issue in both the Final Determination and the Verification Failure Report. The Final Determination stated that "the US sales database contained errors that . . . in isolation were susceptible to correction . . . ." <sup>42</sup> The Verification Failure Memorandum likewise stated that the "several errors" identified in the Sales Verification Report "are susceptible to correction . . . ." <sup>43</sup>

50. India agrees with USDOC's contemporaneous evaluation that the four errors identified in the Sales Verification Report were "susceptible to correction" and with the additional statement that the "US sales database would require revisions and corrections in order to be usable." These statements resolve any question of whether the US sales database could have been used without undue difficulty. This is particularly true in light of the fact that SAIL argued repeatedly before USDOC that its US sales database was usable with the normal value information in the petition. <sup>44</sup> In the context of these arguments, USDOC's use of the term "usable" could only mean "usable to calculate a dumping margin." There is no other relevant use of the term "usable."

51. As the Panel knows, India has also presented a great deal of evidence to show (1) that the four errors identified in the "US sales database" were easily "susceptible to correction", and (2) exactly how SAIL's US sales database could have been used with the normal value data in the petition to calculate a dumping margin.

52. India has established without any doubt that USDOC was correct when it concluded that these four errors were "susceptible to correction." This evidence can be summarized as follows:

- *Width Coding Error:* SAIL provided USDOC at verification with a list of all sales affected by this error, sorted by invoice number. <sup>45</sup> The information could have been easily submitted by SAIL to USDOC in a revised database, or scanned electronically in half an hour for use in the US sales database, or keypunched manually in roughly four hours by USDOC personnel. <sup>46</sup> Once the data is entered into the database, the corrections could be made with minimal effort using the nine lines of programming as set out in Mr. Hayes' First Affidavit.
- *Freight Expense:* SAIL over-reported its plant-to-port foreign inland freight. <sup>47</sup> This error was adverse to SAIL, because it lowered the US price and would have resulted in a higher dumping margin. In the absence of any information necessary to correct this error, USDOC could have simply done nothing, and used as facts available SAIL's reported freight amounts. <sup>48</sup> This is a common USDOC practice.

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Final Determination, USDOC treated the US sales data as a separate component from the cost of production component when it found that SAIL's US sales database could be used if corrections and revisions were made.

The fact is that VCOMU and TCOMU fields are set out in the US sales database for convenience purposes. USDOC requests that respondents report model-specific variable costs for each transaction in the home market sales database, and model-specific variable and total costs for each transaction in the US sales database, so that those values are immediately available, without reference to the cost databases, in the event that a non-identical match occurs requiring a difmer adjustment.

<sup>42</sup> Ex. IND-17 at 73127.

<sup>43</sup> Ex. IND-16 at 5.

<sup>44</sup> Ex. IND-14 at 14.

<sup>45</sup> Ex. IND-13 (excerpts from Verification Exhibit S-8).

<sup>46</sup> India Comments on US Answers, paras 13-14.

<sup>47</sup> Ex. IND-13 at 30 (last sentence).

<sup>48</sup> Id.

- *Duty Drawback*: SAIL calculated the duty drawback factor incorrectly.<sup>49</sup> Duty drawback exists to assist foreign respondents by increasing net price and lowering dumping margins. If USDOC did not agree with SAIL's calculations, it could have simply disregarded the data and denied the upward adjustment in price. Alternatively, the error could be corrected with one line of programming that would take a matter of minutes to perform.<sup>50</sup>
- *Product Control Numbers*: SAIL did not report certain product control numbers (CONNUMs) in the cost of production database.<sup>51</sup> Consequently, USDOC asserted that it was unable to completely examine the values in the field PLSPECU (a unique code devised by USDOC for steel specification and/or grade). However, the data in that field are duplicative of information already reported by SAIL in two other fields in the US sales database.<sup>52</sup> Moreover, this information was not needed to make any comparison between the US sales database and the normal value in the petition, because the normal value product characteristics were not classified using PLSPECU.<sup>53</sup>

53. In sum, these four errors were easily correctable, could have been ignored by USDOC to the detriment of SAIL, and/or otherwise did not affect the usability of the US sales database to calculate a dumping margin in combination with the normal value information in the petition.

54. India has also demonstrated that SAIL's US sales information could be used without undue difficulties to calculate a dumping margin in combination with the normal value information in the petition. It is useful to recall USDOC's evaluation that the "US sales database" was "useable" if certain "revisions and corrections" were made. Given the fact that it was presented with three different options by SAIL in November 1999,<sup>54</sup> USDOC obviously made this statement after considering SAIL's three options. Accordingly, the Panel may presume that USDOC had some basis for this conclusion about the usability of the US sales database.

55. The evidence shows that there are a number of different methodologies that USDOC could have employed to calculate a dumping margin using the information in the petition on normal value, and SAIL's US sales data as the export price. USDOC was presented with three methodologies by SAIL in November 1999.<sup>55</sup> Mr. Hayes has presented other methodologies in his First and Second Affidavits. Each of these methods is easy to implement, and employing them would render the US sales database usable "without undue difficulties." Mr. Hayes estimates that none of them would require more than a few hours for an experienced USDOC analyst to draft and input the necessary computer programming language, to run the margins, and to evaluate the results.

56. The "usability" of some of the methods was demonstrated by USDOC itself when it determined the dumping margin in this investigation. Some of the methods closely resemble that used by the US petitioners in the petition and adopted by USDOC – i.e., comparing US price information with CV data in the petition. The only difference is that the methods proposed by SAIL and India use SAIL's actual submitted, verified US sales data, instead of the price offer in the petition, which we all know was grossly inaccurate.

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<sup>49</sup> Ex. IND-13 at 31.

<sup>50</sup> India Comments on US Answers, paras 17-18.

<sup>51</sup> Ex. IND-13 at 12.

<sup>52</sup> India Rebuttal Submission, paras 77-79.

<sup>53</sup> *Id.*

<sup>54</sup> Ex. IND-14.

<sup>55</sup> Ex. IND-14 at 14.

**4. Mr. Hayes statement concerning the methodology used to calculate the 30 per cent of SAIL's database that is identical to the product used in the petition**

57. I calculated the 30 per cent of merchandise in SAIL's US sales database as identical to the specific cut-to-length plate model used in the petition for constructed model. I first corrected the September 1, 1999 database, shown in India Exhibit 8, for the width error discovered at verification. To do this, I scanned the list of 942 observations listed in India Exhibit 13 that the Department took at verification. This took me about 1/2 hour to accomplish. I then changed the width value "D" to a value of "C" for all 942 observations.

58. The specific "product" (defined as a combination of "grade"/"thickness"/"width") in the petition was listed in the "product" block of Figure 4 of the confidential version of the petition. The "product" represented a specific product with a particular chemical makeup (otherwise known as a "grade" of steel in commercial and technical jargon). In addition to "product/grade", there were three other physical characteristics listed for this product -- gauge (thickness), width, and length.<sup>56</sup>

59. There was one other step I needed to take to calculate the 30 per cent figure. I had to determine the "banding" that the Department used in SAIL's investigation. By this, I mean the Department's method for combining particular thicknesses (gauges) and widths of cut-to-length plate in the questionnaire. The Department does this in order to be able to identify "identical" products for the purposes of making a fair comparison (*i.e.*, matching US merchandise to home market merchandise). What I found for "thickness" and "width" is set out in page C-10 of the Questionnaire (India Exhibit 3). This document lists Field Number 3.5 (thickness - PLTHICKU) and 3.6 (width - PLWIDTHU). The "banding" can be readily seen in the values assigned to values "A-F" for both fields. For example, all plate of the thickness 1.6 to 3.3 inches are treated as "identical" under value "E"; all plate with a banded width of between 72.1 and 96 inches are treated as identical under value C. All of SAIL's US sales database was created using these different "bands." Therefore, because the Department only requested information on SAIL's US sales in these "bands," SAIL's database did not include specific widths or thicknesses, but rather only "bands."

60. My next step was to apply the Department's "banding" requirements for width and thickness to the product in the petition. This meant using the exact same banding set forth in page C10 of the Questionnaire for the product in the petition.

61. The final step was to isolate that same product (using the same "banding" for width and thickness) to all identical products in SAIL's US sales database. This meant sorting all of SAIL's data by grade, thickness and width. After sorting, I then isolated those transactions whose grade, thickness, and width were identical to the characteristics of the petition product. To calculate the percentage of SAIL's US sales database that were of this particular grade/thickness/width, I summed the quantities of these transactions, and then divided that by the total quantity of the cut-to-length plate in the database. The identical merchandise constituted 30.4 per cent of SAIL's database by volume.

**5. The difmer issue does not affect the usability of SAIL's US sales data**

62. India has addressed the new US argument on difmer in detail in its recent submissions.<sup>57</sup> Even assuming *arguendo* that the Panel allows the United States to assert the new "difmer" argument,

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<sup>56</sup> The Department did not request any information on "length" in the investigation therefore none of SAIL's US sales data included "length" and the Department never required SAIL to provide this information.

<sup>57</sup> In addition to the point that this is a *post hoc* rationalization, which India has already thoroughly discussed, the lack of data from which a "difmer" adjustment could be made does not affect the usability of the

there are multiple methods by which SAIL's US sales data could be used in combination with the petition's NV data to calculate margins, where the difmer issue would not preclude a fair comparison under Article 2.4 of the AD Agreement.

- *Use of the 30 per cent of SAIL's US sales database with no difmer adjustment:* Using the very same methodology as in the petition, the fictitious \$251 price offer could be replaced with all of SAIL's US sales transactions involving the same model as that for which the petition calculated CV. The prices in these transactions could then be compared to the petition's CV. The lack of difmer data is irrelevant to this calculation because it involves only matches of identical merchandise. The United States cannot question this methodology because it is the same as that used in the petition, and by USDOC itself in the Final Determination. In other words, the petition used *one* cut-to-length plate model to calculate a margin, which was then applied to all of SAIL's exports of plate to the United States.
- *Use of 72 per cent of SAIL's US sales data with no difmer adjustment:* USDOC is familiar also with a methodology that would allow the use of 72 per cent of SAIL's data without any difmer adjustment. This is the methodology that USDOC used in the *Stainless Steel Bar from India* case to address the problem arising from the lack of "useable VCOMs." In that case, USDOC "banded [one respondent's] sales of different stainless steel bar sizes in order to obtain more identical matches."<sup>58</sup> Specifically, USDOC "banded" the respondent's sales into two categories – bars that are 20 mm or greater in width, and those that are less than 20 mm in width.<sup>59</sup>

A similar expansion of the "identical" product could be accomplished in this case. The *Stainless Steel Bar* methodology would permit the dumping comparison to focus on two of the most important factors involved in the cost of production of cut-to-length plate, grade and thickness. If "identical products" are defined as those within the same commercial grade, and falling within a range of plus or minus one-half inch of the thickness of the model to which the petition calculated CV, 72 per cent of SAIL's sales were of "identical products." Thus, no difmer adjustment would be required for this 72 per cent of SAIL's US sales. As in *Stainless Steel Bar*, this is a reasonable methodology because any cost differences in the production of identical-grade commercial products within a range of one-half inch in thickness are not likely to be significant.

- *Use of 100 per cent of SAIL's US sales data with no difmer adjustment:* All of SAIL's US sales database could be used without any difmer adjustment using USDOC's methodology from *Static Random Access Memory Semiconductors from Taiwan*. In that case, USDOC calculated margins for all of the US transactions that either required no difmer adjustment (because they involved the sale of identical models) or for which sufficient data had been submitted to calculate a difmer adjustment. For the remaining transactions (i.e., those for which difmer data was necessary but

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US sales database, because under the US anti-dumping law, the "difmer" adjustment is applied only to NV. Although as a matter of convenience VCOMU and TCOMU are reported with the US sales database, those figures are used only when a particular US sale is matched to a non-identical product in the NV database – and then they are used to calculate an adjustment to NV. India Rebuttal Submission, paras. 44-49.

<sup>58</sup> USDOC, Issues and Decision Memorandum, in *Stainless Steel Bar from India* (3 Aug. 2000) at 11, Ex. IND-35.

<sup>59</sup> USDOC, Calculation Notes for Final Results for Viraj Impoexpo, Ltd., *Stainless Steel Bar from India* (3 Aug. 2000), Ex. IND-35.

lacking), USDOC chose the highest “non-aberrant” margin from the transactions for which margins had been calculated.<sup>60</sup> The same method could be used in this case. USDOC could apply the highest non-aberrant margin from either 30 per cent or 72 per cent of SAIL's products to the remaining sales observations.

63. In conclusion, Annex II, paragraph 3 required USDOC, when it considered whether to use SAIL's US sales data, to make comprehensive efforts to use SAIL's information. USDOC had to “cooperate” with SAIL in trying to use verified and timely produced US sales information in combination with the normal value information in the petition.<sup>61</sup> USDOC had to exercise good faith in an unbiased manner without favoring the interests of any interested party and not impose irrational and illogical burdens on the use of SAIL's US sales data that it did not impose on the use of the data in the petition.<sup>62</sup> USDOC had to analyze separately the usability of SAIL's US sales data in relation to other available facts under Annex II, paragraph 3. And finally, before it rejected SAIL's US sales data as unusable, USDOC had to consider the reliability and accuracy of any alternative margin from other available facts. In this case, that included the \$251 price offer. India submits that no objective investigating authority could have found the \$251 price offer was more “usable” than SAIL's actual, verified US sales information.

#### D. INDIA'S CLAIM UNDER ANNEX II, PARAGRAPH 5

64. India now turns to its claim under Annex II, paragraph 5. The Panel need only rule on this alternative claim if it finds -- contrary to India's arguments -- that one of the four conditions of Annex II, paragraph 3 was not met by SAIL's US sales data. In that event, the Panel would be required to determine whether an unbiased and objective investigating authority would have discarded SAIL's US sales data on the ground that SAIL failed to act to the best of its ability in providing such information.

65. The United States appears to argue that Annex II, paragraph 5 can only be applied in a “global” manner – that is, that an administering authority can only determine whether a respondent has “acted to the best of its ability” by examining the *entire* production of all requested necessary information. In other words, unless SAIL used its best efforts in producing *all* necessary information requested by USDOC, then USDOC is justified in finding a “total” failure to “act to the best of its ability.”<sup>63</sup> This is not a permissible interpretation of Annex II, paragraph 5. It also is not consistent with USDOC's repeated practice of making selective findings regarding the “best efforts” of respondents concerning particular pieces of information.<sup>64</sup>

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<sup>60</sup> Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From Taiwan, 63 Fed. Reg. 8909, 8932 (Comment 24) (Feb. 23, 1998), attached as Ex. IND-38.

<sup>61</sup> WT/DS184/AB/R, paras. 97-104.

<sup>62</sup> WT/DS184/AB/R, paras. 101, 193 and n.142, *citing* the Appellate Body report in *EC Measures Concerning Meat and Meat Products* where it stated “the obligation to make an ‘objective assessment’ includes an obligation to act in ‘good faith’, respecting ‘fundamental fairness’.”

<sup>63</sup> For example, the United States argues at paragraph 55 of its Answer to Panel Question 17 that “[t]he natural corollary to this principle [i.e., that information that is not ideal should not be rejected if the respondent acted the best of its ability] is that where a party has not acted to the best of its ability, and *its information is not ideal in all respects*, that information *may be disregarded* by the investigating authorities” (emphasis added).

<sup>64</sup> It should also be noted that USDOC appears to measure whether a party has acted to the best of its ability by whether the party succeeded in providing ideal information. However, the determination of whether a party “acted to the best of its ability” must be based first and foremost on the party's actions – how the party “acted” – not on the quality of the information provided. Paragraph 5 expressly envisages this by contemplating a situation where a party acts to the best of its ability and yet fails to provide ideal information.

66. Nothing in the text of paragraph 5 suggests that the "best of its ability" criterion can only apply to *all* of the information requested by the investigating authority. Paragraph 5 follows paragraph 3, which applies to *any* piece of information that meets the four conditions set out therein. Logically, recourse to Annex II, paragraph 5 only becomes necessary if the particular information does *not* meet all four conditions of Annex II, paragraph 3. Otherwise, it would have no purpose. The United States recognized this when it stated in its Answer to Panel Question 17 that "if the information provided is ideal in all respects, it would not be necessary to consider whether the party acted to the best of its ability."<sup>65</sup> Thus, where information meets the four conditions of Annex II, paragraph 3, it cannot be disregarded by the investigating authority. But if the information does *not* meet all four of these conditions, then it must be determined whether the respondent "acted to the best of its ability" before the information can be discarded altogether.<sup>66</sup>

67. The fallacy of the United States' argument as a litigant is exposed by USDOC's application of Annex II, paragraph 5 in many other cases.<sup>67</sup> USDOC itself consistently applies the "best of its ability" provision of Annex II, paragraph 5 to particular pieces of information. For example, in the *Japan Hot-Rolled* case, the United States performed a "mini best-of-its ability" analysis.<sup>68</sup> In reviewing this decision, both the panel and Appellate Body focused their analysis on the level of cooperation of the Japanese respondent with respect to the particular piece of information at issue—the CSI data— not on its overall level of cooperation with respect to other "necessary information."

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<sup>65</sup> US Answers, para. 56. This sequenced approach to paragraphs 3 and 5 of Annex II is consistent with the decisions of the two panels and the Appellate Body in interpreting Annex II, 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>66</sup> Immediately following paragraph 5 is Annex II, paragraph 6, which applies only when information is rejected because it does *not* meet the conditions of Annex II, paragraph 5. Thus, paragraph 6 provides that investigating authorities must provide "reasons for the rejection of *such* evidence or information . . ." If Annex II, paragraph 5 applied to *all* the evidence or information submitted by a respondent, then there would be no reason for paragraph 6 to use the phrase "such evidence or information" instead of "all" evidence or "all" information.

<sup>67</sup> The purpose of the standard of review in Article 17.6(ii) of the Agreement is to provide a measure of deference to the interpretations of the Agreement that are made *by administering authorities in their determinations*, not to provide importing Members as WTO litigants with an unqualified endorsement for any plausible legal rationalizations they might come up with *post hoc* in the course of WTO litigation. The Panel should look critically at the facts of past USDOC cases, and the interpretation of the Agreement reflected therein. In other words, the Panel should consider what USDOC does, not what it says it does.

<sup>68</sup> The United States made the following statement in its Appellant's submission to the Appellate Body: USDOC's determination to apply partial adverse facts available to KSC for failing to provide necessary information regarding the sales through its US affiliate, California Steel Industries (CSI) was consistent with Article 6.8 and annex II of the AD Agreement. *The application of facts available to KSC was partial because KSC was cooperative as to the majority of its sales to the United States, which were simple export price sales to unaffiliated buyers in the United States.* Nevertheless, for the constructed export price sales through CSI, USDOC found that KSC had failed to cooperate in providing the sales and cost information requested by USDOC . . . .

Appellant Submission of the United States, WT/DS/AB184, 7 May 2001 at 26 (emphasis added). The Appellate Body described USDOC's conclusions as follows:

USDOC concluded that "KSC did not act to the best of its ability *with respect to the requested CSI data*", and it "cannot be said that KSC was fully cooperative and made every effort to obtain and provide *the information*." USDOC, therefore, decided to apply "adverse" facts available in determining *that portion of KSDC's dumping margin attributable to its sales to CSI.*

WT/DS184/AB/R, para. 94 (emphasis added).

This is the correct way to analyze and use Annex II, paragraph 5. And it is consistent with many other cases where USDOC has made partial "best efforts" decisions.<sup>69</sup>

68. It is undisputed that in this case, USDOC made no separate analysis of SAIL's US sales data analysis, despite the fact that SAIL made specific requests that it do so.<sup>70</sup> But even if such a finding could be implied from the finding of a "total" failure by SAIL to act to the best of its ability, no objective and unbiased authority could find that SAIL did not act to the best of its abilities in providing its US sales information to USDOC. The best evidence of USDOC's position on this issue is the Sales Verification Report, India Exhibit 13. This report shows that India acted to the best of its ability in providing, assembling and correcting the US sales database as well as assembling the source documents for a thorough review at verification. Given the evidence in the record, the Panel should find that no unbiased and objective investigating authority could have disregarded SAIL's US sales data.<sup>71</sup>

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<sup>69</sup> The following determinations in which USDOC made such an evaluation are found in Ex. IND-39, attached hereto: *Final Results of Antidumping Duty Administrative Review: Certain Welded Carbon Steel Pipe and Tube from Turkey*, 61 Fed. Reg. 69067, 69072-74 (31 December 1996) (USDOC applied partial facts available for certain home market freight expenses because respondent Borusan did not act to the best of its ability); *Final Determination of Sales at Less Than Fair Value: Freshwater Crawfish Tail Meat from the People's Republic of China*, 62 Fed. Reg. 41347, 41355-56 (1 August 1997) (USDOC employed partial facts available for several respondents who failed to cooperate by not acting to the best of their abilities; USDOC used components of cost data in the petition as facts available in the calculation of normal value); *Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from South Africa*, 62 Fed. Reg. 61731, 61734, 61739, 61748-49 (19 November 1997) (USDOC applied partial facts available for various expenses and missing US sales for two respondents who failed to cooperate by not acting to the best of their abilities); *Final Results of Antidumping Duty Administrative Review: Small Diameter Circular Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe from Germany*, 63 Fed. Reg. 13217, 13223 (18 March 1998) (USDOC applied partial facts available for foreign inland freight expenses for US sales because respondent Mannesmann failed to cooperate by not acting to the best of its ability); *Final Results of Antidumping Duty Administrative Review: Circular Welded Non-alloy Steel Pipe and Tube from Mexico*, 63 Fed. Reg. 33041, 33046-47 (17 June 1998) (USDOC employed partial facts available for freight and brokerage expenses because respondent Hylsa did not cooperate to the best of its ability); and *Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils from Italy*, 64 Fed. Reg. 30750, 30755-60 (8 June 1999) (USDOC applied partial facts available to respondent AST for missing US sales because respondent failed to cooperate to the best of its ability; as partial adverse facts available USDOC chose the highest non-aberrational margin from the rest of AST's US sales for the missing sales).

<sup>70</sup> SAIL's counsel argued as follows during the USDOC's hearing on 18 November 1999 (Ex. IND-15 at 36-38):

Even if you don't agree that SAIL's overall cooperation shows that they acted to the best of their ability, even if you disagree with me, with respect to their US sales information . . . that has been submitted, SAIL clearly acted to the best of its ability. There is no hint that they refused to respond to any requests or that they couldn't provide information, or didn't respond to information. That is the real test here, whether with respect to this discrete segment of information SAIL meets the test of, I guess its, what Section 1677M(e) of the Act. The Federal Register is full of determinations that use what we believe is required, in effect, a compartmentalized approach. The Department looks at pieces of information and subjects those particular pieces of information to the five-part test. There are dozens, if not hundreds, of Departmental findings that find, with respect to a particular piece of information . . . the Respondent did not act to the best of its ability with respect to this piece of information, and as a result we're going to apply adverse facts available with respect to this piece of information. These determinations don't say, because you failed this piece, you flunked the entire thing.

<sup>71</sup> Finally, although the point is legally irrelevant to this Panel's analysis of the Final Determination in this case, in the domestic litigation concerning USDOC's Final Determination in this investigation, the USCIT reversed USDOC's conclusion that SAIL had not acted to the best of its ability, and remanded the case to USDOC to reconsider that conclusion. Predictably, on remand USDOC came to the same conclusion as before, but even with this additional opportunity for reflection, USDOC did not base its conclusion on any problems with the US sales database. See Remand Redetermination, Ex. IND-21.



E. INDIA'S CLAIMS UNDER ANNEX II, PARAGRAPH 7

69. India has asserted two alternative claims under Annex II, paragraph 7. The first claim is that USDOC improperly found that SAIL had not cooperated with USDOC in collecting, organizing, and providing its US sales data. India argued, and the United States has not responded to date, that no objective and unbiased authority could find on the basis of the facts of this record that SAIL had not cooperated with USDOC in the efforts regarding the production of its US sales database.<sup>72</sup> The Panel need only rule on this claim in the event the Panel were to find that USDOC could apply total facts available *and* that SAIL did not act to the best of its ability in providing the US sales information.

70. The second Annex II, paragraph 7 claim, which involves USDOC's wrongful application of "total adverse facts available", is a secondary "alternative" to the first claim.<sup>73</sup> The Panel need only address this claim in the event it were to decide that (1) USDOC properly applied total facts available, and (2) that it was appropriate for USDOC to apply a "total best of its ability" test under Annex II, paragraph 5. In that event, India has argued that it would still not be appropriate for USDOC to apply *adverse* facts available because there is no evidence that SAIL "withheld" information.<sup>74</sup> Nor has USDOC found or suggested that SAIL engaged in such behaviour. Instead, USDOC has improperly applied the worst possible result based upon its finding that SAIL failed to cooperate regarding certain aspects of the investigation. No unbiased or objective authority could have justifiably drawn "adverse" inferences from such a record.

F. INDIA'S CLAIMS UNDER ARTICLE 15

71. India has set forth two claims regarding Article 15. The first claim relates to USDOC's failure to engage in a good faith exploration of constructive remedies with SAIL during the investigation.<sup>75</sup> The facts as set forth in India's various submissions demonstrate that there is no basis for the United States to assert that it actually "explored" in good faith SAIL's offer for a constructive remedy. The United States has also focused incorrectly on the element of the "essential interests" of a developing country. As India has explained, it is for the developing country respondent to decide whether its essential interests will be affected by the imposition of anti-dumping remedies.<sup>76</sup>

72. India's second claim under Article 15 relates to USDOC's failure to give special regard to the situation of developing country Members when considering the application of anti-dumping measures in this case. The relevant measures could include the final imposition of dumping duties as well as the imposition of provisional dumping duties under AD Agreement Article 7. The United States criticizes India's assertion that the first sentence of Article 15 is a mandatory provision with a general obligation to provide "special regard" for the interests of developing country members.<sup>77</sup> Yet, the United States has never provided the Panel with any reasons why the text of the first sentence is *not* a

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<sup>72</sup> This claim is described in detail in the Rebuttal Submission of India at paragraphs 97-100, and in India's First Submission at paragraphs 120-129.

<sup>73</sup> This claim is set out in paragraphs 75-80 of India's First Oral Statement and in paragraphs 87-96 of India's Rebuttal Submission.

<sup>74</sup> *Id.*

<sup>75</sup> India First Oral Statement, paras. 69-74; India Comments on US Answers, paras. 50-51; India Answer to Panel Question 31, paras. 62-65.

<sup>76</sup> India Comments on US Answers, paras. 51-51. Indeed, as stated in India's submission to the Committee on Anti-Dumping Practices referred to below, given the limited share of developing countries in world trade, and the fact that anti-dumping duties prevent all trade in the relevant product— as they did in this case— anti-dumping duties should be *presumed* to adversely affect the essential interests of the developing countries. G/ADP/AHG/W/128, para. 5.

<sup>77</sup> US Comments on India's Answers, para. 17.

mandatory provision creating a general obligation.<sup>78</sup> The use of the phrase "special regard *must* be given" clearly demonstrates the mandatory character of this general obligation. Indeed, the Ministerial Conference Decision on Implementation, adopted at Doha, has now explicitly recognized that Article 15 "is a mandatory provision."<sup>79</sup>

73. The fact that additional agreed procedures might emerge from the negotiating process at some later time does not weaken the legal conclusion that the Ministerial Conference has reached regarding Article 15, and does not relieve the Panel from its duty to resolve India's claims in the present dispute. India has suggested to the Panel ways in which it can interpret Article 15. By contrast, the United States has offered no constructive suggestions as to how this mandatory provision could be made effective by administering authorities. Nor has the United States offered any suggestions for how it has implemented this mandatory requirement in its laws, regulations, administrative policies or practices.

74. India has also made a submission in the post-Doha working group process on Article 15.<sup>80</sup> The United States refers to a statement in that paper that the obligations of the first sentence of Article 15 are only applicable "once dumping and injury have been determined."<sup>81</sup> However, the United States incorrectly assumes that India's paper only addresses the application of "final" anti-dumping measures. In fact, India's paper addresses "measures" generally, including provisional measures, as demonstrated by India's reference in the paper to Article 12.2.1, which sets out the provisions for the public notice of *provisional* measures.<sup>82</sup>

75. Thus, consistent with India's argument in its paper for the Committee and in its submissions to this Panel, it is appropriate for this Panel to consider whether USDOC provided any "special regard" to the situation of SAIL as a developing country Member during the investigation. India can find no such "special regard" reflected at any point after the provisional findings of dumping, nor at the latter stages of the process when final dumping and injury findings were made. Nor can the United States identify any such "special regard" that it provided in this case after the final determination of dumping and injury. This is not surprising, because there is no obligation in US statutes, regulations, administrative policies or its practices to provide such special regard.

#### G. INDIA'S CLAIM UNDER ARTICLE 2.4, FIRST SENTENCE

76. India has also asserted a claim under Article 2.4 first sentence, which provides: "A *fair* comparison shall be made between the export price and the normal value." The word "fair" is defined as "unbiased; equitable; impartial."<sup>83</sup> The word "fair" is related to the concept of "good faith" found

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<sup>78</sup> See US Answers to the Panel's Question 25, para. 67. Rather, the United States has addressed various statements by India regarding this provision. The task of this Panel is to interpret the text of Article 15. India has done this. The United States has not.

<sup>79</sup> WT/MIN(01)/DEC/17, adopted 14 November 2001, para. 7.2. Specifically, the Decision recognizes that "the modalities for its application would benefit from clarification" and instructs the Committee on Anti-Dumping Practices, through its Working Group on Implementation, to examine this issue and draw up appropriate recommendations on how to operationalize Article 15. *Id.* The use of the word "operationalize" does not mean, as the United States has asserted, that no specific requirements in Article 15 are operational at present. US Comments on India's Answers, para. 22. In scientific terms, "operationalize" simply refers to converting general knowledge or principles (e.g., "buy low, sell high") into executable decision procedures in terms of available data. See, e.g., Harcourt, *Academic Dictionary of Science and Technology*, at <http://www.harcourt.com/dictionary/browse>. The negotiating process chartered by the Ministerial Decision may do exactly this, and result in agreed procedures elaborating the requirements of Article 15.

<sup>80</sup> United States Comments on India's Answers, paras. 18-19.

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

<sup>82</sup> G/ADP/AHG/W/128, para. 13.

<sup>83</sup> New Shorter Oxford Dictionary, Vol. 1, at 907.

by the Appellate Body to require anti-dumping investigating authorities to make an "objective examination" and to exercise "fundamental fairness."<sup>84</sup>

77. India is of the view that if information consistent with the rules of AD Agreement Article 6 is used, adherence to the procedures in Article 2.4 would generally result in a fair comparison between the export price and the normal value. But contrary to the United States' arguments, this obligation to engage in a "fair comparison" is not limited to only the procedures spelled out in the subsequent text of Article 2.4. The Appellate Body in *EC Bed Linens* made it clear that "Article 2.4 sets forth a *general obligation* to make a 'fair comparison' between export price and normal value. This is a general obligation that, in our view, informs all of Article 2 . . ."<sup>85</sup> Among the provisions of Article 2 is Article 2.1, which sets out the requirement for determining when a product is "dumped." In this regard, the "fair comparison" provision of Article 2.4, first sentence applies generally to all determinations of dumping -- including determinations under Article 2.1 in which total facts available are applied.<sup>86</sup>

78. Further, one of the key aspects of a "fair" comparison is the identification of the information to be used for the comparison. If an investigating authority knowingly uses information, such as the \$251 offer in the petition in this case, which is clearly inaccurate when compared to other information on the record (such as official import statistics), then the ultimate comparison between normal value and export price cannot be considered "fair." Since India acknowledges in this case that USDOC could properly use facts available to determine the NV side of the dumping comparison, the "fair" comparison that USDOC should have undertaken under Article 2.4, first sentence, would be to compare either SAIL's actual US sales data or the US Customs data in the petition with the normal value from the petition. But in no circumstances could an objective investigating authority conduct a "fair" comparison using the US price offer of \$251 per ton from the petition.

## II. INDIA'S CLAIMS REGARDING THE US STATUTORY PROVISIONS

79. India will now address the two claims that relate to sections 782(e)(3) and (4), and its two claims that involve sections 776(a), 782(d), and 782(e).

### A. *PER SE* CHALLENGE TO SECTIONS 782(E)(3) AND (4)

80. India's arguments that section 782(e)(3) and 783(e)(4) *per se* violate Article 6.8 and Annex II, paragraph 3 of the AD Agreement are based on the fact that these are "extra" conditions that respondents must meet before their data can be used in the investigation.

81. As a threshold matter, this provision is "mandatory," because under the US statute, a respondent's information cannot be used unless it meets *all* five conditions of section 782(e). This mandatory requirement to meet all five conditions is provided in the text of section 782(e), as demonstrated by the use of the word "and" between sections 782(e)(4) and (5).

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<sup>84</sup> *Japan Hot-Rolled AB* decision, WT/DS184/AB/R, para. 193.

<sup>85</sup> WT/DS141/AB/R, para. 59.

<sup>86</sup> The United States has argued that when it applied total facts available in this case, it did not "calculate" a dumping margin but rather "made a determination." US Answers to Panel Question 37, para 90. But Article 2 of the AD Agreement is entitled "Determination of Dumping." When USDOC uses Article 6.8 for the purposes of "partial facts available," it combines the "facts available" with other information from the respondent to "calculate" a margin *before* it makes a determination under Article 2.1 of the existence of "dumping." Similarly, a determination of dumping using total facts available still requires a "determination" under Article 2.1 as to whether dumping exists, and the decision whether to impose dumping margins or some other remedy.. See AD Agreement Article 8, 9.1, 9.4, which demonstrate that to "make a determination" can only be preceded by a calculation of the extent, if any, of dumping.

82. The United States now argues that USDOC and USCIT decisions reflect the “discretionary nature” of section 782(e).<sup>87</sup> This is not correct. Consistent with the mandatory text, section 782(e) has been repeatedly interpreted as requiring that all five conditions must be met before a respondent’s data can be taken into account.<sup>88</sup> Indeed, the cases cited by the United States support this requirement because they note that when all five conditions set forth in section 782(e) are satisfied, USDOC will accept the respondent’s submitted data. But in none of these cases has USDOC accepted (or the USCIT required that USDOC accept) a respondent’s submitted data despite the fact that the two additional conditions in section 782(e)(3) and (4) were not satisfied.

83. The second issue is whether these two provisions impose “extra” conditions that are not found in the exhaustive list in Annex II, paragraph 3.<sup>89</sup> The United States has admitted that section 782(e)(3) imposes an “extra” step beyond those listed in Annex II, paragraph 3:

By requiring Commerce to evaluate the degree of completeness of the information, section 782(e) provides that *when the other criteria* [in Annex II, paragraphs 3 and 5] *have been met*, Commerce may not decline to consider the partial information *when it is sufficiently complete so that it can form a reliable basis for a dumping calculation*.<sup>90</sup>

In other words, USDOC is required by the statute to reject information that otherwise satisfies the four conditions of Annex II, paragraph 3, if it determines that the absence of *other* information renders the overall universe of information not “sufficiently complete”.

84. The present case illustrates exactly how section 782(e)(3) imposes an “extra” condition. Without this additional condition, SAIL’s US sales information would have been taken into account in the USDOC determination if it met the four conditions of Annex II, paragraph 3. But because section 782(e)(3) requires satisfaction of the additional condition that the completeness of SAIL’s US sales data must be analyzed in relation to *other information* submitted by SAIL, the errors in SAIL’s home market and cost of production data caused the rejection of the US sales data for the calculation of a dumping margin.

85. In short, if the Panel finds that there is no justification under the AD Agreement to reject a respondent’s information that meets the four conditions of Annex II, paragraph 3, then the Panel must also find that this additional condition of section 782(e)(3) *per se* violates Article 6.8 and Annex II, paragraph 3.

86. The second additional condition imposed by section 782(e) is found in section 782(e)(4), which requires that a respondent must be found to have acted to the “best of its ability” in providing the information and in complying with USDOC’s requirements “with respect to the information.” As India has argued, paragraphs 3 and 5 of Annex II impose *separate* obligations upon investigating authorities.<sup>91</sup> Section 782(e)(4) improperly collapses these distinct obligations.<sup>92</sup>

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<sup>87</sup> US Second Written Submission, paras. 13-14.

<sup>88</sup> *AST* case, cited in India First Written Submission, footnote 206; cases in India Exhibits 28 and 29, discussed extensively in India’s Answer to Panel Question 24.

<sup>89</sup> The text of section 782(e)(3) requires that the information must not be “so incomplete that it cannot serve as a reliable basis for reaching the applicable determination.” Annex II, paragraph 3 imposes no requirement of a *quantum* of information that must be reached before the information may be used. Indeed, the Appellate Body in *Japan Hot-Rolled* said that the information had to be used if it met the four conditions in Annex II, paragraph 3.

<sup>90</sup> United States Answers to the Panel’s Question 3, para. 9 (emphasis added).

<sup>91</sup> India First Submission, paras. 80-84, 150. These If information submitted by a respondent satisfies the criteria of paragraph 3, it must be used, regardless whether the respondent has acted to the “best of its ability” in submitting that data -- or some *other* data. Conversely, under paragraph 5, investigation authorities

B. “AS APPLIED” CHALLENGE TO SECTION 782(E)(3) AND (4)

87. India set forth its claims regarding the WTO-inconsistent application of sections 782(e)(3) and (4) at paragraphs 166 and 167 of its First Submission. The United States has not directly challenged these arguments regarding the application of these provisions. Accordingly, India refers the Panel to its previous arguments on this issue.

C. *PER SE* CHALLENGE TO SECTIONS 776(A), 782(D), AND 782(E)

88. India has explained that section 776(a) of the US anti-dumping law *mandates* the application of “facts otherwise available” whenever any of the four situations set forth in that statute are found to exist.<sup>93</sup> That statute notes that it is “subject to section 782(d),” which in turn contains the phrase stating that USDOC “may . . . disregard all or part of the original and subsequent responses” submitted by a respondent in certain situations. However, as India explained at the First Meeting of the Panel and in its answers to the Panel’s questions, USDOC and the USCIT have consistently interpreted Section 782(d) as a mandatory provision despite the use of the apparently discretionary verb “may.” In other words, the word “may” is interpreted in this instance as “shall.”<sup>94</sup>

89. The United States argues that “[t]he application of facts available is a discretionary exercise, not a mandatory one, specifically dependent upon the quantity and quality of the information submitted by the respondent.”<sup>95</sup> It then discusses several USDOC determinations and a USCIT decision in which the agency accepted respondents’ data because, although flawed, it satisfied the conditions of section 782(e).<sup>96</sup> However, these determinations do not establish the “discretionary” nature of the statutory provisions at issue. Rather, they make it clear that USDOC will accept information that satisfies the conditions of section 782(e) -- a point that is not in contention. None of these cases address India’s argument that, once USDOC determines that one “essential component” does not meet one or more of the conditions in section 782(e), the mandatory provision of section 776(a) applies, requiring the rejection of the respondent’s data.

90. The United States also notes that at times, USDOC has invoked sections 782(e) and (d) to apply only partial – as opposed to total – facts available.<sup>97</sup> But there is no dispute that at times

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must use even less-than-ideal information that does not meet the requirements of paragraph 3, as long as the respondent has acted to the best of its ability.

<sup>92</sup> India has addressed the United States’ arguments that section 782(e) does not violate the Agreement because it “liberalized Commerce’s general acceptance of data submitted by respondents in anti-dumping proceedings by directing Commerce not to reject data submissions once Commerce concludes that the specified criteria are satisfied.” US Second Written Submission, para. 15. While section 782(e) may have liberalized USDOC’s rules for accepting respondents’ submitted data, the problem is that it did not liberalize those rules sufficiently. The statute still imposes two conditions not included in the exhaustive list set out in Annex II, paragraph 3, which must be satisfied before a respondent can have its data accepted and “taken into account” by USDOC in “reaching the applicable determination.”

<sup>93</sup> India First Submission, paras. 141-145; India Answers, paras. 21-24.

<sup>94</sup> Paras. 19-28. Furthermore, this interpretation is not merely a matter of administrative practice, by which USDOC might have said in individual cases that, although it was rejecting the respondent’s data in that case, it “may” in future cases apply Section 782(d) not to reject a respondent’s data. To the contrary, the decisions of USDOC and the USCIT described in detail in India’s answers show that the agency and the Court have concluded that USDOC *must* apply Section 782(d) by referring back to Section 776(a)’s mandatory instruction to disregard a respondent’s data once it finds that the respondent has failed to meet all the conditions of Section 782(e).

<sup>95</sup> United States Answers, para. 20.

<sup>96</sup> United States Answers, paras. 22-25.

<sup>97</sup> United States Answers, para. 24.

USDOC has applied "partial" facts available. However, despite repeatedly being asked to identify specific cases, the United States has not been able to name a single case in which USDOC applied "partial facts available" when one of what it considers the four "essential components" of a respondent's data failed to satisfy the conditions of section 782(e). In this situation, to the contrary, USDOC always has applied "total facts available" to reject all the information submitted by the respondent, without regard to the fact that other information submitted by the respondent (i.e., information on other "essential components") may satisfy those conditions.

91. Thus, section 776(a) of the US statute requires USDOC to reject submitted information that does not meet the conditions of section 782(e), and that mandatory rejection is total, not partial, whenever USDOC determines that one or more of the "essential components" of a respondent's submitted information is flawed. Section 782(d) has never been interpreted as forestalling this inevitable result. Because they mandate the rejection of information meeting the requirements of Article 6.8 and Annex II, paragraph 3, these statutory provisions violate the AD Agreement.

#### D. CHALLENGE TO SECTIONS 776(A), 782(D), AND 782(E) AS APPLIED

92. India has set out in detail its claims regarding the WTO-inconsistent application of sections 776(a), 782(d), and 782(e).<sup>98</sup> The United States has not directly addressed these assertions. Accordingly, India refers the Panel to its arguments as the basis for the Panel's decision on this claim.

### III. INDIA'S "AS APPLIED" CHALLENGE TO USDOC'S LONG-STANDING PRACTICE OF APPLYING TOTAL FACTS AVAILABLE

93. As India set forth in its Answers to the Panel's questions, its "as applied" claim regarding USDOC's long-standing practice is straightforward and based on uncontested facts. India responded in detail to the United States' procedural challenges concerning the consultation process and the argument that USDOC's long-standing practice is not a "measure,"<sup>99</sup> and will not repeat those arguments here.

94. India notes, however, that there are three elements to this claim: (1) that a long-standing practice exists; (2) that the long-standing practice was applied in this case; and (3) that the application of the long-standing practice in this case is inconsistent with the AD Agreement. The facts regarding each of these three elements are found in the Final Determination. The United States has never challenged these three elements or the facts that support them.

95. Regarding the first, USDOC plainly states that it has a "long-standing practice to reject a respondent's questionnaire *in toto* when essential components of the response are so riddled with errors and inaccuracies as to be unreliable."<sup>100</sup> USDOC also stated in the Final Determination that "the Department must apply total adverse facts available because SAIL's data on the whole is unreliable." Numerous USCIT decisions, as well as USDOC decisions in other investigations, also describe the "long-standing practice" of USDOC in applying total facts available.<sup>101</sup>

96. With respect to the second element -- whether the long-standing practice was applied in this case -- once again, the answer is affirmative, and is supplied by the Final Determination, in which USDOC stated that "total facts available" are "warranted for this determination" and that it "must apply total adverse facts available. . . ."<sup>102</sup>

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<sup>98</sup> See India First Submission, paras. 160-173.

<sup>99</sup> See India Answers to the Panel's Questions 35-36.

<sup>100</sup> Final Determination, at 73130 (Ex. IND-17).

<sup>101</sup> See, e.g., Ex. IND-28, IND-29.

<sup>102</sup> Final Determination, at 73130 (Ex. IND-17).

97. Finally, regarding the third element -- whether the long-standing practice as applied is inconsistent with the AD Agreement -- the Final Determination reveals the process by which USDOC rejected SAIL's US sales data, which USDOC itself admitted were "usable" if minor corrections were made, through the application of total facts available. This application was inconsistent with AD Agreement Article 6.8, and Annex II, paragraphs 3, 5, and 7 for the reasons discussed earlier by India.<sup>103</sup>

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<sup>103</sup> See India First Submission; India First Oral Statement.