

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

*Report of the Panel*

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## I. INTRODUCTION

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

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

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

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

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

Chairman: H.E. Mr. Tim Groser

Members: Ms. Salmiah Ramli  
Ms. Luz Elena Reyes de la Torre

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

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

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

## II. FACTUAL ASPECTS

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

2.2 Based on an application filed by the US Steel Group, Bethlehem Steel, Gulf States Steel, Ipsco Steel, Tuscaloosa Steel and the United Steel Workers of America, the United States Department of Commerce (USDOC) initiated an anti-dumping investigation of imports of certain cut-to-length

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<sup>1</sup> WT/DS206/1.

<sup>2</sup> WT/DS206/2.

<sup>3</sup> WT/DS206/3.

carbon steel plate from, *inter alia*, India, on 8 March 1999. The sole Indian respondent was the Steel Authority of India, Ltd. (SAIL). The dumping portion of the investigation was conducted by USDOC under the US anti-dumping statute and related USDOC regulations.<sup>4</sup>

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

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

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

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

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

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

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

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

### III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

#### A. INDIA

3.1 India requests that the Panel make the following findings:

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

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

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

#### B. UNITED STATES

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

### IV. ARGUMENTS OF THE PARTIES

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

## **V. ARGUMENTS OF THE THIRD PARTIES**

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

## **VI. INTERIM REVIEW**

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

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

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

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

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

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

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

6.8 This statement could be interpreted as raising no objection at all, as India asserts. At the time, however, we understood the United States' view to be that while it viewed India's action with disfavor, it did not consider that there was a legal objection to India's action – that is, that while the United States "objected" to India's action in a general sense, it would not pursue any legal objection. As the report is based on, and reflects our understanding of, the arguments and positions of the parties, and the United States does not consider that our characterization of its position is incorrect, we have determined to make no change in this regard.

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

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

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

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

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

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

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

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

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

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

6.18 The United States had no comment in this regard.

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

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

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

## VII. FINDINGS

### A. GENERAL ISSUES

#### 1. Standard of review

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

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

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

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

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

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

7.5 The Appellate Body, in *US - Hot-Rolled Steel*, considered the relationship between Article 17.6(i) of the AD Agreement and Article 11 of the DSU, and concluded specifically that, with respect to the obligation of panels to make an objective assessment of the facts of the matter before

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<sup>5</sup> Appellate Body Report, *United States - Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan* ("US - Cotton Yarn"), WT/DS192/AB/R, adopted 5 November 2001.

<sup>6</sup> Appellate Body Report, *United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ("US - Hot-Rolled Steel"), WT/DS184/AB/R, adopted 23 August 2001.

them, there is no conflict between the two.<sup>7</sup> With respect to Article 17.6(ii), the Appellate Body observed that, while it imposed obligations not found in the DSU on panels in anti-dumping disputes, it supplemented Article 11 of the DSU in this regard.<sup>8</sup>

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

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

## 2. Burden of proof

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

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<sup>7</sup> Appellate Body Report, *US – Hot-Rolled Steel*, at para. 55

<sup>8</sup> *Id.*, at para 62.

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

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

<sup>11</sup> Appellate Body Report, *Thailand – H-Beams*, at para. 136.

B. PRELIMINARY ISSUES

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

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

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

"The DSB shall, at the request of the complaining party, establish a panel to examine the matter based upon: ...

(ii) the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member".

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

"under this provision, a panel may not, when examining a claim of violation of the AD Agreement<sup>22</sup> in a particular determination, consider facts or evidence presented to it by a party in an attempt to demonstrate error in the determination concerning questions that were investigated and decided by the authorities, unless they had been made available in conformity with the appropriate domestic procedures to the authorities of the investigating country during the investigation.

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<sup>22</sup>We note that there is no claim under Article VI of GATT 1994 in this case, so we need not consider whether Article 17.5(ii) has implications for the evidence a panel may consider in that context."<sup>12</sup>

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

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

7.12 The basis of much of India's argument is the assertion that the US sales price information submitted by SAIL was not "unusable". India argues that the errors in that information submitted by SAIL could have been corrected by a simple change in the computer program used in calculating margins. The Hayes affidavits describe the errors in the information (which are undisputed), and describe changes in the USDOC computer program (which is available to parties) which would, in Mr. Hayes' opinion, have corrected it. The affidavits also set out Mr. Hayes' opinion, as a former USDOC investigator, that this sort of change was within the normal bounds of USDOC actions in anti-dumping cases. The affidavits also sort the US sales price information submitted by SAIL with reference to different criteria to support the argument that it could have been used as the basis for the export price side of the dumping margin calculation.

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

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

7.15 India argues that a "practice" becomes a "measure" through repeated similar responses to the same situation, and that therefore the US practice it challenges is properly before the Panel. India asserts that USDOC always applies total facts available in particular factual circumstances, and has done so consistently since 1995. Parties to a USDOC investigation can predict that USDOC will apply this "practice". In India's view, where such a practice is established over a long period of time, it takes on the character of a measure, because a similar response to similar circumstances can be predicted (or threatened) in the future. India considers that the point at which a pattern of similar conduct takes on the character of a measure is to be determined on the facts and circumstances of each case. But in India's view, the label of "practice", as opposed to administrative procedure, regulation or law, coupled with the assertion that it can be changed at any time, does not render the "practice" in question immune to challenge. To accept this possibility would, India asserts, open the door for potential abuse of the obligations imposed by the AD and other WTO Agreements.

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

7.17 In considering this second issue, we note that our mandate in this dispute is to consider the claims that are within our terms of reference, which are established by the request for establishment. The United States argues that the Indian claim regarding "practice" is not properly before us because it was not identified in the request for consultations, and not actually consulted about. Similar arguments have been considered by previous panels and the Appellate Body. For instance, in the *Brazil-Aircraft* dispute, the Panel considered an argument that certain measures were not properly before the Panel because they were not enacted until after the consultations were held, and therefore were not the subject of consultations and could not be considered by the Panel. The Panel found that the measures in question were part of the overall scheme of export subsidization which was the subject-matter of the dispute, and that scheme had clearly been the subject of the consultations.<sup>14</sup> The Panel went on to observe that its terms of reference were based upon the request for establishment, which governed the parameters for the panel's work. The Panel concluded further that "Nothing in the text of the DSU...provides that the scope of a panel's work is governed by the scope of prior consultations. Nor do we consider that we should seek to somehow imply such a requirement into the WTO Agreement."<sup>15</sup> On appeal, the Appellate Body upheld the Panel's conclusion, stating "We do not believe, however, that Articles 4 and 6 of the DSU, ..., require a *precise and exact identity* between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel."<sup>16</sup>

7.18 In this case, the request for consultations clearly identified the USDOC determination regarding application of facts available in the challenged determination, and identified the provisions of US law governing application of facts available as measures in dispute. Thus, in our view, the application of facts available in the US anti-dumping system, both in general (based on the statutory provision), and as actually applied in this case, were the subject of the dispute about which

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<sup>13</sup> Panel Report, *United States – Measures Treating Exports Restraints as Subsidies* ("*US – Export Restraints*"), WT/DS194/R and Corr.2, adopted 23 August 2001, at para. 8.129.

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

<sup>15</sup> *Id.*, at para. 7.9.

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

consultations were requested. The request for establishment specifically identifies the US practice in applying facts available as a measure in dispute. This does not, in our view, change the subject matter of the dispute before us in any significant respect from that which was consulted. Accordingly, we consider the US objection based on failure to identify the US practice as a measure in dispute in the request for consultations to be without merit in this case.

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

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

7.21 We note that the Appellate Body, in *Guatemala-Cement I*, concluded that Article 17.4 of the AD Agreement, read together with Article 6.2 of the DSU, requires a panel request in a dispute under the AD Agreement to identify as the specific measure at issue, either a definitive anti-dumping duty, the acceptance of a price undertaking, or a provisional measure.<sup>19</sup> Clearly, the challenged "practice" is not one of these three types of measure. Subsequently, the Appellate Body clarified, in *US – 1916 Act*, that nothing in its decision in *Guatemala-Cement I* suggested that Article 17.4 precluded review of anti-dumping legislation as such.<sup>20</sup> It went on to note that Article 18.4 supported the

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<sup>17</sup> Panel Report, *United States – Sections 301-310 of the Trade Act of 1974* ("*US – Section 301 Trade Act*"), WT/DS152/R, adopted 27 January 2000, at paras. 7.24 – 7.27,

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

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

<sup>20</sup> Appellate Body Report, *United States – Anti-Dumping Act of 1916* ("*US – 1916 Act*"), WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, at para. 72.

conclusion that AD legislation could be examined, as such, by a panel.<sup>21</sup> Article 18.4 requires each Member to bring into conformity with its obligations under the AD Agreement, its "laws, regulations, and administrative procedures". It is thus clear to us that, in addition to the specific measures set out in Article 17.4 of the AD Agreement, a request for establishment of a panel to examine a matter under the AD Agreement may raise, as measures in dispute, a Member's laws, regulations, and administrative procedures as such.

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

7.23 In this context, we note particularly the decision of the Panel in *US – Export Restraints*.<sup>24</sup> In that case, the Panel faced the question whether the measures identified by Canada, including US practice, with respect to the treatment of export restraints as subsidies, **required** the USDOC to treat export restraints in a certain way. The Panel addressed the question whether the measures identified could give rise to a violation of WTO obligations by considering whether each measure constituted "an instrument with a functional life of its own, i.e., that it would have to *do* something concrete, independently of any other instruments, for it to be able to give rise independently to a violation of WTO obligations."<sup>25</sup> In answering this question, the Panel considered the status, under US law, of each measure identified, including the challenged US practice. With respect to that practice, the Panel observed that USDOC could depart from it, so long as it explained its reasons for doing so, and concluded that this fact "prevents such practice from achieving independent operational status in the sense of *doing* something or *requiring* some particular action...US "practice" therefore does not appear to have independent operational status such that it could independently give rise to a WTO violation as alleged by Canada".<sup>26</sup> The challenged practice in this case is, in our view, no different from that considered in the *US – Export Restraints* case. It can be departed from so long as a reasoned explanation is given. It therefore lacks independent operational status, as it cannot require USDOC to do something, or refrain from doing something.

7.24 Thus, we conclude that the challenged US practice concerning the application of total facts available is not a separate measure which can independently give rise to a WTO violation, and we will

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<sup>21</sup> *Id.*, at paras. 76-79.

<sup>22</sup> Answers of India to Questions of the Panel - First Meeting, questions 35 & 36, at para. 74.

<sup>23</sup> Answers of the United States to Questions of the Panel - First Meeting, question 34, at paras. 83-84 and fns. 54 & 55 and cases cited therein.

<sup>24</sup> *US – Export Restraints*.

<sup>25</sup> *Id.*, at para. 8.85.

<sup>26</sup> *Id.*, at para 8.126.

therefore not rule on the consistency of that practice, as such, with the United States' obligations under the AD Agreement.

### C. ABANDONED CLAIM

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

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

7.27 This situation is not explicitly addressed in either the DSU or any previous panel or Appellate Body report. We do note, however, the ruling of the Appellate Body in *Bananas* to the effect that a claim may not be raised for the first time in a first written submission, if it was not in the request for establishment.<sup>28</sup> One element of the Appellate Body's decision in that regard was the notice aspect of the request for establishment. The request for establishment is relied upon by Members in deciding whether to participate in the dispute as third parties. To allow a claim to be introduced in a first written submission would deprive Members who did not choose to participate as third parties from presenting their views with respect to such a new claim.

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

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<sup>27</sup> First Written Submission of India, at fn. 12. India did not seek to reinstate any of the other claims it abandoned.

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

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

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

#### D. CLAIMS AND ARGUMENTS

##### 1. Overview

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

7.32 India argues that USDOC should not have rejected **all** of SAIL's reported information because of problems with **some** of that information. Specifically, India argues that USDOC was required by the AD Agreement, in particular Article 6.8 and paragraph 3 of Annex II, to use the US sales price information reported by SAIL. India maintains that USDOC could have, and should have, determined export price from that information, and should have resorted to facts available only with respect to the particular categories of information which were either flawed or not available.<sup>31</sup> India asserts that the USDOC decision to reject all of SAIL's information and rely instead on facts available was required under US law, and that therefore US law is inconsistent on its face with the provisions of the AD Agreement governing reliance on facts available. India also submits that SAIL acted to the best of its ability to supply complete responses to USDOC, but that difficulties in compiling information prevented it from complying any more fully. Thus, in India's view, USDOC erred in applying adverse

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

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

<sup>31</sup> India appears to accept USDOC's decision to reject other information submitted, and rely instead on facts available.

inferences. India has raised additional claims asserting that, as a result of improper application of facts available, the US final anti-dumping measure is in violation of Articles 2.2 and 2.4 of the AD Agreement, because it is based on an improper calculation of normal value and an unfair comparison in the calculation of dumping margins, and is in violation of Article 9.3 of the AD Agreement and Articles VI:1 and 2 of GATT 1994, because it imposes a duty that is based on an improper calculation and comparison.

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

## **2. Whether USDOC acted inconsistently with Article 6.8 and Annex II of the AD Agreement in resorting to use of facts available in the AD investigation in question**

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

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

7.36 The United States does not dispute the essential facts as presented by India, but it defends the USDOC decision rejecting all of the information submitted by SAIL, including the information on US sales prices, and basing its determination on facts available instead. The United States asserts that USDOC gave notice of the information that would be required for the dumping determination and identified deficiencies in the information provided in SAIL's questionnaire responses, both the original questionnaire and subsequent requests for information, on at least five occasions. The United States maintains that USDOC accepted additions, corrections, and modifications to the information submitted, and granted several requests for additional time to provide information, in an effort to assist SAIL and obtain usable information necessary for the dumping determination.

7.37 The United States asserts that SAIL never indicated that it **could not** provide the requested information, but merely indicated repeatedly that it needed additional time due to difficulties in gathering and submitting the information. Ultimately, USDOC concluded that some of the

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<sup>32</sup> First Written Submission of India at para. 116.

information requested was never submitted in a usable format, and thus USDOC was unable to satisfy itself regarding the accuracy of the information that was submitted. USDOC concluded that there were fatal gaps in the necessary information, which precluded the determination of a dumping margin based on the information that had been submitted, and necessitated resort to facts available with respect to the entire determination. In the US view, it is clear that SAIL had the ability to provide the requested information, but failed to do so. Therefore, the United States considers that USDOC was justified in ultimately concluding that SAIL had failed to act to the best of its ability in gathering and submitting the information, and applying adverse facts available.

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

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

7.40 The investigation was initiated on 8 March 1999, and on 17 March 1999, USDOC issued the basic questionnaires to the foreign producers and exporters, including SAIL. The questionnaires consisted of multiple parts, each requesting different information. Between 12 April and 10 May 1999, SAIL submitted responses to all parts of the questionnaire, and on 11 May 1999 submitted sales and cost information on computer disk. On 27 May 1999, USDOC issued a first supplemental questionnaire. On 11 June 1999, SAIL submitted its response to the supplemental questionnaire, and on the same day, USDOC issued a second supplemental questionnaire. On 16 June 1999, SAIL filed its initial response to the second supplemental questionnaire and revised US sales computer database, and on 18 June 1999, SAIL submitted information further supplementing previous submissions. On 29 June 1999, SAIL made three submissions, two in response to USDOC's third deficiency questionnaire issued on 18 June 1999, and one in response to USDOC's first supplemental questionnaire. On 12 July 1999, USDOC sent a letter to SAIL providing it with a final opportunity to submit a reliable electronic database and information on product-specific costs. On 16 July 1999, SAIL submitted another version of the US sales database, revising information previously submitted. As outlined in the parties' submissions, the principal areas in which problems arose involved SAIL's home market sales prices and cost of production information. USDOC also had concerns with the electronic databases submitted, and that some of SAIL's submissions were made past the applicable deadlines.

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

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<sup>33</sup> USDOC conducted separate verifications of sales and cost information, and issued separate reports.

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

7.43 On 13 December 1999, USDOC issued a memorandum concerning "Determination of Verification Failure", listing deficiencies in information submitted by SAIL.<sup>39</sup> This memorandum sets out fourteen specific deficiencies in the information submitted. The only one which concerned the US sales information was the error involving product width noted above.<sup>40</sup> The memorandum, in the "Analysis" section, states with respect to the information concerning U.S. sales:

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

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

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

"at verification the Department discovered that SAIL failed to report a significant number of home market sales; was unable to verify the total quantity and value of home market sales; and failed to provide reliable cost or constructed value data for the products. See Home Market and United States Sales Verification Report ("Sales Report"), dated November 3, 1999; see also Cost of Production and Constructed Value Verification Report ("Cost Report"), dated November 3, 1999. ... SAIL was provided with numerous opportunities and extensions of time to fully respond to the Department's original and supplemental questionnaires, as well as ample time to prepare for verification. However, even with numerous opportunities to remedy problems, SAIL failed to provide reliable data to the Department in the form and

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<sup>34</sup> Exhibit India-13 at 8, 9, 13, 14.

<sup>35</sup> *Id.*, at 5.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*, at 8, 12-13, 15, 29-33.

<sup>39</sup> Exhibit India-16.

<sup>40</sup> *Id.*, at 3.

<sup>41</sup> *Id.*, at 5.

<sup>42</sup> 64 Fed. Reg. 73126, 73131 (29 December 1999), Exhibit India-17.

manner requested. ... as a result of the widespread problems encountered at verification, SAIL's questionnaire responses could not be verified. See Sales Report and Cost Report. See Memorandum to the File: Determination of Verification Failure ("Verification Memo"), dated December 13, 1999.... subsequent to the preliminary determination we issued two additional questionnaires and further extensions to SAIL presenting it yet additional opportunities to submit a complete and accurate electronic database. Nevertheless, the Department found at verification that the final submission was again substantially deficient (see the Department's Position below; see Verification Memo; and see Sales Report and Cost Report). Therefore the Department may "disregard all or part of the original and subsequent responses," subject to subsection (e) of section 782.... In the instant investigation, record evidence supports the following findings: ... as stated in the Preliminary Determination and the sales and cost verification reports, SAIL was given numerous extensions to submit accurate data which it failed to do. In fact the last submission of cost data filed on August 18, 1999, was a database which contained unreadable electronic versions of SAIL's cost of production which did not include any constructed value information.

Second, with respect to section 782(e)(2), we were not able to verify SAIL's questionnaire response due to the fact that essential components of the response (i.e., the home market and cost databases) contained significant errors.

Third, with respect to section 782(e)(3), the fact that essential components of SAIL's response could not be verified resulted in information that was incomplete and unreliable as a basis for determining the accurate margin of dumping.

Fourth, with respect to section 782(e)(4), SAIL, as stated in the home market sales verification report, did not sufficiently verify the accuracy and reliability of its own data prior to submitting the information to the Department, thereby indicating that it did not act to the best of its ability to provide accurate and reliable data to the Department.

Finally, with respect to section 782 (e)(5), **the U.S. sales database contained errors that, while in isolation were susceptible to correction, however when combined with the other pervasive flaws in SAIL's data lead us to conclude that SAIL's data on the whole is unreliable.** As a result, the Department does not have an adequate basis upon which to conduct its analysis to determine the dumping margin and must resort to facts available pursuant to section 776(a)(2) of the Act." (emphasis added)<sup>43</sup>

7.45 India argues that the ordinary meaning of Article 6.8 and paragraph 3 of Annex II of the AD Agreement requires an investigating authority to use, in its calculation of dumping margins, any information submitted by a company in response to questionnaire requests that meets the conditions set out in paragraph 3. India maintains that those conditions are that (1) the information must be verifiable, that is, capable of being verified, (2) "appropriately" submitted, that is, at a time, in a format, and in a manner that makes it capable of being used by investigating authorities without undue difficulties, (3), submitted in a timely fashion, and (4) submitted in a medium or computer language requested by the authorities. In India's view, any **category**<sup>44</sup> of information which satisfies these requirements must be used by the investigating authorities, even if information in some other category fails to satisfy the conditions, and with respect to which resort is had to facts available. India submits

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<sup>43</sup> *Id.*, at 73127.

<sup>44</sup> India subsequently referred to a "component/category/set" of information.

that paragraph 5 of Annex II acts as an "additional safeguard" to ensure that investigating authorities attempt to use a particular category of information submitted even if it is not perfect, so long as the supplier acted to the best of its ability in providing that information.

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

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

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

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

7.50 Regarding the phrase "provided the interested party has acted to the best of its ability", the United States recognizes that perfection is not the standard, and that information that "may not be

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<sup>45</sup> First Written Submission of India at para. 87, citing the Appellate Body Report in *US - Cotton Yarn*, at para. 120.

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

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

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

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## ANNEX II

### BEST INFORMATION AVAILABLE IN TERMS OF PARAGRAPH 8 OF ARTICLE 6

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

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

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

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

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<sup>46</sup> The same principles apply to our consideration of India's challenge to the US statute on its face, discussed below.

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

7.54 On this point, the parties have divergent views. The United States argues that if any necessary information is not provided, the investigating authority may conclude that necessary information has not been provided in terms of Article 6.8, and may instead base its entire determination on facts available. India, on the other hand, considers that the "necessary" information can be considered to fall into discrete categories or sets, grouped around the basic elements of the anti-dumping calculation – information relating to the normal value and export price calculations, and information regarding cost of production and constructed normal value in some cases. India appears to consider these categories as essentially discrete elements of an anti-dumping investigation. India considers that a failure to provide information regarding one element of the overall determination does not justify resort to facts available for all aspects of the calculation of the dumping margin.<sup>49</sup>

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

7.56 We note that there is disagreement between the parties as to whether the provisions of Annex II, which are largely phrased in the conditional tense ("should") are mandatory. We consider that Article 6.8 itself answers this question. Article 6.8 explicitly provides that "The provisions of Annex II **shall** be observed in the application of this paragraph" (emphasis added). In our view, the use of the word "shall" in this context establishes that the provisions of Annex II are mandatory. Indeed, this would seem a necessary conclusion. The alternative reading would mean that investigating authorities are required ("shall") to apply provisions which are not themselves required, an

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<sup>47</sup> New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993.

<sup>48</sup> New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993.

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

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

interpretation that makes no sense.<sup>51</sup> Moreover, the provisions of Annex II, while worded in the conditional, give specific guidance to investigating authorities regarding certain aspects of their determinations which, without more, clearly establish the operational requirements. Thus, we consider that the provisions of Annex II are mandatory, not because of the wording of those provisions themselves, but because of the obligation to observe them set out in Article 6.8.<sup>52</sup>

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

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

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

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

<sup>54</sup> The Appellate Body has stated explicitly that:

"according to paragraph 3 of Annex II, investigating authorities are directed to use information if three, and, in some circumstances, four, conditions are satisfied. In our view, it follows that if these conditions are met, investigating authorities are *not* entitled to reject information submitted, when making a determination."

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

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

<sup>56</sup> New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993.

<sup>57</sup> New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993.

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

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

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

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

7.62 In sum, we consider that paragraph 3 of Annex II establishes specific criteria which an investigating authority must apply before rejecting information submitted and relying instead on facts

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<sup>58</sup> Answers of India to Questions of the Panel - First Meeting, questions 28 & 29, at paras. 54 & 60.

<sup>59</sup> See Panel Report, *US – Hot-Rolled Steel*, at para. 7.55.

<sup>60</sup> In addition, as discussed below, the explanation of such findings is vital.

available. Clearly, with respect to the specific item of information in question, if it fails to satisfy the criteria of paragraph 3, it may be rejected and resort may be had to facts available. This is not in dispute, and is the basis of the United States' not-infrequent resort to "partial facts available" or "gap-filling".<sup>61</sup> The more difficult question, presented in this dispute, is whether a conclusion that some information submitted fails to satisfy the criteria of paragraph 3, and thus may be rejected, can in any case justify a decision to reject other information submitted which, if considered in isolation, would satisfy the criteria of paragraph 3. We consider that the answer to this question is yes, in some cases, but that the result in any given case will depend on the specific facts and circumstances of the investigation at hand.

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

7.64 Paragraph 5 establishes that information provided which is not ideal is not to be disregarded if the party submitting it has acted to the best of its ability. As the Appellate Body found in *US – Hot-Rolled Steel*, the degree of effort demanded of interested parties by this provision is significant.<sup>63</sup> We are somewhat troubled by the implications of India's view of this provision, which might be understood to require that information which fails to satisfy the criteria of paragraph 3, and therefore need not be taken into account when determinations are made, must nonetheless "not be disregarded" if the party submitting it has acted to the best of its ability. We find it difficult to conclude that an investigating authority must use information which is, for example, not verifiable, or not submitted in a timely fashion, or regardless of the difficulties incumbent upon its use, merely because the party supplying it has acted to the best of its ability. This would seem to undermine the recognition that the investigating authority must be able to complete its investigation and must make determinations based to the extent possible on facts, the accuracy of which has been established to the authority's satisfaction.

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

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

7.67 As discussed above, it may indeed be the case that a failure to provide one element of information undermines the usability of information that is submitted, making it unduly difficult to use the information submitted in making determinations. Critical to such a determination is the explanation by the investigating authority of its conclusion in this regard. A panel reviewing such a

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

<sup>62</sup> First Written Submission of India at para. 52.

<sup>63</sup> Appellate Body Report, *US – Hot-Rolled Steel*, at para. 102.

decision must be able to conclude that the investigating authority considered the relationship between the missing information and the information submitted, and concluded that in light of that relationship, the fact that one element of information was not submitted justified the conclusion that information submitted did not satisfy the criteria of paragraph 3 of Annex II.<sup>64</sup> There is no indication on the face of USDOC's determination, or the other information from the record submitted to us, to indicate how the problems with other data submitted, which led to its rejection, affected the US sales price information such that it failed to satisfy the criteria of paragraph 3.

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

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

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

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

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

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

<sup>66</sup> New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993.

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

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

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

7.73 In discussing the obligation on interested parties to cooperate in the information gathering aspect of the investigation, the Appellate Body in *US – Hot-Rolled Steel*, noted that cooperation is a process, commenting that paragraphs 2 and 5 of Annex II of the AD Agreement reflect "a careful balance between the interest of investigating authorities and exporters. In order to complete their investigations, investigating authorities are entitled to expect a very significant degree of effort – to the "best of their abilities" – from investigated exporters" However, the Appellate Body further commented that "cooperation is indeed a two-way process involving joint effort."<sup>72</sup> Thus, it seems clear to us that investigating authorities must undertake a degree of effort – some degree of "difficulty" – if needed to be able to use information submitted by an interested party. However, the investigating authorities are not required to undertake extreme measures – that is "undue" difficulties - in order to use information submitted, any more than the interested parties are required to undertake extreme measures to provide requested information.

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Dictionary, Clarendon Press, Oxford, 1993. Thus, even in the absence of on-the-spot verification, the authorities are, in a more general sense of assessing the accuracy of information relied upon, required to base their decisions on information which is "verified".

<sup>68</sup> See Exhibit India-13.

<sup>69</sup> Determination of Verification Failure, Exhibit India-16, at 5.

<sup>70</sup> New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993.

<sup>71</sup> New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993.

<sup>72</sup> Appellate Body Report, *US – Hot-Rolled Steel*, at paras. 102 and 104.

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

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

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

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

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<sup>73</sup> First Written Submission of the United States at para. 170 and fn. 160.

<sup>74</sup> See Appellate Body Report, *US – Hot-Rolled Steel*, at para. 83.

<sup>75</sup> Panel Report, *US – Hot-Rolled Steel*, at paras. 7.54-7.55, Appellate Body Report, *US – Hot-Rolled Steel*, at paras. 73-74.

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

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

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

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

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

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

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

7.84 India argues that the US statutory provisions impermissibly merge the requirements of paragraphs 3 and 5 of Annex II by requiring the rejection of a category of information which satisfies the criteria of paragraph 3 based on a finding that the respondent has failed to act to the best of its

ability in providing some **other** information in some other category. India also criticises Section 782(d), which India asserts mandates the use of facts available if USDOC finds that some other or supplemental submission is not satisfactory, or if the submission was not made by the deadline set for it, and in addition permits USDOC to disregard all or part of the original response.

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

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

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

7.88 Before considering the consistency of US law with the AD Agreement, we consider it important to address an underlying question. A number of Panels have held that a municipal statute will be found to be inconsistent on its face with a Member's WTO obligations only if it is mandatory and requires WTO inconsistent action or prohibits WTO consistent action.<sup>76</sup> This was consistently the finding of Panels under the GATT 1947, and has been followed by WTO panels. The Appellate Body has recognized the distinction, but has not specifically ruled that it is determinative in consideration of whether a statute is inconsistent with relevant WTO obligations. However, it did recently state, in *United States – Anti-Dumping Act of 1916* :

"88. As indicated above, the concept of mandatory as distinguished from discretionary legislation was developed by a number of GATT panels as a threshold consideration in determining when legislation as such – rather than a specific application of that legislation – was inconsistent with a Contracting Party's GATT 1947

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

obligations. The practice of GATT panels was summed up in *United States – Tobacco* as follows:

... panels had consistently ruled that legislation which mandated action inconsistent with the General Agreement could be challenged as such, whereas legislation which merely gave the discretion to the *executive authority* of a contracting party to act inconsistently with the General Agreement could not be challenged as such; only the actual application of such legislation inconsistent with the General Agreement could be subject to challenge. (emphasis added)

89. Thus, the relevant discretion, for purposes of distinguishing between mandatory and discretionary legislation, is a discretion vested in the *executive branch* of government". (footnotes omitted)<sup>77</sup>

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

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

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

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

(a) IN GENERAL. - If -

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

(2) an interested party or any other person-

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

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

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

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

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<sup>77</sup> Appellate Body Report, *US – 1916 Act*, at paras. 88 - 89.

<sup>78</sup> First Written Submission of India at para. 141; First Written Submission of the United States at paras. 116-118.

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

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

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

"Section 782 - CONDUCT OF INVESTIGATIONS AND ADMINISTRATIVE REVIEWS.

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

- (1) the administering authority or the Commission (as the case may be) finds that such response is not satisfactory, or
- (2) such response is not submitted within the applicable time limits,

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

(e) USE OF CERTAIN INFORMATION. - In reaching a determination under Section 703, 705, 733, 735, 751, or 753 [preliminary and final determinations, administrative review of determinations, and special rules for injury investigations for certain section 303 countervailing duty orders and investigations] the administering authority and the Commission shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority or the Commission, if -

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

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

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

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

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

7.95 India argues, however, that when section 776(a) is read in combination with sections 782(d) and (e), the result is to require USDOC to reject information in a manner inconsistent with paragraph 3, because the statute requires criteria additional to those in paragraph 3 to be satisfied before information can be considered by USDOC. Looking at section 782(d), we note first that it provides that, in certain circumstances, the USDOC **may** resort to facts available. Thus, on its face, this provision is discretionary, and does not require the US authorities to reject information and resort to facts available in any circumstances, and certainly not in a manner inconsistent with Article 6.8. Finally, section 782(e) requires the US authorities to consider information, submitted by a party, that might otherwise be rejected under section 776(a), if the conditions in section 782(e) are satisfied with

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<sup>80</sup> First Written Submission of India at para 140.

<sup>81</sup> USDOC frequently relies on facts available with respect to some element of information that is not submitted by a party. See, e.g., cases cited at note 61. For instance, in the investigation underlying *US - Hot-Rolled Steel*, the missing information was a conversion factor necessary to allow calculation of dumping margins on a consistent weight basis. The failure of some parties to submit such a conversion factor led USDOC to rely on facts available only with respect to the calculation of a dumping margin for those sales affected by the conversion factor – for other aspects of the calculation, the information actually submitted was used.

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

respect to that information. Contrary to India's argument, we do not understand this provision to require the US authorities to reject information that does not satisfy the conditions of section 782(e). Rather, we understand section 782(e) to **limit** the US authorities' discretion to reject information under section 782(d). That is, our reading of these provisions, taken together, is that if information does not satisfy the conditions of section 782(e), then the US authorities may, **but are not required to**, disregard that information under section 782(d). Thus, the issue is not one of the US law requiring action inconsistent with the AD Agreement, but whether the application of that law in a particular case results in a decision inconsistent with the AD Agreement. A decision in a particular case to exercise the discretion afforded by the statute and disregard information, basing determinations instead on facts available, may, or may not, be consistent with Article 6.8 of the AD Agreement.

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

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

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

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<sup>83</sup> First Written Submission of India at para. 43.

"does not indicate whether the term "information submitted" refers to a specific category of information, as argued by SAIL, or all the information submitted by the interested party, as argued by the Department. Moreover, neither the legislative history of the statute nor the Statement of Administrative Action ("SAA") accompanying the Uruguay Round Agreements Act further clarifies Congress's intent regarding "information submitted." As a result, there is no clear statutory directive as to when the Department must use partial facts available. See Heveafil Sdn. Bhd v. United States, 25 CIT \_\_\_, \_\_\_, slip-op. 01-22 at 9 (Feb. 27, 2001). The statute is, therefore ambiguous on this issue.

As the statute is unclear, the question for the court is whether the agency's interpretation of the statute is "reasonable in light of the language, policies and legislative history of the Statute." Corning Glass Works vs. United States Int'l Trade Comm'n, 799 F2d 1559, 1565 (Fed. Cir. 1986)(emphasis omitted)(discussing general statutory interpretation)."<sup>84</sup>

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

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

7.100 Based on the foregoing discussion, we conclude that sections 776(a), 782(d), and 782(e), of the Tariff Act of 1930, as amended, are not, on their face, inconsistent with the United States' obligations under Articles 6.8 and paragraph 3 of Annex II of the AD Agreement.

#### **4. Whether the final measure is inconsistent with Articles 2.2, 2.4, and 9.3 of the AD Agreement and Articles VI:1 and VI:2 of GATT 1994**

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

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

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

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

## 5. Whether USDOC acted inconsistently with Article 15 of the AD Agreement

7.104 India argues that USDOC violated the first sentence of Article 15 of the AD Agreement by failing to give special regard to India's status as a developing country when considering the application of AD duties. India considers that the nature of the "special regard" will vary from case to case, but must at least involve some extra consideration of the arguments of respondents in developing countries. In this case, India maintains that USDOC should have given "special regard" to the special situation of SAIL as a developing country respondent when making choices in connection with calculating the final dumping margin, rather than treating SAIL the same as any other exporter. India also maintains that Article 15 requires an investigating authority to articulate in its final determination how special regard was exercised.

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

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

7.107 The United States considers that the second sentence of Article 15 obligates a developed country Members to explore the possibilities of constructive remedies under the AD Agreement before applying a final anti-dumping duty. However, the United States maintains that there is no obligation to **accept** any such remedies in lieu of imposing a final anti-dumping measure. The United States also considers that the obligation is only to explore possible **remedies** other than the imposition of a final anti-dumping measure – it does not require the consideration of alternative methodologies for calculating dumping margins. Finally, the United States considers that the obligation to explore

constructive remedies only arises in a particular case if the application of an AD duty "would affect the essential interests" of developing country Member at issue. In the United States' view, the developing country Member seeking the application of Article 15 must first demonstrate that some essential interest is implicated in the case that would be affected by the application of an anti-dumping measure. The United States asserts that there is no indication that SAIL or India ever suggested that applying an anti-dumping measure would affect India's essential interests. In the absence of any demonstration that India's essential interests would be affected by the application of AD duties, the USDOC was under no obligation to even explore the possibilities of constructive remedies.

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

7.109 Article 15 provides:

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

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

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<sup>85</sup> Exhibit US-21, memorandum to file regarding meeting with SAIL representatives on 31 August 1999.

<sup>86</sup> Answers of India to Questions of the Panel - First Meeting, question 25, at para 36.

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

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

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

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

""Remedy" is defined as, *inter alia*, "a means of counteracting or removing something undesirable; redress, relief".<sup>87</sup> "Constructive" is defined as "tending to construct or build up something non-material; contributing helpfully, not destructive".<sup>88</sup> The term "constructive remedies" might consequently be understood as helpful means of counteracting the effect of injurious dumping. However, the term as used in Article 15 is limited to constructive remedies "provided for under this Agreement". ... In our view, Article 15 refers to "remedies" in respect of injurious dumping."

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<sup>87</sup> The New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993.

<sup>88</sup> *Id.*

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

7.113 We turn next to the question of what is meant by the requirement to "explore" possibilities of constructive remedies. India argues that this obligation entails a requirement to "articulate the basis

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

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

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

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

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

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

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

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

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

7.115 In this case, it is clear to us that possibilities of constructive remedies were in fact explored, but that no constructive remedy was applied. The United States asserts, and India acknowledges, that

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<sup>90</sup> The New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993.

a meeting was held at which SAIL's proposal of a suspension agreement was discussed, and that US officials indicated at that meeting that it was unlikely that a suspension agreement would be accepted. In the end, there were no further discussions of a suspension agreement, and no such agreement was entered into. In our view, while this is a clearly unsatisfactory result from SAIL's, and India's, point of view, this course of action by USDOC was sufficient to satisfy the requirements of the second sentence of Article 15.

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

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

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

"that, while Article 15 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 is a mandatory provision, the modalities for its application would benefit from clarification. Accordingly, the Committee on Anti-Dumping Practices is instructed, through its working group on Implementation, to examine this issue and to draw up appropriate recommendations within twelve months on how to operationalize this provision."<sup>91</sup>

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

## **VIII. CONCLUSIONS AND RECOMMENDATION**

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

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

- (a) that the United States statutory provisions governing the use of facts available, sections 776(a) and 782(d) and (e) of the Tariff Act of 1930, as amended, are not inconsistent with Articles 6.8 and paragraphs 3, 5, and 7 of Annex II of the AD Agreement.
- (b) that the United States did not act inconsistently with Article 15 of the AD Agreement with respect to India in the anti-dumping investigation underlying this dispute.

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<sup>91</sup> Decision of 14 November 2001, WT/MIN(01)/17 (20 November 2001).

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

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

- (a) we will not rule on India's abandoned claim; and
- (b) in light of considerations of judicial economy, it is neither necessary nor appropriate to make findings with respect to the remainder of India's claims.

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

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

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

8.8 Article 19.1 of the DSU provides that:

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

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

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

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

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<sup>92</sup> First Written Submission of India at para 181.