

## ANNEX C

### Second Submissions by the Parties

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## ANNEX C-1

### SECOND WRITTEN SUBMISSION OF INDIA

(12 February 2002)

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## I. INTRODUCTION

1. The record at this stage of the proceeding shows with increasing clarity that USDOC's final determination on cut-to-length plate from India, discarding SAIL's verified, timely produced and usable US sales data, violated India's rights under the Anti-dumping Agreement. That final determination adopted wholesale the worst-case calculation offered by the petitioning domestic industry -- based primarily on an export price of \$251 per ton<sup>1</sup> that was contradicted by the very evidence claimed as corroboration by USDOC. USDOC's adoption of the petitioners' calculation using the unsupported US price did not provide a fair comparison between the export price and the normal value as required by Article 2.4, first sentence. Nor did USDOC's rejection of SAIL's US sales data comply with the facts available provisions of Article 6.8 and Annex II, paragraph 3. The record shows that the US sales data were timely produced, were in the requested computer format, were exhaustively verified and thus were "verifiable". Most importantly, they could have been used in a number of methods together with normal value information in the petition to calculate -- without any difficulty -- a final dumping margin.

2. India will focus on several key issues in its rebuttal submission. First, India responds to US arguments concerning the standard of review. Second, India addresses US arguments that the text of Article 6.8 permits anti-dumping authorities to apply total facts available. Third, India discusses the important question of "undue difficulty," as follows:

- First, India discusses the meaning of the phrase "can be used without undue difficulty," responding to the Panel's questions during the First Meeting, written questions 33 and 34, and arguments raised by the United States during that meeting.
  - Second, India raises a fundamental procedural objection under AD Agreement Article 17.6 to the United States' newly asserted evaluation of the facts regarding the usability of SAIL's US sales data, which differs from the evaluation it made in the Final Determination.
  - Third, India points out that the novel US assertion regarding SAIL's US sales database-- that the lack of cost data from which "difference in merchandise" (or "difmer") adjustment could be calculated rendered SAIL's database unusable-- is inconsistent with the United States' own anti-dumping law. In fact, "difmer" adjustments under the US anti-dumping statute are applied only to normal value (NV)-- never to US price-- so the lack of data to calculate the "difmer" adjustment for SAIL cannot undermine the validity of its US sales database.
  - Fourth, even accepting the relevance of the US argument, India further points out that USDOC routinely fills in gaps in respondents' submitted databases, including expressly accepting a respondent's database from which DIFMER data was absent. USDOC recently used the submitted data in a way that limited the importance of the missing information, just as India has proposed in this case.
  - Fifth, even accepting for purposes of argument that the cost issue is relevant to the usability of SAIL's US sales data, India sets out a number of different methods by which the margins could be calculated "without undue difficulty," using NV and cost data from the petition.

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<sup>1</sup> Ex. IND-1, at figure 5, page 000040 (public version).

3. In Section V of this submission, India addresses the issue of the meaning of the terms “verified” and “verifiable.” India discusses how SAIL's US sales data was actually *verified* during the intensive, multi-week verification process in India. Using USDOC's own description of that process, India demonstrates how SAIL's US sales data met the criterion of being “verifiable” in Annex II, paragraph 3.

4. Finally, in sections VI India responds to US arguments that a respondent who does not act to the best of its ability under Annex II, paragraph 5 necessarily “does not cooperate” within the meaning of Annex II, paragraph 7, and in Section VII to arguments that USDOC properly drew adverse inferences in its Final Determination. India summarizes the key measures and claims at issue in this dispute in Section VIII in the Conclusion.

5. India has provided extensive answers to the Panel's questions in a separate document. These answers set forth, *inter alia*, evidence, argument and discussion related to many of India's claims. India will not repeat that discussion in this submission. Among the claims addressed in the Answers include the following:

- Article 2.4 - USDOC's failure to make a fair comparison between export price and normal value (Answer to Question 20).
- Article 15, first sentence - USDOC's failure to adhere to its obligation to give special regard to SAIL (Answer to Question 25).
- Article 6.8, Annex II, paragraph 3 - “as applied” claim relating to USDOC's practice of applying total facts available in this case (Answer to Questions 35-36).

6. India will respond at the Second Meeting of the Panel to any comments made regarding these and other claims in the United States submission of 18 February addressing India's answers to the Panel's questions.

## II. STANDARD OF REVIEW

7. The United States suggests in paragraph 66 of its First Submission that the Panel may not focus on only particular facts in the investigative record, but instead “are directed to look to the entire administrative record of an investigation.” India disagrees with this suggestion. The entire investigative record in this case is enormous, as it is in many anti-dumping investigations. The Panel's “objective assessment of the facts of the *matter*” under AD Agreement Article 17.6(i) (as well as DSU Article 11) necessarily involves the relevant and pertinent facts related to the measures and legal claims at issue. Any other standard of review would be unworkable. Because this dispute focuses on particular facts in an anti-dumping investigation, the Panel must make, in the words of the Appellate Body, “an active review or examination of the *pertinent* facts.”<sup>2</sup>

8. Applying this “active review” of “pertinent facts” standard under Article 17.6(i), the Panel should determine that USDOC's establishment of certain facts was not proper, and USDOC's evaluation of the facts was not unbiased and objective. The following are some of the key factual evaluations that could not have been made by an unbiased and objective investigating authority:

- USDOC's determination to use a \$251 per ton offer price in the petition as the export price in calculating a final dumping margin, when the allegedly corroborating

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<sup>2</sup> *Japan Hot-Rolled*, WT/DS184/AB/R at para 55 (emphasis added).

evidence in the petition showed an average unit price of \$354 per ton<sup>3</sup> during the period of investigation, and SAIL's own verifiable data showed an average price of \$346 per ton<sup>4</sup> during the period of investigation;

- USDOC's finding that SAIL's US sales data "failed verification" because of the unreliability of information in *other* categories of information, and without regard for the fact that the information had actually been verified, as reflected in USDOC's own verification report; and
- USDOC's determination not to use SAIL's US sales database in the calculation of a final dumping margin, despite its own statement that the data were "useable" if errors "susceptible to correction" were corrected, and despite the fact that SAIL provided USDOC with a variety of methods to use the data, and that the methods could have been used without undue difficulty.

### III. INTERPRETATION OF THE PHRASE IN ARTICLE 6.8 "PRELIMINARY AND FINAL DETERMINATIONS . . . MAY BE MADE ON THE BASIS OF THE FACTS AVAILABLE"

9. The United States argues at paragraphs 93-97 of its First Submission that the phrase, "preliminary and final determinations may be made on the basis of the facts available" in AD Article 6.8 means that investigating authorities have the authority to make such determinations using total facts available without any limits. This argument, like the US argument concerning "information" at paragraphs 82-92 of the US First Submission, totally ignores the mandate in the AD Agreement that Annex II, paragraph 3 must be observed in the application of Article 6.8. As India has repeatedly argued<sup>5</sup>, the last sentence of Article 6.8 makes it clear that Article 6.8 cannot be read in a vacuum. The terms of Article 6.8 can *only* be understood and applied in light of Annex II. And the phrase "all information which" meets the four conditions of Annex II, paragraph 3 has been interpreted by the Appellate Body to require the use of such information.

10. Nor does the text of Article 6.8 authorize the application of "total facts available", *i.e.* *rejection* of all of the information submitted by respondent. The text does not say that the final or preliminary determination may be made on the basis of "total," "all" or "only" facts from the petition or adverse facts. Rather, the text uses the expression "may be made on the basis of *the* facts available" (emphasis added). This phrase does not mean that any information provided by the respondent which meets the requirements of Annex II, paragraph 3 can be rejected if other information submitted by a respondent does not meet these requirements. Read in the context of Annex II, paragraph 3, the pool of "facts available" that can be used to make a preliminary or final determination in Article 6.8 is limited to filling the gap for the piece or component of necessary information that the respondent has not been able to supply consistent with Annex II, paragraphs 3 and 5. For that particular information, the pool of "available" facts would include facts from the petition or from other available sources.

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<sup>3</sup> Ex. IND-31; figure based on publicly available data from US Customs Service.

<sup>4</sup> Ex. IND-32.

<sup>5</sup> India First Submission at paras. 50-79; India First Oral Statement paras. 25-43.

#### IV. USDOC COULD HAVE USED SAIL'S SUBMITTED US SALES DATA WITHOUT UNDUE DIFFICULTY IN COMBINATION WITH INFORMATION IN THE PETITION

##### A. PROPER INTERPRETATION OF THE TERM "*UNDUE DIFFICULTY*"

11. One of the key issues in this case is the proper interpretation of the phrase "can be used without undue difficulty" in Annex II, paragraph 3. A key word in this phrase is "used." The ordinary meaning of the term "used," in the context of the AD Agreement, is that the data are "used" to establish a dumping margin.<sup>6</sup> The entire purpose of collecting the necessary information (and, indeed, in conducting a dumping investigation) from both the domestic industry and the interested foreign parties is to "use" the information to determine if the product investigated is "introduced into the commerce of another country at less than its normal value."<sup>7</sup> In the dumping phase of an investigation, there is simply no other reason to collect the information, and no other "use" for the information.<sup>8</sup>

12. The term "difficulty" suggests that the information at issue in an Annex II, paragraph 3 situation may not be perfect. If perfection were the requirement, then the text would not have included the element of "difficulty." So, it can be presumed that if this criterion is at issue, there are some difficulties in using the data that must be overcome through efforts of the investigating authorities before it becomes "usable" for the purpose of calculating the dumping margins. These difficulties could include gaps in the information submitted by the respondent -- for example, missing data on freight expenses, missing product characteristics, missing cost data, incorrect customer information, etc. These gaps in the submitted information are those that USDOC regularly "fills" through the application of its "filling the gap" doctrine. Another issue that may require some effort on the part of the investigating authorities before the information is "usable" would be to account for errors or revisions to data encountered at verification. For example, the documents reviewed at verification may reveal that a particular freight expense amount is different from that reported in the respondent's questionnaire response. Or it may be discovered that certain customers were identified with an incorrect level of trade. Or it may be determined that certain general expenses were incorrectly allocated among home market, US, and third country sales. These items can generally be handled by the investigating authority through revisions to, or the insertion of additional lines in, the computer programme used to calculate the respondent's margins.

13. Another key qualifier is the term "undue." The ordinary meaning of this term is "going beyond what is warranted or natural, excessive, disproportionate."<sup>9</sup> The importance of this word can be seen by considering the text *without* it. If the text simply read "can be used without difficulty", the text would require investigating authorities to take efforts to use the verifiable and timely produced information but to stop trying if any difficulty arose in their efforts to use the information. But with the addition of the word "undue", the text suggests an even higher degree of effort is required on the part of investigating authorities to use the verified (or verifiable) and timely produced information.

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<sup>6</sup> The information need only "contribute" to the calculation of a dumping margin because the entire thrust of Annex II, paragraph 3 relates to "all information which" can be used to calculate a dumping margin -- not all information requested by investigating authorities (as argued incorrectly by the United States). See India First Submission at paras. 56-67, India Oral Statement at the First Meeting of the Panel with the Parties ("First Oral Statement") at XX.

<sup>7</sup> AD Agreement Article 2.1.

<sup>8</sup> The United States argues at paragraph 113 of its First Submission that information meeting the requirement of Annex II, paragraph 3 "should be taken into account, although it need not be used to calculate a margin." India finds it difficult to understand how information can be used in the sense of being "taken into account" but then not used for the purpose of calculating a margin.

<sup>9</sup> New Shorter Oxford English Dictionary, Clarendon Press 1993.

This includes, as discussed below, the requirement to use information that may not be perfect, or information that may have to be combined with other data to become usable. This interpretation is consistent with the disciplines in the AD Agreement: on the one hand, the Agreement sets minimum standards for the information required in an application, and on the other hand, the Agreement limits the investigating authorities' ability to use that information to calculate dumping margins if respondents have provided verified and timely produced information.<sup>10</sup>

14. India offers the following suggestions for criteria to be used in interpreting the meaning of the phrase "can be used without undue difficulty". Not all of these criteria may be applicable in every case, but these criteria could be used to assess whether information that is already timely produced, verified (or verifiable) and in the required computer format, can be used "without undue difficulty" to contribute to the calculation of a dumping margin. These criteria are as follows:

- (a) The extent to which the component/category/set of information requested is complete;
- (b) The extent and ease with which gaps in the information can be filled with other available information in the record;
- (c) The amount of information that is available to be used;
- (d) The amount of time and effort required from the authorities to use the data in calculating a dumping margin;
- (e) The accuracy and reliability of alternative information that would be used if the respondent's information were discarded.

15. We discuss each of these suggested criteria below.

16. (a) *Completeness of component/category/set of information:* Investigating authorities (including USDOC) request information from interested foreign parties in components and sections. The largest components are entire data sets for home market sales, export sales, cost of production, and constructed value. However, data is frequently requested and provided in much smaller groupings. One consideration in assessing "undue difficulty" is the completeness of the information requested. The more complete the information, the easier it will be to use in connection with other information to calculate the respondent's margins. For example, SAIL's US sales database was complete except for the VCOMU and TCOMU data used to calculate the "difmer" adjustment, which in any event, as noted below, does not affect the calculation of US price. The US sales database contained complete information on all 1284 of SAIL's US sales into the US market during the period of investigation, including information regarding 26 different characteristics of SAIL's US sales, including quantity shipped, prices, physical characteristics, movement expenses, credit expense, etc. As described in section IV.E below, this US sales database was easily capable of being used to contribute to the calculation of a dumping margin.

17. (b) *Extent the information can be used with other information:* Another important consideration is the extent to which the particular information can be combined with other information to calculate a dumping margin. No particular piece or category of information collected in an investigation, standing alone, can be used to calculate a dumping margin. Rather, a dumping margin can only be calculated by using this information in conjunction with *other* information provided either by the respondent or from other sources, including the petition. SAIL's US database can be used when combined with the NV data supplied in the petition – either the petition's estimated

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<sup>10</sup> See India First Oral Statement, paragraphs 48-54.

home market prices (from a market research report submitted by petitioners) or its estimated constructed value. Margins could easily be calculated from the combination of these sources of information, as described in Mr. Hayes' first affidavit and as he described further during the First Meeting. If USDOC were to insist (unnecessarily, in India's view) that a "difmer" adjustment must be made to the NV before the NV could be compared to SAIL's reported US sales database, the information necessary to calculate a "difmer" adjustment is likewise to be found in the petition. Further details regarding margin calculation options are found in Mr. Hayes' second affidavit, attached to this rebuttal brief as India Exhibit 34.

18. (c) *Amount of information available to be used:* The amount of information available to be used in calculating a dumping margin is a further criterion that could be considered in assessing undue difficulty. If the information provided constitutes complete information, but it covers only a relatively small aspect of the sales involved (such as brokerage fees, freight or credit expense), then the administering authority would not be expected to spend a significant time attempting to correct any errors or otherwise to use considerable efforts to make the information usable without undue difficulty.

19. But if the information at issue is a largely complete set or category of information, then it cannot be so easily ignored. If the information provided represents *one* entire component of an equation that involves two components necessary to calculate a dumping margin, then investigating authorities must take considerable steps to attempt to use this verified (or verifiable) and timely produced information, before determining that they cannot use it.

20. In this case, SAIL's US sales information represented effectively the entire database required in order to calculate the export price component (*one* side) of the two-sided dumping calculation equation. USDOC could therefore be expected to expend considerable efforts to use the database. These efforts should be measured not only in terms of the number of hours of work involved, but also in the flexibility of the efforts undertaken by USDOC to make the submitted data "usable" – for example, as it did to overcome the missing "difmer" data in the *Stainless Steel Bar from India* case, discussed in detail below.

21. (d) *Amount of time and effort required from investigating authorities:* Another element that could be considered in assessing "undue difficulty" is the amount of time and effort required by the investigating authorities to use the information. As a general matter, the fewer or less complex the changes required to correct or modify data, the easier the data would be to use. In the case of SAIL's US database, the effort required to make the information usable in conjunction with information in the petition does not involve very much time. As Mr. Hayes' Second Affidavit indicates, in the case of each of the suggested methods for using SAIL's US sales data, he estimates it would take from between a half-hour to three hours of an experienced USDOC analyst's time to calculate SAIL's margins. This is a very short period of time, compared to the thousands of hours demanded from respondents for responding to anti-dumping questionnaires and collecting and formatting the requested information.

22. (e) *Accuracy of alternative information if the information in question is not used:* A final factor to consider, in deciding whether information can be used without undue difficulty, is the quality and accuracy of the alternative information in the petition, or other sources of information that would be used in the event that the submitted data is disregarded. This analysis responds to the Panel's question 33. The concept of "undue difficulties" must be read in light of the object and purpose of the AD Agreement, which is to use the most accurate information possible in calculating a dumping margin. The level of effort required to use information should be considered in connection with the accuracy of alternative available information. If investigating authorities know that if they do *not* use the verifiable and timely produced information from the respondents, they will instead use information in the petition which is *not* verified and can *not* be corroborated by other information,

then they must use particular efforts to make the submitted information “usable”. The amount of effort required from investigating authorities as well as the quality of the information that can be used without undue difficulty may well differ in each case.

23. In the current case, USDOC knew that the single \$251 per ton offer that was the basis of the export price in the petition never resulted in a sale, and was \$100 less per ton than the average unit value of the US Customs data against which USDOC claimed to have corroborated that offer.<sup>11</sup> India submits that in these circumstances USDOC was obligated to use particular efforts to make SAIL's US sales data usable to calculate its margins. The situation here is especially stark because USDOC made no efforts to use SAIL's US sales information, despite the fact that USDOC concluded in its Final Determination that the information could be "used" with some minor corrections to the database.

24. In conclusion, the determination of whether verifiable and timely produced information is usable “without undue difficulty” is a critical stage of the process by which an investigating authority calculates a respondent's margins. It demands significant cooperation and effort on the part of investigating authorities. It requires that they undertake efforts to use the information submitted by a respondent, including seeking ways to use the information, if necessary, in conjunction with other information. It also requires investigating officials to make corrections in data and to request and obtain information from respondents needed to make such corrections.

**B. THE PANEL SHOULD REJECT THE UNITED STATES' ATTEMPT TO HAVE THE PANEL CONDUCT A *DE NOVO* EVALUATION OF THE FACTS REGARDING THE USABILITY OF SAIL'S US DATABASE**

25. During the First Meeting of the Panel with the parties, the United States raised for the first time a new argument that India's US sales data was not usable to calculate a dumping margin because of problems that spilled over from India's cost database. In particular, the United States asserted that the absence of cost information from which a “difmer” adjustment could be calculated on SAIL's US sales made all of SAIL's US export price data unusable to calculate a margin. The Panel should reject the new US “difmer” argument on the merits, if the Panel considers it must address that argument's merits in order not to leave a void in the event of an appeal. However, first and foremost the Panel should reject the United States' new argument as an attempt to have the Panel make a *de novo* finding that SAIL's US sales data are not "usable." Fundamental systemic considerations for the WTO dispute resolution process, far more important than this case standing alone, compel such a finding by the Panel.

**1. Relevant facts**

26. The facts relevant to India's objection based on AD Article 17.6(i) are described below. Because section 782(e) of the US anti-dumping statute contains three of the conditions of Annex II, paragraph 3 (as well as two others), SAIL's arguments before the USDOC on the "usability" of SAIL's US database were very similar to the arguments advanced by India before this Panel. Five weeks before USDOC issued its final determination on 29 December 1999, SAIL's counsel presented oral arguments to USDOC. After discussing the width error in the data and the extensive and successful verification process regarding SAIL's US sales database, SAIL's counsel made the following statement:

It would be unreasonable and irrational for the Department, in any context -- in this case or in any other case -- for the Department to knowingly say, well, let's use information that we know is wrong in place of information that we know and we have verified to be correct. But that is, in essence, what you are being urged to do here.

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<sup>11</sup> See Ex. IND-8 (public version), Ex. IND-31 (public version).

You're being asked to use the Petitioner's -- clearly and, I think, beyond doubt -- inaccurate estimate of US sales data in place of the actual US sales information that you know, without question, is accurate, timely, and verified. I do not think the Department or any other government agency can say, even though we know the answer is four, we are going to say that two plus two equals five. But that is, in effect, what you're being asked to do, to submit something you know is incorrect for information that you know is verified without question to be accurate.

'The basic purpose . . . of the [US] anti-dumping law is to calculate dumping margins as accurately as possible.' . . . All the authorities that we have referred to in our brief are clear, that with respect to discrete, particular pieces of information, such as the US sales database that we submitted, if the information is timely, if it is verified, if it is complete, if it is submitted with that party's best of its ability, and if it can be used without any undue difficulties, then the Department is required to use it. It is another way of saying, the Department is required to act rationally.<sup>12</sup>

27. In addition, SAIL's counsel proposed to USDOC that one method for calculating a margin was "based on [SAIL's submitted] information and US sales list and the constructed value information based on the petition."<sup>13</sup> In SAIL's case and rebuttal briefs to USDOC dated 12 and 18 November 1999, SAIL repeated the arguments that the information in SAIL's US database, standing alone, was verified and could be used by the Department in its final determination. In its submission of 12 November, SAIL made the following arguments:

Were the Department to use information other than SAIL's home-market sales and cost data, it would be appropriate for the Department to calculate the dumping margin using (1) the verified US sales data submitted by SAIL and (2) the average of the normal value and constructed value alleged in the Petition. Alternatively, the Department might reasonably calculate the dumping margin by using (1) the verified US sales data submitted by SAIL and (2) the single largest home-market sale by value of [ ], the home-market product that is the "most similar" product for over [ ] per cent of [ ]. What the Department cannot do is ignore the verified US sales data submitted by SAIL and use in its stead the US sales price information alleged in the Petition. The US sales price alleged in the Petition is unquestionably much less accurate than the verified US sales data submitted by SAIL. Accordingly, the Department is required to use SAIL's US sales data when calculating SAIL's dumping margin.<sup>14</sup>

28. Thus, at the time that USDOC issued its Final Determination on 29 December 1999, the issue of exactly how SAIL's US sales data could be used by USDOC was squarely before it.

29. The Final Determination evaluated the facts regarding SAIL's US database as follows:

Finally, with respect to section 782(e)(5), the US sales database contained errors that, *while in isolation were susceptible to correction*, however when combined with the other pervasive flaws in SAIL's data lead us to conclude that SAIL's data *on the whole* is unreliable.<sup>15</sup>

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<sup>12</sup> Ex. IND-15 at 28-30.

<sup>13</sup> *Id.* at 54-56.

<sup>14</sup> Ex. IND-14 at 14-15 (November 12, 1999) (emphasis in original).

<sup>15</sup> Ex. IND-17 at 73127 (emphasis added).

Furthermore, we disagree with SAIL's characterization of its US sales as accurate, timely, and verified. In fact, the US sales database contained certain errors, as revealed at verification. *See Sales Report; see also Verification Memo.*<sup>16</sup>

Yet SAIL has not provided a useable home market sales database, cost of production database, or constructed value database. Moreover, the US sales database would require some revisions and corrections in order to be *useable*.<sup>17</sup>

30. Thus, USDOC focused its evaluation of the facts regarding SAIL's US sales data on two aspects -- the errors ("revisions and corrections") that were found in SAIL's database and the useable nature of that database. As set forth in USDOC's Sales Verification Report, and its Memorandum on Verification Failure, the only error that rose to the level of a "significant" issue was the width coding error which Mr. Hayes has indicated would take a short amount of time to correct, and for which USDOC had all the corrected information as set out in Exhibit S-8 of its Verification Report. Indeed, given that this was the only error USDOC considered "significant," it properly stated in the Final Determination that, *inter alia*, SAIL's US sales database was "susceptible to correction."

31. USDOC also stated in the Final Determination that SAIL's US sales database "would require some revisions and corrections in order to be useable." India notes the inter-related nature of these two statements, *i.e.*, that the "revisions and corrections" were "susceptible to correction." Contrary to the United States' new assertions, nothing in the Final Determination states that the US sales database needed "additions" in order to be usable. Nor does the Final Determination suggest that the US sales database was infirm because of missing data required to calculate a "difmer" adjustment. It is significant that USDOC did *not* make any such assertion despite the fact that SAIL had proposed several methodologies in its case brief on 12 November 1999 that would have combined SAIL's US sales data with the information on constructed value in the petition. This is exactly the same basic methodology that India has proposed to the Panel since its First Submission and which it continues to assert would be an appropriate method to calculate SAIL's margins in this case.

32. The United States raised the "difmer" issue for the very first time at the First Meeting of the Panel with the parties in January 2002. In orally responding then to India's objection that this was a new argument not found in the record or in the Final Determination, the United States stated it was making the argument because of calculations made by Mr. Hayes in his affidavit. But the methodology proposed by Mr. Hayes for calculating a dumping margin was exactly the same as that proposed two years earlier by SAIL before USDOC -- to combine SAIL's actual US sales data with the data in the petition on normal value.

33. A plain reading of the Final Determination shows that the United States' argument that the lack of "difmer" data undermines the usability of SAIL's US sales database is a new evaluation of the facts in the record generated *post hoc* by USDOC. But this new evaluation is directly at odds with its own evaluation *in the Final Determination* that the database was "useable" if "some revisions and corrections" were made, and its acknowledgement in the same Final Determination that the errors in SAIL's US sales database were "susceptible to correction."

## 2. Legal analysis

34. As the United States has argued in this dispute, AD Article 17.6 precludes panels from conducting *de novo* evaluation of the facts.<sup>18</sup> Yet the new argument by the United States, in effect, either asks the panel to conduct a *de novo* review of USDOC's evaluation of the facts-- by asking the

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<sup>16</sup> Ex. IND-17 at 73130.

<sup>17</sup> Ex. IND-17 at 73130 (emphasis added).

<sup>18</sup> Oral Statement of the United States, First Meeting of the Panel, para. 2.

panel to find that SAIL's US sales database *cannot* be used by USDOC at all— or admits that the USDOC actually reached its decisions during the investigation for reasons not reflected in its final determination. GATT and WTO panels have rightly found such arguments unacceptable. For instance, the panel on *Korea – Anti-Dumping Duties on Imports of Polyacetal Resins from the United States* rejected an attempt by Korea to justify an injury determination by reference to considerations not reflected in the public statement of reasons accompanying the determination:

An explanation of how in a given case investigating authorities had evaluated the factual evidence before them pertaining to the factors to be considered under Article 3 [of the Tokyo Round Anti-Dumping Agreement] clearly fell within the scope of the requirement in Article 8:5 that authorities articulate in a public notice "the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities, and the reasons and basis therefor." This provision served the important purpose of transparency by requiring duly motivated public decisions as the basis for the imposition of anti-dumping duties. In the view of the Panel, the purpose of this provision would be frustrated if in a dispute settlement proceeding under Article 15 of the Agreement a Party were allowed to defend a challenged injury determination by reference to alleged reasons for such determination which were not part of a public statement of reasons accompanying that determination. The Panel therefore did not accept Korea's argument that the Agreement did not limit an investigating authority's ability to demonstrate that it considered all of the required factors, and to demonstrate that dumped imports caused material injury, to the text of the public notice which announced its determination.

Furthermore, for a panel to review a determination by reference to considerations not actually reflected in a public statement of reasons accompanying such determination would also be inconsistent with the requirements of an orderly and efficient conduct of the dispute settlement process under Article 15. A full and public statement of reasons underlying an affirmative determination at the time of that determination enabled Parties to the Agreement to assess whether recourse to the dispute settlement mechanism under Article 15 was appropriate and provided a basis for a delimitation of the object of such dispute settlement proceedings. In this connection the Panel noted that, in light of the wording of the public notice given by the Korean authorities at the time of the imposition of the anti-dumping duties, Parties to the Agreement and exporters affected by these measures had no reason to believe that the injury determination of the KTC was based on considerations not reflected in that notice.<sup>19</sup>

35. One of India's claims in this matter focuses entirely on the fact that the Final Determination is inconsistent with, *inter alia*, Annex II, paragraph 3 of the AD Agreement. Another is that USDOC made an unfair comparison between export price and normal value. As the Panel can see from India's panel request, from its First Submission, and from its Oral Statement to the Panel on 23 January 2002, India has focused its arguments on the fact that SAIL's US sales database should have been used by USDOC because while it contained minor errors, USDOC itself had admitted that these were "susceptible to correction" and USDOC itself had indicated that the information was "useable" if those corrections were made. India made the decision to bring this case to this Panel, in part, because of these findings and evaluations of facts by USDOC regarding the quality of SAIL's US sales database. USDOC is estopped from now claiming a different reason for its determination than that which appeared in the Final Determination.

36. AD Agreement Article 17.6(i) requires that in assessing the facts of the matter, a panel "shall determine whether the authorities' establishment of the facts was proper and whether their evaluation

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<sup>19</sup> ADP/92, adopted 27 April 1993, BISD 40S/205, 275-276, paras. 209-10 (footnote 19 omitted).

of those facts was unbiased and objective." The use of the past tense in this sentence indicates it is focused on an "evaluation" that has already occurred. The "evaluation" of the facts established during an anti-dumping investigation is reflected in the Final Determination. It does not take place two years after the Final Determination has been issued.

37. The context for this interpretation of Article 17.6(i) is Article 12.2 of the AD Agreement requiring that public notice of any final determination must "set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities." In other words, the "evaluation" of facts by an investigating authority may not be modified once the Final Determination is issued. Additional context is provided by Annex II, paragraph 6, which states that "the reasons for the rejection of such evidence or information should be given in any published determinations." These reasons and the evaluation of the facts simply cannot be performed *post hoc* to create *different* factual evaluations where an investigating authority has already made an *evaluation* of a particular fact and provided reasons for the rejection of the data.

38. Another relevant legal authority is the panel report in *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/R where the panel stressed that it could not conduct a *de novo* review of the evidence before the US textile authorities. In that case, the United States attempted to introduce with its first written submission an Annex setting forth the "relevant evidence" applicable to a USDOC final determination in a textile transitional safeguard investigation.<sup>20</sup> This Annex contained additional facts and explanations regarding the final determination issued by US textile officials. In its findings, the panel repeatedly declined to accept this *post hoc* evidence and explanations offered by the United States.<sup>21</sup> Instead, the panel relied only on the evaluation of the facts contained in the final determination.

39. This is not the first time that the United States has been confronted in WTO proceedings with an allegation that it was attempting to introduce into the record *post hoc* findings. In the *Korean Line Pipe* dispute, Korea argued that the United States had presented new arguments on certain issues regarding the WTO compatibility of the final safeguard measure which had not been found in the US notices or decision memoranda regarding the safeguard. In responding to this argument, the United States made the following statement:

Of course, one way Korea might prevail is if the United States were precluded from presenting a defense . . . As Korea has acknowledged, arguments concerning consistency with WTO obligations were not an issue in the domestic proceeding. Therefore the absence of any arguments concerning WTO consistency in the notices is not surprising. *A rationale that was never required in the first place is not post hoc.*<sup>22</sup>

40. Assuming for the sake of argument that India agrees with the latter statement by the United States, there can be no doubt that in the current case, USDOC was presented with arguments during the investigation concerning the usability of SAIL's US database. And the language of subsections 782(e) (1), (2), and (5) of the US anti-dumping statute largely track the language of Annex II, paragraph 3. There is no question that the issues before USDOC, while conducted under US law, involved the same "facts available" issues (and evidence) that India has presented to this Panel.<sup>23</sup> Therefore, US law *and* the WTO rules both required the United States to make a finding regarding the usability of SAIL's US sales data. USDOC's only finding in this regard is quoted above.

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<sup>20</sup> WT/DS33/R at para. 7.33.

<sup>21</sup> *Id.* at paras. 7.33, 7.37, 7.40, 7.41, 7.44.

<sup>22</sup> WT/DS/179/R at 333, para. 4 (emphasis added).

<sup>23</sup> *See* Ex. IND-15.

Having made that evaluation of the facts, the United States must accept it -- not seek to change it. Alternatively, to the extent the Panel finds that USDOC did *not* make any finding on the usability of SAIL's data to calculate a dumping margin, USDOC cannot now *post hoc* develop and introduce a new evaluation of the facts to support the conclusion that it could not use that data at the time of its Final Determination.

41. India does not contest the evaluation of the facts by USDOC that "the US sales database would require some revisions and corrections in order to be *useable*." In fact, the "revisions and corrections" contemplated by this statement are the kinds of corrections and revisions that USDOC routinely makes to data submitted by interested foreign parties (see Section IV.D *infra*). Nor does India contest the evaluation of the facts by USDOC that the revisions and corrections needed to be made to SAIL's US database "in isolation were susceptible to correction . . .". Mr. Hayes has demonstrated exactly how "susceptible to correction" these errors were.

42. However, India strongly opposes the United States' attempt to have this Panel conduct a *de novo* evaluation on these particular aspects of USDOC's original evaluation. This is simply not permitted by AD Agreement 17.6. The United States cannot have it both ways; it cannot insist that the Panel apply a very narrow standard of review under Article 17.6(i) for those findings it wishes to be upheld, and then argue for the Panel to accept a new evaluation of the findings it would like to change or supplement. Accordingly, in conducting its review of India's claims under AD Agreement 17.6, this Panel should find, in accordance with the Final Determination, that (1) SAIL's US database contained errors that were susceptible of correction, and (2) that SAIL's US database could be used by USDOC if some corrections and revisions were made.

43. Finally, India urges the Panel to find in the alternative that it rejects the US "difmer" arguments on the merits-- even if the Panel agrees with India's arguments above under Article 17.6-- in order to avoid a legal vacuum in the event of an appeal. India presents evidence below demonstrating that no unbiased and objective investigating authority could have concluded that SAIL's US sales data was not usable. This evidence demonstrates that SAIL's US sales database -- either in part or in full - can be used in a number of methods to calculate a dumping margin when combined with information in the petition. This analysis is detailed below and in Mr. Hayes' Second Affidavit.

C. THE UNITED STATES ERRS IN ASSERTING THAT THE LACK OF VERIFIED COST DATA RENDERED SAIL'S US SALES DATABASE UNUSABLE, BECAUSE THE COST DATA ARE USED ONLY TO CALCULATE AN ADJUSTMENT TO NORMAL VALUE

44. There is a good reason why USDOC did not take the position during the administrative proceedings or in its Final Determination that the United States has now attempted to raise before the Panel -- i.e., that the absence of verified cost data rendered SAIL's US sales database unusable. Put simply, it is because such an assertion suggests an interaction between cost data and the US sales database that is contrary to US law.

45. Specifically, the adjustment for which the missing cost data is used -- the so-called "difference in merchandise" (or "difmer") adjustment -- is required by US law to be an adjustment *only to normal value, not US price*. Thus, although USDOC requires respondents to include two cost-based data fields in the US sales database, these fields are only used, as discussed below, in the calculation of normal value. In the current case, however, USDOC has already rejected SAIL's NV data (based on both submitted home market sales prices and costs of production). The fact that there may be yet another reason why SAIL's submitted NV data is unusable -- the inability to calculate a difmer adjustment on the basis of submitted cost data -- can have no effect on the outcome of this case. More importantly for the issue at hand, the inability to calculate a difmer adjustment to NV cannot have any

effect on the usability of SAIL's US sales database for the purpose of calculating US prices on which margins can be based. We review this reasoning in greater detail below.

46. The United States' argument is that the verification failure of SAIL's cost of production database means that there is an absence of data for two fields in the US sales database – variable and total cost of manufacture (often referred to by their computer field names, VCOMU and TCOMU). As was discussed during the First Meeting, these two data fields are used for one purpose – to calculate a so-called “difference in merchandise” adjustment that is authorized by the Agreement and US law when a margin is calculated through the comparison of merchandise in the US and home markets that is not identical. Although the Agreement and US law both authorize such an adjustment, neither specifies the manner in which the adjustment is to be calculated. The Agreement, for example, simply notes in Article 2.4 that “Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in . . . physical characteristics . . .” USDOC's practice has been to calculate the adjustment on the basis of the difference in the variable cost of manufacture of the specific models that are being compared in the US and home markets (VCOMU and VCOMH).

47. The US anti-dumping statute provides very precisely for the place in the dumping margin calculation in which the difmer adjustment is to be applied – and that place is in the calculation of NV, not US price. Specifically, subsection 773 of the Trade Act of 1930 as amended (19 U.S.C. § 1677b) governs the calculation of normal value. Subsection (a)(6) of that statutory provision states:

Section 773. Normal Value.

(a) . . .

(6) ADJUSTMENTS.-The price [on which NV is based] described in paragraph (1)(B) shall be-

. . .

(C) increased or decreased by the amount of any difference (or lack thereof) between the export price or constructed export price and the [normal value] price described in paragraph (1)(B)(other than a difference for which allowance is otherwise provided under this section) that is established to the satisfaction of the administering authority to be wholly or partly due to-

. . .

(ii) the fact that merchandise described in subparagraph (B) or (C) of section 771(16) is used in determining normal value . . . .

48. In other words, the statute provides that an adjustment is to be made to the price on which normal value is based, if the merchandise used to determine NV is merchandise described in subparagraphs (B) and (C) of section 771(16) (19 U.S.C. §1677(16)). Those subsections, in turn, describe the merchandise, other than identical merchandise, that may serve as a basis for comparison in calculating dumping margins. Thus, when NV is based on different merchandise (hence, “difmer”) from the merchandise sold in the United States that is the basis of export price, the statute authorizes an adjustment – *but that adjustment can only be made to the NV side of the calculation.*

49. On the basis of this unambiguous statutory directive, USDOC's uniform practice has been to apply the difmer adjustment factor calculated as described above to the adjusted NV of the model sold

in the *home* market.<sup>24</sup> Conversely, under USDOC practice as mandated by the statute above, the difmer adjustment has no bearing at all on the calculation of the US price of the model to which that home market model is matched. For this very basic reason, the United States' assertion that the lack of verified cost data on which a difmer adjustment could be calculated somehow undermines the usability of SAIL's US sales database, is simply incorrect.

D. USDOC COMMONLY FILLS GAPS THAT ARE SIMILAR IN SCOPE TO THE MISSING COST DATA IDENTIFIED BY THE UNITED STATES IN SAIL'S DATABASE

50. Even accepting the United States' argument that the unusable VCOMU and TCOMU data somehow infected the US sales database, it should be recalled that these are only two fields of information in a database of almost 30. The United States has argued to the Panel that the lack of information in these two cost fields renders the US sales database unusable in its entirety, but that simply is not correct. USDOC itself has developed the concept of "filling gaps" in a database, as an exercise of "partial facts available," when necessary to calculate dumping margins. In these cases, USDOC has determined that the magnitude of the gaps (i.e., the missing information) is not so large that it undermines the usability of the database involved. The United States in the current case has argued that the gaps here are too large to be filled through the application of the "filling the gap" doctrine, but in fact the situation in this case is similar to others in which USDOC has done so.

51. For example, in *Stainless Steel Bar From India*, USDOC rejected the home market sales database of one respondent (Viraj) entirely because it was found to be "incomplete and could not serve as a reliable basis for the calculation of normal value."<sup>25</sup> USDOC instead used the respondent's submitted database in which it reported sales to third country markets as the basis for NV. USDOC noted that the third country sales database was "lacking" in one respect – namely, the failure to report usable VCOM data. However, unlike the current case, USDOC *did not conclude that the lack of usable VCOM data rendered the entire database unusable*. To the contrary, it worked creatively with the respondent's submitted information in order to deal with the missing VCOM data in the third country database – specifically, by "band[ing] the company's sales of different stainless steel bar sizes in order to obtain more identical matches."<sup>26</sup> In other words, USDOC redefined what comprised a "product" to expand the scope of "identical" merchandise. And as discussed in detail above, no "difmer" adjustment is applied to matches of identical merchandise, so by revising its definition of "identical" merchandise to ensure that all US products are matched as identical to home market products, USDOC renders the lack of reported VCOM data moot.

52. Moreover, in *Stainless Steel Bar from India* (as in this case), not all products could be matched on an identical basis. But this did not stop USDOC from using the data. Instead, USDOC continued to make efforts to use even this data noting that "[i]n those instances where the banding of sizes did not produce an identical match for a US sale, we have, as facts available, assigned the "all others" rate established in the . . . investigation."<sup>27</sup>

53. USDOC's acceptance of the respondent's database in *Stainless Steel Bar from India* as a basis for calculating margins despite the absence of VCOM data in that database shows how USDOC (or other investigating authorities) can use such data without undue difficulty. As Mr. Hayes' second affidavit describes, a number of methodologies could have been used by USDOC to deal with the lack of usable difmer data, had USDOC desired to make use of them. It is simply incorrect for the

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<sup>24</sup> See Mr. Hayes' Second Affidavit, para. 3.

<sup>25</sup> *Stainless Steel Bar From India: Final Results of Anti-dumping Duty Administrative Review and New Shipper Review and Partial Rescission of Administrative Review*, 65 Fed. Reg. 48965 (10 August 2000) (Decision Memorandum, comment 4) (attached hereto in Ex. IND-35).

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

<sup>27</sup> *Id.*

United States now to claim that in *this* case the lack of the *same* difmer data in SAIL's US sales database rendered it unusable for calculating SAIL's margins.

54. USDOC applied its "filling the gap" methodology in many other cases of equal scope. For example, *Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From the Russian Federation* involved a "non-market economy" country, requiring that NV be based on the respondent's "factors of production." The respondent was not able to report factors of production on a product-specific basis because of "limitations of its accounting system,"<sup>28</sup> and it "failed to develop a reasonable allocation methodology for purposes of this proceeding and instead reported" factors of production based on its records in the normal course of business.<sup>29</sup> As a result, USDOC rejected the NV database as submitted by the respondent. However, this decision did not lead USDOC to apply adverse facts available or to rely on the petition as the basis for NV. Instead, despite its concerns regarding the usability of the respondent's submitted NV data, USDOC retained the factors of production information submitted by the respondent, and used it to calculate a single weighted average NV, to which it compared all US prices.<sup>30</sup>

55. Likewise, in *Certain Circular Welded Carbon Pipe and Tubes from Taiwan*, one of the respondents failed to provide COP and CV information for some of the models sold in the United States and home market. USDOC did not conclude that this missing data undermined the validity of the entire COP and CV databases, but rather filled the gap by inserting for those models the highest average cost of models for which the respondent did provide data. USDOC noted that it was applying "adverse" facts available in doing so, and it rejected the respondent's arguments that it should have used a more "neutral" approach to filling the gap.<sup>31</sup> But USDOC did not assert that it should reject the databases entirely or that the missing information in the COP and CV databases undermined the validity of the other databases (US sales and home market sales).

56. In conclusion, India notes that there are many other cases where USDOC has filled gaps similar to those at issue in this dispute. It will supply additional citations to USDOC decisions if the Panel so requires. The point made is that these decisions illustrate that if USDOC has the will to use the information in calculating a dumping margin -- it can and will find the ways to do so without any undue difficulty.

E. THERE ARE NUMEROUS METHODS THROUGH WHICH USDOC COULD HAVE USED SAIL'S US SALES INFORMATION TO CALCULATE SAIL'S MARGINS

57. Contrary to the United States' assertions, a broad range of methods exist by which it could have calculated SAIL's margins using its verified US sales database and NV information from the petition. Several of these methods are set out in detail in Mr. Hayes' Second Affidavit, attached hereto as Exhibit IND-34, and India reviews them below. However, a few introductory points should be noted. First, each of these methods is easy to implement -- i.e., employing them, the US sales database is usable "without undue difficulty." Mr. Hayes estimates that none of them would take more than a few hours for an experienced USDOC analyst to draft and input the necessary computer programming language, to run the margins, and to evaluate the results.

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<sup>28</sup> Notice of Final Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From the Russian Federation, 64 Fed. Reg. 38626, 38629-30 (19 July 1999) (attached hereto in Ex. IND-35).

<sup>29</sup> *Id.* at 38635.

<sup>30</sup> *Id.* at 38630.

<sup>31</sup> *Certain Circular Welded Carbon Steel Pipes and Tubes From Taiwan: Final Results of Antidumping Duty Administrative Review*, 64 Fed. Reg. 69488, 69489-90 (13 December 1999) (attached hereto in Ex. IND-35).

58. Second, some of the methods are very similar to that used by the petition and adopted by USDOC – i.e., comparing US price with CV data in the petition. The only difference is that these proposed methods use SAIL’s actual submitted, verified US sales data, instead of the price offer in the petition, which was known to be grossly inaccurate. And in adopting the petition’s margin, USDOC did not express any concern regarding the fact that the petition did not account for the lack of “difmer” adjustment data in the petition’s estimate of US price. Thus, there should be no reason why that factor has any relevance to the use of the alternative methodologies described below. However, the lack of “difmer” adjustment data was overcome by USDOC in *Stainless Steel Bar From India*, and a methodology such as was used in that case could be employed here as well, to overcome any lingering concerns regarding the lack of difmer adjustment data in this case.

59. The CV in the petition was based on the cost of producing certain cut-to-length carbon steel merchandise. As set forth in Mr. Hayes’ Second Affidavit, a substantial proportion - 30 percent - of cut-to-length plate shipped by SAIL to the United States during the period of investigation was of the same merchandise as that for which the petition calculated CV.<sup>32</sup> For the transactions involving these shipments, the absence of cost information from which a “difmer” adjustment could be calculated would be irrelevant, because no such adjustment need be applied to matches of “identical” merchandise.

60. Thus, one alternative method by which USDOC could calculate the margins using SAIL’s verified US sales database would be simply to calculate the margins on those products for which an “identical” match exists between that database and the products on which the petition calculated NV.<sup>33</sup> The weighted average margin could then be applied to all of SAIL’s US sales, including those for which there was no direct match to NV. This method would obviate the need for a difmer adjustment. It is also the method used by the petition and adopted by USDOC, but instead of using SAIL’s actual verified data, USDOC used a fictitious price in the only price offer in the petition as the basis of US price. It is hard to understand why that method would be less accurate if the margin were calculated on the basis of SAIL’s actual verified US sales data, as opposed to the inaccurate and fictitious price offer in the petition.<sup>34</sup>

61. Another option, which is closely similar to the first, would be to calculate the margins using all of SAIL’s US sales transactions by calculating the weighted average USP for all the transactions on the basis of the information submitted in SAIL’s US sales database, and comparing those USPs to the petition’s CV. This methodology is the same as that shown in India’s Exhibit 33, which Mr. Hayes presented to the Panel during the first day of the First Meeting. Although this option does not account for a “difmer” adjustment, it is very similar to the methodology applied by the petition and adopted by USDOC, again, without any apparent concern as to the lack of such an adjustment.

62. Yet another option would be to calculate the simple average NV from the two calculations shown in the petition (i.e., the price-based NV from the home market research report, shown in Figure 2 of the public version of the petition, and the CV-based NV). The prices for all the US transactions involving identical merchandise would be calculated on the basis of the information submitted in SAIL’s US sales database. Those US prices would then be compared to the NV figure, to obtain the margins for the vast majority of SAIL’s US sales. Given that only identical matches are involved, the absence of data on which a “difmer” adjustment could be calculated is moot under this option.<sup>35</sup>

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<sup>32</sup> See Mr. Hayes’ Second Affidavit (Ex. IND-34), para. 5.

<sup>33</sup> The details of this option are presented in Mr. Hayes’ Second Affidavit (Ex. IND-34), para. 7.

<sup>34</sup> More complex versions of this option are presented in paragraphs 12-13 of Mr. Hayes’ Second Affidavit.

<sup>35</sup> See Mr. Hayes’ Second Affidavit, para. 9.

63. Another possible methodology would be based on USDOC's determination in *Stainless Bar from India*, discussed in paragraph 51-53 above. USDOC could expand the definition of a "product" in the current case, by "banding together" products into larger groups. For example, this could involve comparing the US prices of all of SAIL's merchandise that is of the identical grade of steel and within plus or minus 0.5 inches (13 millimetres) in thickness as that of the petition's CV merchandise to the petition's CV-based NV of \$372. Again, it would be unnecessary to perform a "difmer" adjustment to NV, and margins would be calculated for a substantial majority of SAIL's shipments. For the remainder of SAIL's US sales, USDOC could apply the calculated margin, which is the same method by which the petition and USDOC applied a margin to SAIL's unmatched US sales, as noted at the end of paragraph 64 above.<sup>36</sup>

64. Finally, another option would be a variation on the first described above (in paragraph 63), in which, for the small quantity of SAIL's remaining, unmatched US sales, the Department would simply apply the highest margin calculated on the US sales whose margin is calculated using the CV as NV. A single weighted-average margin could then be calculated over all of SAIL's US sales by weight averaging the transaction margins calculated above.<sup>37</sup>

**V. NO UNBIASED AND OBJECTIVE INVESTIGATING AUTHORITY COULD HAVE CONCLUDED THAT SAIL'S SUBMITTED US SALES INFORMATION WAS NOT VERIFIABLE**

65. The Panel has raised questions concerning the meaning of the term "verifiable" in the Agreement during the first meeting of the Panel with the parties and in various questions to India. The United States suggested at the first meeting that SAIL's US sales data were not verifiable. India disagrees with this argument, and describes below the meaning of the terms "verifiable", "verified", and "not verified". India also supplements arguments it made in its First Submission and during the first meeting of the panel with the parties to demonstrate how USDOC itself "verified" a considerable amount of SAIL's US sales data during the verification process.

**A. MEANING OF THE TERM "VERIFIABLE"**

66. The term "verifiable" means "the fact of being capable of verification."<sup>38</sup> Section 782(e)(1) of the US anti-dumping statute uses the phrase "can be verified" to express this element of Annex II, paragraph 3. As India has explained, the term "verification", in turn, means the "action of establishing or testing the accuracy or correctness of something, esp. by investigation or by comparison of data."<sup>39</sup>

67. This definition leaves unanswered the *process* by which the verification takes place. An insight into the appropriate process is found in Annex I, paragraph 7, providing that the "main purpose of the on-the-spot investigation is to verify information provided or to obtain further details." A reasonable interpretation of the phrase "on-the-spot" verification is not that the investigating authorities visit every conceivable facility where source documents may be found, nor do they identify and examine every relevant source document and check every piece of submitted information. It would be impossible for investigating authorities to examine every piece of information within any remotely realistic timeframe for completing the investigation. Instead, the on-the-spot verification functions like an "audit," by which the investigating authorities test samples of the information submitted by the respondent against source documents maintained by the company in the normal course of business, in particular the financial statements that have been subject to review by

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<sup>36</sup> See Mr. Hayes' Second Affidavit, para. 10.

<sup>37</sup> See *id.* paragraph 11.

<sup>38</sup> New Shorter Oxford English Dictionary, Clarendon Press 1993.

<sup>39</sup> India First Submission, para. 57.

independent third parties. Thus, it is reasonable for them examine (*i.e., verify*) sufficient selected information in order to be in the position to judge the verifiability of the information they do *not* affirmatively check.

68. The process of assessing whether information is "verifiable" requires an objective and unbiased investigating authority to examine a variety of different source documents (financial statements, ledgers of various types (general, sales, cost), production records, invoices, contracts, bills of lading, etc.) within a particular "component" of information (such as export sales or cost of production). If those source documents for individual transactions or production processes -- examined on a "spot" basis -- are accurately reflected in the information submitted by the respondent to the investigating authority, then an objective and unbiased authority would conclude that other information submitted by the respondent are "verifiable."

69. An important aspect of the *process* of the verification exercise is to examine the verifiability (*i.e., the accuracy and reliability of the information*) of a particular piece or component of information (such as export sales, home market sales, or cost of production). This is a legal requirement flowing from the text of Annex II, paragraph 3, which states that "all information which is . . . verifiable" must be used in the calculation of dumping margins. It would not be consistent with this provision to assess the verifiability of a particular piece of information based on the reliability or completeness of another piece or category of information.

70. As India has described in detail in answers to Panel's question 28 and 29, verifications are performed, as they were in underlying investigation of SAIL, by verifying the separate components of information. As India explained in these answers, one of the main reasons for such a separation is the manner in which the source documentation from the different categories is created, maintained, and used in the normal course of business by separate people within a company in separate facilities for separate purposes. For example, the export price computer database submitted by SAIL on 17 August 1999 was verified by examining a large number of documents relevant to numerous individual export sales transactions. USDOC felt it was necessary to undertake this exhaustive process in order to ensure not merely that the specific pieces of information reviewed were "verified", but also thereby that the entire US sales database, including the other, non-examined data, was "verifiable". But in conducting this exercise, USDOC's verification report does not indicate that it compared SAIL's cost of production source documents to check the verifiability of SAIL's export sales. This would make no sense. Thus, based on both logic and legal requirement of Annex II, paragraph 3, conclusions concerning the verifiability of information must take place within the particular component of information undergoing the verification process.

71. The quantity of information that is affirmatively examined will vary in different cases. In this sense, most information submitted by a respondent remains "verifiable" (not "verified") during the investigation because as a practical matter, only a small proportion of the information is manually examined against source documents. In some cases, such as SAIL's US sales data, authorities will examine a great deal of information. However, even if a small quantity of information is examined, investigating authorities, using proper sampling techniques, may well be in the position to make an appropriate assessment concerning the overall verifiability of the component of information submitted.

72. How can information within such a component be determined to be "verifiable"? India suggests that a reasonable process based on existing USDOC verification procedures would include the following circumstances:

1. The auditor (verifier) is provided with source information (original documentation such as financial statements, ledgers, bills of lading, sales records, invoices, bank

statements, freight documentation, etc.) to examine against the information reported by the respondent (most probably in a computer database);

2. The examination of these source documents reveals no significant systemic problems with reporting, accuracy, completeness, or reliability of the reported information;
3. Any discrepancies found are minor and/or understandable in terms of scope or cause, and further examination reveals the scope of the problem and that it is limited to a particular aspect of the data.

73. India describes below how SAIL's US sales data were audited during the verification process and how the information so verified meant that a unbiased and objective decision-maker could only have concluded that it was "verifiable."

#### B. THE VERIFICATION OF SAIL'S US SALES COMPUTER DATABASE DEMONSTRATED THAT IT WAS "VERIFIABLE"

74. The verification of SAIL's US sales data took place in several company locations over a two week period between 30 August and 14 September 1999. It involved extensive examination by teams of USDOC personnel performing both a macroscopic and microscopic analysis. They made a "top-down" examination to insure that all US sales values and quantities were reported, and a "bottom-up" examination to confirm that conclusion and to insure that the details of each transaction were reported accurately. Indeed, the extent of the audit performed was emphasized by USDOC's statement that "*we were able to test the accuracy of the reporting for a large number of individual sales observations.*"<sup>40</sup> Furthermore, as the United States has acknowledged, "SAIL made relatively few export sales to the United States. . ."<sup>41</sup> Thus, judging the accuracy and completeness (*i.e.*, the verifiability) of SAIL US sales database was well within the grasp of USDOC's investigators.

75. A close examination of the USDOC's verification report (Ex. IND-13) reveals the extensive nature of the audit conducted on SAIL's US sales data. While India has discussed this document previously, it bears further examination in light of the United States' assertions that this information was neither "verified" nor "verifiable." The key elements of the report show the following process and results:

- The Completeness for US Sales section of the report (page 15) involved examining a number of pre-selected US sales observations from individual contracts. This is perhaps the most important step in USDOC's sales verifications, the purpose of which is "to ensure that all sales of the subject merchandise were properly included in [the respondent's] sales responses."<sup>42</sup> The overall conclusion of this section is that all US sales were *completely* and correctly reported: "[w]e found no unreported or incorrectly reported sales in the US sales listing". This section even demonstrates that USDOC "proved the negative" by examining export contracts to other countries and finding no shipments destined for the United States under those contracts.
- The US Sales Process section of the verification report (pages 8-9) describes the distinctive aspects of SAIL's export sales, including the existence of a separate "International Trade Division" in New Delhi, which was responsible for negotiating the price, quantity, and material terms of export contracts, and handled the major

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<sup>40</sup> Ex. IND-13 at 14.

<sup>41</sup> US First Submission at para. 163. The omitted words in the quote stated "and yet even this data contained errors." However, the verification report and Final Determination both concluded that these errors were susceptible to correction.

<sup>42</sup> Ex. IND-12 at 10.

aspects of the sales process. The report concluded at page 8 that there were "no discrepancies."

- The Customer Records section of the report (pages 10-11) shows that SAIL maintained separate records for its US sales using the contract documents, while documents identifying home market sales customers consisted of "invoice records." The report concluded at page 11 that there were "no discrepancies" for the US sales.
- The Merchandise section of the report (pages 11-12) involved checking that all items reported by SAIL as "not applicable" or "omitted" in the so-called "Model Match" section of the questionnaire "were reported correctly and supported with documentation". Four of the categories (PRIMEU, PLEHEATU, PLSCALEU, and PLPATRNU) were tested and "no discrepancies" were found. USDOC also found that "all characteristics [of the merchandise] were reported correctly" except the width coding error. Upon discovering the width coding error at verification, SAIL provided USDOC with information (included in Ex. IND-8) identifying the transactions affected by the error and permitting its correction.
- The Quantity and Value of Sales – US Sales section of the report (pages 12-13) then describes how US sales were identified in SAIL's ledgers by using both sale-specific documentation (contracts) and product-specific data in the sale records. This technique showed that export sales were discernible from SAIL's records and were accurately isolated. USDOC noted that even in the atypical situation where a single contract included shipments to more than one country, SAIL properly isolated and reported only the US shipments covered by that contract. All nine contracts for US shipments of subject merchandise during the period of investigation were examined during the quantity and value verification. USDOC "reconciled the total US sales, as reported to the Department, to sales ledgers, the general ledger, and the financial statements for the POI." As USDOC stated at page 13, "[a] review of the other eight export contracts showed no other situation where sales under a US export contract was not sold to the United States." These contracts were identified as reconciling to SAIL's records, and the complete reporting of all US sales was confirmed. The conclusion for the entire Quantity and Value of Sales process was "no discrepancies."
- In the US Sales Contracts section of the report (page 14), USDOC's bottom-up examination of the details of the data in each examined transaction accomplished two tasks. First, it confirmed the accurate reporting of price and quantity data for each examined transaction, as well as the reported product characteristics (with the exception of the correctable width coding error described in the Merchandise section of the report at page 12). In addition, the transaction-specific data tied accurately to SAIL's US contracts, all of which were examined. USDOC states in its Completeness section (at page 15) that "during our review of the detailed invoices covered by the contracts listed above, we found no unreported sales and found that all sales of subject merchandise covered by those contracts were within the POI and were reported correctly." The overall conclusion: "no discrepancies except for the coding error described in the Merchandise section of this report."

76. Since all of the audited information described above was found to be accurate, complete and reliable (*i.e.*, it was verified), what was the basis of USDOC's conclusion that SAIL's US sales database was nevertheless unverifiable? As the Panel knows, the *only* "significant" (in USDOC's terms) discrepancy found in the examination of US sales appears in the Merchandise section of the report. There the verifiers note that the width coding error – *i.e.*, a large number of transactions with a

width equal to 96 inches were misidentified as greater than 96 inches. A list of all of the affected transactions was taken as a verification exhibit,<sup>43</sup> and the method for correcting the misidentification was succinctly identified (re-code the width characteristic from 'D' to 'C' for those transactions). This section of the report also notes that certain "CONNUMs" for US merchandise were not reported in the cost of production database. However, for US sales, the report states at page 12 that "we note that all characteristics were reported correctly, unless otherwise noted." Thus all of the characteristics (grade, thickness, and width) necessary to match merchandise in the US sales database to merchandise in the petition were either correctly reported or, in the case of the width error, correctable.

77. Another minor verification problem raised in paragraph 39 of the US First Written Submission was that "SAIL had failed to report certain product control numbers in the cost of production database" and "it was difficult for its verification team to evaluate whether the reporting of product specification/grade was accurate because SAIL had prepared no supporting verification exhibits."<sup>44</sup> Although the United States draws no conclusions from this statement, it leaves the impression that this lack of information somehow supported the verification failure conclusion or somehow made the data unusable. Neither of these conclusions is justified.

78. The field in the US sales database on which USDOC's verification addendum of 10 November focused is "PLSPECU", which is shorthand for "specification". In this field, SAIL was to report the specification, as defined by USDOC, of the product sold in each transaction. The purpose of this information is to permit a tie between each of the products sold in each reported transaction with the costs for the corresponding products reported in the CV database. However, a product's specification as defined by USDOC is merely the combination of its quality and "actual specification". Thus, the PLSPECU field is entirely duplicative of information that USDOC requested and SAIL provided in full in *other* fields in the US sales database – namely, PLQUALU and PACTSPU. USDOC obviously recognized that this was not an important issue because it did not treat the verifiers' alleged difficulty in evaluating the reported PLSPECU data as a "significant finding" in the Sales Verification Report. The PLSPECU field is not even mentioned in the Determination of Verification Failure memorandum (Ex. IND-16).

79. Furthermore, regarding the "usability" of SAIL's US sales database, as can be seen from the description above, there is a fundamental reason why whatever misgivings USDOC may have had about SAIL's reported PLSPECU information do not render SAIL's US sales database unusable in combination with NV data in the petition to calculate a dumping margin. This is because, when USDOC rejected SAIL's home market and cost of production/CV databases, there was no longer any need to match each specific product listed in SAIL's US sales database to a specific product in its (rejected) CV database. Instead, the transactions in the US sales database would be matched to NV data in the petition. And the petition developed its NV data on the basis of product characteristics *other than* specification— namely, grade, thickness, and width. SAIL reported those characteristics in its US sales database, and the information was fully verified by USDOC (as described above) and the data for all these fields are set out in India's Exhibit 8.

80. Finally, it is noteworthy in light of the new arguments by the United States in this proceeding that the Sales Verification Report makes no mention, whatsoever, of any missing difmer cost data in the US sales database. Nor is difmer mentioned in the Verification Failure Memorandum with respect to SAIL's US sales data.<sup>45</sup>

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<sup>43</sup> A large quantity of sample documents from the examined transactions were included as verification exhibit S-7. The sample invoices that were included in that exhibit are attached hereto as Ex. IND-36.

<sup>44</sup> US First Written Submission, para. 39 *citing* Ex. US-24, Addendum to Verification Report (10 November 1999).

<sup>45</sup> Ex. IND-16.

81. In conclusion, the evidence before USDOC in December 1999 when it had to decide whether SAIL's US sales information was "verifiable" was that summarized in paragraph 75 above. Recalling that USDOC acknowledged in the Verification Report that "we were able to test the accuracy of the reporting for a large number of individual sales observations," the issue before the Panel is whether an objective and un-biased investigating authority could have concluded that the *remaining* sales that were *not* specifically reviewed were "verifiable." India submits that this is the only conclusion that could be drawn in the face of overwhelming evidence of the successful verification of the sales that were specifically reviewed – i.e., that they were not only "verifiable" but also "verified".

C. USDOC IMPROPERLY FOUND THAT SAIL'S US SALES DATA WAS NOT VERIFIABLE BECAUSE OF THE UNVERIFIABILITY OF INFORMATION IN THE HOME MARKET SALES AND COST OF PRODUCTION DATABASE

82. USDOC did not find that SAIL's US sales data was "verifiable," however. In its "Determination of Verification Failure" Memorandum, USDOC concluded that "given these numerous and widespread problems found with the reported sales, cost and constructed value data we must conclude that the credibility of the entire questionnaire response is lacking. Based on our analysis, we recommend finding that SAIL failed verification."<sup>46</sup>

83. USDOC did *not* conduct the separate analysis of the verifiability of SAIL's US sales data as required by Annex II, paragraph 3. Indeed, the only statement it made regarding SAIL's US sales data suggested that SAIL's US sales data, standing alone, *were verifiable*:

As detailed in the Sales Verification Report, several errors were described in the US sales database. While these errors, in isolation, *are susceptible to correction*, when combined with other pervasive flaws in SAIL's data, these errors support our conclusion that SAIL's data on the whole is unreliable. The fact that *limited errors were found* must not be viewed as testimony as to the underlying reliability of the SAIL's reporting, particularly when viewed in context the *widespread problems encountered with all the other data* in the questionnaire response.<sup>47</sup>

84. This statement points to no major problems with SAIL's US sales. It cannot, because there were none. It ignores the repeated and consistent "no discrepancies" findings for every aspect SAIL's reported data in the Sales Verification Report. Rather, USDOC resorted to "guilt by association" by implying that *all* of SAIL's US sales information, despite being the subject of a rigorous and successful verification, was somehow "unreliable" because of "widespread problems encountered with all the *other* data in the questionnaire response."

85. USDOC's verification failure report points to *no* specific relationship between SAIL's US sales data and its cost of production or home market sales data that would suggest the US sales data was infected and thus not verifiable. This "finding" that the US sales data was infected has no basis (articulated or otherwise) in the record. It is completely contradicted by the information USDOC found in the Sales Verification Report (but did not mention in the verification "failure" report). It is also contradicted by the lack of any meaningful relationship between SAIL's US sales data and the rest of the information it produced. For example, in the Sales Verification Report, USDOC did not use information from SAIL's home market source documents to verify SAIL's US sales documents -- rather, it logically used SAIL's US sales source documents. Moreover, as India states in its answers to the Panel's question 28, SAIL's US sales data was generated, maintained, and used separately from its home market sales information and cost of production information. All of this evidence demonstrates the separate character of the US sales documents, and the lack of any meaningful connection between

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<sup>46</sup> *Id.* at 5.

<sup>47</sup> Ex. IND-16 at 5 (emphasis added).

the US sales database and the other information supplied by SAIL. Therefore, there was no basis for USDOC to conclude, in effect, that the information in SAIL's US sales database, despite being verified, was not verifiable -- or in USDOC's terms that it "failed verification."

86. In conclusion, USDOC's "throw the baby out with the bathwater" approach to data verification "failure" is inconsistent (1) with the text, object and purpose of the AD Agreement, and (2) with the facts as set forth in the Sales Verification Report. The impropriety of this procedural error was compounded by the fact that in a "large number of observations" in SAIL's US sales data were verified for what the United States has admitted was a small group of sales. Based on the record before USDOC, no objective and unbiased investigating official could have concluded that SAIL's submitted US sales data were not "verifiable".

## VI. MEANING OF "DOES NOT COOPERATE" IN ANNEX II, PARAGRAPH 7

87. The United States has assumed in its arguments to the Panel that if a respondent has not "acted to the best of its ability," then by definition, it "does not cooperate." The United States then uses this assumption to justify the drawing of adverse inferences. In other words, because SAIL allegedly did not use its best efforts in responding to all portions of the questionnaire, it did not "cooperate". The result is that it was subjected to the worst scenario possible-- the use of the \$251 offer price for calculating export price. These assumptions and the argument that USDOC was entitled to apply adverse inferences in calculating a final dumping margin for SAIL are not correct.

88. In the Final Determination, USDOC explained this assumption as follows:

In selecting from among the facts otherwise available, section 776(b) of the Act provides that adverse inferences may be used when a party has failed to cooperate *by not acting to the best of its ability* to comply with a request for information. To examine whether the respondent "cooperated" by "acting to the best of its ability" under section 776(b), the Department considers, *inter alia*, the accuracy and completeness of submitted information and whether the respondent has hindered the calculation of accurate dumping margins.<sup>48</sup>

89. The applicable provisions are Annex II, paragraphs 5 and 7: They provide in relevant part:

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

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

90. The trigger for the application of the "adverse" facts available ("less favourable" result) provision of the last sentence of Annex II, paragraph 7 is that information is being "withheld." The word "withhold" means to "keep back what belongs to, is due to, or is desired by another; refrain from giving, granting, or allowing; keep in custody or under control."<sup>49</sup> This definition suggests that a foreign respondent is refusing to provide information within its possession, custody, or control. The context for this definition is Article 6.8, which refers to "an interested party that refuses access to . . .

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<sup>48</sup> Ex. IND-17 at 73127.

<sup>49</sup> *New Shorter Oxford English Dictionary*, Clarendon Press 1993, Vol. II, at 3705.

necessary information." This notion of "refusal" is consistent with the definition of "withhold," which requires that a foreign respondent must actively refuse to provide information that it knows exist.

91. By contrast, the concept contained in Annex II, paragraph 5 is quite different. Annex II, paragraph 5 indicates that information should be used even if not ideal, if the respondent has "acted to the best of its ability." A respondent may not act to the "best of its ability" because it has been incompetent, has allocated insufficient company resources to the dumping questionnaire response task, or even employed advisors that may not properly tabulate or present information within the deadlines. But such behaviour does not mean that this respondent necessarily has "withheld" information or that this would rise to the level of a finding that it did "not cooperate". There is a very clear difference between not providing information and providing less than perfect information. Yet the United States assumes that a failure to get everything right is the equivalent of withholding information.

92. As India has argued, there are two different remedies available if a respondent has not acted to the best of its ability. First, the information not supplied may be replaced with facts that are available, including facts from the petition. The second remedy is that "adverse" facts may be used for facts not supplied by a respondent that is significantly impeding the investigation or withholding information. This is India's interpretation of the phrase "could lead to a result which is less favourable to the party than if the party did cooperate." USDOC, in applying its procedures and Section 762(b), however, treats all respondents who do not act to the best of their ability in the same way. It *assumes* that they are all withholding information or otherwise impeding the investigation, regardless of whether or not the respondent repeatedly attempted to supply the requested information even if late, or even if it actually did supply information but not to the satisfaction of the investigating authority.

93. USDOC's rationale that it applied in this case for assuming that the failure to apply best efforts necessarily means a lack of cooperation is not consistent with the AD Agreement. Article 6.8 uses the term "refuses access to". This suggests non-cooperation and the "withholding" of information. A respondent company that refuses to allow an investigating authority access to particular information necessary to calculate accurate dumping margins is "not cooperating" with respect to that information. But a respondent that may not be able to provide the information in a timely fashion due to its confusion, incompetence or inexperience is not necessarily failing to cooperate in providing the particular information.

94. The facts of this case illustrate the distinction between "acting to the best of one's ability" and "a failure to cooperate." There is no evidence in this case that SAIL actively withheld information from USDOC. The United States has argued at length that SAIL failed to cooperate with the USDOC in the submission of data regarding its home market sales and cost of production. However, the fact that SAIL was not able to provide the requested home market sales and cost data in the formats required by USDOC or within USDOC's timeframes does not indicate a failure to cooperate, but rather shows the extreme difficulties that SAIL faced in attempting to provide the data within the extremely tight time constraints imposed by USDOC.

95. Moreover, SAIL worked intensively throughout the investigation process to provide USDOC with the requested home market sales and cost of production information in the required formats, in an attempt to avoid the application of "facts available" – even to the point of submitting a corrected cost of production database on the first day of verification. The United States claims that SAIL's failure to meet some of the deadlines for submitting responses to the supplemental questionnaires demonstrates a failure by the company to cooperate. As discussed in India's Oral Statement at the First Meeting, the record demonstrates that SAIL's difficulties were due to the overwhelming logistical problems it faced in preparing information in a manner different from that in which it was maintained in the ordinary course of business. However, even assuming for the sake of argument that there were points during the investigation at which SAIL could have acted more promptly, the facts of

this case nevertheless illustrate the critical distinction between, at worst, incompetence on the part of a respondent and an active withholding of information that would rise to the level of a refusal to cooperate.

96. USDOC implicitly recognized this distinction during and after the investigation. In all the proceedings in which it has participated in the United States, including the Final Determination of its investigation, in its arguments to the US Court of International Trade in defending its Final Determination, and in its Redetermination on Remand, USDOC has never alleged that SAIL actively withheld information or obstructed the investigation. In light of this record, it cannot now be argued that SAIL's actions somehow constituted a failure to cooperate that could give rise to "less favourable" results (or "adverse" facts available in USDOC parlance) under Annex II, paragraph 7.

## **VII. USDOC IMPROPERLY DREW ADVERSE INFERENCES IN THE FINAL DETERMINATION BY USING THE \$251 OFFER AS THE EXPORT PRICE**

97. The United States has argued that USDOC's Final Determination (which applied adverse inferences in calculating SAIL's dumping margins) was justified by SAIL's alleged lack of cooperation in producing information *other* than US sales.<sup>50</sup> The final margin of dumping and the final determination were based on an export price offer of \$251 per ton, included in the petition. USDOC applied the margin based on this export price because it drew an "adverse inference" in selecting the margin, as noted in the Final Determination:

Moreover, because we determine that SAIL has not acted to the best of its ability, pursuant to 776(b) of the Act, we used an adverse inference in selecting a margin as facts available. The Department has applied a margin rate of 72.49 percent, the highest margin alleged in the petition, as facts available.<sup>51</sup>

98. It is uncontested from this statement and from Figure 5 of the Petition (Ex. IND-1) that USDOC selected the \$251 price in the petition in order to secure the "highest margin alleged in the petition." The legal question presented to the Panel by this finding and the evidence in the record is whether an objective and unbiased investigating authority could have used this \$251 price as an "adverse inference."

99. As India has argued in Section VI above, the last sentence of Annex II, paragraph 7 does permit the drawing of adverse inferences, *but only* in instances where respondents "do not cooperate." India has argued previously that any finding of cooperation must be performed not on a "global" basis, but based on the conduct of a respondent regarding particular categories (or in USDOC's terms "essential components") of information.<sup>52</sup> To hold that there is a "global" cooperation requirement is tantamount to accepting the US argument that there are "global" use and "global" verifiability requirements as well. As the United States has repeatedly argued, all information can be rejected if there is a lack of cooperation regarding the production of some information. For all of the reasons set forth in India's submissions, this "global" approach should be rejected. Accordingly, USDOC was required to make a separate finding as to whether SAIL "cooperated" regarding the production of its US sales data.

100. USDOC did not make such a finding. No objective and unbiased investigating authority could have made such a finding or have drawn adverse inferences given the information set out in the Sales Verification Report (Ex. IND-13). The Panel should so find. In addition, should the Panel deem it necessary, even assuming *arguendo* that (1) the Panel were to find that SAIL did not

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<sup>50</sup> See US First Submission at paras 148-164.

<sup>51</sup> Ex. IND-17 at 73131.

<sup>52</sup> India First Submission at paras. 80-90.

cooperate in the production of information regarding home market sales and cost of production sales, and (2) that USDOC was justified in applying total facts available, USDOC still would not have been justified in drawing an adverse inference with respect to SAIL's cooperation efforts in supplying information regarding its US sales. At most, in such a scenario, USDOC could have used adverse facts for calculating normal value (which, in effect, it already has done, by using the petition's CV figure as NV), but would have to use the US customs data (or even SAIL's US actual prices) as the "available" facts for calculating the export sale price.

## VIII. CONCLUSION

101. For the foregoing reasons -- as well as for the reasons in India's other submissions to the Panel<sup>53</sup> -- India requests that the Panel make the following findings concerning the "matter" (the measures and the claims) at issue before it:

- **First Measure** : The final action taken to levy anti-dumping duties on imports of cut-to-length plate, including the final determination on 13 December 1999. India's major claims<sup>54</sup> include the following:
  - AD Agreement Article 2.4: USDOC failed to make a fair comparison between normal value and export price when it used the \$251/ton export price.
  - Article 6.8 and Annex II, paragraph 3: USDOC's failure to use SAIL's verified, timely produced & usable US sales data in the calculation of a dumping margin violated Article 6.8 and Annex II, paragraph 3.
  - Article 6.8 and Annex II, paragraph 5: USDOC's failure to use SAIL's US sales data in light of the fact that SAIL used its best efforts in supplying US sales information violated Article 6.8 and Annex II, paragraph 5.
  - Article 6.8 and Annex II, paragraph 7: USDOC's improper drawing of adverse inferences and use of the \$251/ton export price in calculating the dumping margin, without a basis in the record that SAIL failed to cooperate in the production of the US sales data or, alternatively, in any other aspect of the investigation, violated Article 6.8 and Annex II, paragraph 7.
  - Article 15: USDOC's failure to give special regard to SAIL's situation as a developing country producer when considering the application of the facts available violated Article 15, first sentence; and USDOC's failure to explore in good faith other constructive remedies before imposing anti-dumping duties violated Article 15, second sentence.
- **Second Set of Measures**: Sections 782(e), 782(d) and 762(a) of the Tariff Act of 1930 as amended. Claims include the following:

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<sup>53</sup> See India's First Written Submission; India's First Oral Statement; and India's Answers to the Questions from the Panel Following the First Meeting of the Panel with the Parties.

<sup>54</sup> India continues to assert claims under AD Articles 2.2, 9.3, 6.6 and Annex II, paragraph 7 (concerning special circumstances), Article XVI:4 of the Marrakesh Agreement, and Articles VI:1 and VI:2 of GATT 1994 as reflected in its Request for the Establishment of a Panel (Ex. IND-23).

- Section 782(e) *per se* violates Article 6.8 and Annex II, paragraph 3 by imposing two additional requirements (sections 782(e)(3) and 782(e)(4)) not reflected in Annex II, paragraph 3, before a respondent may secure the use of its information in calculating a dumping margin;
- Sections 762(a), 782(d) and 782(e) *per se* violate Article 6.8 and Annex II, paragraph 3 because as interpreted by USDOC and the US CIT, they impose a mandatory requirement on USDOC to impose total facts available if a respondent does not provide information for one "essential" category of information.
- Section 782(e) *as applied* in this case violates Article 6.8 and Annex II, paragraph 3 because USDOC imposed two additional requirements on the use of SAIL's US sales data not reflected in Annex II, paragraph 3.
- Sections 762(a), 782(d) and 782(e) *as applied* in this case violate Article 6.8 and Annex II, paragraph 3 because USDOC, as affirmed by the US CIT, used and applied these provisions in the application of total facts available.
- **Third Measure**: The *application* of USDOC's long-standing practice of applying total facts available in this case. USDOC has a long-standing measure which it applied in this case in a manner inconsistent with Article 6.8 and Annex II, paragraph 3.

## ANNEX C-2

### SECOND WRITTEN SUBMISSION OF THE UNITED STATES

(12 February 2002)

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## INTRODUCTION

1. In this submission, the United States addresses three issues: 1) the consistency of the US “facts available” provisions with Article 6.8 and Annex II of the AD Agreement; 2) the decision by US authorities to apply “facts available” in the challenged proceeding, consistent with Article 6.8 and Annex II of the AD Agreement; and 3) India’s failure to establish a *prima facie* case that the United States violated Article 15 of the AD Agreement by allegedly failing to explore the possibilities of constructive remedies during the investigation. The United States will focus on new positions that India has taken in its statements and submissions since the parties’ first written submissions.

2. As became evident at the first meeting of the Panel, this dispute involves a decision by the US authorities not to use the Indian respondent’s data, most of which is acknowledged by India to be inadequate, and the remainder of which contains deficiencies which rendered it unusable. India has made efforts to re-examine the facts before the US authorities to suggest there was a more reasonable alternative available, but these efforts have served instead to reveal not only that the Indian respondent failed to raise these arguments during the proceedings two years before, but that, even if it had, they are flawed. The Panel should reject India’s efforts to examine *de novo* the factual record of this case, as well as its arguments that the AD Agreement precludes the disregarding of the Indian respondent’s data and that the US statute improperly mandates action inconsistent with Article 6.8 and Annex II of the AD Agreement.

### I. NOTHING IN THE "FACTS AVAILABLE" PROVISIONS OF US LAW MANDATES ACTION INCONSISTENT WITH ARTICLE 6.8 AND ANNEX II OF THE AD AGREEMENT

3. India continues to argue that the US statutory provisions regarding the use of the “facts available” are *per se* inconsistent with the AD Agreement. Narrowing its focus to section 782(e) of the Tariff Act of 1930, India argues that this provision imposes additional conditions, which go beyond those permitted under the AD Agreement.<sup>1</sup>

4. The United States explained in its first written submission the flaws in India’s argument.<sup>2</sup> Specifically, the United States explained that section 782(e) actually *requires* Commerce to consider information that would otherwise be rejected under section 776(a).<sup>3</sup> Thus, section 782(e) serves to

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<sup>1</sup> Oral Statement of India at para. 62.

<sup>2</sup> First Submission of the United States at paras. 131-39.

<sup>3</sup> It is worth repeating the text of the provision:

(e) Use of Certain Information. - In reaching a determination under section 703, 705, 733, 735, 751, or 753 the administering authority . . . shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority or the Commission if-

- (1) the information is submitted by the deadline established for its submission,
- (2) the information can be verified,
- (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
- (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements

*reduce* the likelihood that Commerce will resort to the facts available in a particular case. In fact, the text of the companion provision authorizing Commerce to disregard all or part of a respondent's information – section 782(d) – is explicitly subject to the USDOC's consideration of the information pursuant to section 782(e).

5. In short, section 782(e) does not *require* Commerce to apply the facts available in a WTO inconsistent manner; it *requires* Commerce to consider a respondent's information when the five listed criteria are met. Moreover, the section 782(e) criteria themselves are consistent with Article 6.8 and Annex II of the Agreement.

A. THE SECTION 782(E) CRITERIA ARE CONSISTENT WITH ARTICLE 6.8 AND ANNEX II OF THE AD AGREEMENT

6. The plain language of section 782(e) specifically *limits* Commerce's discretion to reject information submitted by an interested party. Moreover, the five criteria in section 782(e) closely track the text of the relevant provisions of the AD Agreement. For these reasons, there is no basis for the Panel to conclude that section 782(e) of the Act *mandates* rejection of information that should be acceptable pursuant to Article 6.8 and Annex II of the AD Agreement.<sup>4</sup>

7. The factors identified in section 782(e) are all found in Annex II, paragraphs 3 and 5, of the AD Agreement. India does not object to three of the criteria in section 782(e): that the information be timely, verifiable, and usable without undue difficulty. These criteria are taken directly from paragraph 3 of Annex II. Rather, India objects to the presence of the two remaining criteria found in sections 782(e)(3) and (4).

8. Section 782(e)(3) provides that Commerce should take into account whether submitted information is "not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination." When Commerce has a questionnaire response which contains some usable and some unusable information, a relevant issue becomes whether Commerce has enough information to form an objective basis for determining the respondent's margin of dumping. Section 782(e)(3) simply provides that, when the other criteria have been met, Commerce may not decline to consider the partial information, provided that the information is not so incomplete that it cannot form a reliable basis for a dumping calculation. In other words, if the respondent supplies enough information to provide a reliable indication of its margin of dumping, the fact that Commerce may have to fill in some gaps based on facts available will not prevent Commerce from using that information. In this respect, section 782(e)(3) is analogous to paragraph 5 of Annex II of the AD Agreement.

9. India also objects to the criterion found in section 782(e)(4), which provides that Commerce should take into account whether a party "has demonstrated that it acted to the best of its ability in providing the information . . ." As the United States has noted previously, this provision is consistent with Annex II, paragraph 5 of the AD Agreement:

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established by the administering authority or the Commission with respect to the information, and

(5) the information can be used without undue difficulties.

Section 782(e) (emphasis added) (Exh. IND-26).

<sup>4</sup> As explained in our First Written Submission, the legislative history to section 782(e) of the Act states that the provision "directs {Commerce} to consider deficient submissions" where the five criteria are met. Statement of Administrative Action (SAA) at 865, US Exh. 23. Thus, the SAA confirms that section 782(e) of the Act does not mandate rejection of WTO-consistent information, but rather provides restraints on Commerce's ability to disregard insufficient submissions under certain circumstances.

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

It is entirely proper, therefore, for investigating authorities to take into account whether a party has acted to the best of its ability in submitting information.

10. India attempts to dismiss the explicit reference to this criterion in Annex II, simply because it is in paragraph 5 rather than paragraph 3. To make the placement of the criterion significant, India makes the totally unsupported assertion that the provisions of Annex II must be considered in sequence. Under this “sequencing” approach, “Paragraph 5 only becomes applicable *if* a particular category of information submitted does not meet the requirements specified in paragraph 3.”<sup>5</sup>

11. There is no logical basis – nor a textual one – to interpret paragraphs 3 and 5 in this manner. Each paragraph is relevant to an investigating authority’s examination of submitted information. For this reason, the “best efforts” criterion found in section 782(e)(4) is not inconsistent with the AD Agreement.

12. In sum, each of the criteria contained in section 728(e) – including the two factors to which India objects – is fully consistent with Article 6.8 and Annex II of the AD Agreement.

#### B. THE DISCRETIONARY NATURE OF SECTION 782(E) IS REFLECTED IN COMMERCE AND CIT DECISIONS

13. India argues that decisions by Commerce demonstrate that, if submitted information fails to meet the criteria of section 782(e), then Commerce will disregard all the information provided. Based on India’s statements at the first Panel meeting, India apparently is not claiming that these decisions themselves give rise to a WTO breach, but only illustrate how section 782 gives rise to such a breach.<sup>6</sup> To the contrary, decisions by Commerce and domestic courts demonstrate that section 782(e) provides US authorities with discretion to accept data when the AD Agreement requires, and that Commerce has exercised this discretion. Thus, this provision does not mandate any breach of the AD Agreement provisions cited by India.

14. For example, in *Stainless Steel Bar from India*<sup>7</sup>, Commerce determined that, although the cost information provided by the Indian respondent was incomplete, pursuant to Section 782(e) of the Act, it could use most of the information on the record in its calculations, and use “partial facts available” in the few areas in which the few necessary facts were missing.<sup>8</sup> As a result, Commerce

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<sup>5</sup> First Written Submission of India at para. 83 (emphasis in original).

<sup>6</sup> Moreover, even if India had made a separate claim with respect to “practice,” as explained in the US First Written Submission, US “practice” does not have an “independent operational status” that can independently give rise to a WTO violation. First Submission of the United States at para. 146.

<sup>7</sup> *Final Results; Administrative Review and New Shipper Review of the Antidumping Duty Order on Stainless Steel Bar from India*, 65 Fed. Reg. 48965 (10 August 2000) and accompanying Decision Memorandum (*India Steel Bar Final Results*), Ex. US-26.

<sup>8</sup> Commerce stated that “we have determined that the continued use of total adverse facts available with respect to Panchmahal is unwarranted. Pursuant to section 782(e) of the Act, we will not decline to consider information that is submitted, even if it does not meet all of our requirements, if the information was timely, could have been verified, is not so incomplete that it cannot serve as a reliable basis for our determination, the submitting party demonstrates that it acted to the best of its ability in providing the information and meeting our requirements, and the information can be used without undue difficulties. *With respect to the information submitted by Panchmahal, we find that a sufficient amount of it meets these requirements and, thus, we have not declined to use it in our final results.*” *India Steel Bar Final Results Decision Memorandum*, US-Exh. 26, at 3 (emphasis added).

resorted to facts available only with respect to certain portions of the margin analysis. India is thus incorrect that section 782 requires US authorities to resort to “total facts available” if any information fails to meet the requirements of that provision.

15. The US courts have also confirmed that section 782(e) “liberalized Commerce’s general acceptance of data submitted by respondents in antidumping proceedings by directing Commerce not to reject data submissions once Commerce concludes that the specified criteria are satisfied.”<sup>9</sup>

16. Finally, the United States notes again that India itself has acknowledged that “the text of Sections 776(a) and 782(e) could be interpreted as applying to individual categories of information.”<sup>10</sup> SAIL’s own brief before the USCIT supports this argument.<sup>11</sup> In order to succeed with its argument that the US statute is inconsistent with US WTO obligations, India must demonstrate that the statute mandates WTO-inconsistent action, a position that both India and SAIL have explicitly disavowed before this Panel and before US courts.

17. In sum, India has offered no basis for the Panel to find that section 782(e) mandates WTO-inconsistent action, and the Panel should reject India’s claim to the contrary.

## II. COMMERCE’S APPLICATION OF FACTS AVAILABLE TO SAIL WAS NOT INCONSISTENT WITH THE STANDARDS OF THE AD AGREEMENT

18. Commerce’s application of facts available to SAIL was based upon an unbiased and objective establishment of the facts and a permissible interpretation of the Agreement. The United States will not burden the Panel with a repetition of the facts establishing SAIL’s failure to act to the best of its ability to provide necessary information.<sup>12</sup> Instead, the United States will focus on the reason India’s arguments on this issue lack any basis in the facts or under the AD Agreement.

### A. INFORMATION THAT WAS NOT BEFORE THE INVESTIGATING AUTHORITY IS IRRELEVANT

19. Pursuant to Article 17.6(i), in its assessment of the facts of the matter, a panel “shall determine whether the authorities’ establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective.” As articulated by the Appellate Body in *United States - Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan* (“*Hot-Rolled AB Report*”), pursuant to Article 17.6(i) and Article 11 of the DSU, both of which require an “objective” assessment of the facts, “the task of panels is simply to review the investigating authorities’ ‘establishment’ and ‘evaluation’ of the facts.”<sup>13</sup> Because Commerce established the facts during its anti-dumping duty investigation and evaluated those facts in its *Final Determination*, this means that the Panel must assess Commerce’s evaluation of the facts *at the time of the Final Determination*. While this assessment “clearly necessitates an active review or examination of the pertinent facts,”<sup>14</sup> the facts that are “pertinent” are those that were in existence at the time Commerce made its final determination – not the facts that India is just now bringing to the Panel’s attention.

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<sup>9</sup> *NSK Ltd., v. United States*, 170 F. Supp. 2d. 1280, 1318 (Ct. Int’l Trade, 6 June 2001), US-Exh. 27.

<sup>10</sup> First Written Submission of India at para. 140.

<sup>11</sup> SAIL’s CIT Brief, IND Exh. 19, at 16-18.

<sup>12</sup> These facts may be found at paragraphs 19-58 and 148-164 of the First Written Submission of the United States.

<sup>13</sup> *United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, Report of the Appellate Body*, WT/DS184/AB/R, adopted 23 August 2001, para. 55 (“*Hot-Rolled AB Report*”). See also *Article 21.5 Report, Mexico-Anti-Dumping Investigation of High Fructose Corn Syrup From the United States* (“*HFCS AB Report*”), WT/DS132/AB/RW, adopted 22 October 2001, para 130. Article 11 of the DSU imposes upon panels a comprehensive obligation to make an “objective assessment of the matter.”

<sup>14</sup> *Hot-Rolled AB Report*, at para. 55.

20. Both parties have discussed the standard of review applicable under Article 17.6 of the AD Agreement, and India acknowledges this standard. And yet, in its challenge to Commerce's application of "facts available" in this case, India asks the Panel to consider new facts and theories conceived long after Commerce made its determination. The Government of India's efforts to cobble together facts and theories two years after Commerce's decision cannot compensate for SAIL's failure to ensure that it provided the information necessary for Commerce to investigate the allegations of dumping. Thus, to the extent that India has presented new factual evidence to this panel, including new theories or models regarding how SAIL's flawed and incomplete US sales database might have been utilized in a margin calculation, this evidence is not properly part of the record before this Panel. When considering whether Commerce's decision was unbiased and objective, evidence and theories which were not before Commerce during the investigation are irrelevant.

**B. THE UNITED STATES' DECISION TO RELY ON THE FACTS AVAILABLE IN THIS CASE IS CONSISTENT WITH ARTICLE 6.8 AND ANNEX II**

21. Article 6.8 of the AD Agreement expressly permits the use of facts available when a party fails or refuses to provide necessary information in an anti-dumping investigation. Annex II of the AD Agreement sets out guidelines for investigating authorities when deciding whether to use facts available. As discussed below, taken together, Article 6.8 and Annex II allow investigating authorities to make preliminary and final determinations based entirely on facts available, which could lead to a result which is less favorable to the party than if the party had cooperated and provided the necessary information.

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

22. Article 6.8 of the AD Agreement provides:

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

23. As explained in the US First Submission, a fundamental issue in this dispute is the proper interpretation of the term "information" as used in Article 6.8 and Annex II of the AD Agreement.<sup>15</sup> The starting point for interpreting "information" as used with respect to "facts available" is Article 6.8 of the AD Agreement. Article 6.8 uses the term "necessary information;" as the United States explained in its First Written Submission, the ordinary meaning of the term "necessary" is "[t]hat which cannot be dispensed with or done without; requisite; essential; needful."<sup>16</sup> The "necessary" or "requisite" or "essential" information for conducting an anti-dumping investigation includes the price and cost information that is essential to the calculation of an anti-dumping margin.

24. According to India, "the US interpretation of 'necessary information' would require that when a dumping margin is calculated, either *all* of the necessary information must be obtained from the foreign respondent or *all* of the necessary information must be through the use of 'facts available.'"<sup>17</sup> That is not correct. Applying the guidelines in Annex II, an investigating authority may determine

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<sup>15</sup> First Written Submission of the United States at paras. 82-92.

<sup>16</sup> *Id.* at para. 83, *citing* New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993.

<sup>17</sup> Oral Statement of India at para. 41.

that it is appropriate to use all, some or none of the information provided by the exporter, depending on the facts of the case.<sup>18</sup>

25. The use of the word “necessary” to modify “information” in Article 6.8 is essentially a limitation because not all information provided during an anti-dumping investigation is necessary to the calculation of an anti-dumping margin. For example, if there is a question as to whether certain sales are an appropriate basis for export price or normal value because of an alleged association between the relevant parties to the transactions, the investigating authority may require the respondent to report information on the so-called “downstream” sales. If the investigating authority subsequently determines that the alleged association does not exist, the downstream sales are no longer necessary. As a consequence, if the reporting of the downstream sales information was defective, that would not constitute an absence of necessary information and would not be a basis to use facts available.

26. In its First Written Submission, India argued that Commerce was obligated to focus on certain “categories” of information – a term which does not appear anywhere in the AD Agreement.<sup>19</sup> Nor is there any reference in the AD Agreement to “categories” of information or to “a portion of” the necessary information. At the first meeting of the Panel, in fact, India conceded that the AD Agreement does not refer to “categories” of information and that investigating authorities are not required to use bits and pieces of an exporter’s information.<sup>20</sup>

27. Article 6.8 reflects a recognition on the part of Members that there is certain information, most of which is in the control of the exporters, that is necessary to a dumping calculation and, if that information is not available, the investigating authority must have the flexibility to make its determination on the facts otherwise available. Annex II provides the guidelines for exercising that discretion. However, Article 6.8 provides the context in which Annex II must be interpreted. Specifically, the references to “information” in Annex II should be interpreted as a reference back to the “necessary information” referred to in Article 6.8. This interpretation is supported by paragraph 1 of Annex II, which refers to “required” information.

28. This interpretation is also consistent with the purpose of the facts available provision. The plain language of Article 6.8 of the AD Agreement provides that, when certain conditions have been met, “*preliminary and final determinations*, affirmative or negative, may be made on the basis of facts available.” (emphasis added). While there are instances in which “partial” facts available may allow an investigating authority to calculate a margin after filling a “gap” of missing information -- such as the weight conversion factors at issue in the *Japan - Hot-Rolled Steel* dispute and referenced by India -- the situation with respect to SAIL was not such a case. Here, none of the necessary information could be used to calculate a dumping margin in a manner that would satisfy the dictates of, *inter alia*, Article 2.4 of the AD Agreement.<sup>21</sup> Having determined that the application of facts available was necessary, Commerce was not required to calculate a dumping margin for SAIL because SAIL failed to provide the necessary data. Instead, Article 6.8 authorized that Commerce's Final Determination “may be *made* on the basis of facts available.”<sup>22</sup>

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<sup>18</sup> As discussed in section I, above, this is, in fact, authorized under US law, and is reflected in decisions of US authorities applying this law. See also, the United States' response to Question 8 of the Panel's 25 January 2002, Questions to the United States.

<sup>19</sup> See, e.g., First Written Submission of India at para. 50-51, 124-25.

<sup>20</sup> Oral Statement of India at para. 34.

<sup>21</sup> Article 2.4 of the AD Agreement explicitly requires that investigating authorities make a fair comparison by making due allowance for all factors affecting price comparability.

<sup>22</sup> Another example of India's mischaracterization of Commerce practice is its statement that “[i]f any “necessary” information is not provided by a foreign respondent, the United States interprets Article 6.8 and Annex II, paragraphs 1, 3, 5, and 7 as giving it the discretion to disregard *all* of the information provided.” Oral Statement of India at para. 40 (emphasis in original). The presumption – which is incorrect – is that Commerce would reject all information provided if “any” necessary information is not provided. Not only does this

## 2. Annex II of the AD Agreement

29. As explained in the US First Written Submission, Annex II, paragraphs 1, 3, and 5 are relevant to this dispute.<sup>23</sup> Not surprisingly, India disagrees with the interpretations offered by the United States.

30. First, India argues that the United States has misinterpreted Annex II, paragraph 1 of the AD Agreement, which provides:

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

31. As explained in the US First Written Submission, paragraph 1 of Annex II provides the basic guidance in the AD Agreement for obtaining the participation of responding interested parties.<sup>24</sup> The first sentence provides that the authorities, as soon as possible, should contact the parties, advise them of the information required from them for the investigation, and advise them of the manner in which to submit that information. The second sentence then provides that the investigating authorities should advise the responding interested parties of the consequences of not providing the required information – that the investigating authorities *will be free* to make determinations on the basis of the facts available, including, in particular, those facts contained in the application for the initiation of the investigation.

32. India argues that the United States has misinterpreted Annex II, paragraph 1. According to India, for example,

The warning of the second sentence becomes relevant only for whatever information is not supplied in the structure and manner requested. It does not apply to *all* of the information requested unless a respondent refuses to provide any information.<sup>25</sup>

Again, India proposes a reading not justified by the text: that investigating authorities are not free to make a determination entirely on facts available unless the respondent refuses to supply any information at all. It is a reading that would lead to illogical, if not absurd, results: a respondent could fail to provide 99 per cent of the necessary information, and yet, because it had provided one per cent of the information, the investigating authority would *not* be free to make its determination on the basis of the facts available. This turns the explicitly authorized warning of Annex II, paragraph 1 into meaningless verbiage.

33. There is a more logical reading, consistent with AD Agreement. The second sentence of Annex II, paragraph 1 states that investigating authorities are free to make “determinations” on the basis of the facts available. In context, “determinations” means the “preliminary and final

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statement not reflect the situation involving SAIL – for which substantially more than “any” information was deficient – but other Commerce decisions, including one subject to WTO dispute settlement, have expressly disproved this point. See *Hot-Rolled Panel Report* at para. 7.65 (Commerce did not apply “total” facts available; rather, Commerce applied partial facts available only for the US sales that were missing).

<sup>23</sup> First Written Submission of the United States at paras. 98-114.

<sup>24</sup> *Id.* at para. 100.

<sup>25</sup> Oral Statement of India at para. 37.

determinations” in Article 6.8. Thus, if information – i.e., the “required” information referenced in the first sentence of Annex II, paragraph 1, or the “necessary information” as defined in Article 6.8 – is not provided, the investigating authority is free to make a preliminary or final determination based on facts available, consistent with the other requirements of the Agreement, including Annex II.

34. The importance of Annex II, paragraph 1 is plain: parties must be made aware that, where information is not supplied within a reasonable time, investigating authorities “will be free to make determinations on the basis of the facts available. . . .” This interpretation is in harmony with Article 6.8, which provides that “preliminary and final determinations . . . may be made on the basis of the facts available” where necessary information is not provided.

(a) *Paragraph 3*

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

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

36. As the United States explained in the First Written Submission, Annex II, paragraph 3 contains a number of conditions:

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

Only if all four of these conditions are met does the AD Agreement provide that the information should be taken into account.

- (i) The information "is verifiable"

37. The term “verifiable” is defined as “able to be verified or proved to be true; authentic, accurate, real.”<sup>26</sup> The use of the word “verifiable” in Annex II, paragraph 3 of the AD Agreement is understandable since an actual on-site verification is not required by the AD Agreement. Thus, information that has *not* been subject to actual verification may be considered to be “verifiable,” provided that it is internally consistent and otherwise properly supported. In such circumstances, an investigating authority that opts not to verify such information cannot decline to consider it because it was not, in fact, verified. This was the principle expressed in the panel reports in *Japan Hot-Rolled and Guatemala Cement II*<sup>27</sup>, where the investigating authorities in those cases refused to accept or verify the information during the relevant investigations.

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<sup>26</sup> New Shorter Oxford Dictionary, Clarendon Press, at 3564.

<sup>27</sup> *Guatemala – Definitive Anti-dumping Measures on Grey Portland Cement from Mexico*, WT/DS/156/R, 24 October 2000, para. 2.274; *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS/184/R (28 February 2001, adopted 23 August 2001) (*Hot-Rolled Panel Report*) at para. 5.79.

38. The facts established in this case are quite different, however. Neither the *Japan Hot-Rolled* panel nor the *Guatemala Cement II* panel were faced with a situation like the instant one in which on-site verification of the information was attempted but the information failed to be verified. Such information which has actually been subjected to verification and found not to verify can no longer be said to be “verifiable,” since it has been proven to be inaccurate. Such an explicit finding – such as was made in this case – that a respondent’s information failed verification<sup>28</sup> rebuts any assertion that information was “able to be verified or proved to be true.”<sup>29</sup>

39. One final point on the question of “verification:” as the United States responds to India’s arguments about the usability of SAIL’s US sales database, India has tried to rehabilitate some small portion of that database by placing inordinate weight on statements in the US sales verification report that “no discrepancies were found.” As the United States has explained previously – and as India acknowledged in its First Written Submission<sup>30</sup> – verification is the equivalent of an audit in which information is “spot-checked” for reliability. At verification, Commerce determined that SAIL’s US sales database contained discrepancies, a fact that India itself recognized.<sup>31</sup> In sum, SAIL’s information did not satisfy the first condition of Annex II, paragraph 3, that it be verifiable.

(ii) The information "can be used without undue difficulty"

40. Similarly, it was reasonable to conclude that SAIL’s information – or even just its US sales database – could not be used “without undue difficulty.” The term “undue” is defined as “going beyond what is warranted or natural.”<sup>32</sup> As discussed in detail during the first Panel meeting, among the problems with SAIL’s US sales database was the fact that the cost information requested by Commerce and supplied by SAIL as part of that database, failed verification and was unusable. Commerce would have utilized this information to make a price adjustment, when the product sold in the US was compared to a normal value with different physical characteristics, consistent with the requirements of Article 2.4.2 of the AD Agreement. In the absence of that information, it was not possible for Commerce to compare non-identical merchandise.

41. In addition, the information as supplied by SAIL would not have permitted Commerce to identify those US sales transactions that involved merchandise identical to a particular normal value model without undertaking significant additional work. As discussed in the US First Written Submission<sup>33</sup> and acknowledged by India<sup>34</sup>, there were flaws with the sales transaction portion of SAIL’s US sales database. The only way to correct those flaws would have been for Commerce to have manually corrected approximately 75 per cent of SAIL’s US database.<sup>35</sup> Whether such efforts would have resulted in any US sales of products being identical to the normal value model is uncertain because Commerce was not obligated to, and elected not to, undertake this substantial effort in light of the number of demonstrated problems with SAIL’s data.

42. India’s suggestion that Commerce did not make sufficient efforts to use SAIL’s information is groundless and is, in fact, contradicted by the established facts. The United States agrees that the AD Agreement contains a presumption that information from responding exporters is to be preferred over

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<sup>28</sup> Verification Failure Memorandum, Ex. US-25.

<sup>29</sup> New Shorter Oxford Dictionary, Clarendon Press, at 3564.

<sup>30</sup> First Written Submission of India at para. 57, n. 131.

<sup>31</sup> First Written Submission of India at paras. 30-31.

<sup>32</sup> New Shorter Oxford Dictionary, Clarendon Press, Vol. II at 3480.

<sup>33</sup> First Written Submission of the United States at para. 39.

<sup>34</sup> First Written Submission of the United States at para. 97-103.

<sup>35</sup> See, e.g., First Written Submission of India at para. 26, where India explains that errors in the “width” characteristic necessary for model matching affected 984 out of a total of 1284 sales observations.

alternative sources.<sup>36</sup> The established facts demonstrate that Commerce went to considerable efforts to secure SAIL's information and exercised an unusual degree of leniency in addressing major flaws in that information; nevertheless, SAIL's repeated and continuing failures prevented Commerce from calculating a margin for SAIL within the time provided for in the AD Agreement.

(iii) The information "should be taken into account"

43. As noted above, the criteria of Annex II, paragraph 3 of the AD Agreement were not met with respect to SAIL's data. Consequently, it is not necessary for the Panel to interpret the phrase "should be taken into account," and whether that phrase sets forth any affirmative obligations relevant to the present dispute. Instead, the relevant question for this dispute is whether, based on the facts before Commerce at the time it made its Final Determination, an unbiased and objective decision-maker could determine that it was appropriate to reject the exporter's information and rely entirely on the facts otherwise available. In the view of the United States, as discussed in our First Submission and at the first Panel meeting, and as further discussed throughout this submission, the facts provide a more than adequate basis for an unbiased and objective decision-maker to reach such a conclusion.

44. Nevertheless, if the Panel chooses to examine the phrase "should be taken into account," the United States offers the following additional comments. Annex II, paragraph 3 simply states that, if the four conditions are met, then the information "should be taken into account." Nevertheless, India continues to argue that "paragraph 3 is a *mandatory* provision, and information meeting all four conditions *must* be used by investigating authorities in connection with calculating the antidumping margin."<sup>37</sup> But "must use" and "should be taken into account" are not synonymous terms.

45. The ordinary meaning of the term "should" differs greatly from the terms "must" or "shall." The former word implies a suggested course of action, while the latter terms impose a mandatory obligation on Members. In *United States - Anti-dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip From Korea*<sup>38</sup>, the panel explicitly recognized that the ordinary meaning of "should" does not impose mandatory obligations upon WTO Members in the context of the AD Agreement.<sup>39</sup> Likewise, in *EC-Measures Concerning Meat and Meat Products (Hormones)*<sup>40</sup>, another panel recognized that the phrase "should take into account" in Article 5.4 of the Agreement on the Application of Sanitary and Phytosanitary Measures, "does not impose an obligation" because the word "should" was used and not the word "shall."<sup>41</sup> In two further reports, panels in *India-Patent Protection for Pharmaceutical and Agricultural Chemical Products*<sup>42</sup> and *United States-Anti-dumping Act of 1916*<sup>43</sup> also recognized that the phrase "should" indicates that terms are "directory or recommendatory, not mandatory."<sup>44</sup> These findings alone provide considerable evidence that the US interpretation of Annex II, paragraph 3, is, at the very least, *permissible*, and therefore must be considered correct under the special standard of review contained in Article 17.6(ii) of the AD Agreement.

46. Even if Annex II, paragraph 3 stated that information "must" be taken into account, it would take a further leap in logic to reach India's reading that such information "*must* be used by

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<sup>36</sup> First Written Submission of India at para. 70.

<sup>37</sup> Oral Statement of India at para. 27 (emphasis in original).

<sup>38</sup> WT/DS179/R, adopted 1 February 2001, para. 6.93 ("*SSPC from Korea*").

<sup>39</sup> *Id.* at para. 6.93 ("The term 'should' in its ordinary meaning generally is non-mandatory, i.e., its use in [Article 2.4 of the AD Agreement] indicates that a Member is not required to make allowance for costs and profits when constructing an export price").

<sup>40</sup> WT/DS48/R/CAN, adopted 18 August 1997 ("*Hormones from EC*").

<sup>41</sup> *Id.* at para. 8.169.

<sup>42</sup> WT/DS79/R, adopted 24 August 1998 ("*Patent Protection from India*").

<sup>43</sup> WT/DS162/R, adopted 29 May 2000 ("*United States 1916 Act*").

<sup>44</sup> *Patent Protection from India* at para. 7.14; *see also United States 1916 Act* at para. 7.14.

investigating authorities in connection with calculating the antidumping margin." <sup>45</sup> The phrase "take into account" is defined as "take into consideration" or "notice." <sup>46</sup> An obligation to consider or take notice of something is distinct from an obligation to actually use that same thing.

C. COMMERCE'S DECISION TO APPLY FACTS AVAILABLE WITH RESPECT TO SAIL WAS BASED ON AN UNBIASED AND OBJECTIVE EVALUATION OF THE FACTS

47. The portion of SAIL's information that India is arguing could have been used by Commerce to determine a dumping margin for SAIL seems to have shrunk over the course of the first Panel meeting. During the underlying proceeding, SAIL insisted that all of its data would be corrected, verified, and ready for use in an anti-dumping calculation. SAIL's promises were never fulfilled. In its papers subsequently filed with the US Court of International Trade, SAIL acknowledged that "resort to facts available arguably is justified (but not required) . . . for both SAIL's home market sales data and its cost data." <sup>47</sup> Before this Panel, India started by taking up SAIL's cause and arguing that its entire US sales database should have been used. However, faced with the fact that SAIL could not demonstrate the veracity of its reported cost information – information that would be required to make adjustments for physical differences between the US products and the normal value products pursuant to Article 2.4.2 of the AD Agreement – India modified its argument to then suggest the use of a small subset of US sales. Specifically, India's most recent theory is that Commerce should have used just the specific US sales that matched identically with the product upon which the normal value alleged in the petition was based.

48. Even India's fallback argument is belied by the facts of the case. As discussed previously, SAIL's US database contained recognized flaws, beyond the absence of usable cost information for making price adjustments. In fact, it would not have been possible for Commerce to identify the US transactions involving merchandise physically identical to the normal value merchandise using the database as submitted by SAIL. That database contained inaccurate information regarding the physical characteristics of the reported transactions. Thus, it would have been necessary for Commerce to manually identify and correct approximately 75 per cent of SAIL's database, before making any further effort to utilize that data. Given the repeated failure of SAIL to provide usable data and Commerce's verification that, at the very least, the vast majority of that data was completely unusable, it was neither unreasonable nor inconsistent with the United States' WTO obligations for Commerce not to have undertaken this additional burden.

49. In its Oral Statement, India concedes that there may be circumstances in which the lack of some aspect of the requested information renders the entire body of data to which that aspect pertains unreliable. India stated,

if a foreign respondent provided information on all export sales but did not provide information on a number of necessary characteristics of such sales (for example, their physical characteristics or the prices at which they were sold), the investigating authorities may be justified in finding that they cannot use that information without undue difficulty because it is too incomplete. <sup>48</sup>

We view this as a very significant concession by India because the foreign respondent in this case did not provide information on a necessary characteristic (for example, the cost of manufacture data required to measure the affect on price comparability caused by the differences in physical

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<sup>45</sup> Oral Statement of India at para. 27 (emphasis in original).

<sup>46</sup> New Shorter Oxford Dictionary, Vol. 1 at 15.

<sup>47</sup> SAIL's USCIT Brief, Ex. IND-19, at 16.

<sup>48</sup> Oral Statement of India at para. 58.

characteristics of the merchandise). Therefore, India's own logic would support the rejection of the US sales data.

50. Finally, having rejected SAIL's attempt to resurrect its claim under Annex II, paragraph 7 – that Commerce allegedly failed to exercise “special circumspection” in relying on information in the petition as facts available – the Panel should reject India's arguments that the margins used in the petition were unreasonable. This was an unexpected issue for India to raise, since assessment or “corroboration” of the information in the petition used as facts available is a factual exercise and SAIL, the party that participated in the investigation, never objected to Commerce's corroboration of the petition during the investigation.<sup>49</sup>

### III. INDIA HAS FAILED TO ESTABLISH A *PRIMA FACIE* CASE THAT THE UNITED STATES VIOLATED ARTICLE 15 OF THE AD AGREEMENT

51. The United States demonstrated in its first written submission that India has failed to establish a *prima facie* claim of breach of Article 15 of the AD Agreement. None of the points that India raised in the first meeting of the Panel changes this conclusion.

52. As the Panel noted in its written questions, India has focused its Article 15 claim on the second sentence of that provision.<sup>50</sup> It did not even mention the first sentence in the first meeting of the Panel. India's approach to this matter reflects the fact that the first sentence of Article 15 imposes no obligations on developed country Members. As India stated in the *Bed Linens* case, the first sentence “does not impose any specific legal obligation, but simply expresses a preference that the special situation of developing countries should be an element to be weighted when making that evaluation.”<sup>51</sup> Since the first sentence of Article 15 imposes no obligations on developed country Members, there is no basis to conclude that a Member can breach that provision, and there is no need to address this point further.

53. With respect to the second sentence of Article 15, the United States has acknowledged that the provision creates an obligation to “explore constructive remedies.” That obligation only arises, however, when the application of anti-dumping duties “would affect the essential interests of developing country Members.” Until the United States noted this point in its first written submission, neither SAIL nor India ever claimed that applying anti-dumping duties to SAIL would affect India's essential interests. Nor did India or SAIL ever identify what essential interests – if any – might be implicated in this case.

54. India's arguments on this point during the first meeting of the Panel amount to little more than a bald assertion that the United States should have known that applying anti-dumping duties to SAIL would affect India's essential interests. It is unable, however, to point to any evidence on the factual record supporting its assertion. For example, since SAIL manufactures many different types of steel products and sells those products throughout the world, its citation of the total number of SAIL employees proves nothing.<sup>52</sup> Similarly, without knowing what percentage of the company's total sales were made up of steel plate exports to the United States, there is no way to evaluate the importance of those sales to the company, much less to determine whether the application of an

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<sup>49</sup> See Commerce Corroboration Memorandum, Exh IND-30. This memorandum was issued more than four months prior to the date on which SAIL filed its brief commenting on Commerce's “facts available” determination and yet the company never raised any objection to the corroboration exercise.

<sup>50</sup> See *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India*, Questions for the Parties, 1 January 2002, Question 25.

<sup>51</sup> Panel Report on *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linens from India*, WT/DS141/R, adopted 12 March 2001, para. 6.220.

<sup>52</sup> Oral Statement of India at para. 70.

anti-dumping measure to those sales would affect India's essential interests. If a company produces a variety of products that it sells to a variety of markets, the imposition of an anti-dumping measure on the export of a single product to a single export market may not even affect the company's essential interests, much less the developing country Member's essential interests.

55. In addition, India's arguments on this point evidence a lack of understanding of the US position. Contrary to India's assertion, the United States is not claiming that "a developing country private respondent must have its government initiate government-to-government contacts before the private respondent can seek a suspension agreement."<sup>53</sup> The fact that Commerce considered the possibility of a suspension agreement without any intervention of the Indian government demonstrates that the United States does not impose any such requirement. The United States is simply arguing that there is no WTO obligation to "explore constructive remedies" unless the application of an anti-dumping measure would affect the developing country Member's essential interests. There is no evidence on the record of the challenged investigation suggesting that this circumstance existed in the present case.

56. India claims that the Article 15 obligation is triggered "even when the developing country interested party or its government is silent."<sup>54</sup> It fails to explain, however, how a developed country Member would ever be in a position to identify what interests individual developing country Members view as "essential" in the absence of any claim from the private respondent or developing country government, and investigating authorities cannot realistically be expected to assess whether the application of an anti-dumping measure in a particular case would affect essential interests without such a claim.<sup>55</sup> If anything, the fact that a developing country Member or its private companies choose to remain silent should be viewed as *prima facie* evidence that the application of an anti-dumping measure would not affect the developing country Member's essential interests.

57. Nor has India found any support for its interpretation among the arguments of the third parties. In their written submissions, Japan and the European Communities took no position on the issue. In its oral statement, Chile asked the Panel to refrain from ruling on the claim, pointing out that the Doha Ministerial recognized that clarification was needed on how to "operationalize" Article 15.<sup>56</sup>

58. In any event, the facts on the record demonstrate that Commerce did actively explore the possibility of a suspension agreement in this case. The United States discussed this point at paragraphs 188-191 of its First Written Submission. As was explained, Commerce officials held a meeting with SAIL's representatives specifically to discuss the possibility of a suspension agreement. India's claim that Commerce was unwilling to consider a suspension agreement is not supported by the administrative record, nor did SAIL suggest during the investigation that the *ex parte* memorandum reflecting this meeting was in any way inaccurate or incomplete.

59. For these reasons, there is no factual or legal basis to find that the United States has acted inconsistently with Article 15.

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<sup>53</sup> Oral Statement of India at para. 71.

<sup>54</sup> Oral Statement of India at para. 72.

<sup>55</sup> The *India Steel* investigation is a case in point. As the United States noted in its first written submission (at para. 187), SAIL's letter addressing the possibility of a suspension agreement did not mention India's essential interests, and it did not claim that (or explain how) applying an anti-dumping measure to SAIL's exports of steel plate would affect those interests. See *Letter from SAIL's Counsel to USDOC Re: Request for a Suspension Agreement*, dated 29 July 1999 (Exh. IND-10).

<sup>56</sup> Oral Statement of Chile, 25 January 2002, para. 21.

**CONCLUSION**

60. For the foregoing reasons, the United States requests that the Panel reject India's claims in their entirety.

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

WT/DS206

Second Written Submission of the  
United States of America

**EXHIBIT**

- US-26. (A) Final Results; Administrative Review and New Shipper Review of the Antidumping Duty Order on Stainless Steel Bar from India, 65 Fed. Reg. 48965 (10 August 2000) and accompanying Decision Memorandum; Final Determination of Sales at Less Than Fair Value;
- (B) Certain Polyester Staple Fibre From Taiwan, 65 Fed. Reg. 16877 (30 March 2000) and accompany Decision Memorandum