

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

**WT/DS206**

**Comments of the United States of America on India's  
12 February 2002 Responses to Panel Questions**

**February 18, 2002**

1. This submission is filed in accordance with the instructions of the Panel permitting the parties to this dispute to respond to new points raised in the answers to the 25 January 2002 questions posed by the Panel.<sup>1</sup>

2. For the most part, India's responses to the questions reiterate positions it has taken since the outset of this dispute. In at least two instances, however, India has raised new points in its responses to questions. Specifically: 1) in response to Question 29, India has presented five new criteria – what it calls “detailed considerations” – that it believes should guide whether the use of certain information would present “undue difficulties;”<sup>2</sup> and 2) India has asserted, in response to Question 25, an independent claim of violation of the first sentence of Article 15 of the AD Agreement.<sup>3</sup> The United States will reserve its response to any other new Indian arguments for its oral statement at the second Panel meeting.

**A. India's “Undue Difficulty” Argument Presents Five More Factors for the Panel's Consideration but Continues to Focus Exclusively (And Improperly) on Sail's U.S. Sales Database**

3. In its first written submission, India submitted five factors that the Panel should consider in determining whether “particular categories” of information submitted could be used without “undue difficulties.”<sup>4</sup> India argued that the Panel should focus exclusively on the U.S. sales “category” of information submitted by SAIL, and that it should consider (1) the timeliness of the information submitted; (2) the extent to which the information submitted has been verified or is verifiable; (3) the volume of the information; (4) the amount of time and effort required by the investigating authorities to make any corrections to information submitted to make it usable to assist in calculating margins; and (5) whether other interested parties are likely to be prejudiced if the information is used or corrected. The United States noted in response that India's focus on the term “categories” is misguided because that the term does not appear in the AD Agreement and ignores the very nature of the antidumping analysis required by Article VI and the rest of the AD Agreement.<sup>5</sup> India's focus on only the U.S. sales database ignored that the Agreement refers only to “necessary” information. India's application of the criteria exclusively to the U.S. sales database led it to conclude that errors could be corrected by “simply changing a line of computer

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<sup>1</sup> 25 January 2002 Questions from the Panel.

<sup>2</sup> India's Response to the 25 January 2002 Panel Questions, para. 60, incorporates by reference paragraphs 14-24 of India's Rebuttal Submission.

<sup>3</sup> India's Response to Questions, paras. 29-36.

<sup>4</sup> First Written Submission of India, para. 71.

<sup>5</sup> Answers of the United States to 25 January 2002 Questions, para. 4.

code and calculating margins on the basis of the corrected data within a matter of minutes or even several hours."<sup>6</sup> We explained previously that India's conclusion is not supported by the facts.<sup>7</sup>

4. Now, in response to the Panel's questions, India has revised the factors that it asks the Panel to consider on the issue of "undue difficulty." India now proposes the following factors for consideration: 1) the extent to which the component/category/set of information requested is complete; 2) the extent and ease with which gaps in the information can be filled with other available information in the record; 3) the amount of information that is available to be used; 4) the amount of time and effort required from the authorities to use the data in calculating a dumping margin; and 5) the accuracy and reliability of alternative information that would be used if the respondent's information were discarded. Again, India applies these criteria only to the U.S. sales data, and then, only in combination with other conclusions that are not supported by the record. We will address each of India's new factors in turn for purposes of argument.

5. First, India argues for consideration of the extent to which the "component," "category," or "set" of information requested – in other words, the Indian respondent's U.S. sales data – is complete.<sup>8</sup> In India's view, SAIL's U.S. sales data was complete "except for the VCOMU and TCOMU data used to calculate the 'difmer' adjustment . . . ."<sup>9</sup> But this conclusion ignores the facts established by the record: the Indian respondent's U.S. sales database revealed numerous flaws in the items examined (and the on-site verification was only a selective audit that did not review each piece of data submitted). One significant flaw was the discovery at verification that a physical characteristic used to match U.S. and home market sales was incorrectly reported, an error that affected approximately 75 percent of U.S. sales in the database.<sup>10</sup> In addition, several other errors were discovered, including the fact that certain freight costs were over- and under-reported for export sales<sup>11</sup> and that the duty drawback calculation for U.S. sales was incorrect. For these reasons, India is wrong in its conclusion that the U.S. sales database was "easily capable of being used" in calculating a margin.

6. Second, India focuses on the "extent and ease with which gaps in the U.S. sales information can be filled with other available information in the record." Again, India has incorrectly focused only on the U.S. sales data and the record does not support the "ease" of its

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<sup>6</sup> First Written Submission of India, para. 36.

<sup>7</sup> See, e.g., U.S. Answers to Questions, para. 32.

<sup>8</sup> On this point, Question 29 refers to India's Rebuttal Submission, para. 16.

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

<sup>10</sup> First Written Submission of India, para. 30.

<sup>11</sup> *Sales Verification Report*, Ex. IND-13, at 30.

conclusion. One important "gap" in the U.S. sales information was the absence of cost information necessary for calculating the necessary adjustments for physical differences. SAIL's own "section C" or U.S. sales portion of its questionnaire response referred Commerce to the "section D" or cost of production portion of the questionnaire response for this information, and the record reflects that SAIL never provided this information.<sup>12</sup> Only SAIL could easily have filled the gaps; Commerce was certainly in no easy position to do so.

7. Third, India asks the Panel to consider the amount of U.S. sales information that is available to be used.<sup>13</sup> According to India, "if the information provided represents *one* entire component" of the anti-dumping equation – here, presumably, the export price data – then investigating authorities must make "considerable efforts" to use this information. Setting aside the fact that the Agreement does not speak to "components" (or "categories") of information, the record demonstrates that SAIL did not even provide an *entire* U.S. database; it was flawed, as outlined above.

8. Fourth, India argues that the amount of time and effort required from the authorities to use the U.S. sales data in calculating a dumping margin is relevant. But as the United States has explained, even were one to focus solely on the U.S. sales database, the gaps in the information could not be easily filled. The absence of the cost information associated with U.S. sales made the comparisons required by Article 2.4 not just difficult, but impossible, where adjustment for physical differences were necessary.<sup>14</sup> Even for those sales for which the missing cost information was not needed – sales that matched identically and would require no adjustment for physical characteristics pursuant to Article 2.4 – U.S. authorities would have been required to manually correct the physical characteristics for 75 percent of the sales just to be able to identify the identical sales. It then would have been necessary to make further corrections for errors such as incorrect freight and duty drawback costs. Considering these facts, it cannot be said that gaps in the U.S. sales database could be easily filled.

9. Finally, India asks the Panel to consider the accuracy and reliability of alternative information that would be used if the respondent's information were discarded.<sup>15</sup> To the extent that India uses this factor to resurrect issues related to its "special circumspection" claim, we simply note that this claim has already been rejected by the Panel. Moreover, India is simply wrong to claim that Commerce "made no efforts to use SAIL's U.S. sales information." The facts as established reveal that Commerce made strenuous efforts throughout this investigation to use all of SAIL's data, including its U.S. sales database.

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<sup>12</sup> *SAIL Section C Response* (excerpts), Ex. US-28.

<sup>13</sup> India's Rebuttal Submission, para. 18-20.

<sup>14</sup> U.S. Answers to Questions, para. 32.

<sup>15</sup> India's Rebuttal Submission, paras. 22-23.

10. In addition to the above criticisms of India's new factors, the factors themselves, if applied to the only "subset" of information defined by the Agreement – "necessary information" – would support Commerce's actions in this case. Viewed in the correct light, these criteria would cause an unbiased and objective investigating authority to reach a very different conclusion from that drawn by India.

11. First, in determining the completeness of the information provided by SAIL that was necessary to the calculation of a dumping margin, an unbiased and objective investigating authority could reasonably conclude that the failure to provide usable home market, export price, cost of production, and constructed value information meant that the necessary information was incomplete. Therefore, the information could not be used without undue difficulty.

12. Second, in determining the extent to which information provided by SAIL that was necessary to the calculation of a dumping margin could be used with other information, an unbiased and objective investigating authority could reasonably conclude that SAIL's information could not be used with other information to calculate a margin – too much of it was missing. For this reason, the information could not be used without undue difficulty.

13. Third, in assessing the amount of the necessary information provided by SAIL that could be used, an unbiased and objective investigating authority could reasonably conclude that without usable home market, export price, cost of production, and constructed value information, it had almost no amount of the information necessary for conducting an antidumping analysis. As a result, use of what information SAIL did provide would be unduly difficult, if not impossible.

14. Fourth, in determining the amount of time and effort required to use SAIL's information, an unbiased and objective investigating authority could reasonably conclude that it would involve a great deal of time or effort to address the unusable home market, export price, cost of production, and constructed value information. Consequently, it could not be said that the information could be used without undue difficulty.

15. Finally, in assessing the accuracy of alternative information that could be used if the necessary information could not be used, an unbiased and objective investigating authority could reasonably conclude that the facts available as provided in the petition are no less accurate and reliable than the unusable information submitted by the respondent. Precisely because the submitted information was unusable, there is no way to know whether the facts available are more or less reliable vis-a-vis SAIL. Only by providing accurate information could SAIL guarantee a result that would accurately reflect SAIL's own selling practices. But it did not do so.

**B. India's New Interpretation of the First Sentence of Article 15  
Has No Textual Basis and Conflicts with the Interpretations  
That It Has Put Forward in Other Fora**

16. As the United States anticipated in its initial answer to Question 25, India has abandoned its previously-expressed view that the first sentence of Article 15 of the AD Agreement does not create any obligations for developed country Members.<sup>16</sup> While it continues to maintain that the provision does not set out any “specific legal requirements,” it now believes that the provision does create a “general obligation, the precise parameters of which are to be determined based on the facts and circumstances of the particular case.”<sup>17</sup>

17. As an initial matter, the fact that there are no “specific legal requirements” in the first sentence of Article 15 – as India still admits – should be dispositive with respect to determining whether the United States has breached that provision. There is, for example, no basis in the text of the provision for requiring developed country Members to undertake any of the actions that India suggests in paragraph 31 of its response to Question 25, and thus no basis for finding a Member in breach of the provision if it does not undertake them.

18. The Panel should also note that, in addition to contradicting the position that it took in the *Bed-Linens* dispute, India's new interpretation also conflicts with the interpretation it set forth in a paper on “operationalizing” Article 15 that it recently filed in the Anti-Dumping Committee.<sup>18</sup> For example, India argues to the Panel that the reference to providing special regard “when considering the application of anti-dumping measures” means the developed country Member must take action “in deciding what information to use and how to use it to calculate margins.” India then sets out a variety of ways in which a developed country Member might do so, including by using SAIL's data to collect an antidumping margin.<sup>19</sup>

19. These arguments flatly contradict the position that India has put forward in its paper to the Anti-Dumping Committee. In paragraph 3 of that paper, India states that the issue presented in the first sentence of Article 15 “is that, once dumping and injury have been determined, when deciding whether anti-dumping measure [sic] should be imposed, developed countries should

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<sup>16</sup> Compare India's Response to Questions, para. 36, with Panel Report on *European Communities – Antidumping Duties on Imports of Cotton-type Bed Linens from India*, WT/DS141/R, adopted 30 October 2000, para. 6.220 (*Bed-Linens*).

<sup>17</sup> India's Response to Questions, para. 36.

<sup>18</sup> *Implementation-Related Issues Referred to the Committee on Anti-Dumping Practices and its Working Group on Implementation*, Paper Submitted by India, G/ADP/AHG/W/128, February 1, 2002 (“India's Submission to the Committee”).

<sup>19</sup> India's Response to Questions, paras. 31, 33.

take into account the developing country status of the targeted country.”<sup>20</sup> India then explained that the “obligation” arises “when considering the application of anti-dumping measures.”<sup>21</sup> Thus, while India argues to the Panel that the provision is relevant in the calculation of margins, it stated to the Committee that it is relevant to the application of measures.

20. In addition, India argues that the Panel should judge the compliance of the United States with its purported “obligations” by examining Commerce’s final determination.<sup>22</sup> In its paper to the Committee, India properly noted that if there is an issue regarding what should appear in a Member’s published determination, the extent of any such obligation is rooted in Article 12 of the AD Agreement.<sup>23</sup> The United States does not agree with India that a developed country Member is required to explain in its published report how it gave “special regard” to the “special situation of developing country Members.” However, even if a Member were required to provide such an explanation, India has alleged no violation of Article 12 in this case, and U.S. compliance with that article is not within the Panel’s terms of reference.

21. The United States also notes that India argued in its paper to the Anti-Dumping Committee that the second sentence of Article 15, viewed in the context of the first sentence, suggests that a developed country Member could provide “special regard” to the developing country Member by exploring constructive remedies.<sup>24</sup> The United States agrees with the position that India put forward in the *Bed-Linens* case that the first sentence of Article 15 does not create an obligation. However, even if a Member were required to give “special regard” by exploring constructive remedies, the record demonstrates that the United States did explore constructive remedies in the investigation at issue.<sup>25</sup>

22. Finally, the United States recalls the key point related to the paper that India submitted to the Anti-Dumping Committee: India submitted the paper in the context of “operationalizing” Article 15. The fact that the Ministers have recognized that Article 15 would benefit from clarification and have asked the Committee to make recommendations on how to “operationalize” the provision demonstrates that no specific requirements are “operational” at present. Further, none of India’s supposed requirements – neither those argued to the Panel nor those suggested to the Committee – is required by the text.

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<sup>20</sup> India’s Submission to the Committee, para. 3 (emphasis added).

<sup>21</sup> *Id.* (emphasis added).

<sup>22</sup> India’s Response to Questions, para. 24.

<sup>23</sup> India’s Submission to the Committee, para. 13.

<sup>24</sup> *Id.*, para. 4.

<sup>25</sup> The United States discussed this point in paragraphs 188 – 191 of its first written submission.

23. For additional insights on this issue, the United States respectfully refers the Panel to India's argumentation on this point in the *Bed-Linens* proceeding. Among other things, India described the first sentence of Article 15 as not creating a "rock-solid legal obligation." Rather, India described the sentence as a "permissive" provision that contained a statement of "preferred policy."<sup>26</sup>

### **C. Conclusion**

24. The United States will address additional points raised by India in its second oral statement and in response to any questions that the Panel may have at the second Panel meeting.

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<sup>26</sup> *Bed-Linens*, Annex 1-1, paras. 6.20 – 6.22.