

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

**WT/DS206**

**Answers of the United States of America  
to the Panel's 25 January 2002 Questions**

**February 12, 2002**

## United States - Anti-dumping and Countervailing Measures on Steel Plate from India

### Questions for the Parties

#### To the United States

1. In paragraph 84 of its first submission, the United States asserts that "Nothing in the AD Agreement requires an administrating authority to evaluate distinct "categories" of information separately for purposes of determining whether it is permissible to use facts available for a dumping determination". In paragraph 83 of its submission, the United States enumerates certain information which is necessary for conducting an anti-dumping investigation - including prices of the subject merchandise in the domestic market of the exporting country, export prices of the subject merchandise, and in appropriate circumstances, cost of production information and constructed value information. Without prejudice to the United States' legal argument, could it be considered that, for practical purposes of calculating an anti-dumping duty, these constitute distinct "categories" of information?

#### Answer:

1. Any set of information or data can be separated into “categories.” The definition of the term “category” is “any of a possibly exhaustive set of basic classes among which all things might be distributed.”<sup>1</sup> In this sense, the information which is necessary for conducting an anti-dumping investigation – including prices of the subject merchandise in the domestic market of the exporting country, export prices of the subject merchandise, and in appropriate circumstances, cost of production information and constructed value information – could be considered “categories” of information. In turn, each of these “categories” is actually a “set of categories” – comprised of multiple smaller “categories” of information such as prices, quantities, physical characteristics, levels of trade, packing and movement expenses. Each of these “categories” is necessary to calculate a dumping margin.<sup>2</sup> Even each sales listing for a particular model of subject merchandise could be identified as a “category” of a respondent’s sales information. But as the European Communities aptly stated at the meeting with third parties,

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<sup>1</sup>The New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993.

<sup>2</sup>See, e.g., Article 2.4 of the AD Agreement (“Due allowance *shall* be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability” (emphasis added)(footnote omitted)).

It is important to recognize that the data requested of interested parties in an anti-dumping investigation is not atomised, it does not consist of independent sets of data which have no link to one another. Consequently, failure to provide one set of data may affect the validity of other elements of data provided.<sup>3</sup>

2. India itself seems unsure of where it would draw the line between different “categories” of information. In its First Written Submission, India expressed the view that the Indian respondent’s U.S. sales database was a “category” of information that should be examined separately under the lens of Annex II, paragraph 3.<sup>4</sup> If this U.S. sales “category” satisfied the criteria of Annex II, paragraph 3, then India stated that it must be used. At the first Panel meeting, however, India made the following statement:

India recognizes that it may not be reasonable to expect an investigating authority to conduct a separate examination of each of the four conditions in Annex II, paragraph 3 for thousands of individual pieces of information submitted by a respondent. India does not insist upon an interpretation of Annex II, paragraph 3 that would require investigating authorities to use any piece of information provided by foreign respondents, no matter how small and isolated. India’s First Submission used the qualifying term “categories” of information for exactly this reason. The United States correctly points out that the term “category” is not a term found in the AD Agreement. However, what is important here is not the exact term used. Rather, what is important is the need to interpret the Agreement in good faith, in a way that ensures the use of information meeting the four criteria of Annex II, paragraph 3.<sup>5</sup>

3. India then continued by offering as an example of a “category” of information the “weight conversion factor” information at issue in the *Japan Hot-Rolled* dispute. But this “weight conversion factor” information – a formula used to measure the difference between the actual and estimated weight per ton for steel in coils – is just such a “small and isolated” piece of

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<sup>3</sup>Third Party Oral Statement of the European Communities at para. 3.

<sup>4</sup>First Written Submission of India at para. 51 (“[a]ny category of information which is submitted by a foreign respondent and which meets [the criteria of Annex II, paragraph 3] must be used by investigating authorities without regard to whether the foreign respondent has submitted *other* categories of information that [do not meet the criteria of Annex II, paragraph 3].” (emphasis in original)).

<sup>5</sup>Oral Statement of India at para. 34 (emphasis added).

information that India claims investigating authorities need not separately examine.<sup>6</sup> India’s reasoning shows the flaw in applying the criteria of Annex II, paragraph 3 to subject “categories” of information.

4. In sum, India’s focus on the term “categories” of information is misguided for two reasons. First, as India concedes, the term “categories” does not appear in the AD Agreement. As the Appellate Body has said, “The fundamental rule of treaty interpretation requires a treaty interpreter to read and interpret the words actually used by the agreement under examination, and not words which the interpreter may feel should have been used.”<sup>7</sup> In fact, the only “category” of information recognized by Article 6.8 is “necessary” information. Second, treating as distinct what India conceives as separate “categories” of information ignores the very nature of the anti-dumping analysis required by Article VI and the rest of the AD Agreement. As Article 2.4 of the AD Agreement makes clear, the required comparison of this information means that the various pieces of “necessary information” are in no way distinct. The customary rules of treaty interpretation do not allow India to read the term “categories” into the AD Agreement as a way of narrowing the Panel’s focus to the smallest subset of information that India believes will pass muster under the conditions of Annex II, paragraph 3 (here, an as-yet undefined subset of SAIL’s U.S. sales information).

**2. In paragraph 91 of its first submission, the United States refers to the fact that certain portions of information provided by a respondent may appear acceptable in isolation, but when the nature and extent of deficiencies on the whole are substantial, it calls into question the reliability of the entire response. The United States asserts that Article 6.8 provides that in such circumstances, the investigating authority may rely on facts available. Can the United States point to any specific language in the AD Agreement which refers to the potential impact of deficiencies of some information submitted on the reliability of the entire response?**

**Answer:**

5. The text of the AD Agreement recognizes that where there are significant deficiencies in the necessary information that has been submitted, those deficiencies may have an impact on the reliability of the entire response. Article 6.8 of the AD Agreement states that “preliminary and final determinations, affirmative or negative, may be made on the basis of facts available” where a respondent does not provide necessary information. Article 6.8 does not require that *all* necessary information must be missing before a preliminary or final determination may be made based on facts available; rather, it states that such determinations may be made when *necessary*

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<sup>6</sup>Japan Hot-Rolled Panel Report at para. 7.32.

<sup>7</sup>EC - Measures Concerning Meat and Meat Products (“EC-Hormones AB Report”), WT/DS48/AB/R, adopted Feb. 13, 1998, para. 181 (“EC-Hormones AB Report”).

information is not provided. Therefore, an investigating authority is not restricted to merely filling “gaps” when necessary information is missing – if the circumstances warrant, the authority may base its entire determination on facts available, subject to the provisions of Annex II. In the case of the Indian respondent, SAIL, a very significant degree of information was not provided or was unusable; what was missing was not susceptible to replacement or “gap-filling” by other pieces of information. Even SAIL’s U.S. database contained significant deficiencies and errors.<sup>8</sup>

6. By stating in Article 6.8 that investigating authorities may base preliminary and final determinations on facts available when “necessary information” is not provided, Article 6.8 does not establish a standard that limits the use of facts available to situations in which no necessary information has been provided. The fact that Article 6.8 allows an investigating authority to base its preliminary or final determination on facts available implies that some necessary information which the respondent has properly submitted to the investigating authority will not be used. The text of Annex II, paragraph 5 reinforces this point in stating that “[e]ven 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.” The text of Annex II, paragraph 5 recognizes that certain information can be ideal in some respects, and yet authorities may disregard the information if the submitting party has not acted to the best of its ability. Again, in the case of the Indian respondent, even India acknowledges that SAIL’s information was far from ideal in many respects.

7. In sum, based on the text of Article 6.8 and Annex II, paragraph 5 of the AD Agreement, investigating authorities are not prevented from assessing whether deficiencies in a significant portion of information necessary for an anti-dumping calculation has an impact on the reliability of the entire response

**3. Does the United States consider that section 782(e)(3) relates to the condition set out in paragraph 3 of Annex II regarding whether information is "appropriately submitted so that it can be used in the investigation without undue difficulties", or does the United States justify this aspect of its statute on some other or additional basis?**

**Answer:**

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.” First, it is entirely consistent with Article 6.8 and Annex II for an investigating authority to consider whether or not submitted information forms a reliable basis

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<sup>8</sup>Details of the deficiencies and unreliability of SAIL data were described in the U.S. First Written Submission at paras. 19-58 and 148-163 and are further discussed herein in response to Question 10.

for calculating a company's dumping margin. For example, Annex II, paragraph 3 provides that investigating authorities should consider whether information is verifiable, demonstrating the importance of one method by which an investigating authority can ensure that information is reliable.

9. Furthermore, as discussed in the United States' Second Written Submission, when Commerce has a questionnaire response which contains some usable and some unusable information, it is relevant to consider whether there is enough information to form an objective basis for determining the respondent's margin of dumping. By requiring Commerce to evaluate the degree of completeness of the information, section 782(e)(3) provides that, when the other criteria have been met, Commerce may not decline to consider the partial information when it is sufficiently complete that it can 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, the considerations of paragraph 5 of Annex II of the AD Agreement also are reflected in section 782(e)(3).

**4. In paragraph 107 of its first submission, the United States suggests that Annex II paragraphs 3 and 5 urge the investigating authority to take into account, or at least not to disregard information on the record which meets the criteria set out in these provisions, but does not oblige Members to utilise this information. Does this not suggest that an interpretation which furthers the goal of objective decision-making based on facts, by requiring consideration of information which meet the criteria, is more appropriate than one which allows investigating authorities to reject some information submitted because of problems with respect to other information?**

**Answer:**

10. An interpretation that requires consideration of information which meets the criteria of Annex II, paragraph 3 -- but does not require the investigating authority to "use" the information to calculate an antidumping margin -- furthers the goal of objective decision-making based on facts. The AD Agreement should be interpreted in a manner that will maintain the careful balance between the interests of investigating authorities, injured domestic industries, and exporters that is reflected in the AD Agreement. On the one hand, there is a clear preference in the AD Agreement for the use of information provided by a respondent. On the other hand, when a preponderance of the information provided proves inaccurate and unreliable -- or when a party fails to provide the information at all -- requiring an investigating authority to use any remaining information, regardless of its limits, would place control of the anti-dumping investigation firmly within the hands of the exporting party. Interpreting the AD Agreement to allow responding parties to selectively provide information and to require investigating

authorities to use that information would encourage such selective responses and defeat the underlying purpose of “objective decision-making based on facts.”

11. An interpretation that requires consideration of information which meets the criteria of Annex II, paragraph 3 -- but does not require the investigating authority to "use" the information -- also rests on a permissible interpretation of Annex II, paragraph 3. According to Article 17.6(ii), a panel shall uphold a measure where it rests upon a permissible interpretation of the Agreement. The decision by Commerce to apply facts available in this case satisfies this principle: 1) Annex II, paragraph 3 requires that information should be "taken into account" if it satisfies four criteria; 2) the phrase “take into account” is defined as “take into consideration” or “notice;”<sup>9</sup> and 3) Commerce did "take into account" or "take into consideration" or "notice" all of SAIL’s submitted information. To this end, in its preliminary determination, Commerce took SAIL’s efforts to provide information into account in selecting the facts available used as the preliminary margin of dumping.<sup>10</sup> Furthermore, notwithstanding significant concerns with the responsiveness and completeness of SAIL’s data, and over the objections of petitioners, Commerce further considered and took into account the information provided by SAIL by attempting to verify that information.<sup>11</sup> In the end, Commerce’s *Final Determination* took account of the totality of the record, the substantial problems with SAIL’s data, the verification failure, and the undue difficulties that would have been required to use any of SAIL’s data and determined to base its determination entirely on facts available.<sup>12</sup>

**5. Does the United States object to the submission of the affidavit of Mr. Hayes *per se*, or does the United States object to the arguments made by India to the effect that the correction of errors in the US sales database would have been a relatively simple matter for the United States? In this regard, we note that SAIL did propose, during the proceedings before USDOC, that the USDOC computer programme could have been modified to address the errors in the US sales database, and did propose alternative calculations of the margin of dumping. Does the United States object to the Hayes affidavit because it contains different proposals in these matters than were presented during the investigation? If so, could the United States explain why it considers this significant, given that the Panel will not, for itself, either calculate the dumping margin or correct programming language? What specific aspects of the Hayes affidavit and testimony does the United States consider constitute new facts as opposed to new analysis or arguments regarding the facts in the record?**

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<sup>9</sup>New Shorter Oxford Dictionary, Clarendon Press, Vol. 1 at 15.

<sup>10</sup>See First Written Submission of the United States at ¶ 34.

<sup>11</sup>*Id.* at ¶ 37.

<sup>12</sup>*Id.* at ¶¶ 45-51.

**Answer:**

12. First, the United States does object to the Hayes affidavit *per se*. An "affidavit" is a "a written statement, confirmed by oath or affirmation, to be used as evidence."<sup>13</sup> The purpose of an affidavit, therefore, is to serve as evidence. The Hayes affidavit itself expresses its purpose as such.<sup>14</sup> While India is entitled to make any arguments to the Panel that are within the Panel's terms of reference, India is not entitled to present new factual information, even in the guise of an affidavit. Pursuant to Articles 17.5(ii) and 17.6(i), the pertinent evidence on which the panel must base its review is the record established by the investigating authority at the time of its determination.<sup>15</sup>

13. Second, there are specific aspects of Mr. Hayes' affidavit and testimony that constitute new facts. In addition to the new computer program attached by Mr. Hayes to his affidavit and his factual conclusions that certain errors in the U.S. sales database "were either adverse to SAIL or would likely not have been used" by Commerce, Mr. Hayes stated at the first meeting of the Panel that he had "created a new exhibit, India Exhibit 32" with new calculations of total price, expense, and quantity data for all of SAIL's U.S. sales, and he invited the Panel to see new calculations and "substitutions" in India Exhibit 33.<sup>16</sup>

14. Finally, the specific proposals made by Mr. Hayes did, in fact, differ from proposals made by SAIL during the Commerce proceeding. The fact that these proposals are different underscores the underlying reason for the requirement in Articles 17.5(ii) and 17.6(ii) that panels consider the record before the authorities at the time of their determinations, and not new information. It would not be appropriate or fair to assess the adequacy of Commerce's determination using information that India only developed two years later and that India has continued to refine over the course of this case. SAIL made arguments during the investigation as to how its own data could be used and the Panel should limit its review to those arguments, to the extent that India continues to pursue them. The fact that India's new methodologies never

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<sup>13</sup>New Shorter Oxford Dictionary, Clarendon Press, Vol. 1 at 35.

<sup>14</sup>Hayes Affidavit, Ex. IND-24. For example, the affidavit includes 1) a computer program created for a separate anti-dumping proceeding that never appeared in the record of that proceeding, and was never submitted in the India plate proceeding; and 2) post-hoc assertions of fact that errors discovered in SAIL's U.S. sales database "were either adverse to SAIL or would likely not have been used" by Commerce.

<sup>15</sup>See *United States-Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 28 February 2001, at paras. 7.6-7.7 ("It seems clear to us that, under this provision, a panel may not, when examining a claim of violation of the AD Agreement, in a particular determination, consider facts or evidence presented to it by a party in an attempt to demonstrate error in the determination concerning questions that were investigated and decided by the authorities, unless they had been made available in conformity with the appropriate domestic procedures to the authorities of the investigating country during the investigation").

<sup>16</sup>Oral Statement of India at para. 91 (comments by Mr. Hayes).

occurred to SAIL, that it has taken India two years to develop them, and that India must even now continuously refine them, only serves to demonstrate why they are irrelevant to the Panel’s review of whether Commerce’s determination of the evidence *before it* was unbiased and objective.

**6. Can the United States explain how the US sales data, had it been accepted and taken into account, would have affected negatively the process of reaching an objective decision based on facts? Does the United States consider that a decision based entirely on facts available is more in keeping with the objectives of the AD Agreement than one based in part on facts available and in part on verified information? Please explain in detail. Would the United States consider that it is in all cases unsound to calculate a dumping margin based on a comparison of normal value calculated on the basis of facts available and export price calculated on the basis of verified information submitted by the party in question?**

**Answer:**

15. The Panel’s question assumes that SAIL’s U.S. sales data were “verified” and, therefore, could be used in reaching a decision based on facts. As we explained at the first meeting of the Panel, they were not. Based on the comprehensive flaws in SAIL’s information, Commerce reached a determination that SAIL’s information failed verification *in toto*. This determination was based on errors in the U.S. sales data itself (as detailed in Question 10 below) and the inherent linkages between the respondent’s U.S. sales and its other data. The term “U.S. sales data” is an inclusive term meaning all of the data pertaining, or related, to U.S. sales. It includes, for example, the cost of manufacturing data for each U.S. sale – data which SAIL was unable to verify as accurate. This data is necessary for making due allowance for physical differences which affect price comparability. Because the data was inaccurate and unusable in the calculation of a dumping margin, it could not have been used to reach an objective decision based on fact.

16. As the Appellate Body stated in the *Japan Hot-Rolled* case, the goal of an anti-dumping investigation is “ensuring objective decision-making based on facts.” To reach this goal, the investigating authority must assess whether it can use the particular facts before it when making its determination. If a responding party does not provide the information necessary for making a decision, as in this case with respect to SAIL, the Agreement provides for the use of facts available by the investigating authorities. In some cases, it will be possible to use only partial facts available; however, as in this case, there may be times where the information submitted by the responding party is so deficient that it will not provide an indication of the respondent’s level of dumping and the investigating authority may appropriately rely entirely on facts available. In such a case, the decision to use total facts available is an objective one, based on the facts on the record of the investigation. As long as the decision to use total facts available is made with

regard to the viability of the overall record of information necessary for making an anti-dumping determination, this decision will be consistent with the objectives of the AD Agreement.

17. With these points in mind, the United States does not believe that it is necessarily unsound in all cases for the calculation of a dumping margin to be based on a comparison of normal value calculated on the basis of facts available and export price calculated on the basis of verified information. The use of facts available, partial or total, must be addressed on a case-by-case basis, and there may be a situation where a normal value based on facts available can be compared to export price calculated on the basis of verified information. The case at issue is not one of those cases.

**7. Speaking hypothetically, could the USDOC have concluded that, standing alone, US sales data was verified, timely submitted, accurate and reliable? If your response is no, please explain why not.**

**Answer:**

18. It is difficult to address this issue hypothetically, given Commerce’s specific finding in this case that SAIL’s information – including its U.S. sales data – failed verification.<sup>17</sup> In addition, there were inaccuracies specific to the U.S. sales data that were never resolved, as detailed in the verification report and acknowledged by India in its “affidavit.” As a result, Commerce concluded that these errors in the U.S. sales database “support our conclusion that SAIL’s data on the whole is unreliable.”<sup>18</sup> For these reasons, Commerce could not conclude that the U.S. sales data, standing alone, were verified, accurate, and reliable.

**8. Does the United States consider that the interpretation of US law adopted by USDOC and affirmed by the USCIT and applied in this case is a necessary result under US principles of statutory interpretation, or would the United States consider that the USCIT merely accepted as reasonable an interpretation by USDOC, but that, following US principles of statutory interpretation, the statute could be interpreted differently? Please provide specific references and authorities in support of your response. Is it correct to understand the United States’ position as being that its statutory provisions governing use of facts available require USDOC to apply facts available in circumstances in which the AD Agreement permits the use of facts available?**

**Answer:**

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<sup>17</sup>Determination of Verification Failure Memorandum, Ex. US-25.

<sup>18</sup>*Id.* at 5.

19. The standard of review of anti-dumping determinations under U.S. law is analogous to the standard provided in Article 17.6(ii) of the AD Agreement, i.e., that a determination applying a provision that admits of more than one interpretation will be upheld if it rests on a permissible interpretation. In the underlying USCIT decision, the court affirmed Commerce’s decision to apply total facts available, stating that the court’s responsibility was to determine if the agency’s interpretation of the statute was “reasonable, in light of the language, policies and legislative history of the statute.”<sup>19</sup> The court did not express a view as to whether the statute could be interpreted differently.<sup>20</sup>

20. It is not correct that the “facts available” provisions of U.S. law *require* Commerce to apply facts available in circumstances in which the AD Agreement *permits* the use of facts available. As noted in our first written submission at paragraphs 119 - 147, nothing in the U.S. statute, or regulations, requires that Commerce apply facts available in a manner inconsistent with Article 6.8 and Annex II of the AD Agreement. The application of facts available is a discretionary exercise, not a mandatory one, specifically dependent upon the quantity and quality of the information submitted by the respondent. This analysis is particularly true for section 782(e) of U.S. law.

21. Section 782(e) requires that Commerce *consider* information that might otherwise be rejected under section 776(a), if five relevant criteria are met. In some cases, like the case now before this Panel, Commerce has found that a respondent has failed to provide significant necessary information on the record and that what was provided should be disregarded because it failed to meet the criteria of section 782(e). In other cases, however, Commerce has determined that the necessary information, though flawed, could be used in its calculations because the criteria of 782(e) were met.

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<sup>19</sup>*Steel Authority of India, Ltd. v. United States*, 149 F. Supp. 2d 921, 927 (May 22, 2001). Following the filing of the United States’ First Written Submission, the USCIT upheld Commerce’s Remand Redetermination, which further explained its finding that SAIL failed to act to the “best of its ability.” See *Steel Authority of India, Ltd. v. United States*, Slip Op. 2001-149 (Dec. 17, 2001) (Exhibit US-28).

<sup>20</sup>The Court’s holding is in conformity with the standard of review expressed in the United States Code and historically recognized by the Court of International Trade, that “the Court of International Trade must sustain ‘any determination, finding or conclusion found by Commerce unless it is ‘unsupported by substantial evidence on the record, or otherwise not in accordance with law.’” *Fujitsu General Ltd. v. United States*, 88 F.3d 1034 (Fed. Cir. 1996)(quoting 19 U.S.C. § 1516a(b)(1)(B)). “Substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Consolidated Edison v. NLRB*, 305 U.S. 197, 229 (1938); accord *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984). Even if it is possible to draw two inconsistent conclusions from the evidence contained in the record, this does not mean that the DOC’s findings are not supported by substantial evidence, and the Court will sustain DOC’s determination if its conclusion is found to be reasonable. See *Consolo v. Federal Maritime Comm’n*, 383 U.S. 607, 620 (1966).

22. In India Exhibit 28, India presented administrative cases adopting “total” facts available and suggested that section 782(e) “as interpreted” by Commerce requires the rejection of all of a respondent’s information where only some information is flawed. This is incorrect. Even the determinations submitted by India make clear that Commerce interprets section 782(e) as requiring it to consider information even where that information contains a significant flaw. For example, in *Certain Cut-to-Length Carbon Steel Plate from Sweden: Preliminary Results of Antidumping Administrative Review*, the respondent’s cost data failed verification. Nevertheless, Commerce stated that “[w]e *must* therefore consider whether the submitted cost data is useable under Section 782(e) of the Act.”<sup>21</sup>

23. Other cases not cited by India also rebut its assertion. For example, in *Final Results; Administrative Review and New Shipper Review of Antidumping Duty Order on Stainless Steel Bar from India*, 65 Fed. Reg. 48965 (August 10, 2000) and accompanying Decision Memoranda (*India Steel Bar Final Results*), Commerce determined that although the cost information provided by the Indian respondent, Panchmahal, was incomplete, pursuant to section 782(e) of the Act, it could apply most of the information on the record to its calculations, and use “partial facts available” in the areas in which necessary facts were missing:

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.*<sup>22</sup>

As a result, Commerce resorted to facts available only with respect to certain portions of the margin analysis.

24. Similarly, in *Polyester Staple Fiber from Taiwan*, Commerce recognized that the respondent failed to submit entirely accurate and complete responses to its cost and sales database, but determined that the application of partial facts available, rather than total facts

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<sup>21</sup>61 Fed. Reg. 51898, 51899 (1996), Ex. IND-28.

<sup>22</sup>*India Steel Bar Final Results* Decision Memorandum, US-Exh 26, at 3 (emphasis added).

available, was appropriate under the statute.<sup>23</sup> Commerce noted that the respondent’s submissions had been timely, the majority of the information provided was accurate, the effect of the errors discovered at the verification of sales and costs were limited in scope and the impact of those errors on any potential dumping margin was small. Commerce determined that the respondent’s data, overall, “could be used without undue difficulties” and that “pursuant to section 782(e) of the Act, we do not find that [respondent’s] information is so incomplete that it cannot serve as a reliable basis for reaching a final determination.”

25. Commerce's interpretation of section 782(e) of the Act is also supported by decisions of the USCIT. For example, in *NSK Ltd., v. United States*, 170 F. Supp. 2d. 1280 (June 6, 2001), the court reviewed Commerce's decision to accept adjustment and rebate information from certain respondents in an antidumping review. The Court affirmed Commerce’s decision to accept these adjustments and rebates, citing to section 782(e) of the Act. The Court noted 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>24</sup>

26. Thus, contrary to India’s assertions, United States law requires Commerce to accept a respondent’s data where the criteria of section 782(e) are met. As we explain in greater detail in Section 1 of our Second Submission, section 782(e) of the Act serves to *reduce* the likelihood that Commerce will resort to the facts available in a particular case. Furthermore, all of the provisions pertaining to the application of facts available in the U.S. statute and regulations are fully consistent with Article 6.8 and Annex II of the Agreement.

**9. Could the United States clarify whether USDOC found all the databases submitted by SAIL unusable at the preliminary stage, or all the databases except for the US sales database? Was the 16 July "final database" limited to information other than US sales? Was it also found to be unusable, as the earlier ones had been, or were these data analysed for purposes of the final determination?**

**Answer:**

27. As detailed in our First Submission, SAIL’s electronic databases had significant flaws that were never corrected. One week before its July 19, 1999, preliminary determination, Commerce continued to advise SAIL that “your electronic database submissions have proven

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<sup>23</sup>*Final Determination of Sales at Less Than Fair Value; Certain Polyester Staple Fiber From Taiwan*, 65 Fed. Reg. 16877 (March 30, 2000) and accompany Decision Memorandum, Exhibit US-26, at Issue 1 (*PSF from Taiwan*).

<sup>24</sup>*NSK Ltd., v. United States*, 170 F. Supp. 2d. 1280, 1318 (June 6, 2001), Exhibit US-27.

seriously deficient and are currently unusable.”<sup>25</sup> On July 16, 1999, SAIL submitted revised electronic databases, including information on U.S. sales, but this information was submitted too late to be incorporated into the preliminary determination. Commerce explained that “because of problems with the electronic databases that SAIL submitted, its questionnaire response cannot be used to calculate a reliable margin at this time.”<sup>26</sup> In any event, this electronic database tape, in turn, was replaced on August 17, 1999, and SAIL attempted to submit a further database tape on the first day of verification, which Commerce rejected as untimely. The verification itself revealed, for example, that:

The total cost of manufacture (TCOM) and the variable COM (VCOM) on the COP tape submitted August 17, 1999, are incorrect. There is no way to establish a meaningful correlation between the TCOM and VCOM on the tape and the underlying cost data and sources documents.<sup>27</sup>

28. The TCOM and VCOM information was directly relevant to the U.S. sales database and resulted in a complete lack of information that would be needed for “difference in merchandise” adjustments. Given that the purpose of these cost and sales databases are to be run in comparison with each other, the flaws in these databases left Commerce with nothing it could analyze at the time of the *Final Determination*.

**10. Would the United States specify how the US sales data was itself flawed? Did the USDOC specifically determine that consideration of the US sales data would cause "undue difficulties"? Can the United States point to where, in the determination or otherwise in the record, this conclusion can be discerned? Can the United States explain the underpinnings of this conclusion? Or, is it accurate to conclude that the only reason the USDOC decided not to consider the US sales data is because of the problems identified with the other data? Please explain in detail what would be the "undue difficulty" in comparing export prices derived from the US sales database with information contained in the petition. Could the United States clarify how the absence of cost of manufacture information US export sales make the entire US sales database unreliable?**

**Answer:**

29. Commerce did not base its decision not to consider the U.S. sales data solely on problems with other data. While the reliability of SAIL’s questionnaire response was judged on the

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<sup>25</sup>Letter from Commerce to SAIL Re: Return of Untimely Information, Ex. US-14) at 1.

<sup>26</sup>Preliminary Determination, Ex. IND-11, at 41203.

<sup>27</sup>Cost Verification Report, Ex. US-3, at 2.

information presented by SAIL as a whole, Commerce also identified significant flaws in the U.S. sales database.

30. First, keeping in mind that on-site verification amounts to a selective audit that does not review each piece of data submitted, the “sales” verification of most aspects of the Indian respondent’s U.S. sales database revealed numerous flaws in the items examined. 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>28</sup> In addition, several other errors were discovered, including the fact that certain freight costs were over- and under-reported for export sales<sup>29</sup> and that the duty drawback calculation for U.S. sales was incorrect.

31. Second, the “cost” verification also reviewed elements of the U.S. sales database. For logistical reasons, the cost elements of the U.S. sales database were examined separately. As SAIL acknowledges, the cost verification ended in SAIL’s complete failure to reconcile its costs to its books and records.<sup>30</sup> As a result of this failure, another flaw in the U.S. sales database was exposed: the total cost of manufacture (TCOM) and variable cost of manufacture (VCOM) for each U.S. sale could not be verified. Without verified TCOM and VCOM information, Commerce could not adjust for differences in physical characteristics that affect price comparability as required by Article 2.4 of the Agreement.

32. In assessing the information submitted by SAIL – including the flaws in the U.S. sales database described above – Commerce specifically determined, *inter alia*, that the information “cannot be used without undue difficulty.”<sup>31</sup> As Commerce stated in its final determination, “SAIL’s questionnaire response is substantially incomplete and unuseable in that there are deficiencies concerning a significant portion of the information required to calculate a dumping margin.”<sup>32</sup> While there were significant flaws in the U.S. sales database, Commerce’s facts available determination was based on all of SAIL’s information. This is appropriate because the data requested in an anti-dumping investigation does not consist of independent sets of data which have no link to one another.<sup>33</sup> To assess the “undue difficulty” of using information, one

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<sup>28</sup>First Written Submission of India at para. 30.

<sup>29</sup>*Sales Verification Report*, Ex. IND-13, at 30.

<sup>30</sup>*SAIL’s USCIT Brief*, Ex. IND-19, at 16.

<sup>31</sup>*Final Determination*, Ex. IND-17, at 73130-31.

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

<sup>33</sup> We note in this regard the statement of the European Communities that “it is important to recognize that the data requested of interested parties in an anti-dumping investigation is not atomised, it does not consist of independent sets of data which have no link to one another.” Third Party Statement of the European Communities (continued...)

must evaluate how the necessary comparison of information can be accomplished in its present state. In this case, the absence of the cost information associated with U.S. sales made the required comparisons not just difficult, but impossible, where adjustment for physical differences were necessary. 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, then it would have been necessary to make further corrections for freight costs, duty drawback errors, etc.

33. As to whether it would cause "undue difficulty" to compare the export prices derived from the U.S. sales database with information contained in the petition, we note that all the corrections just described would be required, with the result that Commerce could still not be assured that all errors were discovered. These corrections would have caused undue difficulty, notwithstanding India’s assertions to the contrary. In fact, India’s evolving proposals demonstrate the undue difficulty involved in making this comparison.

34. Finally, to accept India’s argument that “facts available” should result in a calculation that leaves the respondent in the same position as if it had provided the information would encourage respondents in an anti-dumping proceeding to pick and choose the information they submit, providing only the information that is to their advantage. To do so would render Article 6.8 and Annex II of the AD Agreement meaningless.

**11. In paragraph 33 of its first submission, the United States identifies 1) technical errors in SAIL's electronic databases, 2) lateness and incompleteness of certain narrative portions of the questionnaire response, and 3) lack of product-specific costs in connection with the finding that SAIL did not act to the best of its ability to provide the information requested. Is it correct to understand that these three factors are the entire basis of the conclusion that SAIL did not act to the best of its ability to provide the information requested?**

**Answer:**

35. The Panel refers to paragraph 33 of the first submission, in which the United States summarized the three factors that USDOC identified in its *preliminary* determination that SAIL did not act to the “best of its ability.” Ultimately, by the time of Commerce’s *Final Determination*, there were additional factors justifying a finding that SAIL failed to act to the best of its ability. In the *Final Determination*, Commerce noted that SAIL “consistently failed to

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<sup>33</sup>(...continued)  
at para. 3.

provide reliable information throughout the course of the investigation,” despite Commerce’s “numerous and clear indications to SAIL of its response deficiencies.”<sup>34</sup> Furthermore, Commerce noted that “[e]ven though we rejected use of SAIL’s questionnaire response at the preliminary determination, because the company was seemingly attempting to cooperate, albeit in a flawed manner, we continued to collect data after the preliminary determination in an attempt to gather a sufficiently reliable database and narrative record for verification and for use in the final determination.”<sup>35</sup> SAIL continued to provide Commerce with unuseable data, however, and Commerce in the end determined SAIL had not acted to the best of its ability, summarizing in detail the deficiencies in the previously-identified areas of completeness, timeliness, and workability of computer tapes and the fact that SAIL failed verification.<sup>36</sup>

36. The U.S. Court of International Trade then requested Commerce to further explain its reasoning that SAIL had not acted to the “best of its ability,” and Commerce did so in its Remand Redetermination.<sup>37</sup> SAIL filed comments with USDOC on this point but chose not to challenge the finding before the USCIT.

37. Commerce addressed in detail in its Remand Redetermination the factors contributing to its determination that SAIL had not acted to the best of its ability during this investigation. Commerce explained that it has very limited knowledge of the actual extent of a respondent’s ability to comply with requests for information, as it is the respondent, not Commerce, that possesses the necessary information and knowledge of the company’s operations and records.<sup>38</sup> Therefore, Commerce explained, it was incumbent upon SAIL in this case to demonstrate why it was incapable of providing the requested information in a timely fashion. As has already been discussed in the United States’ first written submission, SAIL failed to provide Commerce with necessary information for calculating its margin of dumping, and during the investigation never explained to Commerce that it was unable to provide this information.

38. Commerce noted in the Remand Redetermination that SAIL informed Commerce that it was experiencing difficulties in gathering and submitting the requested information, but that in all of its communications with Commerce, SAIL further indicated that the requested information would be forthcoming. “SAIL gave every indication that it would comply with the agency’s

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<sup>34</sup>*Final Determination*, Ex. IND-17, at 73 129-30.

<sup>35</sup>*Id.*

<sup>36</sup>*Id.* at 73130.

<sup>37</sup>*Remand Redetermination*, Ex. IND-21.

<sup>38</sup> *Id.* at 4.

information requests.”<sup>39</sup> Nonetheless, even after Commerce returned submissions to SAIL with explanations of what needed to be done to complete its electronic databases, for example, SAIL again submitted deficient databases with “no reasonable basis for its failure to provide the information requested.”<sup>40</sup>

39. Commerce also noted that SAIL is one of the largest steel producers in the world, has an established accounting system and its books are audited annually by a large team of public accountants.<sup>41</sup> Given the size and sophistication of SAIL, the extent of the insufficient responses provided by SAIL during the investigation, and SAIL’s repeated opportunities to correct information and its failure to do so, Commerce determined that SAIL had not cooperated during the investigation to the “best of its ability.”<sup>42</sup>

**12. Could the United States elaborate on its contention that Article 15 second sentence only requires action by a developed country proposing to impose anti-dumping measures if the developing country in question first demonstrates that there are "essential interests" that would be affected by the imposing of an anti-dumping measure? Specifically, could the United States explain the legal basis of its view that the first step belongs to the developing country, which must come forward with a demonstration that the imposition of anti-dumping duties would affect its essential interests? Could the United States indicate, in general, what elements such a demonstration might consist of, or what might be considered relevant factors in this regard, in its view?**

**Answer:**

40. The second sentence of Article 15 states that the obligation to explore constructive remedies arises when the application of antidumping duties “would affect the essential interests of developing country Members.” Therefore, there would be no basis to find a developed country Member in breach of that provision unless the application of an antidumping measure in a particular case would affect the developing country Member’s essential interests.

41. There are two components to this inquiry. First, what are the “essential interests” at issue? Second, how would the application of an antidumping measure in the particular case affect those interests, if at all? As a practical matter, it is the developing country Member and the respondent private company that will possess the information needed to answer these questions. Developed country Members are in no position to identify what interests individual developing

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

<sup>40</sup> *Id.* at 7.

<sup>41</sup> *Id.* at 8.

<sup>42</sup> *Id.* at 8-9.

country Members view as “essential” to their own interests, and investigating authorities cannot assess whether the application of an antidumping measure in a particular case would affect those interests unless the private respondent or its government provides the information needed to make such an assessment.<sup>43</sup> Moreover, it is not enough for a private respondent to provide evidence suggesting that the imposition of an antidumping measure would affect its own essential interests; it is the developing country Member’s essential interests that are relevant.

42. The elements relevant to demonstrating these matters will likely vary from case to case. Some possible elements – assuming there are essential interests at issue – might include whether the product is of particular strategic importance to the developing country Member; whether the developed country Member is the sole market for the product; whether the total value of the affected trade is significant relative to the developing country Member’s economy as a whole; and whether, if the private respondent company is large enough that imposition of a measure would affect the developing country Member’s essential interests (and not just the company’s own), the producer produces other products that the measure would not affect. If the company produces a variety of products that it sells to a variety of markets, the imposition of an antidumping measure on the export of a single product to a single export market may not affect the company’s essential interests, much less the developing country Member’s essential interests.

43. India characterizes the U.S. position on this issue as “an unfortunate attempt by a developed WTO Member to read additional restrictions into a provision that already provides little benefit in terms of legal effect or certainty to developing countries . . . .”<sup>44</sup> This is simply not true. The U.S. position on this issue is based on a good faith reading of the language of Article 15. The second sentence of that Article demonstrates a clear decision by the WTO Members that the special provisions of Article 15 do not simply apply to any case in which a developing country is involved as a respondent. Otherwise, there would have been no need to include any reference to essential interests in the provision.

**13. Is the cost verification an integral process, or is the cost of manufacture for US export sales separately verified? If the former, can the United States point to any particular part of the cost verification report that relates to information regarding cost of manufacture of US export sales?**

**Answer:**

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<sup>43</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 Commerce Re: Request for a Suspension Agreement*, dated 29 July 1999 (Exh. IND-10).

<sup>44</sup>India’s Oral Statement at para. 69.

44. On-site verifications are structured to fit the situation of the company being examined. Verification for certain companies will be conducted by the same staff at the same location, covering U.S. sales, home market sales, cost of production and constructed value. Other verifications, such as that conducted for SAIL, are done by separate teams of staff due to the number of locations to be visited. This resulted in separate verification reports. But the purpose of verification is the same: to conduct a spot-check to test the accuracy of the submitted information. The verification of each essential element of the response is necessary to the overall verification of the response. In this case, the cost of manufacture for U.S. sales was verified separately with the rest of the cost data for logistical reasons. Had SAIL’s data been available at a single location, it would have been verified together with the U.S. sales data.

45. SAIL’s total cost of manufacture (TCOM) and variable cost of manufacture (VCOM) were developed using a single cost methodology. In fact, in replying to Commerce’s questions requesting TCOM and VCOM information for U.S. sales, SAIL simply referred Commerce to its cost questionnaire (Section D) response.<sup>45</sup>

46. Similarly, the verification of cost information was conducted on a consolidated basis. All cost information, regardless of whether it related to home market or U.S. sales, was examined during the cost verification. As the United States previously noted, and India has not disputed, SAIL failed to verify its reported cost information.<sup>46</sup>

**14. Is it US practice to make adjustments for differences affecting price comparability, including physical differences in the products concerned, to export price, to normal value, or does it vary from case to case? Could the United States please explain the significance of cost of manufacture information in the context of export price information? Is this information equally important in all cases, or was it considered particularly significant in this case?**

**Answer:**

47. Yes, it is U.S. practice to make adjustments to export price and normal value for differences affecting price comparability, including physical differences in the products concerned. The United States makes such adjustments in accordance with its obligations under Article 2.4 of the AD Agreement. Article 2.4 states the following:

“A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level... Due allowance shall be made in each case, on its merits, for differences which affect price

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<sup>45</sup>See SAIL Section C Questionnaire Response at C-49 and C-50 (Exhibit US-29).

<sup>46</sup>First Written Submission of the United States at para. 40.

comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, *physical characteristics*, and any other differences which are also demonstrated to affect price comparability.” (Emphasis added.)

48. The U.S. statute implements these obligations under Article 2.4. The specific adjustments necessary for making a fair comparison will vary on a case-by-case basis. For example, if sales to the United States were made on a delivered basis, all of the movement expenses associated with delivery from the factory to the U.S. customer would have to be deducted from export price in order to reach an ex-factory price. On the other hand, if the U.S. sales were made on an ex-factory basis, the exporter would have incurred no costs to deliver the merchandise to the U.S. customer. Consequently, there would be no movement expenses to deduct from the export price.

49. Cost of manufacture information is very important in the context of export price information, because it is the information needed to make the due allowance for differences in physical characteristics mandated by Article 2.4. Article 2.4 imposes an obligation on Members to make adjustments to account for physical differences that affect price comparability in the process of making fair comparisons between export price and normal value. The United States bases its price adjustments for physical differences on differences in variable cost of manufacture between distinct products. Without the cost of manufacture data, it is not possible to make these price adjustments.

50. The cost of manufacture information is equally important in all cases in which products sold in the U.S. market must be matched to sales of non-identical merchandise in the comparison market.

**15. The United States in paragraph 10 of its oral submission notes that the US sales data was only "a fraction" of the information necessary for an anti-dumping analysis. Does this characterization refer to the amount of information involved in relation to the total information necessary? How would this be measured - number of pages, data points? Would the conclusion be the same if, in terms of volumes involved, the US sales were much larger than home market sales (but home market sales still met the test of footnote 2)? How about if foreign production were much greater than the volume of export sales ?**

51. As an initial matter, the United States notes that paragraph 10 of its oral submission discussed India’s request that the U.S. authorities use SAIL’s U.S. *pricing* information to perform an anti-dumping analysis. It was this *pricing* information that the United States characterized as a fraction of the information necessary for an anti-dumping analysis. The U.S. sales data normally necessary to perform an antidumping analysis would further include selling expenses, movement charges, product matching characteristics, variable cost of manufacturing,

total cost of manufacturing, and constructed value. As discussed above in response to question 10, much of this information in SAIL’s U.S. database was inaccurate and/or unusable.

52. The United States’ characterization of the U.S. pricing information as being a fraction of the information necessary for an anti-dumping analysis was, indeed, a reference to the amount of information involved in relation to the total information necessary. However, this “amount” of information cannot be measured with respect to the number of pages needed to print out U.S. prices or the number of data points needed to program them. Rather, it needs to be measured with respect to the totality of information necessary to perform an anti-dumping analysis. In this case, as India itself has conceded, most of the information SAIL submitted that was necessary to perform the anti-dumping analysis was inaccurate, failed verification, and could not be used in performing the analysis. This includes all of the information related to home market sales, cost of production, constructed value, and some of the information related to U.S. sales.

**16. Could the USDOC have identified, among the US sales reported in the US sales database, export prices for transactions involving a like or similar product to that represented in the constructed normal value reported in the petition? Is it the United States' view that this would, in this case or inherently, constitute "undue difficulty" in using this information in the investigation? Please explain in detail the nature and scope of the undue difficulty involved.**

**Answer:**

53. As we explained at the first Panel meeting and in response to Questions 6 and 10, the U.S. sales database contained numerous flaws and could not be used. In addition, as India and SAIL have conceded, all other data with respect to home market sales, cost of production, and constructed value proved to be unverifiable, unreliable, and unusable. These combined failures properly led Commerce to conclude that it should make a determination in this investigation on the basis of total facts available. After making this conclusion in the face of such a failure on the part of the respondent, for Commerce or any investigative authority to attempt to rehabilitate such a response by selectively identifying certain information that might be useable would have inherently constituted an undue difficulty.

54. For Commerce to have identified, among the U.S. sales reported in the U.S. sales database, export prices for transactions involving a like or similar product to that represented in the constructed normal value reported in the petition, would have involved undue difficulty. To have identified U.S. sales transactions of like or similar merchandise would have required Commerce to manually review and input the physical characteristics for 75% of the U.S. sales transactions, then identify those sales of merchandise that was identical to the product in the petition for which there was a constructed value. Commerce would also have had to input

corrected freight costs that had been either over- or under-reported, duty drawback errors and any other errors discovered while making the comparisons.

**17. Is it the United States' view that paragraph 5 of Annex II is symmetrical? That is, paragraph 5 provides that if a party has acted to the best of its ability, the fact that the information provided is not ideal in all respects should not justify disregarding it. Putting aside the import of "should", does the United States consider that the fact that a party has failed to act to the best of its ability should justify the investigating authority in disregarding information that is otherwise not ideal in all respects? Further, does the United States consider that the fact that a party has failed to act to the best of its ability should justify the investigating authority in disregarding information that is otherwise ideal in all respects?**

**Answer:**

55. Annex II, paragraph 5 states that even if “information provided may not be ideal in all respects, this should not justify the authorities from disregarding it,” provided that the interested party responding to authorities’ questionnaires has acted to the best of its ability. The natural corollary to this principle is that where a party has not acted to the best of its ability, and its information is not ideal in all respects, that information may be disregarded by the investigating authorities. Therefore, in response to the first question, the United States agrees that if a party submitting information has failed to act to the best of its ability, an authority may disregard information that is not ideal in all respects. While the appropriateness of disregarding the information would have to be considered on a case-by-case basis, we note that in this case, SAIL’s information was ideal in almost no respect.

56. In response to the second question, the United States notes that if the information provided is ideal in all respects, it would not be necessary to consider whether the party acted to the best of its ability.

**18. It appears that India considers that a comparison between a constructed normal value calculated by petitioners, and an average of US sales prices, or an average of a subset of US sales prices for product that "matches" the product for which normal value was calculated, yields a more accurate result, one that better represents "objective decision-making based on facts," than a determination that applies the dumping margin calculated in the petition as facts available. Could the United States respond to this proposition, specifically regarding the relative quality of the result in each case? Does the outcome affect the United States' view in this regard?**

**Answer:**

57. As we noted in response to Question 16, the lack of necessary information to conduct an anti-dumping analysis required Commerce to base its determination on facts available in the petition; specifically, the price offer in the petition which matched the product on which constructed value was based. The relative quality of this decision – comparing the price offer in the petition to the matching product on which constructed value was based – is quite sound, particularly where the information has been corroborated as in this case.

58. As an alternative, India would require that Commerce make all the changes necessary to utilize the U.S. sales data – an exercise that would have involved a distinct amount of speculation given the extent of what was missing – so that these sales could be compared to the product for which normal value was calculated. Given that many of these sales did not match the product on which normal value was based, a subset of these sales would need to be identified in order to conduct this comparison. The relative quality of India's proposed exercise is questionable at best. It is the analytic process involved – not the outcome – that affects the United States' view in this regard.

### **Questions to India**

**19. India claims that the United States violated Article 2.4 of the AD Agreement because the failure to use the US sales data submitted by SAIL resulted in an unfair comparison. Does India consider that a comparison of normal value based on facts available and export price based on the US sales data would have been fair within the meaning of Article 2.4? Does India agree that USDOC was entitled to rely on facts available with respect to the determination of normal value in this case?**

#### **Answer:**

59. India's argument is based on the false premise that a breach of Article 6 could also constitute a breach of Article 2.4. Even if there had been a breach of Article 6 in the investigation at issue (a point the United States does not concede) such a breach would not cause a violation of Article 2.4. The Panel's question illustrates the flaw in the logic of India's suggestion that Articles 2.4 and 6 are linked. The United States discusses this point further in its answer to Question 20.

**20. Could India elaborate on the link it draws between the Article 2.4 "fair comparison" requirement and the asserted violation of Article 6.8. Specifically, does India consider that a comparison in which one element is determined in violation of some other provision of the AD Agreement is, ipso facto, unfair in terms of Article 2.4? Does India consider that this constitutes a separate violation of the AD Agreement? For instance, assume a panel were to conclude that an investigating authority violated some aspect of**

**Article 2.2 in the calculation of normal value. Would this, in India's view, necessarily constitute a violation of Article 2.4 as well?**

**Answer:**

60. To the extent that India is arguing that there is a link between Articles 2.4 and 6.8, its argument is unfounded. There is no support in the text of the Agreement for an interpretation of Article 2.4 that would allow breaches of other provisions to also constitute a breach of Article 2.4.

61. The ordinary meaning of this term used in Article 2.4, viewed in context, demonstrates this point. Article 2 governs the "Determination of Dumping." The first sentence of Article 2.4, in turn, states that "A fair comparison shall be made between the export price and the normal value." The remainder of that paragraph sets out the ways in which investigating authorities are to make this fair comparison.

62. The first sentence of Article 2.4.2 further demonstrates this point. That provision establishes additional criteria for establishing margins, "subject to the provisions governing fair comparisons in paragraph 4." Thus, it is the provisions in paragraph 4 of Article 2 that establish the obligations relevant to making a fair comparison. By contrast, there is no language suggesting that other provisions of the Agreement are implicated in Article 2.4 in any way.

**21. India argues that paragraph 5 of Annex II requires that information in a particular category must be accepted, despite possible flaws, if it can be used without undue difficulties and if the party providing it has acted to the best of its ability. India also asserts that if a category of information satisfies the three or sometimes four conditions of paragraph 3 of Annex II, the investigating authorities may not reject that category of information. These requirements do not, however, address the substance or quality of the information in question. Does India maintain that the investigating authority must, in all cases, base its determination on the information submitted in these circumstances? What if, for instance, information regarding home market sales is known to be incomplete, but is verifiable, timely submitted, and can be used with undue difficulties - would this incomplete information have to be used in calculating the dumping margin? Going further, what if, upon verification, the information proves to be incorrect - must it still be used in calculating the dumping margin? What if the information simply cannot be verified - must it still be used in calculating the dumping margin? Would India consider that the completeness or correctness or actual verification of the information is part of the conditions under paragraph 3 of Annex II, or would these be separate or further requirements?**

**Answer:**

63. This question identifies an important flaw in India's "sequencing" argument regarding the relationship between Annex II, paragraph 3 and Annex II, paragraph 5. We agree with the statement in the question that the requirements of Annex II, paragraph 3 do not address the substance or quality of the information in question. India's interpretation, to the extent that it requires an investigating authority to use information without regard to its substance or quality, is an interpretation that contradicts objective decision-making based on facts.

**22. Does India dispute the USDOC finding that SAIL failed to act to the best of its ability in respect to information, other than US sales data? Is it correct to understand that India has not contested the scope of the information request put to SAIL during the investigation?**

**Answer:**

64. The United States notes that SAIL declined to submit any comments to the U.S. Court of International Trade challenging Commerce's Remand Determination that SAIL failed to act to the best of its ability. The United States can confirm that SAIL did not contest the scope of the information request put to SAIL during the investigation.

**23. In SAIL's calculations comparing US sales data to "verified" home market sales, what assurance is there that the home sales data covered all sales of comparable product, or that cost data covered all production of the comparable product? Especially in light of the "significant" flaws in the home sales and cost data, which SAIL does not dispute allowed USDOC to rely on facts available. Isn't the argument here over which facts available to use, which does not appear to be the subject of a claim in this dispute? Does India consider that the comparison SAIL proposed would not have posed "undue difficulties" for USDOC?**

**Answer:**

65. This question raises a very important point: the essence of India's challenge is that U.S. authorities used the wrong "source" for facts available. Yet India has not made a legal claim that matches the essence of its challenge. India has abandoned its claim under Annex II, paragraph 7, that the United States failed to exercise special circumspection in using information supplied in the petition and India has not indicated any other provision of the Agreement which is within the terms of reference and which establishes an obligation to evaluate facts available alternatives relative to one another. The Panel has issued a preliminary ruling indicating that, having abandoned its Annex II, paragraph 7 claim, India may not revive it.

**24. Section 782(d) of the Tariff Act of 1930, as amended, specifies that in the case of deficient submissions, the USDOC "may, subject to subsection (e), disregard all or part of**

**the original and subsequent responses" (emphasis added). How does India justify the contention that the US law required USDOC to reject US sales data and rely on facts available in violation of the AD Agreement, in light of this statutory language, US case law permitting use of partial facts available, USDOC decisions relying on partial facts available, the arguments presented in SAIL's USCIT brief, and India's acknowledgement that that statute "could" be interpreted otherwise?**

**Answer:**

66. It is difficult to see how India can justify its contention that U.S. law *required* Commerce to reject the Indian respondent’s U.S. sales data. Section 782(d) expressly states that Commerce “may” disregard information but only after it considers the information pursuant to section 782(e). In response to Question 8, we have identified Commerce decisions and USCIT case law that permit – indeed encourage – the use of partial facts available. SAIL itself argued to the USCIT that facts available “arguably is justified (but not required) for certain of its information.”<sup>47</sup>

**25. The heading of India's argument regarding Article 15 asserts that USDOC violated Article 15 by "failing to give special regard to the situation of India as a developing country when it applied facts available in relation to SAIL’s US sales data." However, the body of the argument related to the alleged failure of USDOC to "explore possibilities of constructive remedies" as required by the second sentence of Article 15. Is India asserting a violation of the first sentence of Article 15, and if so, could India please explain the legal argument in support of its claim? Could India elaborate on its interpretation of the first sentence of Article 15? In India's view, what obligations does it impose on a developed country, and when must those obligations be satisfied? Could India expand on its assertion and explain how, specifically, the USDOC actions in this case constitute a violation of the first sentence of Article 15?**

**Answer:**

67. There is no possible basis for India to assert a violation of the first sentence of Article 15 because, as India has previously conceded, the provision imposes no obligations on developing country Members. India stated in *Bed Linens* that 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>48</sup> India contrasted the lack of any specific legal obligation with its interpretation of the second sentence,

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<sup>47</sup>*SAIL’s CIT Brief*, Ex. IND-19, at 16.

<sup>48</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

which it claimed "imposes a specific legal obligation to ‘explore possibilities’."<sup>49</sup> The United States urges the Panel to take these facts into account in the event that India changes its interpretation of the first sentence for purposes of the present proceeding.

**26. Does India agree with the contention of the United States that the respondent ultimately controls the information necessary to a dumping calculation? How does India respond to the contention that to allow the respondent to control the information gathering process by deciding which information (or category of information) it will provide, and requiring that this information be accepted if it is adequate under paragraph 3 Annex II regardless of what flaws there may be with other information, gives the respondent control over the dumping calculation and thus opens the possibility for manipulation of the results?**

**Answer:**

68. SAIL is likely to respond that it had no intent to manipulate the results, but this is beside the point. The Panel’s question raises an essential question regarding how to ensure the careful balance between the interests of investigating authorities and exporters that is reflected in the AD Agreement.

**27. It is the Panel's understanding that US law does not provide for the imposition of a lesser duty. In this circumstance, does India consider that the US was obliged to explore the possibility of imposing a lesser duty under Article 15?**

**Answer:**

69. The only place in the AD Agreement that addresses the issue of “lesser duty” is Article 9.1. That provision indicates only that it is “desirable” to impose a lesser duty if doing so would be adequate to remove the injury to the domestic industry. Article 9.1 explicitly reserves that decision to the authorities of the importing Member. Article 9.1 is not a mandatory provision, and there is nothing in Article 15 which would override the clearly discretionary nature of Article 9.1.

70. Moreover, in a recent submission to the Committee on Anti-Dumping Practices, Ad Hoc Group on Implementation, India made a proposal to “operationalize” Article 15 by making the lesser duty rule mandatory with respect to imports from developing countries as a “constructive

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<sup>49</sup>*Id.* Since all parties were in agreement that the first sentence of Article 15 imposed no obligation, the *Bed Linens* panel expressed no views on the matter. *Id.*, para. 6.227 n.85.

remedy” in antidumping cases.<sup>50</sup> The fact that India has made such a proposal further demonstrates that there is no such obligation at present.

**28. Could India please explain why it considers the US sales data to be "unrelated" to the rest of the data in this case? Would India consider that, in every case, the data on (a) the prices of the subject merchandise in the domestic market of the exporting country, (b) the export prices of the subject merchandise, (c) the costs of production, and (d) constructed value, are separate and distinct categories of information? Would India consider that if an exporter provides information on any one or more of these elements that is verifiable, timely provided, and where applicable in the computer language or medium requested, that information must be used in calculating a dumping margin for the exporter providing the information? Would India's answer to the previous question be affected by the extent to which information on other elements is not verifiable, or not timely provided, or not in the computer language or medium requested? That is, does India see any possibility of a "global" perspective on the decision whether information can be used without undue difficulties in calculating the dumping margin?**

**Answer:**

71. The United States refers the Panel to its response to Question 1 in assessing this issue.

**29. Is it correct to understand that, in India's view, the fact that there is no or unverifiable information concerning the cost component of the US sales has no effect on the verifiability or reliability of the US sales price data that was provided? Does India consider that it may in some circumstances be the case that the lack of some aspect of the requested information renders the entire body of data to which that aspect pertains unreliable?**

**Answer:**

72. We refer the Panel to India’s Oral Statement on this issue. There, India stated that

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

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<sup>50</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, para. 9.

authorities also find that the party did not use its best efforts in attempting to supply the complete information, then the application of facts available may be appropriate as to the entire category of information.<sup>51</sup>

73. India went on to give an example of when facts available in its entirety would be justified that is remarkably analogous to this case:

[I]f 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>52</sup>

74. This admission by India is significant because the foreign respondent in this case did not provide information on a necessary characteristic (the cost of manufacture characteristics required to allow Commerce to adjust for the differences in physical characteristics of the U.S. merchandise with the normal value merchandise). Therefore, India’s own reasoning would support the rejection of the U.S. sales data.

**30. Does India consider that §782(e)(3) is NOT consistent with goal of objective decision-making based on facts, or does India object to it because it is not a provision specifically found in Annex II?**

**Answer:**

75. The United States requests that the Panel review its response to Question 3 with regard to this question.

**31. Where in the AD Agreement does India find an obligation on the investigating authority to carry out and record, as suggested in paragraph 74 of its oral statement, a detailed analysis of a proposed constructive remedy?**

**Answer:**

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<sup>51</sup>Oral Statement of India at para. 57.

<sup>52</sup>*Id.* at para. 58.

76. There is no provision in the AD Agreement which requires investigating authorities to take such steps. The three logical places to look for such an obligation are Article 15, Article 8 (the price undertakings provision), and Article 12 (which addresses a Member's obligations with respect to public notice and explanation of determinations). None of these provisions imposes an obligation on authorities to carry out and record a detailed analysis of a proposed constructive remedy.

77. In addition, India has not alleged violation of Article 8 or Article 12. Consequently, U.S. conformity with those provisions is not within the Panel's terms of reference.

78. Finally, even if the Panel should find that the AD Agreement contains an obligation to provide some degree of analysis of a proposed price undertaking when a developing country is involved, and even if India has alleged a violation of the relevant provision, the degree of the investigating authority's analysis would certainly be proportionate to the seriousness of the price undertaking proposal submitted. In this case, we note India's statement to the Panel during the first meeting that India's proposal for a price undertaking was not a realistic proposal, but was merely a negotiating ploy.

**32. Is it correct to understand that India considers that a comparison between a constructed normal value calculated by petitioners, and an average of US sales prices, or an average of a subset of US sales prices for product that "matches" the product for which normal value was calculated, yields a more accurate result, one that better represents "objective decision-making based on facts", than a determination that applies the dumping margin calculated in the petition as facts available? If so, could India explain in detail why it considers this result "better". Would India's view be the same if the outcome were different?**

**Answer:**

79. The United States notes that the only difference between the two approaches for applying facts available is that one may result in a lower margin than the other. It is not possible to say which is more accurate because that implies that one knows what the correct margin is. In this case, there is no way to know what the correct margin of dumping is because SAIL did not supply the information necessary to calculate the actual margin of dumping.

**33. India appears to have argued that the investigating authority should, in deciding whether information will be rejected and facts available used instead, have reference to the facts available that would likely be used, and assess whether they are, in fact, "better", "as good as", or "worse" than the imperfect information provided by the exporter. Is this a correct understanding of India's position? Could India explain what relevance the facts available ultimately used have in the decision regarding whether information provided can**

**be used in the investigation without undue difficulties? Could India please explain its apparent view that the quality of the facts available ultimately relied upon in making a determination somehow effects the degree of effort that might be considered "undue difficulties" in using the information provided?**

**Answer:**

80. Please refer to the response to the previous question.

**Questions to both parties**

**34. Would the parties please discuss their views concerning the meaning of the phrase "undue difficulties" in paragraph 3 of Annex II? Does it encompass substantive as well as procedural aspects of using the data in question?**

**Answer:**

81. Annex II, Article 3 recognizes that information should be taken into account if, among other things, it is “appropriately submitted so that it can be used in the investigation without undue difficulties.” The term “undue” is defined as “going beyond what is warranted or natural.”<sup>53</sup> Whether or not the use of information would cause undue difficulties must be determined on a case-by-case basis, and both substantive and procedural aspects of using the data could be relevant to this question. For example, the information may be substantively flawed in such a manner that corrections would be unduly difficult or impossible. Alternatively, the use of certain information might create procedural issues that would cause undue difficulty. For example, the exercise of using information might involve receiving comments from a large number of interested parties that would be unduly difficult under the circumstances of a particular case, or may be unduly difficult given the time constraints of completing the investigation within required time limits.

**35. The United States argues that India’s claim regarding US “practice” in the application of facts available is not properly before the Panel and submits that under the US law, an agency such as USDOC may depart from established “practice” if it gives a reasoned explanation for doing so. The United States thus argues that US “practice” cannot be the subject of a claim. Could the United States please elaborate on this argument? India is invited to respond to this question as well.**

**Answer:**

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<sup>53</sup>New Shorter Oxford Dictionary, Clarendon Press, Vol. II at 3480.

82. The United States first notes that, in response to a question at the first Panel meeting, India appeared to state that it is not pursuing a separate claim with respect to “practice.” Therefore, the Panel need not reach the issue of whether practice can be the subject of a claim.

83. Having noted this point, and responding to the Panel’s question, it is a well-established principle of U.S. administrative law that an administrative agency, such as Commerce, is not obliged to follow its own precedents, provided that it explains why it departs from them.<sup>54</sup> Thus, even if Commerce had made determinations in previous cases to reject respondents’ submissions *in toto* and to rely instead on the facts available, it would not be bound by those determinations in future antidumping proceedings involving the use of the facts available.<sup>55</sup> The relevant consideration under U.S. law is that Commerce determinations be consistent with the statute and the regulations.

84. As the United States noted in its first written submission, what India refers to as “practice” consists of nothing more than individual applications of the U.S. facts available provisions. While these applications themselves might individually constitute measures, they do not, through numbers, mutate into a separate and distinct “measure” that can be called “practice.” While Commerce, like many other administrative agencies in the United States, uses the term “practice” to refer collectively to its past precedent, that precedent is *not* binding on Commerce, and is, therefore, irrelevant for purposes of WTO dispute settlement. India’s alleged “practice” simply consists of specific determinations in specific antidumping proceedings that are not within the Panel’s terms of reference.

85. The panel in the *Export Restraints* case addressed this issue in some detail. Canada had claimed that the United States had a practice of treating export restraints as countervailable subsidies, and that this “practice” constituted a measure that could be subject to panel review. In response to a question from the panel, Canada defined this U.S. “practice” as “an institutional commitment to follow declared interpretations or methodologies that is reflected in cumulative

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<sup>54</sup>See, e.g., Kenneth Culp Davis and Richard J. Pierce, Jr., *Administrative Law Treatise* § 11.5 at 206 (Little, Brown, 3<sup>rd</sup> ed 1994) (“The dominant law clearly is that an agency must either follow its own precedents or explain why it departs from them. The courts so require.”) (copy attached as Exhibit US-30); and Charles H. Koch, Jr., *Administrative Law and Practice* § 5.67[4] at 255 (West, 2d ed. 1997) (hereinafter “Koch”) (“Neither the Constitution nor general administrative law prohibits an agency from deviating from prior precedent, but there is some general requirement of consistency. At least, the law requires an explanation for deviations from past practices.”) (copy attached as Exhibit US-31).

<sup>55</sup>Indeed, even if Commerce had made determinations under section 776(a) that resulted in the use of the facts available in place of respondents’ submitted information, those determinations, in and of themselves, would not justify similar determinations in future antidumping investigations. Koch, *supra*, note 54, at 256 (“[T]he agency may not rely on past precedent alone to justify its decisions.”). Instead, Commerce ultimately would have to justify any such decision on the basis of the statute and the evidence of record. The existence of prior determinations using facts available under similar factual scenarios would merely serve as evidence that Commerce was not acting arbitrarily in the new antidumping proceeding.

determinations.”<sup>56</sup> Canada admitted, however, that U.S. law permits Commerce to depart from its “practices” as long as it explains its reasons for doing so.<sup>57</sup> The panel correctly rejected Canada’s argument on the grounds that U.S. practice “does not appear to have independent operational status such that it could independently give rise to a WTO violation as alleged by Canada.”<sup>58</sup>

86. In addition to the fact that U.S. facts available “practice” cannot constitute a measure, India’s claims regarding such “practice” are not properly before the Panel because they do not conform to Articles 4.7 and 6.2 of the DSU. As we explained in our first written submission, India did not identify U.S. facts available “practice” in its request for consultations and the United States and India never consulted with respect to U.S. “practice.”<sup>59</sup>

**Question 36. Could the parties explain their views as to what constitutes “practice” as used by India in its request for establishment?**

**Answer:**

87. The United States respectfully submits that this question demonstrates the validity of the U.S. position that India’s claims regarding U.S. facts available “practice” are not properly before the Panel because they do not conform to Articles 4.7 and 6.2 of the DSU. After one full round of briefing and a meeting of the parties with the Panel, it is difficult to discern the point of India’s arguments involving “practice.” Judging from its response to the question that the Panel asked at the first Panel meeting, however, India does not appear to be making a separate claim on the issue of “practice,” but is merely using this concept to form indistinct and nebulous arguments in support of its claims with regard to the U.S. facts available provisions “as such” and as applied in this case.

88. To elaborate, India has already admitted that the U.S. statutory provisions can be interpreted in the manner that it prefers.<sup>60</sup> Since this fact invalidates its challenge to the U.S. facts available provisions “as such,” India argues instead that the Panel should examine the statute as it has been “interpreted” in Commerce practice. But India’s citation of previous Commerce facts available determinations does nothing to prove that the U.S. facts available provisions are inconsistent “as such” with the AD Agreement. An agency’s decision to exercise

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<sup>56</sup>Panel Report on *United States – Measures Treating Exports Restraints as Subsidies*, WT/DS194/R, adopted August 23, 2001, para. 8.120.

<sup>57</sup>*Id.*, para. 8.125.

<sup>58</sup>*Id.*, para. 8.126.

<sup>59</sup>See *U.S. First Written Submission*, para. 147 and n. 28 (citations omitted).

<sup>60</sup>See India’s first written submission at para. 153.

its discretion to interpret a statute in a particular way cannot transform a WTO-consistent statute into a WTO-inconsistent one. Moreover, the United States has already explained (in response to Question 8) why India is wrong to claim that Commerce has interpreted the U.S. facts available provisions to require the rejection of all of a respondent's information where only some information is flawed.

89. With respect to India's "as applied" arguments (*i.e.*, as applied in other cases), the fact that Commerce has applied the provisions in certain ways in other cases sheds no light on whether Commerce acted inconsistently with its obligations under the AD Agreement in the investigation at issue.

**37. Do the parties consider that the USDOC "calculated" a dumping margin in this case? In this regard, we note the arguments made by the United States in paragraphs 93 to 97 of its first written submission regarding Article 6.8, which provides that "preliminary and final determinations, affirmative or negative" may be made on the basis of facts available.**

**Answer:**

90. Commerce did not "calculate" a dumping margin in this case because SAIL's information could not be used for such a purpose. It is more accurate to state that Commerce "made" its final determination on the basis of the facts available. This reflects the language of Article 6.8 of the AD Agreement, which provides that, under specified circumstances, "preliminary and final determinations, affirmative or negative, may be made on the basis of facts available." (emphasis added). It is also consistent with paragraph 1 of Annex II, which states that investigating authorities "will be free to make determinations on the basis of the facts available" when, as in the present case, parties fail to supply necessary information within a reasonable time.

**38. Could the parties please explain their views regarding the meaning of the phrase information should be "taken into account" as used in Annex II paragraph 3. (Ignore for purposes of this question whether "should" is to be understood as mandatory or not). For instance, might it be understood to mean that the determination must be based on that information? or to mean that the investigating authority must look at the information further, attempt to verify it, and judge its reliability, but may ultimately not base decision on it and refer to facts available instead?**

**Answer:**

91. The term “take into account” is defined as “take into consideration” or “notice.”<sup>61</sup> Thus, Annex II, paragraph 3, requires investigating authorities to “take into consideration” or “notice” information which is verifiable, appropriately submitted so that it can be used in the investigation without undue difficulties, supplied in a timely fashion and, where applicable, supplied in a medium or computer language requested by the authorities. In this case, Commerce took into account SAIL’s information, consistent with the totality of the record evidence.<sup>62</sup> Annex II, paragraph 3, however, does not require that Commerce use the information in its calculations.

**39. Could the parties please explain their views as to the meaning of the term "verifiable" in Annex II, paragraph 3, with specific reference to, inter alia, the following possibilities:**

- (a) information is prepared and presented in a way that it can be checked against the books and records of the company submitting it;**
- (b) information not only satisfies (a), but also when it is checked, it is found to be complete, accurate and reliable - i.e., it passes verification**

92. The term “verifiable” is defined as “able to be verified or proved to be true; authentic, accurate, real.”<sup>63</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 decisions in *Japan Hot-Rolled* and *Guatemala Cement II*,<sup>64</sup> where the investigating authorities in those cases refused to accept or verify the information during the relevant investigations.

93. 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

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<sup>61</sup> The New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993 (under the “phrases” section following the definition of the term “account”).

<sup>62</sup> See the response to Question 4, *supra*.

<sup>63</sup> New Shorter Oxford Dictionary, Clarendon Press, at 3564.

<sup>64</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.

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>65</sup> rebuts any assertion that information was “able to be verified or proved to be true.”<sup>66</sup>

### **Questions for third parties**

**2. Could Chile please explain its view that a reading of the provisions of Annex II paragraphs 3 and 5 satisfies the criteria set out in the *Mavrommatis* case relied upon by Chile of being the “more limited” interpretation, which, as far as it goes, is clearly in accordance with the common intentions of the parties?**

#### **Answer:**

94. Chile argues that the term “should” in paragraphs 3 and 5 of Annex II of the Antidumping Agreement should be interpreted as “mandatory and binding,” rather than permissive. It bases its argument on the fact that the Spanish language version of the AD Agreement translates the phrase “should be taken into account” as “deberá tenerse en cuenta.”<sup>67</sup> In Chile’s view, the English-language term “should” is properly translated as “debería”, not “deberá.” It then cites this supposed conflict as a reason to apply the statement of the Permanent Court of International Justice in the *Mavrommatis* case that, in resolving such conflicts, an interpreter is bound to adopt the “more limited” interpretation which can be made to harmonize with the common intention of the Parties. Chile’s argument not only misapplies the *Mavrommatis* case, but also misinterprets the manner in which the term “deberá” is used in the WTO Agreements.

95. With respect to the supposed conflict between the terms “should” and “deberá,” an examination of the text of the WTO Agreements demonstrates that the Agreements repeatedly use “deberá” as the Spanish equivalent of “should,” even when the term is clearly being used in a permissive sense. For example, Article 5.4 of the *Agreement on the Application of Sanitary and Phytosanitary Measures* (the “SPS Agreement”) states that:

Members should, when determining the appropriate level of sanitary or phytosanitary protection, take into account the objective of minimizing negative trade effects.

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<sup>65</sup>Verification Failure Memorandum, Ex. US-25.

<sup>66</sup>New Shorter Oxford Dictionary, Clarendon Press, at 3564.

<sup>67</sup>Chile’s description of the relevant language as “deberá tomarse en cuenta” is a mis-cite of the actual term used in paragraph 3 of Annex II. Cf. Chile’s Oral Statement at para. 4 with AD Agreement, Annex II, para. 3 (Spanish version).

96. The panel in the *Hormones* case found that the wording of Article 5.4, “in particular the words ‘should’ (not ‘shall’) and ‘objective’”, demonstrated that the provision did not impose an obligation.<sup>68</sup> Nonetheless, the Spanish-language equivalent of Article 5.4 of the SPS Agreement translates “should” as “deberá.”<sup>69</sup>

97. Similarly, in the AD Agreement, the term “should” is repeatedly translated as “deberá,” including when “should” and “shall” are used in the same sentence. Article 6.1.1, for example, states that exporters or producers “shall” be given at least 30 days to reply to questionnaires, investigating authorities “should” give due consideration to extension requests, and such requests “should” be granted wherever practicable. The Spanish language version of Article 6.1.1 translates “should” as “deberá,” and “shall” as “dará.”

98. Indeed, in the Spanish language version of the AD Agreement, while the term “should” generally is translated as “deberá,” the term “shall” generally is not translated as “deberá.”<sup>70</sup> Moreover, “debería” – Chile’s preferred translation of “should” – is never used.<sup>71</sup>

99. Since Chile’s purported conflict between “should” and “deberá” does not in fact exist, there is no reason for the Panel to turn to the *Mavrommatis* case. Moreover, there is some question in the scholarly literature whether the Court’s dictum in *Mavrommatis* was meant to establish a general rule.<sup>72</sup> In any event, to the extent that the case is relevant, the more “limited” interpretation of the third paragraph of Annex II is that it imposes a permissive obligation, not a mandatory one. Chile’s analysis assumes that *Mavrommatis* uses the word “limiting,” but it in fact uses “limited.” The more limited interpretation – that which imposes the more limited obligation – is that the term at issue is permissive. Further, the interpretation which harmonizes the common intention of the parties in this case is that the term “should” or “deberá” is non-mandatory. All parties and third parties to this dispute agree that authorities at least *should* take

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<sup>68</sup>Panel Report on *EC Measures Concerning Meat and Meat Hormones*, Complaint by Canada, WT/DS48/R/CAN, Aug. 18, 1997, para. 8.169.

<sup>69</sup>See SPS Agreement, Article 5.4 (Spanish version) (“los Miembros deberán tener en cuenta”) (the text uses “deberán” in place of “deberá” because “Miembros” is plural.)

<sup>70</sup>See, e.g., Article 1 (“shall be applied” translated as “se aplicarán”); Article 2.4 (“A fair comparison shall be made” translated as “Se realizará una comparación equitativa”); Article 6.9 (“shall inform” translated as “las autoridades informarán” and “should take place” translated as “deberá facilitarse”).

<sup>71</sup>Chile’s argument also ignores that the French version of the Agreement uses the term “devraient,” which translates as “should,” not “shall.” See AD Agreement, Annex II, para. 3 (French version).

<sup>72</sup>See, e.g., *Report of the International Law Commission on the Work of its Eighteenth Session*, Yearbook of the International Law Commission, 1966, Vol. II, at 225 (commentary on Article 29, para. 8)(stating that the *Mavrommatis* case “is not thought to call for a general rule laying down a presumption in favour of restrictive interpretation in the case of an ambiguity in plurilingual texts.”)

information into account if the conditions of paragraphs 3 and 5 are met – only some think that they must.

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

**WT/DS206**

**Answers of the United States of America  
to the Panel's 25 January 2002 Questions**

**EXHIBITS**

- US-27. *NSK Ltd., v. United States*, 170 F. Supp. 2d. 1280, 1318 (June 6, 2001)
- US-28. *Steel Authority of India, Ltd. v. United States*, Slip Op. 2001-149 (Dec. 17, 2001)
- US-29. SAIL Section C Questionnaire Response (excerpts)
- US-30. Kenneth Culp Davis and Richard J. Pierce, Jr., *Administrative Law Treatise* § 11.5 at 206 (Little, Brown, 3<sup>rd</sup> ed 1994)
- US-31. Charles H. Koch, Jr., *Administrative Law and Practice* § 5.67[4] at 255 (West, 2d ed. 1997)