United States - Anti-Dumping Measures on Steel Plate from India

WT/DS206

Oral Statement of the United States
Second Meeting of the Panel

26 February 2002

1. Mr. Chairman, members of the Panel, the United States appreciates this opportunity to comment on the issues that remain outstanding in this dispute. We intend to limit our statement today to several key points. We will be pleased to receive any questions you may have at any time during our statement or during the course of this second meeting.

2. Mr. Chairman, we now have the benefit of two rounds of briefing and responses to thorough and pointed questions. At this stage in this proceeding, the fundamental issue in this dispute has become clear: whether an investigating authority is required to use a small portion of a respondent's submitted information, when the overwhelming portion is either missing or inaccurate and unverifiable, and the remaining portion is inaccurate and its use would present undue difficulties. This proceeding has been useful in identifying why the answer is "no." Even now, more than two years after the fact, India's struggle to present its submitted data in the best possible light, based on information and arguments not submitted to Commerce, has only resulted in India's concession that an ever-shrinking portion of that information may even be theoretically usable. Moreover, even the theoretical use of this limited information would have posed undue difficulties, as significant corrections would have to have been made to the U.S. database.

3. Mr. Chairman, members of the Panel, while we have addressed the standard of review under Article 17.6 of the AD Agreement before, (1st U.S. sub., ¶61 -¶73) comments by India in its Second Submission compel us to reiterate one point. Commerce, the U.S. investigating authority, made its "facts available" determination in this case based on *all* the facts made available to it. *All* of these facts – as established and evaluated in the underlying investigation – informed Commerce's conclusion that, *inter alia*, 1) the Indian respondent, Steel Authority of India ("SAIL"), failed to provide the information necessary for an anti-dumping analysis; 2) its information was unverifiable; 3) what information it did provide was inaccurate, and certainly could not be used without undue difficulty; and 4) SAIL failed to act to the best of its ability in providing the necessary information that was within its own control.

4. India's strategy in this dispute has been to limit its focus – and insist that the Panel limit its focus – to *only* those facts most favorable to its case. India ignores the information that was actually necessary to conduct an anti-dumping analysis, and focuses only on the Indian respondent's export sales; in short, India ignores the forest for the tree. For example,

- India focuses exclusively on what it views as the "usable" aspects of the Indian respondent's export prices; but India ignores the explicit linkages between all of the "necessary information" needed to calculate an accurate anti-dumping margin, namely export prices, home market prices, cost of production, and constructed value. India ignores the fact that SAIL's own questionnaire responses reflected these explicit linkages. (In SAIL's export price response, for example, SAIL referred Commerce to its cost of production response for cost information needed to measure differences in physical characteristics between products. *See, e.g.,* Ex. US-28.)

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

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

to the authorities of the importing Member' under Article 17.5(ii)."[1] Thus, all the facts established during the underlying investigation are relevant to the Panel's assessment in this case.

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

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

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[1] WT/DS122/AB/R, para. 117.

[2] *Verification Failure Memorandum*, Ex. US-25 at 4.

difficulties.

SAIL's Information Is Not Verifiable Because It Failed On-Site Verification

8. The parties have discussed at length the meaning of the term "verifiable." Verification is an important tool for an investigating authority to use to assure itself of the accuracy of information, in accordance with Article 6.6 of the AD Agreement. As the United States has already explained, where information is subjected to verification but its accuracy and completeness cannot be demonstrated, the information can no longer be said to be "verifiable."[3] In the case of SAIL, an explicit factual finding was made that its information was inaccurate and incomplete and, therefore, failed verification.[4]

9. Initially, it is important to note that Commerce's decision even to conduct verification demonstrates Commerce's extraordinary effort to work with SAIL. It had been apparent that, despite numerous opportunities, SAIL had failed to fill very significant gaps in the information necessary to make an anti-dumping determination. Nevertheless, in response to SAIL's renewed pledges that it had filled these gaps, Commerce proceeded with verification. In spite of this and previous pledges, SAIL's databases remained unusable throughout the proceeding. At the on-site sales verification, Commerce discovered, *inter alia*, that SAIL failed to report a significant number of home market sales and failed to report accurate gross unit prices.[5] The total quantity and value of home market sales was unverifiable. During the on-site cost verification, which

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[3] *See. e.g.,* U.S. Answers to Panel's 25 January 2002 Questions at para. 92-93.

[4] *Verification Failure Memorandum*, Ex. US-25.

[5] *Sales Verification Report*, Ex. US-4.

included verification of the cost information referenced in SAIL's U.S. database, SAIL was unable to reconcile its reported costs of production to its audited financial statements.[6] It also became clear that SAIL had failed to provide constructed value information on the costs of products produced and sold to the United States.[7] Furthermore, SAIL's U.S. database contained significant errors; Commerce found that "[w]hile these errors, *in isolation*, are susceptible to correction, when combined with other pervasive flaws in SAIL's data, these errors support our conclusion that SAIL's data on the whole is unreliable."[8] In the Final Determination, Commerce again noted that "the U.S. sales database contained errors that, while in isolation were susceptible to correction, however when combined with the other pervasive flaws in SAIL's data" lead to the conclusion that it could not be relied upon." This phrase "in isolation" is important but is almost always omitted from India's references to Commerce's finding. But the phrase makes clear that Commerce's determination regarding the usability of the data was not made – nor was it required to be made – by examining select "categories" of information in isolation. This was appropriate: as the EC has explained, "the data requested in an anti-dumping investigation, and which is necessary for a determination, cannot be seen as isolated pieces of information."[9]

10. Notwithstanding the *Verification Failure Memorandum* – which states explicitly that SAIL's information failed verification – India asserts that "conclusions concerning the verifiability of information must take place within the particular component of information

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[6] *Cost Verification Report*, Exh. US-3.

[7] *Id*.

[8] *Verification Failure Memorandum*, Exh. US-25, at 5 (emphasis added).

[9] 3RD Party Submission of the EC at ¶10.

undergoing the verification process."[10] But Commerce was obligated to satisfy itself as to the accuracy of the information supplied by SAIL upon which it was to base its determination; it was not obligated to assess the accuracy of SAIL's information based only on selected facts that favored SAIL. The anti-dumping calculation represents the sum of an investigating authority's examination of the necessary information: export prices and normal value, and, where appropriate, cost of production and constructed value. Commerce's verification outlines and reports and its *Verification Failure Memorandum* reflect the linkages throughout this information. For example:

- In the preliminary determination to use facts available, Commerce explained that SAIL's failure to provide product-specific costs meant that "it is questionable whether the reported COP, CV, and difmer data is a reliable measure of fair value." In other words, Commerce found that flaws in cost data implicated the U.S. sales database.[11]
- SAIL was notified in the cost verification outline that it would be required to demonstrate that the variable and total manufacturing costs ("VCOM" and "TCOM") reported in the U.S. database were consistent with the amounts reported in its COP and CV information.[12] But SAIL was unable to do so, admitting at verification that the VCOM and TCOM were incorrect.[13]

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[10] India's Second Submission at ¶70.

[11] *Preliminary Facts Available Memorandum*, Ex. US-16 at Attach. I.

[12] *See Cost Verification Outline*, Ex. US-32 at 9.

[13] *Verification Failure Memorandum*, Ex. US-25, at 3.

- Even SAIL's own data reflected these linkages: its U.S. sales questionnaire response refers the reader to its cost of production response for data relevant to adjustments for physical differences. *See SAIL Questionnaire Response*, Ex. US-28.

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

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

SAIL's Information Cannot Be Used Without Undue Difficulties

12. At the first meeting, Mr. Chairman, the Panel identified one of the key issues in this dispute: whether SAIL's information could have been used without "undue difficulties." We note that the question of undue difficulties need not even arise if it is determined that Commerce was correct in determining that SAIL failed verification. On this basis alone, Commerce would have been justified in disregarding all of SAIL's reported information under Annex II, Paragraph

3, of the AD Agreement. In any event, as we explained in our 18 February 2002 submission, even based on India's own criteria, an unbiased and objective investigating authority could readily conclude that SAIL's information could not be used without undue difficulties. First, in determining the completeness of the information provided by SAIL, an unbiased and objective investigating authority could reasonably conclude that the failure to provide usable home market, export price, cost of production, and constructed value information meant that the information necessary for the calculation of a dumping margin was incomplete. Second, in determining the extent to which some small pieces of information provided by SAIL could be identified and used with other information to calculate a dumping margin, an unbiased and objective investigating authority could reasonably conclude that too much of SAIL's information was missing to calculate a margin. Third, in assessing the amount of the necessary information provided by SAIL that could be used, an unbiased and objective investigating authority could reasonably conclude that without any usable home market, cost of production, and constructed value information, and with export price information containing significant flaws, Commerce had almost none of the information necessary for conducting an anti-dumping analysis. Fourth, in determining the amount of time and effort required to use SAIL's information, an unbiased and objective investigating authority could reasonably conclude that it would involve a great deal of time and effort to address the unusable home market, export price, cost of production, and constructed value information and to identify any small pieces of data that might have been usable. Finally, in assessing the accuracy of alternative information that could be used, an unbiased and objective investigating authority could reasonably conclude that the facts available as provided in the petition are no less accurate and reliable than the information submitted by the

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

The Second "Affidavit": India's New Theories for Using SAIL's U.S. Database

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

14. Together with its answers to Panel questions, India has now submitted a second "affidavit" from its representative in this dispute purporting to describe the ease with which pieces of SAIL's information can be manipulated to calculate a dumping margin. After making undisclosed changes to SAIL's database, counsel to India now concludes that over 30 percent of SAIL's export sales are identical to the merchandise upon which the petition based constructed value. Therefore, without any additional consideration of the remaining 70 percent of U.S. sales, India's view is that Commerce need only have taken that subset of the U.S. sales database that

would not be impacted by the missing cost information, and then make corrections based on the errors discovered at verification.

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

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

though possibly as many as 99 percent of those sales would have required a difmer adjustment.

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

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

India's Challenge to the U.S. Statute

19. The "facts available" provision of the U.S. statute mandates *use* of information under

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

Conclusion

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

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