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

WT/DS206

Second Written Submission of the United States of America

February 12, 2002

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INTRODUCTION

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

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

I. Nothing in the "Facts Available" Provisions of U.S. Law Mandates Action Inconsistent With Article 6.8 and Annex II of the AD Agreement

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

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

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[1] Oral Statement of India at para. 62.

[2] First Submission of the United States at paras. 131-39.

[3] It is worth repeating the text of the provision:

> (e) Use of Certain Information.–In reaching a determination under section 703, 705, 733, 735, 751, or 753 the administering authority . . . *shall not decline to*

(continued...)

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

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

A. The Section 782(e) Criteria Are Consistent With Article 6.8 and Annex II of the AD Agreement

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

7. The factors identified in section 782(e) are all found in Annex II, paragraphs 3 and 5, of

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[3](...continued)

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

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

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

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

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

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

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

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

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

11. There is no logical basis – nor a textual one – to interpret paragraphs 3 and 5 in this manner. Each paragraph is relevant to an investigating authority's examination of submitted

[5]First Written Submission of India at para. 83 (emphasis in original).

information. For this reason, the "best efforts" criterion found in section 782(e)(4) is not inconsistent with the AD Agreement.

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

B. The Discretionary Nature of Section 782(e) is Reflected in Commerce and CIT Decisions

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

14. For example, in *Stainless Steel Bar from India*,[7] Commerce determined that, although the cost information provided by the Indian respondent was incomplete, pursuant to Section 782(e) of the Act, it could use most of the information on the record in its calculations, and use "partial facts available" in the few areas in which the few necessary facts were missing.[8] As a result, Commerce resorted to facts available only with respect to certain portions of the margin analysis. India is thus incorrect that section 782 requires U.S. authorities to resort to "total facts available" if any information fails to meet the requirements of that provision.

15. The U.S. courts have also confirmed that section 782(e) "liberalized Commerce's general

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[6]Moreover, even if India had made a separate claim with respect to "practice," as explained in the U.S. First Written Submission, U.S. "practice" does not have an "independent operational status" that can independently give rise to a WTO violation. First Submission of the United States at para. 146.

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

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

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."[9]

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

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

II. Commerce's Application of Facts Available to SAIL Was Not Inconsistent with the Standards of the AD Agreement

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

A. Information That Was Not Before The Investigating Authority is Irrelevant

19. Pursuant to Article 17.6(i), in its assessment of the facts of the matter, a panel "shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective." As articulated by the Appellate Body in *United States - Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan ("Hot-Rolled AB Report")*, pursuant to Article 17.6(i) and Article 11 of the DSU, both of which require an "objective" assessment of the facts, "the task of panels is simply to review the investigating authorities' 'establishment' and 'evaluation' of the facts."[13] Because Commerce established the

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[9]*NSK Ltd., v. United States*, 170 F. Supp. 2d. 1280, 1318 (Ct. Int'l Trade, June 6, 2001), US-Exh. 27.

[10]First Written Submission of India at para. 140.

[11]SAIL's CIT Brief, IND Exh. 19, at 16-18.

[12]These facts may be found at paragraphs 19-58 and 148-164 of the First Written Submission of the United States.

[13]*United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, Report of the* (continued...)

facts during its anti-dumping duty investigation and evaluated those facts in its *Final Determination*, this means that the Panel must assess Commerce's evaluation of the facts *at the time of the Final Determination*. While this assessment "clearly necessitates an active review or examination of the pertinent facts,"[14] the facts that are "pertinent" are those that were in existence at the time Commerce made its final determination – not the facts that India is just now bringing to the Panel's attention.

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

B. The United States' Decision to Rely On the Facts Available in This Case Is Consistent With Article 6.8 and Annex II

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

1. Article 6.8 of the AD Agreement

22. Article 6.8 of the AD Agreement provides:

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[13](...continued)
Appellate Body, WT/DS184/AB/R, adopted 23 August 2001, para. 55 ("*Hot-Rolled AB Report*"). *See also Article 21.5 Report, Mexico-Anti-Dumping Investigation of High Fructose Corn Syrup From the United States ("HFCS AB Report")*, WT/DS132/AB/RW, adopted 22 October 2001, para 130. Article 11 of the DSU imposes upon panels a comprehensive obligation to make an "objective assessment of the matter."

[14]*Hot-Rolled AB Report*, at para. 55.

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

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

24. According to India, "the U.S. interpretation of 'necessary information' would require that when a dumping margin is calculated, either *all* of the necessary information must be obtained from the foreign respondent or *all* of the necessary information must be through the use of 'facts available.'"[17] That is not correct. Applying the guidelines in Annex II, an investigating authority may determine that it is appropriate to use all, some or none of the information provided by the exporter, depending on the facts of the case.[18]

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

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[15]First Written Submission of the United States at paras. 82-92.

[16]*Id*. at para. 83, *citing* New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993.

[17]Oral Statement of India at para. 41.

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

sales information was defective, that would not constitute an absence of necessary information and would not be a basis to use facts available.

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

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

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

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[19]*See, e.g.,* First Written Submission of India at para. 50-51, 124-25.

[20]Oral Statement of India at para. 34.

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

[22]Another example of India's mischaracterization of Commerce practice is its statement that "[i]f *any* "necessary" information is not provided by a foreign respondent, the United States interprets Article 6.8 and Annex
(continued...)

2. Annex II of the AD Agreement

29. As explained in the U.S. First Written Submission, Annex II, paragraphs 1, 3, and 5 are relevant to this dispute.[23] Not surprisingly, India disagrees with the interpretations offered by the United States.

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

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

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

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

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[22](...continued)
II, paragraphs 1, 3, 5, and 7 as giving it the discretion to disregard *all* of the information provided." Oral Statement of India at para. 40 (emphasis in original). The presumption – which is incorrect – is that Commerce would reject all information provided if "any" necessary information is not provided. Not only does this statement not reflect the situation involving SAIL – for which substantially more than "any" information was deficient – but other Commerce decisions, including one subject to WTO dispute settlement, have expressly disproved this point. *See Hot-Rolled Panel Report* at para. 7.65 (Commerce did not apply "total" facts available; rather, Commerce applied partial facts available only for the U.S. sales that were missing).

[23]First Written Submission of the United States at paras. 98-114.

[24]*Id.* at para. 100.

to India, for example,

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

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

33. There is a more logical reading, consistent with AD Agreement. The second sentence of Annex II, paragraph 1 states that investigating authorities are free to make "determinations" on the basis of the facts available. In context, "determinations" means the "preliminary and final determinations" in Article 6.8. Thus, if information – i.e., the "required" information referenced in the first sentence of Annex II, paragraph 1, or the "necessary information" as defined in Article 6.8 – is not provided, the investigating authority is free to make a preliminary or final determination based on facts available, consistent with the other requirements of the Agreement, including Annex II.

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

a. Paragraph 3

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

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

[25]Oral Statement of India at para. 37.

determinations are made.

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

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

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

i. The information "is verifiable"

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

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

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[26] New Shorter Oxford Dictionary, Clarendon Press, at 3564.

[27] *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.

verification[28] rebuts any assertion that information was "able to be verified or proved to be true."[29]

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

ii. The information "can be used without undue difficulty"

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

41. In addition, the information as supplied by SAIL would not have permitted Commerce to identify those U.S. sales transactions that involved merchandise identical to a particular normal value model without undertaking significant additional work. As discussed in the U.S. First Written Submission[33] and acknowledged by India,[34] there were flaws with the sales transaction portion of SAIL's U.S. sales database. The only way to correct those flaws would have been for

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[28]Verification Failure Memorandum, Ex. US-25.

[29]New Shorter Oxford Dictionary, Clarendon Press, at 3564.

[30]First Written Submission of India at para. 57, n. 131.

[31]First Written Submission of India at paras. 30-31.

[32]New Shorter Oxford Dictionary, Clarendon Press, Vol. II at 3480.

[33]First Written Submission of the United States at para. 39.

[34]First Written Submission of the United States at para. 97-103.

Commerce to have manually corrected approximately 75 percent of SAIL's U.S. database.[35] Whether such efforts would have resulted in any U.S. sales of products being identical to the normal value model is uncertain because Commerce was not obligated to, and elected not to, undertake this substantial effort in light of the number of demonstrated problems with SAIL's data.

42. India's suggestion that Commerce did not make sufficient efforts to use SAIL's information is groundless and is, in fact, contradicted by the established facts. The United States agrees that the AD Agreement contains a presumption that information from responding exporters is to be preferred over alternative sources.[36] The established facts demonstrate that Commerce went to considerable efforts to secure SAIL's information and exercised an unusual degree of leniency in addressing major flaws in that information; nevertheless, SAIL's repeated and continuing failures prevented Commerce from calculating a margin for SAIL within the time provided for in the AD Agreement.

iii. The information "should be taken into account"

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

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

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[35]*See, e.g.,* First Written Submission of India at para. 26, where India explains that errors in the "width" characteristic necessary for model matching affected 984 out of a total of 1284 sales observations.

[36]First Written Submission of India at para. 70.

[37]Oral Statement of India at para. 27 (emphasis in original).

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

46. Even if Annex II, paragraph 3 stated that information "must" be taken into account, it would take a further leap in logic to reach India's reading that such information "*must* be used by investigating authorities in connection with calculating the antidumping margin."[45] The phrase "take into account" is defined as "take into consideration" or "notice."[46] An obligation to consider or take notice of something is distinct from an obligation to actually use that same thing.

C. Commerce's Decision to Apply Facts Available With Respect to SAIL was Based on an Unbiased and Objective Evaluation of the Facts

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

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

[40]WT/DS48/R/CAN, adopted 18 August 1997 (*"Hormones from EC"*).

[41]*Id.* at para. 8.169.

[42]WT/DS79/R, adopted 24 August 1998 ("*Patent Protection from India*").

[43]WT/DS162/R, adopted 29 May 2000 (*"United States 1916 Act*").

[44]*Patent Protection from India* at para. 7.14; *see also United States 1916 Act* at para. 7.14.

[45]Oral Statement of India at para. 27 (emphasis in original).

[46]New Shorter Oxford Dictionary, Vol. 1 at 15.

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

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

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

> if a foreign respondent provided information on all export sales but did not provide information on a number of necessary characteristics of such sales (for example, their physical characteristics or the prices at which they were sold), the investigating authorities may be justified in finding that they cannot use that

[47]SAIL's USCIT Brief, Ex. IND-19, at 16.

information without undue difficulty because it is too incomplete.[48]

We view this as a very significant concession by India because the foreign respondent in this case did not provide information on a necessary characteristic (for example, the cost of manufacture data required to measure the affect on price comparability caused by the differences in physical characteristics of the merchandise). Therefore, India's own logic would support the rejection of the U.S. sales data.

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

III. India Has Failed to Establish a *Prima Facie* Case That The United States Violated Article 15 of the AD Agreement

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

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

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[48]Oral Statement of India at para. 58.

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

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

[51]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.

provision, and there is no need to address this point further.

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

54. India's arguments on this point during the first meeting of the Panel amount to little more than a bald assertion that the United States should have known that applying anti-dumping duties to SAIL would affect India's essential interests. It is unable, however, to point to any evidence on the factual record supporting its assertion. For example, since SAIL manufactures many different types of steel products and sells those products throughout the world, its citation of the total number of SAIL employees proves nothing.[52] Similarly, without knowing what percentage of the company's total sales were made up of steel plate exports to the United States, there is no way to evaluate the importance of those sales to the company, much less to determine whether the application of an anti-dumping measure to those sales would affect India's essential interests. If a company produces a variety of products that it sells to a variety of markets, the imposition of an anti-dumping measure on the export of a single product to a single export market may not even affect the company's essential interests, much less the developing country Member's essential interests.

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

56. India claims that the Article 15 obligation is triggered "even when the developing country

[52]Oral Statement of India at para. 70.

[53]Oral Statement of India at para. 71.

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

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

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

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

CONCLUSION

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

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[54]Oral Statement of India at para. 72.

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

[56]Oral Statement of Chile, January 25, 2002, para. 21.

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

WT/DS206

Second Written Submission of the United States of America

EXHIBIT

US-26. (A) *Final Results; Administrative Review and New Shipper Review of the Antidumping Duty Order on Stainless Steel Bar from India*, 65 Fed. Reg. 48965 (August 10, 2000) and accompanying Decision Memorandum; *Final Determination of Sales at Less Than Fair Value;*

(B) *Certain Polyester Staple Fiber From Taiwan*, 65 Fed. Reg. 16877 (March 30, 2000) and accompany Decision Memorandum