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

WT/DS206

First Written Submission of the United States of America

10 December 2001

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I. INTRODUCTION

1. In this proceeding, India has launched a broad-based challenge to the ability of an investigating authority – here, the U.S. Department of Commerce ("Commerce") – to require complete and accurate information necessary to determine the existence of dumping. As we will demonstrate, this challenge is based, in the first instance, on India's fundamental misreading of the Antidumping Agreement ("AD Agreement") and India's efforts to read into that Agreement language and obligations which do not exist therein. In particular, India seeks this Panel's endorsement of its narrow and unsupported reading of Article 6.8 and Annex II of the AD Agreement – that the word "information" as used therein means, in fact, "categories of information" as further defined by India. There is no basis in the AD Agreement for India's interpretation.

2. Then, we will turn to the U.S. statute implementing the obligations in the AD Agreement. India relies on a fundamental misinterpretation of the relevant U.S. statutory provisions to claim that sections 776(a), 782(d) and 782(e) of the Tariff Act of 1930, as amended, ("the Act") constitute *per se* violations of Article 6.8 and Annex II of the AD Agreement. As we demonstrate in detail below, these provisions of U.S. law are not susceptible to a claim of *per se* breach because they do not, as such, mandate a breach of any WTO obligation. Moreover, these provisions are substantively identical to Article 6.8 and Annex II of the AD Agreement.

3. The real issue in this dispute is whether Commerce's use of facts available with respect to the Steel Authority of India, Ltd. ("SAIL") was consistent with Article 6.8 and Annex II of the AD Agreement. Based on the text of the AD Agreement, the challenged determination was fully consistent with the United States' WTO obligations.

4. Finally, India attempts to broaden the obligation of Article 15 of the AD Agreement in a manner that cannot be justified by the text.

5. This first submission of the United States is filed in response to India's First Written Submission, dated November 19, 2001. This submission by the United States: (1) clarifies the applicable standard of review; (2) demonstrates that sections 776(a), 782(d) and 782(e) of the Act are fully consistent with Article 6.8 and Annex II of the AD Agreement; (3) demonstrates that nothing in Article 6.8 or Annex II of the AD Agreement precludes the rejection of a questionnaire response that is overwhelmingly deficient; (4) demonstrates that Commerce's facts available determination with regard to SAIL was consistent with Article 6.8 and Annex II of the AD Agreement; and (5) demonstrates that India's claims relating to obligations under Article 15 are baseless.

II. PROCEDURAL BACKGROUND

6. On February 16, 1999, Commerce received an antidumping petition from a group of domestic steel producers alleging that certain cut-to-length carbon-quality steel plate products ("steel plate") from India and other countries were being dumped in the United States, and were thereby injuring a U.S. industry.[1] In addition to alleging injurious dumping, the petition provided information demonstrating reasonable grounds to believe or suspect that sales in India were made at prices below the cost of production ("COP").[2]

7. On March 8, 1999, Commerce initiated an investigation to determine whether imported steel plate from India and other countries was being sold at less than fair value.[3] In addition, Commerce initiated a country-wide cost investigation with respect to steel plate from India.[4] The period covered by this investigation was calendar year 1998.

8. Commerce published its Preliminary Determination of Sales at Less Than Fair Value ("*Preliminary Determination*") on July 29, 1999.[5] Because SAIL was unable to provide information necessary for the calculation of a dumping margin, Commerce resorted to information in the petition as facts available and assigned a margin for SAIL of 58.50 percent.[6]

9. Petitioners and respondents both submitted case and rebuttal briefs on November 12 and 17, 1999, respectively, and a public hearing was held on November 18, 1999.[7]

10. On December 29, 1999, Commerce published its Final Determination of Sales at Less Than Fair Value ("*Final Determination*").[8] The dumping margin for SAIL in the *Final Determination* was 72.49 percent.[9]

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[1] *Initiation of Antidumping Duty Investigations: Certain Cut-to-Length Carbon-Quality Steel Plate from the Czech Republic, France, India, Indonesia, Italy, Japan, the Republic of Korea, and the Former Yugoslav Republic of Macedonia* (*"Commerce Initiation Notice"*), 64 Fed. Reg. 12959 (March 16, 1999) (Exh. IND-2).

[2] *Id.* at 12969.

[3] *Id.* at 12963.

[4] *Id.* at 12965-66.

[5] *Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon-Quality Steel Plate from India* ("*Preliminary Determination*"), 64 Fed. Reg. 41202, 41202 (July 29, 1999) (Exh. IN-11).

[6] *Id.* at 41205.

[7] Transcript of Hearing at USDOC, dated 18 November 1999 (Exh. IND-15).

[8] *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon-Quality Steel Plate from India* ("*Final Determination*"), 64 Fed. Reg. 73126, 73126 (December 29, 1999) (Exh. IND-17)

[9] *Id.* at 73131.

11. On February 10, 2000, the USITC published its final determination, finding that an industry in the United States was materially injured by reason of imports of the subject merchandise.[10]

12. On February 10, 2000, Commerce published its antidumping duty order in this case.[11]

13. On March 13, 2000, SAIL initiated proceedings before the U.S. Court of International Trade ("CIT"), challenging Commerce's *Final Determination*.

14. On October 4, 2000, India requested consultations with the United States pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article 17 of the Agreement on Implementation of Article VI of the GATT 1994 ("AD Agreement"), Article 30 of the Agreement on Subsidies and Countervailing Measures ("*SCM Agreement*"), and Article XXII of the GATT 1994, with respect to, *inter alia*, the U.S. Department of Commerce's final antidumping determination on cut-to-length steel plate from India.[12] The United States and India held consultations in Geneva on November 21, 2000, but were unable to resolve the dispute.

15. On May 26, 2001, the CIT issued a decision affirming Commerce's decision to use total facts available in determining an antidumping duty margin for SAIL. The CIT remanded the decision, however, for further explanation as to Commerce's basis for determining that SAIL had failed to act to the best of its ability to respond to Commerce's information request. Commerce filed its explanation with the CIT on September 27, 2001.[13]

16. On June 7, 2001, India requested the establishment of a panel pursuant to Article 6 of the *DSU*, Article 17.4 of the AD Agreement, and Article XXIII:2 of the GATT 1994. India's panel request alleged violations of Articles 2.2, 2.4, 6.6, 6.8, 6.13, 9.3, 15, 18.4 and Annex II of the AD Agreement, Article VI:1 and VI:2 of the GATT 1994, and Article XVI:4 of the WTO Agreement.[14]

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[10] *Certain Cut-To-Length Steel Plate Products From France, India, Indonesia, Italy, Japan and Korea* ("*USITC Final Determination*"), 65 Fed. Reg. 6624, 6624 (February 10, 2000).

[11] *Notice of Amendment of Final Determinations of Sales at Less Than Fair Value and Antidumping Duty Orders: Certain Cut-To-Length Carbon-Quality Steel Plate Products From France, India, Indonesia, Italy, Japan and the Republic of Korea ("Antidumping Duty Order")*, 65 Fed. Reg. 6585, 6585 (February 10, 2000) (Exh. IND-18).

[12] WT/DS206/1, 9 October 2000.

[13] *USDOC Redetermination on Remand* (September 27, 2001)(Exh. IND-21).

[14] WT/DS206/2, 8 June 2001.

17. The Dispute Settlement Body established a panel to review India's allegations on July 24, 2001.[15] Chile, the European Communities, and Japan reserved third party rights.

18. For the convenience of the Panel, further facts relating to the underlying antidumping investigation have been organized and set forth below in terms of the issues raised for review. In addition, each section of argument pertaining to each issue addresses the facts as necessary to the argument of that issue.

III. FACTUAL BACKGROUND

A. Application of Facts Available with Regard to SAIL

1. Major Deficiencies in SAIL's Questionnaire Response

19. At the outset of the investigation, Commerce issued a standard antidumping questionnaire to SAIL. This questionnaire requests the information that collectively is necessary for the investigating authority's antidumping analysis.[16] Commerce granted several extensions to SAIL for submitting its initial questionnaire response.[17]

20. From April 12 through May 11, 1999, SAIL submitted responses to the questionnaire. SAIL's failure to submit necessary information began early in the proceeding. For example, SAIL filed its May 11, 1999 database submission – including its reported U.S. sales – late because of what it described as a "breakdown" in the computer program being used by its U.S. counsel to prepare the computer disk.[18] SAIL also indicated in its narrative response that "some of the data requested by the Department is still being collected (because, *e.g.*, it is available only in handwritten form). As soon as these data are available we will submit them to the Department and revise the diskette accordingly."[19]

21. After reviewing SAIL's responses, Commerce identified numerous deficiencies and areas requiring clarification and issued a supplemental questionnaire on May 27, 1999, covering

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[15] WT/DS206/3, 31October 2001.

[16] *USDOC Initial Antidumping Questionnaire to SAIL*, Sections A, B, C and D, dated March 17, 1999 (Exh. US-1). Section A of the questionnaire requested general information concerning the company's corporate structure and business practices, the merchandise under investigation that it sells, and the sales of that merchandise in all markets. Sections B and C of the questionnaire requested home market sales listings and U.S. sales listings, respectively. Section D of the questionnaire requested information regarding the cost of production of the foreign like product and the constructed value of the merchandise under investigation.

[17] *Memoranda Granting Extensions*, dated 14, 16, and 30 April 1999, (Exh. US-5).

[18] *Letter from SAIL's Counsel to USDOC Re: Breakdown/Extension Request*, dated 11 May 1999 (Exh. US-6).

[19] *Letter from SAIL's Counsel to USDOC*, dated 11 May 1999 (Exh. US-7).

SAIL's entire initial questionnaire response.[20] SAIL's Section A response required further information and/or clarification in 13 areas.[21] Additionally, further information and/or clarification were required in 17 areas of SAIL's home market sales response and five aspects of its U.S. sales response.[22] SAIL's cost of production information was the most seriously deficient, requiring significant further information and/or clarification in 33 areas.[23] In addition to identifying these specific deficiencies, Commerce notified SAIL that:

> there are two deficiencies which are major and need to be emphasized here. The first deficiency is that the response is substantially incomplete to the point where we may not be able to use the information contained therein to calculate a margin. Repeatedly throughout the questionnaire response you make the statement that certain data are unavailable and will be submitted later. For example, you only reported a subset of all your home market sales, and we cannot determine which sales have been reported. Because of your repeated failure to provide the information requested by the questionnaire, and incompleteness of your responses to other questions, we are unable to adequately analyze your company's selling practices. The questions in the attachment are limited accordingly. We anticipate having further questions once your questionnaire response is more complete.
>
> The second deficiency is that you failed to respond adequately to the entire section III of section D, which requires an explanation of the response methodology. Indeed, almost your entire response to this section is contained in Exhibits 9 and 10, which are not responsive to the questions in this section. Moreover, you have not provided product-specific cost information. This information is essential for an adequate analysis of your company's selling practices. After reviewing the attached questions that relate to section D of the questionnaire, please contact the official in charge of the investigation to discuss possible ways to provide more product-specific cost information.[24]

22. On June 3 and 8, 1999, SAIL submitted certain clarifications supplementing its questionnaire responses submitted on April 26 and May 10, 1999. On June 11, 1999, Commerce issued a second deficiency questionnaire covering Sections A-C of SAIL's questionnaire response.[25] Commerce requested that SAIL provide more specific information on variables

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[20] *USDOC First Deficiency Questionnaire to SAIL*, dated 27 May 1999 (Exh. US-8).

[21] *Id.* at Attach. 1, pp. 1-4.

[22] *Id.* at pp. 4-10.

[23] *Id.* at pp. 10-15.

[24] *Id.* at cover letter from DOC to SAIL.

[25] *USDOC Second Deficiency Questionnaire to SAIL*, dated 11 June 1999 (Exh. US-9) (*"Second Deficiency Questionnaire"*).

reported in its home market, U.S. sales and cost databases.[26] This *Second Deficiency Questionnaire* also identified inconsistencies between SAIL's narrative explanation and its reported databases, inaccurate control numbers ("CONNUMs"),[27] and other necessary information.[28] Commerce further granted SAIL's request for an extension to provide its response to this deficiency questionnaire.[29]

23. On June 16, 1999, SAIL submitted revised home market and U.S. sales electronic databases.[30] SAIL assured Commerce that the "revised database includes all of the individual home market sales that were made during the period of investigation."[31] According to SAIL, "[s]ome gaps still remain in the database, but they are not significant and do not materially impact the dumping margin analysis."[32] On June 18, 1999, SAIL submitted certain data further supplementing its previous submissions.

2. Commerce's Actions to Assist SAIL

24. During this time, Commerce staff took action to assist SAIL in supplying information by working regularly with SAIL's counsel to identify deficiencies in the electronic database, including deficiencies in the reporting of U.S. sales.[33] Among the specific deficiencies discussed were: 1) that SAIL provided no explanation in its response for why certain sales data were not reported; 2) that SAIL's home market and U.S. sales databases did not correspond, preventing performance of the test to determine whether home market sales were made at less than the cost of production and precluding Commerce from assigning a constructed value to specific products; 3) that certain information was missing entirely from the home market database; and 4) that SAIL's U.S. database was missing several fields needed to perform the necessary model match procedures to determine the proper comparisons of sales to be made to calculate the dumping margin.[34]

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[26] *Id.* at Attach. I. India's Statement of Facts incorrectly suggests that this questionnaire contained no questions regarding SAIL's U.S. sales database. *See* India's First Written Submission at para. 22. The deficiency questionnaire specifically identified product classification and coding errors related to SAIL's U.S. sales database.

[27] CONNUMs are used by Commerce to identify each product sold by its unique characteristics. Identical products have identical CONNUMs; different products have different CONNUMs. The reporting of accurate CONNUMs is essential for purposes of determining the sales of merchandise that should be compared to calculate a company's dumping margin and for assigning a cost of production for each product.

[28] *USDOC Second Deficiency Questionnaire* at Attach. II.

[29] *Id.* at cover letter.

[30] *Letter from SAIL to USDOC*, dated 16 June 1999 (Exh. US-10).

[31] *Id.*

[32] *Id.*

[33] *USDOC Memorandum to File: Conversations with SAIL's Counsel*, dated 7 July 1999 (Exh. US-11).

[34] *Id.* at Attachment.

25. On June 18, 1999, Commerce issued its *Third Deficiency Questionnaire* – concerning SAIL's Section D response – which SAIL had supplemented on June 8, 1999.[35] Specifically, Commerce requested that SAIL provide supporting evidence for its reported "standard" cost of production.[36] SAIL's responses were due on June 28, 1999.

3. SAIL's Untimely Submissions

26. On June 29, 1999, SAIL made three submissions. The first two submissions were in response to Commerce's *Third Deficiency Questionnaire* and had been due the previous day, June 28. SAIL's counsel explained that its courier had been unable to deliver the submissions to Commerce.[37] The third submission responded to Commerce's *First Deficiency Questionnaire* and had been due June 18, 1999. SAIL did not provide any explanation for why this third submission was untimely filed. In accordance with its own regulations (19 C.F.R. § 351.302(d)), Commerce explained that it must return all three submissions to SAIL as untimely.[38] Commerce cautioned SAIL that:

> repeated throughout your submissions is the statement that certain data are unavailable and will be supplied later. These statements are not substitutes for extension requests under [section] 351.302 of the Department's regulations. If you submit these data after the deadline the Department has set for a response to its information requests, and the Department has not formally granted you an extension, these data also will be returned to you as late.[39]

27. In addition, Commerce notified SAIL that the company had yet to address the major deficiencies in its responses that had been identified one month previously:

> The first deficiency, which was raised to your attention in our letter of May 27, 1999, is that you still have not provided product-specific costs, nor adequately demonstrated that such costs cannot possibly be derived from SAIL's accounting records. Without product-specific costs it is impossible to determine whether

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[35] *USDOC Third Deficiency Questionnaire to SAIL*, dated 18 June 1999 (Exh. US-12).

[36] *Id.* at Attachment I.

[37] *Letter from SAIL to USDOC Re: Late Filing*, dated 28 June 1999 (Exh. US-13). SAIL stated that:

> Our messenger left our offices at 4:30pm on Monday, June 28, to file the enclosed submissions. He returned at 5:30 pm saying that he arrived at the Commerce Department too late to gain entry. The problem, as he described it, was a combination of traffic congestion and refusal by the police to allow him to park near the Commerce Department.

[38] *Letter from USDOC to SAIL Re: Return of Untimely Information*, dated 7 July 1999 (Exh. US-14).

[39] *Id.* at 2.

> home market sales are being made at prices below production costs, whether any adjustment for physical differences in merchandise is warranted, and, where appropriate, whether constructed value has been properly calculated.
>
> The second deficiency is that your electronic database submissions have proven seriously deficient and are currently unusable. We have made repeated requests and have yet to receive the supporting documentation that customarily accompanies electronic database submissions, including hard-copy examples of the database. Most troubling is that after devoting significant amounts of time and attention to your tapes, we have had to ask you to resubmit them on three separate occasions due to database flaws which prevent the files on these tapes from loading. Because such a large amount of data is reviewable only in electronic form, your repeated failure to provide usable electronic databases has prevented us from adequately evaluating SAIL's selling practices.[40]

28. On July 6, 1999, domestic producers submitted comments regarding deficiencies in SAIL's questionnaire responses. Domestic producers argued that SAIL should not be permitted to submit a new cost response and that any scheduled verification be canceled.[41]

4. Continued Actions by Commerce to Assist SAIL

29. On July 12, 1999, Commerce issued a letter to SAIL providing it with a final opportunity to submit a reliable electronic database and information on product-specific costs:

> As discussed previously with you, and as identified in earlier supplemental questionnaires, these databases have been fraught with problems and are not yet useable. On July 6[,] we described in a telephone conversation and in a memorandum to the file, the remaining database errors that, given the state of your tapes, we could identify as requiring attention and correction. You have until Friday July 16, to submit revised tapes to the Department. After that date, any other electronic submissions that you make will be returned to you unless the Department has specifically requested further tape filings.[42]

30. On July 16, 1999, one business day before the agency's preliminary determination, SAIL filed a revised electronic database and proposed a product-specific cost methodology. Commerce accepted the submission, but, given the timing of the submission, there was no possibility that the revised data could be analyzed in time for the preliminary determination.

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[40] *Id.* at 1.

[41] *Letters from Counsel for Domestic Producers to USDOC Re: Request Cancellation of Verification*, dated 6 July 1999 and 20 August 1999 (Exh. US-15).

[42] *Letter from DOC to SAIL Re: Final Request for Useable Database*, dated 12 July 1999 (Exh. US-20).

31. For purposes of the preliminary determination, Commerce calculated a margin for SAIL based entirely on facts available. In its *Preliminary Determination Facts Available Memorandum,* Commerce chronicled in detail the bases for its concerns regarding SAIL's timeliness and completeness of information and its problematic database submissions.[43] Commerce also outlined its concerns regarding SAIL's failure to submit product-specific costs.[44]

32. In its public notice, Commerce summarized its findings on this issue:

> We have determined that the use of facts available is appropriate for SAIL for purposes of this preliminary determination. Although SAIL filed a questionnaire response, it contained numerous errors. Moreover, because of the problems with the electronic databases that SAIL submitted, its questionnaire response cannot be used to calculate a reliable margin at this time. Section 776(a)(2)(B) of the Act provides that the administering authority shall use facts otherwise available when an interested party "fails to provide such information by the deadlines for the submission of the information or in the form and manner requested." Therefore, the use of facts available is warranted in this case.[45]

33. Commerce also concluded that, despite numerous opportunities and extensions of time, "SAIL did not act to the best of its ability to provide the information requested."[46] Commerce identified the three inter-related problems with SAIL's questionnaire response: (1) technical errors in its electronic databases; (2) lateness and incompleteness of certain narrative portions of its questionnaire response; and (3) the lack of product-specific costs.[47]

34. Commerce also explained its decision to apply, as adverse facts available, the average of the margins alleged in the petition, rather than the highest margin alleged in the petition:

> For the preliminary determination, we assigned SAIL the average of the margins in the petition, which is 58.50 percent. Although we find that SAIL did not fully cooperate to the best of its ability, SAIL tried to provide the Department with the data requested in the antidumping questionnaire. Recognizing SAIL's attempts to respond to the Department's information requests, and in light of its claimed difficulties, we do not believe that it is appropriate to assign the highest margin alleged in the petition at this time.[48]

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[43] *DOC Memorandum Re: Preliminary Determination Facts Available for SAIL*, dated 29 July 1999 (Exh. US-16), at Attach. I & II.

[44] *Id.* at Attach. I.

[45] *Preliminary LTFV Determination* at 41203.

[46] *Id.*

[47] *Id.* at 41203-04.

[48] *Id.* at 41204.

5. Commerce's Final Efforts to Assist SAIL, Including the Decision to Proceed with Verification

35. Commerce continued to collect data that it hoped would be sufficient for verification and for use in the final determination. On August 2, 1999, Commerce issued its *Fourth Deficiency Questionnaire* that sought to resolve continuing deficiencies in SAIL's July 16, 1999 submission.[49] The next day, Commerce provided SAIL with its *Fifth Deficiency Questionnaire,* listing twelve areas that required further information or clarification in preparation for the verification scheduled for the following month.[50]

36. On August 16, 1999, Commerce granted SAIL's request for an additional extension due to logistical difficulties in collecting data and further revisions that its cost data required.[51] In addition to filing corrected data, SAIL detailed how it would reconcile these data during verification. At no time during this period did SAIL indicate that it could not provide the data necessary for a margin analysis.

37. On August 12 and 23, 1999, Commerce provided SAIL with outlines of the agenda and procedures to be followed during the on-site sales and cost verifications in India.[52] On August 20 and 26, 1999, domestic producers argued that SAIL "has again failed to provide product-specific costs as requested" and argued that Commerce should cancel verification.[53] Nevertheless, Commerce proceeded with the sales and cost verifications. These verifications were conducted during a 2½ week period, from August 30-September 15, 1999. On September 1 and 8, 1999, SAIL submitted corrections discovered during preparation for verification, including a revised computer disk for certain sales.[54] Notwithstanding these corrections, significant additional problems were discovered during the verification.

6. The Sales Verification

38. The sales verification report summarizes the findings made during the on-site verification. Commerce made the following findings:

> SAIL had under-reported home market prices for a significant percentage of sales.

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[49] *USDOC Fourth Deficiency Questionnaire to SAIL*, dated 2 August 1999 (Exh. US-17).

[50] *USDOC Fifth Deficiency Questionnaire to SAIL* , dated 3 August 1999 (Exh. US-18).

[51] *Letter from USDOC to SAIL Re: Granting of Extension of Time*, dated 16 August 1999 (Exh. US-19).

[52] *See, e.g., USDOC Verification Outline for SAIL*, dated 12 August 1999 (Exh. IND-12).

[53] *Letters from Counsel for Domestic Industry to USDOC Re: Cancellation Requests of Verification*, dated 6 July 1999 and 20 August 1999 (Exh. US-15).

[54] *SAIL Corrected US Sales Database, computer printout,* dated 1 September 1999 (Exh. IND-8).

> SAIL double-counted sales made by the Rourkela Steel Plant.
>
> SAIL was unable to demonstrate that the quantity and value of home market sales were properly reported.
>
> The reporting of plant sales was incorrect in nearly every possible way -- quantity and value were under-reported, prices and adjustments were inaccurate, and sales of prime and non-prime merchandise were mixed up.[55]

Commerce also stated that it found "numerous coding errors in the home market database."[56]

39. Commerce also discovered errors in the U.S. sales database. Commerce explained that "[w]hile testing U.S. sales for model match purposes, we found an incorrectly reported model match criterion."[57] Commerce further noted that this error affected a preponderance of SAIL's export sales to the United States. Commerce also explained that SAIL had failed to report certain product control numbers in the cost of production database. According to Commerce, the missing control numbers were related to the primary type of steel plate exported by SAIL to the United States during the period of investigation. Commerce later explained that it was difficult for its verification team to evaluate whether the reporting of product specification/grade was accurate because SAIL had prepared no supporting verification exhibits.[58]

7. The Cost Verification

40. A separate cost verification report details the findings made during the on-site verification of SAIL's reported costs. Significant problems with SAIL's cost data were identified:

> Company officials stated 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. On the first day of verification, SAIL presented a completely revised COP tape, as part of the correction presented in exhibit C-3. It was not clear the extent to which this tape should be considered "new information". Accordingly, we did not accept it. . . .

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[55] *Sales Verification Report*, dated 4 November 1999 (Exh. US-4) (public version) at 4-5.

[56] *Id.* at 5.

[57] *Id.* at 5, 12.

[58] *USDOC 10 November 1999 Addendum to Verification Report*, Exh. US-24 (public version) at 1.

> Although the COP tape was incorrect, and a new revised COP tape was not accepted, we proceeded with verification because the {sic} cost information underlying the reported per-unit COP was still verifiable--that is the actual average cost for plates and normalized plates at each plant . . . and the data underlying the indices developed by SAIL for calculating product-specific costs . . . .[59]

As detailed in the verification report, the COP information could not be verified. Commerce identified numerous other problems in SAIL's reported costs.[60]

8. Determination of Verification Failure

41. On November 18, 1999, Commerce held a public hearing was held to allow interested parties to comment in preparation for the final determination.[61]

42. After consideration of the facts, the parties' arguments, and the applicable statute, Commerce determined that SAIL had failed verification and that application of adverse facts available was required to determine the margin of dumping. The agency's *Determination of Verification Failure Memorandum* was issued on December 13, 1999, and outlined the significant findings at verification.[62] Commerce explained that:

> [w]henever serious problems arise at verification we must determine whether the problems can be isolated and perhaps dealt with by the selective use of adverse inferences or are so significant as to undermine the integrity of the whole response.[63]

43. With respect to the home market sales portion of the questionnaire, Commerce explained that:

> [a]t verification one of the primary goals is to ensure that all home market sales were reported meaning that all sales are reported and that the prices and adjustments are reported correctly in the sales listing. An integral part of ensuring the proper reporting of sales is verifying the negative, i.e., looking for unreported sales (or discounts). This requires reconciling the company's records for sales of subject merchandise to the reported quantity and value.

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[59] *Cost Verification Report*, dated 4 November 1999 (Exh. US-3) (public version) at 2.

[60] *Id.* at 2-3.

[61] Transcript of Hearing at USDOC (18 November 1999) (Exh. IND-15).

[62] *USDOC Determination of Verification Failure Memorandum*, dated 13 December 1999 (Exh. US-25).

[63] *Id.* at 4.

> As detailed in the Sales Verification Report, the problems encountered were such that we could not ensure that home market sales were properly reported. We have no way of knowing how many sales of subject merchandise may have been made in the home market. The fact that SAIL could not tie the reported quantity and value for sales of subject merchandise to the company's financial records and that prices were under-reported for a significant percentage of home market sales undermines the credibility of SAIL's records. Taken together these problems resulted in our inability to establish that home market sales were properly reported.[64]

Regarding SAIL's COP/CV data, Commerce stated that:

> [o]n the first day of verification SAIL company officials stated that the cost tape submitted was inaccurate and could not be tied to existing books and records. In addition, SAIL failed even to submit Constructed Value ("CV") data for U.S. sales. Thus, there is no useable COP or CV data on the record. Despite the fact that the aggregate product-specific COP data were inaccurate, and there were no CV data at all, we nevertheless reviewed the [sic] underlying components of the aggregate costs. Here too we find widespread errors and inaccuracies.[65]

44. Finally, in describing several errors in the U.S. sales database, Commerce explained 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.[66]

9. The Final Determination

45. Commerce provided a comprehensive summary of these facts and its decision to base its margin calculation upon adverse facts available in the *Final Determination*:

> [T]he use of facts available is appropriate for SAIL for purposes of the final determination, pursuant to section 776(a)(2)(A), (B), and (D) of the Act. With respect to subsection (A), at verification the Department discovered that SAIL failed to report a significant number of home market sales; was unable to verify the total quantity and value of home market sales; and failed to provide reliable cost or constructed value data for the products. See Home Market and United States Sales Verification Report (``Sales Report''), dated November 3, 1999; see also Cost of Production and Constructed Value Verification Report (``Cost

[64] *Id.* at 4-5.

[65] *Id.* at 5.

[66] *Id.*

> Report"), dated November 3, 1999. With regard to subsection (B), SAIL was provided with numerous opportunities and extensions of time to fully respond to the Department's original and supplemental questionnaires, as well as ample time to prepare for verification. However, even with numerous opportunities to remedy problems, SAIL failed to provide reliable data to the Department in the form and manner requested.
>
> With respect to section 776(a)(2)(D) of the Act, we note that as a result of the widespread problems encountered at verification, SAIL's questionnaire responses could not be verified. See Sales Report and Cost Report. See Memorandum to the File: Determination of Verification Failure (``Verification Memo"), dated December 13, 1999.[67]

46. In addition, Commerce addressed the statutory requirement that parties be advised of deficiencies in their submissions:

> With respect to section 782(d), we gave SAIL numerous opportunities and extensions to submit complete and accurate data. As stated in the Preliminary Determination, SAIL's questionnaire and deficiency questionnaire responses were found to be substantially deficient and untimely for purposes of calculating an accurate antidumping margin. See Preliminary Determination. However, subsequent to the preliminary determination we issued two additional questionnaires and further extensions to SAIL presenting it yet additional opportunities to submit a complete and accurate electronic database. Nevertheless, the Department found at verification that the final submission was again substantially deficient . . . .Therefore the Department may ``disregard all or part of the original and subsequent responses," subject to subsection (e) of section 782.[68]

47. In a separate section of the *Final Determination*, Commerce specifically addressed SAIL's comments that Commerce should determine that the company cooperated to the best of its ability:

> SAIL has consistently failed to provide reliable information throughout the course of this investigation. At the preliminary determination we relied on facts available because widespread and repeated problems in SAIL's questionnaire response rendered it unuseable for purposes of calculating a margin. These problems recurred despite our numerous and clear indications to SAIL of its response deficiencies. Even 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

[67] *Final Determination* at 73126-27.

[68] *Id.* at 73127.

> 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. The Department also rejected petitioners' request that verification be cancelled in light of the response deficiencies. However, as evidenced by the summary below, SAIL was unable to provide the Department with useable information to calculate and determine whether sales were made at less than fair value.[69]

48. Commerce then proceeded to summarize in detail the deficiencies in the previously-identified areas of completeness, timeliness, and workability of computer tapes and the fact that SAIL failed verification.[70]

49. Commerce disagreed with SAIL's characterization that its U.S. sales were accurate, timely submitted, and verified:

> In fact, the U.S. sale database contained certain errors, as revealed at verification. See Sales Report; see also Verification Memo. Moreover, we disagree with SAIL that we are required by the Act to use SAIL's reported U.S. prices. SAIL cites to [judicial and administrative cases] as support for the contention that the Department does not resort to total facts available if there are deficiencies in the respondent's submitted information. It is the Department's long-standing practice to reject a respondent's questionnaire response in toto when essential components of the response are so riddled with errors and inaccuracies as to be unreliable. *See Steel Wire Rod from Germany.* SAIL's argument relies on a mischaracterization of our practice with respect to so-called ``gap-filler'' facts available. SAIL argues that the Department should fill in the record for home market sales, cost of production, and constructed value as if there were a mere ``gap'' in the response, as opposed to the entire record. Thus respondent's arguments and citations to these cases are inapposite. In each of the above-mentioned cases, the majority of the information on the record was verified and useable; there were only certain small areas of information which required the Department to {use} facts otherwise available to accurately calculate a dumping margin. The Department's long-standing practice of filling in gaps or correcting inaccuracies in the information reported in a questionnaire response, often based on verification findings, is appropriate only in cases where the questionnaire response is otherwise substantially complete and useable. In contrast, in this case, 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. To properly conduct an antidumping analysis which includes a sales-below-cost allegation, the Department must analyze four essential components of a respondent's data: U.S.

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[69] *Id.* at 73129-30.

[70] *Id.* at 73130.

> sales; home market sales; cost of production for the home market models; and constructed value for the U.S. models. Yet SAIL has not provided a useable home market sales database, cost of production database, or constructed value database. Moreover, the U.S. sales database would require some revisions and corrections in order to be useable. As a result of the aggregate deficiencies (data problems and SAIL's responses), the Department was unable to adequately analyze SAIL's selling practices in a thorough manner for purposes of measuring the existence of sales at less than fair value for this final determination. *See Sales Report and Cost Report.*[71]

50. Finally, regarding SAIL's argument that U.S. law, specifically section 782(e) of the Act, required Commerce to utilize SAIL's U.S. sales data in calculating a dumping margin, Commerce explained that:

> Section 782(e) of the Act states that the Department shall not decline to consider information deemed "deficient" under section 782(d) provided that subsections (1), (2), (3), (4), and (5) of section 782(e) are met. In the instant investigation, record evidence supports the finding that SAIL did not meet these requirements . . . . With regard to each respective subsection of 782(e): (1) SAIL did not provide information in a timely manner; (2) the information submitted could not be verified; (3) essential components of the information (*e.g.*, home market sales and cost information) are so incomplete that it cannot be used as a reliable basis for reaching a determination; (4) SAIL did not act to the best of its ability in providing the information and meeting the requirements established by the administering authority; and (5) the information cannot be used without undue difficulties. Accordingly, we are applying a margin based on total facts available to SAIL in the final determination.[72]

51. As a result, Commerce determined that SAIL's information was unusable and not a reliable basis upon which to calculate a margin. Moreover, because Commerce determined that SAIL did not act to the best of its ability, it used an adverse inference in selecting the highest margin alleged in the petition as facts available.

52. SAIL subsequently challenged the *Final Determination* at the CIT.

10. The Remand Determination

53. On May 26, 2001, the CIT affirmed Commerce's decision to reject SAIL's information as unusable and use facts available in determining an antidumping duty margin for SAIL. The CIT remanded the decision, however, for further explanation as to Commerce's basis for determining

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[71] *Id.* at 73130.

[72] *Id.* at 73130-31.

that SAIL had failed to act to the best of its ability. Contrary to India's contention, the CIT did not "reverse" Commerce's determination that SAIL had not acted to the best of its ability; it simply remanded the case for further explanation by Commerce on this point.

54. Commerce filed its explanation with the CIT on September 27, 2001.[73] In that determination, Commerce summarized the factual and legal basis for its finding that SAIL had failed to act to the best of its ability.

55. First, Commerce explained its finding that SAIL possessed the necessary information and that it had the ability to provide the information in compliance with Commerce's information requests. Commerce explained its information collection process as follows:

> Although responding to the antidumping questionnaire can be a demanding exercise, it is tailored so that it can be completed by companies that keep audited records of their sales and costs. Every year, Commerce sends essentially the same questionnaire to dozens of foreign producers, and the great majority of these respondent companies is able to provide the necessary information. Although Commerce modulates the level of detail and (importantly) the type of computerization required in order to accommodate each company's unique circumstances, in the main, Commerce solicits much the same type of information from each company. As a general matter, it is reasonable for Commerce to conclude that, if companies with fewer resources can respond fully and adequately to an antidumping questionnaire in a timely manner, a company with the resources and expertise of SAIL, that does not inform the Department otherwise in a timely fashion, is also capable of doing so.[74]

56. Commerce also explained that the respondent ultimately controls the information necessary for an anti-dumping determination:

> It should be noted that Commerce has very limited knowledge of the actual extent of a respondent's ability to comply with requests for information. It is the respondent, not Commerce, that possesses the necessary information and knowledge of the company's operations and records. Therefore, it is incumbent on the respondent to demonstrate why it is incapable of providing requested information in a timely manner. Commerce cannot rely on mere assertions of vague "difficulties" or inability to comply as a basis for concluding that a respondent acted to the best of its ability.

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[73] *USDOC Redetermination on Remand* (September 27, 2001) (Exh. IND-21).

[74] *Id*. at 2-3.

> That is why the Department requires the reason why a party has failed to provide requested data. Without a specific, compelling explanation, Commerce generally has no means of discerning if a respondent is truly incapable of complying. If there was some circumstance beyond SAIL's control that prevented it from responding adequately and in a timely manner, it did not offer any such explanation. SAIL has not demonstrated that its failure to respond accurately is excused "because it was not able to obtain the requested information, did not properly understand the question asked, or simply overlooked a particular request." Mannesmannrohren-Werke AG v. United States, 77 F.Supp. 2d 1302, 1316 (CIT 2000) (Mannesmann I). The information that SAIL failed to provide was within its own control. Moreover, SAIL was provided with substantial guidance on the questions asked, and its failure was more comprehensive than the simple oversight of a particular request.[75]

57. Commerce again summarized the facts of its attempt to obtain necessary information from SAIL:

> During the underlying investigation, SAIL did advise Commerce that it was experiencing difficulties in gathering and submitting the requested information. Typically, however, these difficulties were offered to justify requests for additional time to submit information (which the Department repeatedly granted) and were often accompanied by assurances that the information would be forthcoming. For example, in its May 11, 1999, database submission -- which was filed late due to a computer "breakdown" -- SAIL indicated that "some of the data requested by [Commerce] is still being collected (because, e.g. it is available only in handwritten form). As soon as these data are available we will submit them to the Department and revise the diskette accordingly." Def. Ex. 5, C.R. 7. Thus, in the underlying proceeding, SAIL's reference to handwritten records was given as an example of why it needed additional time. SAIL did not indicate that it would be unable to provide a usable database; on the contrary, it promised that such a database would be forthcoming. As a result, we disagree with SAIL's suggestion, Pl.'s Mem. Supp. Mot. J. Agency R. at 32, that its identification of these logistical difficulties demonstrates that it could not comply with the information requests. In Commerce's view, the record demonstrates that SAIL could comply with the request for data, and SAIL never offered any valid explanation of circumstances that rendered it incapable of complying with those requests.

[75] *Id*. at 3.

> In the underlying proceeding, the Department repeatedly requested that SAIL remedy deficiencies in its response and SAIL gave every indication that it would comply with the agency's information requests. Where information was not provided initially, SAIL indicated that it would be submitted as soon as it became available and that unuseable computer tapes would be revised accordingly. See, e.g., Def. Ex. 5, C.R. 7; see also Def. Ex. 11, C.R. 17 (SAIL submitted revised computer tapes and stated that all home market sales made during the period were provided). At SAIL's behest, Commerce took the unusual step of permitting the submission of significant amounts of information after the preliminary determination; SAIL assured Commerce that this new data could be verified. Def. Ex. 25, C.R. 33. All of these representations suggest that SAIL itself believed it could comply with the requests for information. In such circumstances, it is reasonable for Commerce to conclude that SAIL had assessed its own operations and knew that it could fulfill its representations. This Court has held that it is "reasonable for Commerce to charge [a respondent] with knowledge of its own operations." Mannesmannrohren-Werke AG v. United States, Slip Op. 00-126 (CIT October 5, 2000) (Mannesmann II). Therefore, even accepting that SAIL's efforts were made in good faith "does not relieve its burden to respond to the best of its ability, and its 'ability' includes possessing knowledge of its business operations." Id.[76]

58. Finally, Commerce addressed SAIL's suggestion that it could not provide the necessary information:

> To conclude that SAIL tried its best but simply could not report accurate information about its home market sales or production costs is not credible. SAIL is one of the largest integrated steel producers in the world, with significant expertise in many areas and significant resources at its disposal. For example, SAIL has an established accounting system and its books are audited annually by a large team of public accountants. See, e.g., SAIL Section A Response, C.R. 5, at Exhibit A-9 (SAIL Annual Report). Moreover, because SAIL is predominantly owned by the Indian Government, SAIL is accountable for a variety of additional Government accounting requirements. Based on the information available to Commerce, we conclude that SAIL had the ability to comply with the information requests. In sum, SAIL is and should be accountable for the information recorded in its books and records. To conclude otherwise would allow respondents to provide only the most rudimentary information, without regard to the information actually required for an investigation. More importantly, to allow a respondent to select the information it will submit provides a major incentive for

[76] *Id*. at 3-4 (footnotes omitted).

> self-serving behavior – supplying information that is generally favorable while claiming that it cannot supply information that might prove unfavorable to respondent . . . .
>
> This investigation may have been SAIL's "first real brush with U.S. antidumping law," [] but SAIL has provided us with no information that indicates it could not comply with the information requests made by Commerce. Thus, it is reasonable for Commerce to conclude that SAIL had the resources and ability to comply with Commerce's questionnaire but inexplicably failed to do so.[77]

B. Commerce's Consideration of SAIL's Proposed Suspension Agreement

59. In a letter dated July 29, 1999, SAIL submitted a proposed agreement to suspend[78] the investigation to "address any problems that might be caused by imports of {cut-to-length} plate from India."[79] On August 31, 1999, a meeting was held with counsel for SAIL, Commerce's Assistant Secretary for Import Administration and other officials to discuss the antidumping suspension agreement proposal from India. [80] During the meeting, the Department stated that it "would consider the respondent's request, but noted that suspension agreements are rare and require special circumstances."[81] The Department also discussed the fact that "the requisite circumstances may not exist at the present time," and eventually denied the request.[82]

IV. STANDARD OF REVIEW

60. The AD Agreement is unique among the WTO agreements in providing its own standard for a WTO panel's review of an anti-dumping determination by an investigating authority. That standard is set forth in Article 17.6 in two parts: the first concerns review of questions of fact and the second concerns review of issues of law. In its submission, India acknowledges this concept.[83] However, India also claims that another standard, described in *United States - Transitional Safeguard Measure on Combed Cotton Yard from Pakistan*, also applies. As explained below, this is an incorrect reading of the WTO agreements. Furthermore, India states that Article 17.6 requires this Panel to effectively ignore the policies and procedures underlying

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[77] *Id*. at 4-5 (footnotes, citations omitted).

[78] Note that a suspension agreement is otherwise known as a price undertaking.

[79] *Letter from SAIL's Counsel to USDOC Re: Request for a Suspension Agreement*, dated 29 July 1999 (Exh. IND-10).

[80] *USDOC Memorandum to the File re: Ex-Parte Meeting with Counsel for SAIL Regarding Possible Suspension Agreement*, dated 31 August 1999 (Exh. US-21).

[81] *Id.*

[82] *Id.*

[83] First Submission of India at para. 49.

U.S. law and its application, thereby distorting the standard of review which this Panel is to apply. The proper standard is described below.

A. Review of an Authority's Establishment and Assessment of the Facts: Panels May Not Engage in *De Novo* Review

61. Article 17.6(i) of the AD Agreement provides that:

> (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned.

62. In other words, a panel may not conduct its own *de novo* evaluation of the facts if the authority's establishment of the facts is proper and its evaluation of the facts is unbiased and objective. As articulated by the Appellate Body in *United States - Antidumping 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."[84]

63. In order to 'establish' and "evaluate' the facts, Article 17.6(i) notes that a panel must determine (1) if the establishment of the facts on the record was "proper," given the overall investigation or review under scrutiny by the panel and (2) if the investigating authority's determination, based upon the facts on the record, was unbiased and objective.[85] "Proper," as defined by the Oxford Standard Dictionary, means "suitable" or "appropriate."[86] Thus, a panel must review all of the facts on the record and determine if the investigating authority appropriately considered the facts of the record and applied those facts in an objective, unbiased manner in making its final determination.

64. Once a panel makes an objective assessment of the investigating authority's establishment of the facts, pursuant to17.6(i), it is well established that even if a panel disagrees

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[84] *United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, *Report of the Appellate*, WT/DS184/AB/R, adopted 23 August 2001, para. 55 ("*Hot-Rolled AB Report*"). *See also Article 21.5 Recourse Decision, Mexico-Anti-Dumping Investigation of High Fructose Corn Syrup ("HFCS AB Report") From the United States*, 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."

[85] *See Hot-Rolled AB Report*, para 55.

[86] *The New Shorter Oxford English Dictionary*, Clarendon Press, Oxford (1993) (definition III).

with an agency's findings, as long as the investigating authority's findings are based upon properly-applied facts and its decision has been made in an objective, unbiased manner, then the panel may not substitute its judgment for that of the investigating authority.[87] This applies even if the panel – had it stood in the shoes of that authority originally– might have decided the matter differently.

65. Several panels have stressed that a panel review is not a substitute for proceedings conducted by national investigating authorities, and that the role of panels is not to conduct a *de novo* review of the factual findings of a national investigating authority. This standard of review has been articulated by both WTO panels and GATT panels:

> [T]he Panel was not to conduct a *de novo* review of the evidence relied upon by the United States authorities or otherwise to substitute its judgment as to the sufficiency of the particular evidence considered by the United States authorities.[88]

This concept is extremely important because, as noted in *Thailand - H-Beams from Poland*, "the aim of Article 17.6(i) is to prevent a panel from 'second-guessing' a determination of a national authority when the establishment of the facts is proper and the evaluation of those facts is unbiased and objective."[89]

66. In reviewing the facts of the record, WTO panels are directed to look to the entire administrative record of an investigation. India argues that the Panel is required to review SAIL's U.S. sales data specifically, apply the four conditions of Annex II, paragraph 3 only to that data, and then to make its determination exclusively based upon that analysis. This is a misreading of the AD Agreement. Article 17.6(i), on its face, applies to all of the "facts of a matter," and does not affirmatively segregate between respondent-selected segments of submissions. Thus, this Panel must "examine whether the evidence relied upon by the [investigating authority] was sufficient, that is, whether an unbiased and objective investigating authority evaluating that evidence" could properly have reached its determination.[90]

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[87] *See Hot-Rolled AB Report*, para. 56.

[88] *Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup ("HFCS") from the United States*, WT/DS132/R (Jan. 28, 2000), para. 7.56. The *HFCS* panel was citing from *Guatemala-Anti-Dumping Investigation Regarding Portland Cement From Mexico*, WT/DS60/R, adopted 19 June 1998. The language is actually taken from *United States - Measures Affecting Import of Softwood Lumber from Canada*, SCM/162BISD40S/358, adopted 27-28 October 1993, para. 335.

[89] *Thailand - Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, Report of the Appellate Body, WT/DS122/AB/R, adopted 12 March 2001, paras. 117-18 (*"Thailand H-Beams from Poland"*).

[90] *HFCS*, para. 7.57.

B. Review of an Authority's Interpretation of the AD Agreement: Panels must Respect Multiple, Permissible Interpretations

67. Article 17.6(ii) applies to the legal standard of review:

> (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

68. In reviewing legal questions that turn on the proper meaning to be ascribed to the AD Agreement, subparagraph (ii) of Article 17.6 provides that, where a relevant provision of the AD Agreement is subject to more than one permissible interpretation, a WTO panel shall find the anti-dumping measure in question to be in conformity with the Agreement if it is based on any of those permissible interpretations.

69. Thus, Article 17.6(ii) reflects a deliberate choice by the negotiators to recognize the possibility of multiple interpretations. In this sense, Article 17.6(ii) constitutes an admonition to panels to take special care, as clearly stated in Articles 3.2 and 19.2 of the DSU, not to add to the obligations of Members.

70. In sum, Article 17.6(ii) instructs panels that, if the terms of the Agreement admit of multiple permissible interpretations, they must find an authority's action conforms with the AD Agreement if it conforms to one of those interpretations. Thus, the relevant question in every case is not whether the challenged determination rests upon the best or the "correct" interpretation of the AD Agreement, but whether it rests upon a "permissible interpretation" (of which there may be many).

71. India does not disagree with the above analysis, but by citing to *Transitional Safeguard Measure on Combed Cotton Yarn From Pakistan* ("*Yarn from Pakistan*"),[91] attempts to add to the obligations of investigating authorities, pursuant to Article 11 of the DSU, in determining if the investigating authority has "complied with their obligations." Article 1.2 of the DSU, however, provides that "special or additional rules and procedures on dispute settlement contained in covered agreements" shall prevail over the more general rules and procedures of the DSU to the extent of any differences. As explained previously, the AD Agreement is unique among the WTO Agreements in that it contains a specified "standard of review." Therefore, the decision in *Yarn From Pakistan* is irrelevant, because the Panel in that case had no special standard of review provision to apply.

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[91] *WT/DS192/AB/R*, adopted 8 October 2001, para. 74 ("*Yarn from Pakistan*")

72. Thus, in applying the *Textiles Agreement* in *Yarn From Pakistan*, the Appellate Body was enunciating the standard pursuant to DSU Article 11 for an "objective" review of the facts. In the case at hand, however, Articles 17.6(i) and (ii) of the AD Agreement provide for the standard of review by which a panel should make its determination. The Appellate Body has never stated that in addition to the requirements of Article 17.6, a panel reviewing a measure under the AD Agreement must also implement the test articulated in *Yarn From Pakistan*.

73. In summary, this Panel should review the entire record and all of the facts contained therein. In that context, this Panel should assess whether Commerce's application of facts available in this investigation was conducted in an unbiased and objective manner. Furthermore, this Panel should determine, based upon the complete record, whether the United States' legal analysis is a permissible interpretation of its obligations under the AD Agreement.

V. LEGAL ARGUMENT

A. Introduction

74. Customary rules of interpretation of public international law, as reflected in Article 31(1) of the Vienna Convention, provide that a treaty "shall be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty *in their context and in the light of its object and purpose*" (emphasis added). The purpose of treaty interpretation is, as stated in Article 31 of the Vienna Convention, to give effect to the intention of the parties to the treaty as expressed in their words read in context.

75. Article VI of the GATT 1994 ("Article VI") authorizes WTO Members to impose anti-dumping duties in order to remedy injurious dumping. The object and purpose of Article VI is to provide a remedy to Member countries that are faced with dumped imports that cause or threaten material injury. Article VI:1 states that "dumping . . .is to be condemned if it causes or threatens material injury to an established industry . . .or materially retards the establishment of a domestic industry." Given the object and purpose of Article VI and the AD Agreement, which authorizes a remedy for injurious dumping, the provisions of these agreements must be interpreted so as to allow investigating authorities to obtain and analyze all information necessary to the antidumping analysis.

76. Article VI and the AD Agreement require that a determination of dumping must be based on detailed information involving prices in the domestic market of the exporting country ("normal value") and export prices to the market of the investigating authority.[92] The dumping determination must include, where alleged, an analysis of cost information to determine whether

[92] *See, e.g.,* Article VI:1 of GATT 1994; Article 2 of the AD Agreement.

sales in the domestic market of the exporting country are below the cost of production("COP"). Only when all of this information is accurately provided can the administering authority perform an accurate calculation of a dumping margin. Based on these requirements, Commerce's questionnaire requests of information necessary for the dumping analysis, including general information concerning the company's corporate structure and business practices; the merchandise under investigation that it sells; the sales of that merchandise in all markets; the home market sales listings; the U.S. sales listings; and information regarding the cost of production of the foreign like product and the constructed value of the merchandise under investigation. This information, which is necessary for any dumping determination, is normally within the control of the responding parties whose sales are the subject of the anti-dumping investigation.

77. Thus, in light of the object and purpose of Article VI and the AD Agreement, authorizing Members to remedy injurious dumping, the provisions at issue must be interpreted to allow investigating authorities to request, require and obtain the necessary information from interested parties. The interpretation advanced by India would give ultimate control to responding parties over what information investigating authorities may analyze.

78. The goal of an anti-dumping investigation is "ensuring objective decision-making based on facts."[93] In order for investigating authorities to *make* objective decisions based on facts, they must have *access* to those facts. An interpretation of the AD Agreement that would encourage parties to selectively provide necessary information would frustrate the goal of objective decision-making and nullify the effectiveness of the Article VI remedy. At some point, investigating authorities must have the discretion to reject questionnaire responses in their entirety when responding parties fail to provide critical information that authorities need to conduct antidumping investigations.

B. Textual Analysis of the AD Agreement

79. In this section of our submission, we analyze the provisions of the AD Agreement relevant to this dispute, that is, Article 6.8 and Annex II. As will be shown, the ordinary meaning of Article 6.8 and Annex II of the AD Agreement support the interpretation of the United States as reflected in its statutory provisions and its actions with respect to SAIL in the antidumping duty investigation at issue.

80. Article 6.8 of the AD Agreement permits the application of facts available when a party fails or refuses to provide necessary information in an anti-dumping investigation. Annex II of the AD Agreement then sets out the criteria which investigating authorities should take into account before applying facts available. As we demonstrate below, taken together, Article 6.8

[93] *Hot-Rolled Panel Report,* para. 7.55.

and Annex II allow investigating authorities to make preliminary and final determinations, in whole or in part, on the basis of 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. These provisions of the AD Agreement provide investigating authorities with a feasible method for calculating antidumping margins when information in control of responding parties is missing, untimely, or unreliable because a party either refuses access to it or otherwise does not timely provide it.

1. Article 6.8 of the AD Agreement

81. Article 6.8 of the AD Agreement provides as follows:

> 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.

a. Information

82. 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. The ordinary meaning of the term "information," which is not defined in the AD Agreement, is a "communication of the knowledge of some act or occurrence" and "knowledge or facts communicated about a particular subject, event, etc.; intelligence, news."[94]

83. Article 6.8 of the AD Agreement uses the term "necessary information." The ordinary meaning of the term "necessary" is "[t]hat cannot be dispensed with or done without; requisite; essential; needful."[95] The "necessary" or "requisite" or "essential" information for conducting an antidumping investigation includes 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. Because dumping is defined in Article 2.1 of the AD Agreement based on a comparison of the export price with the normal value, in the ordinary course of trade, all of this information constitutes "necessary" information for purposes of making a dumping determination.[96]

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[94] The New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993.

[95] The New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993.

[96] Article 2.1 of the AD Agreement states:

> For the purpose of this Agreement, a product is to be considered as being

84. Throughout its First Written Submission, India claims that Commerce was wrong to examine the sufficiency of all of the information necessary for the conduct of its investigation. Instead, India argues that Commerce was obligated to focus on certain "categories of information" -- a term which does not appear anywhere in the AD Agreement. Nothing in the AD Agreement requires an administering authority to evaluate distinct "categories" of information separately for purposes of determining whether it is permissible to use facts available for a dumping determination.

85. It is also relevant to consider the meaning of the term "information" in terms of the overall purpose of the AD Agreement. As stated by the *Hot Rolled* panel:

> One of the principal elements governing anti-dumping investigations that emerges from the whole of the AD Agreement is the goal of ensuring objective decision-making based on facts.[97]

To the extent that "objective decision-making based on facts" is accepted as a goal of the AD Agreement, the Agreement should be interpreted in a manner that would achieve that goal. The only way to achieve "objective decision-making based on facts" is to interpret the AD Agreement in a manner which encourages the parties in possession of the facts (in this case the responding interested parties) to provide that information to the investigating authorities in a timely and accurate manner. Conversely, an interpretation which would encourage responding interested parties to provide only partial information would be inconsistent with that goal and is not to be preferred.

86. The purpose of the objective standard for decision-making is to permit neutral determinations to be made without bias toward either the party that could be subject to duties or the party being injured by any dumping. When investigating authorities rely on facts available, it is not possible to determine whether those facts are advantageous to the responding party because the information necessary to determine or even estimate that party's actual margin of dumping is not available. Thus, an interpretation of the AD Agreement that would allow responding parties to selectively provide information and require investigating authorities to use that information could encourage such selective responses and thereby defeat the underlying purpose of "objective decision-making based on facts."

> dumped, ie. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

[97] *Hot-Rolled Panel Report*, para. 7.55.

87. India's interpretation of the term "information" to mean "categories of information" cannot be squared with the goal of "objective decision-making based on facts." Under India's interpretation, responding interested parties would be able to select what information they want to supply to the investigating authorities. India's interpretation would, in fact, encourage responding interested parties to distinguish between helpful and harmful information and to provide only that select information which will not have negative consequences for them.

88. Moreover, India's interpretation would often lead to absurd results. For example, under India's interpretation of the AD Agreement, if a responding party submitted only its COP data, omitting home market and export sales information, Commerce would be required to include that data in its calculations. Such information would be impossible to use, however, because in the absence of actual home market prices, it would be unknowable whether the actual home market sales were above cost and therefore appropriate for determining normal value (pursuant to Article 2.2.1 of the AD Agreement), or below cost, such that constructed value should be used to determine normal value (pursuant to Article 2.2 of the AD Agreement). Such an interpretation would be absurd and, as such, should be avoided.

89. Furthermore, India's interpretation adds language to the text that is not there. The Appellate Body has noted that panels must look to the ordinary meaning of the text of an Agreement in determining the obligations set forth by that provision: "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."[98] The Appellate Body has further noted, "[A] treaty interpreter is not entitled to assume that such usage [of particular terms] was merely inadvertent on the part of the Members who negotiated and wrote that Agreement."[99]

90. It is an investigating authority's ability to apply facts available in cases where responses are substantially incomplete which provides an incentive for responding parties to supply complete information. While the goal of antidumping proceedings is "ensuring objective decision-making based on facts,"[100] allowing the parties submitting information to control that decision-making by controlling the production of information would run counter to the object and purpose of the AD Agreement to encourage participation in antidumping proceedings in order to permit the calculation of accurate antidumping margins.

91. When a respondent provides grossly inadequate and unreliable information pertaining to the overall dumping margin calculation, Article 6.8 permits the investigating authority to use the

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[98] *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*").

[99] *Id.* at para. 164.

[100] *Hot-Rolled Panel Report*, para. 7.55.

facts available to determine the existence of dumping. Although certain portions of information may appear acceptable in isolation, when the nature and extent of deficiencies on the whole are substantial, it calls into question the reliability of the entire response. Article 6.8 provides that in such circumstances, the authority may rely on facts available.

92. Thus, consistent with the proper interpretation of "necessary information" in Article 6.8, it would be permissible for a fair and objective investigating authority to conclude that a party's failure to provide the necessary information for the calculation of accurate dumping margins would constitute the non-provision of necessary information such that, even with some limited data, it was necessary and appropriate to use facts available for the entire dumping determination.

b. Preliminary and final determinations

93. 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). In its First Written Submission to this Panel, India has ignored this language of the AD Agreement which explicitly provides for the use of facts available as to the ultimate determination of dumping.

94. Throughout the AD Agreement, the text distinguishes between "preliminary and final determinations" and individual pieces of information which may need to be determined. For example, Article 12 of the AD Agreement provides for "Public Notice and Explanation of Determinations." Therein, Article 12.2 specifically addresses any "preliminary or final determination" and the required contents of such determinations. Further, Article 12.2.1 of the AD Agreement provides for a public notice of the imposition of provisional measures, including, in particular, "preliminary determinations on dumping and injury," distinguishing such preliminary determinations from the "matters of fact and law" and from the "methodology used in the establishment and comparison of the export price and the normal value" in subsection (iii) of Article 12.2.1.

95. Similar to subsection (iii) of Article 12.2.1, various subparts of Article 2 refer to the particular items which need to be determined in order to reach a preliminary or final determination:

Article 2.2	–	"the margin of dumping shall be determined"
Article 2.2.1	–	"if the authorities determine that such sales are made within an extended period of time"
Article 2.2.2	–	"the amounts {for administrative, selling and general costs and for profits} may be determined"
Article 2.3	–	under particular conditions, "export price may be constructed {...} on such reasonable basis as the authorities may determine."

96. The use of the term "preliminary and final determinations" in Article 6.8 should be given its ordinary meaning within the context of the AD Agreement. As used in the AD Agreement, the term "preliminary and final determinations" refers to the ultimate finding of dumping. Where the drafters of the AD Agreement wanted to refer to the particular items that may need to be determined in order to reach a preliminary or final determination, specific reference was made.

97. Notably, India ignores this language in Article 6.8 in its efforts to have the Panel interpret that Article as applying to "categories of information." Nevertheless, this plain language of Article 6.8 plainly permits the use of facts available as the basis for "preliminary and final determinations" when an interested party has failed to provide necessary information.

2. Annex II of the AD Agreement

98. With respect to Annex II of the AD Agreement, paragraphs 1, 3, and 5 are relevant to this dispute. We discuss each in turn.

a. Paragraph 1

99. Paragraph 1 of Annex II to the AD Agreement 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 facts available, including those contained in the application for the initiation of the investigation by the domestic industry.

100. Paragraph 1 of Annex II provides the basic guidance in the AD Agreement for obtaining the participation of responding interested parties. 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.

b. Paragraph 3

101. 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 and which is supplied in a timely fashion, and, where applicable, supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made. If a party does not respond in the preferred medium or computer language but the authorities find that the circumstances set out in paragraph 2 have been satisfied, this should not be considered to significantly impede the investigation.

102. Annex II, paragraph 3 contains a number of conditions which, if met, indicate that the authorities "should take that information into account." Those conditions are:

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. If the information fails to meet any one of these conditions, Annex II, paragraph 3 does not provide any obligation on the authorities to further consider, or otherwise take into account, the information.

i. The information "should be taken into account"

103. India claims that if the four conditions of Annex II, paragraph 3 are met, the investigating authorities must use the information to calculate the antidumping margin. Once again, India is reading language into the text.[101] In actuality, that provision simply states that, if the four conditions are met, then the information "should be taken into account." "Must use" and "should be taken into account" are not synonymous terms.

104. Annex II, paragraph 5 uses similar language, stating that even if information is not ideal in all respects, this fact alone "should not justify the authorities from disregarding it, providing the interested party has acted to the best of its ability." (emphasis added).

[101] *EC-Hormones AB Report*, para. 181.

105. 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.

106. As the panel recognized in *United States - Anti-dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip From Korea,*[102] the ordinary meaning of "should" does not impose mandatory obligations upon Member states. Therein, the Panel rejected the argument that the term "should" was the equivalent of the word "may," but agreed that in its ordinary meaning, it was a permissive rather than mandatory term.[103]

107. Thus, the language of Annex II, paragraphs 3 and 5, urges the investigating authority to take into account, or not disregard, information on the record which meets the criteria of those provisions; however, the ordinary meaning of both of these provisions does not require Members to utilize that information.

c. Paragraph 5

108. Paragraph 5 of Annex II of the AD Agreement states that

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

109. Paragraph 5 incorporates the principle that perfection is not the standard, that information with correctable errors should not be disregarded where the respondent has acted to the best of its ability.

110. The phrase "may not be ideal in all respects" is particularly relevant to this dispute. It implies that the information in question is either "ideal" in most respects or nearly ideal across the board. Nevertheless, paragraph 5 indicates that there will be situations in which the investigating authority would be justified in disregarding the information.

111. Again, the use of the term "should" in this paragraph, as indicated above, indicates that this is not a mandatory obligation in the AD Agreement.

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

[103] *SSPC from Korea* at para. 6.93 (footnote omitted). The Panel stated that the term "should" was not the equivalent of "may," because there would be no effective disciplines on the methodology selected. Thus, the Panel found that the term "should" provided an authorization for a specified, but non-mandatory, act. *See id.* at para. 6.94 and accompanying notes.

112. The phrase "provided the interested party has acted to the best of its ability" is also particularly relevant. Where the interested party has acted to the best of its ability, the fact that they were unable to provide information which was ideal in all respects should not justify disregarding that information. On the other hand, where the conditions for making a determination based on the facts available otherwise apply, the clear implication of paragraph 5 is that an investigating authority would be justified in disregarding information that is not ideal in all respects if a party has failed to act to the best of its ability. Similarly, if the information is far from ideal in most respects, paragraph 5 would have no bearing, even if the interested party has acted to the best of its ability.

d. Conclusion

113. In short, the AD Agreement provides that when a party refuses or otherwise does not supply necessary information (including the provision of incomplete, untimely or unreliable information), or significantly impedes the investigation, the investigating authority is free to use the facts available to make its determination. However, in such a case, where information was provided which is verifiable, appropriately submitted so that it can be used without undue difficulty, supplied in a timely fashion, and supplied in the requested medium, it should be taken into account, although it need not be used to calculate the margin. Additionally, even though information may not be ideal in all respects, the authorities should not disregard it if the interested party acted to the best of its ability. Conversely, if a party has failed to act to the best of its ability, then an investigating authority would be justified in disregarding information that is not ideal in all respects.

114. As we will demonstrate below, both the statute implementing the United States' WTO obligations and the final determination of the Department of Commerce with respect to SAIL are consistent with this interpretation of the AD Agreement.

C. The "Facts Available" Provisions of the U.S. Statute Do Not Violate U.S. WTO Obligations

115. India seeks to have this Panel find that sections 776(a), 782(d), and 782(e) of the Act "as such" violate Article 6.8 and Annex II, paragraph 3 of the AD Agreement.[104] Its entire argument is premised on a misinterpretation of both the obligations provided for in Article 6.8 and Annex II and those in U.S. law. As we explain below, where the AD Agreement creates obligations pertaining to the use of the facts available, the U.S. statute is consistent with those obligations. Where the AD Agreement leaves discretion with Members, the statute provides particular criteria

[104] Although India cites to three provisions in the heading to section VI.B. of their First Written Submission, the text of that section challenges only the consistency of sections 776(a) and 782(c) with the AD Agreement. *See* India's First Written Submission at paras. 130-59. Nevertheless, we discuss all three provisions for purposes of completeness.

that limit the Department's discretion to use the facts available in place of a respondent's submitted data. Since the U.S. statute does not mandate WTO inconsistent action, there is no basis for the Panel to conclude that the statute violates the AD Agreement.

1. Under Established WTO Jurisprudence, the Legislation of a Member Violates That Member's WTO Obligations Only If the Legislation Mandates Action That Is Inconsistent With Those Obligations

116. It is well established under GATT and WTO jurisprudence that legislation of a Member violates that Member's WTO obligations only if the legislation *mandates* action that is inconsistent with those obligations or precludes action that is consistent with those obligations. If the legislation provides discretion to administrative authorities to act in a WTO-consistent manner, the legislation, as such, does not violate a Member's WTO obligations.

117. The Appellate Body has explained that "the concept of mandatory as distinguished from discretionary legislation was developed by a number of GATT panels as a threshold consideration in determining when legislation as such – rather than a specific application of that legislation – was inconsistent with a Contracting Party's GATT 1947 obligations."[105] This doctrine has continued under the WTO system, as panels and the Appellate Body have continued to apply the mandatory/discretionary distinction in considering whether a Member's legislation is WTO - consistent.

118. Most recently, the panel in the *Export Restraints* case applied the doctrine in concluding that certain provisions of the U.S. countervailing duty law did not mandate action inconsistent with provisions of the *Agreement on Subsidies and Countervailing Measures*.[106] The Panel in *Export Restraints* described the mandatory/discretionary distinction as a "classical test" with longstanding historical support.[107]

2. Sections 776(a), 782(d), and 782(e) of the Act Do Not Mandate WTO Inconsistent Actions

a. The Meaning of the Facts Available Provisions Is a Factual Question That Must Be Answered by Applying U.S. Principles of Statutory Interpretation

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[105] *United States - Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, Report of the Appellate Body adopted 26 September 2000, para. 88 ("*U.S. 1916 Act AB Report*").

[106] *United States – Measures Treating Export Restraints as Subsidies*, WT/DS194/R, adopted 23 August 2001, paras. 8.4 – 8.131.

[107] *Id.* at para. 8.9.

119. A central question in this dispute is the following: Do sections 776(a), 782(d), and 782(e) of the Act mandate that Commerce reject submitted information in a manner inconsistent with Article 6.8 and Annex II of the AD Agreement? If they do not, then India's challenge to the U.S. statute "as such" must fail.

120. It is an accepted principle that questions concerning the meaning of municipal law are questions of fact that must be proven.[108] Likewise, it is equally well-established that municipal law consists not only of the provisions being examined, but also domestic legal principles that govern the interpretation of those provisions.[109] While the Panel is not bound to accept the interpretation presented by the United States, the United States can reasonably expect that the Panel will give considerable deference to the United States' views on the meaning of its own law.[110]

121. For purposes of ascertaining the meaning of sections 776(a), 782(d), and 782(e) of the Act as a matter of U.S. law, U.S. courts and agencies must recognize the longstanding and elementary principle of U.S. statutory construction that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). While international obligations cannot override inconsistent requirements of domestic law, "ambiguous statutory provisions . . . [should] be construed, where possible, to be consistent with international obligations of the United States."[111]

b. Section 776(a) of the Act Does Not Mandate WTO-Inconsistent Action

122. A comparison of section 776(a) of the Act and Article 6.8 of the AD Agreement reveals that the two provisions are largely identical, and that section 776(a) does not mandate any action that is inconsistent with Article 6.8. Article 6.8 states that:

> 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 the

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[108] *See, e.g.*, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, paras. 64, 73-74, and cases and authorities cited therein.

[109] *See, e.g., United States - Section 301-310 of the Trade Act of 1974,* WT/DS152/R, adopted 27 January 2000, para. 7.108 & n. 681 ("*U.S. 301*").

[110] *U.S. 301*, para. 7.19.

[111] *Restatement (Third) of the Foreign Relations Law of the United States*, § 114 (1987) (copy attached as US-13); and *U.S. 301*, note 681, in which the panel recognized the existence of what is known in the United States as "the *Charming Betsy* doctrine".

> facts available. The provisions of Annex II shall be observed in the application of this paragraph.

Section 776(a) in turn reads as follows:

> If–
>
> (1) necessary information is not available on the record, or
>
> (2) an interested party or any other person–
>
> (A) withholds information that has been requested by the administering authority or the Commission under this title,
>
> (B) fails to provide such information by the deadlines for the submission of the information or in the form and manner requested subject to subsections (c)(1) and (e) of section 782,
>
> (C) significantly impedes a proceeding under this title, or
>
> (D) provides such information but the information cannot be verified as provided in section 782(i),
>
> the administering authority and the Commission shall, subject to section 782(d), use the facts otherwise available in reaching the applicable determination under this title.[112]

123. As a side by side comparison of the two provisions demonstrates, the section 776(a)(2)(A) requirement to use the facts available if an interested party "withholds" information does not mandate WTO inconsistent action because Article 6.8 explicitly permits Members to use the facts available when an interested party "refuses access to" information.

124. Similarly, the fact that section 776(a)(2)(B) requires use of facts available if an interested party "fails to provide information" by the relevant deadline does not mandate WTO inconsistent action because Article 6.8 permits a Member to use the facts available if an interested party "does not provide" information within a reasonable period.

125. Moreover, the requirement in section 776(a)(2)(C) to use facts available if a party significantly impedes an authority's investigation does not mandate WTO inconsistent action because it is plainly permissible under Article 6.8 for a Member to resort to facts available in such situations.

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[112] Section 776(a) (emphasis added) (Exh. IND-26).

126. Additionally, the requirement in section 776(a)(2)(D) to disregard information that cannot be verified and use the facts available does not mandate WTO inconsistent action because only "verifiable" information should be taken into account under Article 6.8 and paragraph 3 of Annex II of the AD Agreement.

127. Finally, section 776(a) makes the use of facts available, when any one of these conditions have been met, subject to section 782(d) of the Act. Thus, the reference here to section 782(d) does not mandate WTO inconsistent action because it limits the otherwise WTO-consistent ability to use the facts available.

128. In sum, section 776(a) of the Act only requires use of the facts available in circumstances that are consistent with Article 6.8, therefore, it does not *mandate* rejection of information in a manner inconsistent with Article 6.8 of the AD Agreement. This reading of section 776(a) is further confirmed by the Statement of Administrative Action, interpreting section 776(a).[113]

c. Section 782(d) of the Act Does Not Mandate WTO Inconsistent Action

129. India claims (at para. 137) that section 782(d) of the Act does not modify the basic requirements in section 776(a) pertaining to the facts available. India's point is irrelevant because, as already discussed, section 776(a) does not mandate WTO inconsistent action. The same is true with respect to section 782(d) of the Act. Section 782(d) provides:

> (d) Deficient Submissions.--If the administering authority or the Commission determines that a response to a request for information under this title does not comply with the request, the administering authority . . . shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to

[113] With respect to section 776(a) of the Act, the SAA provides that:

> New section 776(a) requires Commerce and the Commission to make determinations on the basis of the facts available where requested information is missing from the record or cannot be used because, for example, it has not been provided, it was provided late, or Commerce could not verify the information. Section 776(a) makes it possible for Commerce and the Commission to make their determinations within the applicable deadlines if relevant information is missing from the record. In such cases, Commerce and the Commission must make their determinations based on all evidence of record, weighing the record evidence to determine that which is most probative of the issue under consideration. The agencies will be required, consistent with new section 782(e), to consider information requested from interested parties that: (1) is on the record; (2) was filed within the applicable deadlines; and (3) can be verified.

> remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this title. If that person submits further information in response to such deficiency and either–
>
> (1) the administering authority . . . finds that such response is not satisfactory, or
>
> (2) such response is not submitted within the applicable time limits,
>
> then the administering authority . . . *may*, subject to subsection (e), disregard all or part of the original and subsequent responses.[114]

130. The use of the word "may" alone demonstrates that section 782(d) of the Act is discretionary and does not *mandate* rejection of any information that would otherwise be acceptable pursuant to Article 6.8 and Annex II of the AD Agreement. As a discretionary provision, section 782(d) cannot violate U.S. WTO obligations.[115] This reading of section 782(d) is confirmed by the Statement of Administrative Action, interpreting section 782(d) of the Act.[116]

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[114] Section 782(d) (emphasis added) (Exh. IND-26).

[115] Moreover, the text of section 782(d) is substantively identical to paragraph 6 of Annex II, which states:

> If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons thereof and have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation. If the explanations are considered by the authorities as not being satisfactory, the reasons for rejection of such evidence or information should be given in any published findings.

Nothing in this language mandates the rejection of information that is otherwise consistent with Article 6.8 and Annex II.

[116] With respect to section 782(d) of the Act, the SAA (Exh. US-23) provides (at 865) that:

> New section 782(d) requires Commerce and the Commission to notify a party submitting deficient information of the deficiency, and to give the submitter an opportunity to remedy or explain the deficiency. This requirement is not intended to override the time-limits for completing investigations or reviews, nor to allow parties to submit continual clarifications or corrections of information or to submit information that cannot be evaluated adequately within the applicable deadlines. If subsequent submissions remain deficient or are not submitted on a timely basis, Commerce and the Commission may decline to consider all or part of the original and subsequent submissions. Pursuant to new section 782(f), Commerce and the Commission will provide, to the extent practicable, a written explanation of the reasons for not accepting information.

d. Section 782(e) of the Act Does Not Mandate WTO Inconsistent Action

131. Finally, nothing in section 782(e) of the Act mandates WTO inconsistent action. Under 782(e):

> (e) Use of Certain Information.--In reaching a determination under section 703, 705, 733, 735, 751, or 753 the administering authority . . . *shall not decline to consider information that is submitted by an interested party* and is necessary to the determination but does not meet all the applicable requirements established by the administering authority or the Commission if–
>
> (1) the information is submitted by the deadline established for its submission,
>
> (2) the information can be verified,
>
> (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
>
> (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority or the Commission with respect to the information, and
>
> (5) the information can be used without undue difficulties.[117]

132. The United States explained above that section 776(a) of the Act cannot mandate WTO inconsistent action because it only requires use of the facts available in circumstances that Article 6.8 permits. Section 782(e) further ensures this result by requiring the Department to consider information that would otherwise be rejected under section 776(a), if five conditions are met. In this way, section 782(e) serves to *reduce* the likelihood that the Department will resort to the facts available in a particular case; it does not *require* the Department to use the facts available in a WTO inconsistent manner. Moreover, as noted above, the discretionary provision of section 782(d) is made subject to section 782(e). Thus, even if the five requirements of section 782(e) are not met, the decision to disregard the information would remain discretionary pursuant to section 782(d). Therefore, since nothing in section 782(e) requires the Department to reject information submitted by an interested party, it cannot be viewed as *mandating* action that would be inconsistent with Article 6.8 and Annex II.

Nothing in the interpretive language calls into question the obvious discretionary nature of section 782(d).

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

133. In addition, the factors identified in section 782(e), with one exception, are substantively identical to the factors contained in Annex II, paragraphs 3 and 5, of the AD Agreement. The first factor in section 782(e) refers to "information submitted by the deadline established for its submission;" paragraph 3 of Annex II refers to "information . . . which is supplied in a timely fashion."

134. The second factor in section 782(e) refers to information that can be "verified;" Annex II, paragraph 3, refers to "information which is verifiable."

135. The fourth factor in section 782(e) refers to cases in which a 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 . . . with respect to the information"; similarly, Annex II, paragraph 5 of the AD Agreement refers to an interested party that "has acted to the best of its ability."

136. The fifth factor of section 782(e) refers to information that "can be used without undue difficulties;" similarly, Annex II, paragraph 3 identifies information "which is appropriately submitted so that it can be used in the investigation without undue difficulties."

137. Only the third factor of 782(e) – that information is "not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination" – has no identical analogue in the text of the AD Agreement, although it is plainly consistent with the goal of "objective decision-making based on facts."[118]

138. Moreover, the third factor of section 782(e) does not mandate WTO inconsistent action because paragraphs 3 and 5 of Annex II are permissive (*i.e.,* non-mandatory). Paragraph 3 is the primary analogue to section 782(e) and it provides a list of factors which, if met, lead to a permissive result (the information "should be taken into account"). Similarly, paragraph 5 provides a condition which, if met, also leads to a permissive result (the information "should not" be disregarded). With the inclusion of the third factor of section 782(e), the United States has simply clarified how it will exercise the discretion addressed in paragraphs 3 and 5. Specifically, the United States has clarified that if the conditions of paragraphs 3 and 5 have been met, along with one additional condition which is axiomatic in the AD Agreement, the United States will forego its discretion and it "*shall not decline*" to consider the information. On the other hand, if the conditions of section 782(e) have not been met then the consideration of the information will be determined pursuant to section 776(a), subject to the discretion of section 782(d), both of which, as discussed above, are WTO consistent.

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[118] *Hot-Rolled Panel Report*, para. 7.55; *see also* Article 6.6 (investigating authorities must satisfy themselves as to accuracy of submitted information.)

139. In sum, in light of the plain language of section 782(e), which specifically *limits* Commerce's discretion to reject information submitted by an interested party and closely tracks the text of Annex II, there is no basis for the Panel to conclude that section 782(e) of the Act *mandates* rejection of information that would otherwise be acceptable pursuant to Article 6.8 and Annex II of the AD Agreement.[119]

e. The Regulations Implementing Sections 776(a), 782(d), and 782(e) of the Act Confirm That These Provisions Do Not Mandate Rejection of Information In a Manner Inconsistent With Article 6.8 and Annex II of the AD Agreement

140. Finally, the text of the pertinent provision of Commerce' s regulations, 19 C.F.R. § 351.308, makes plain that application of facts available is a discretionary exercise, not a mandatory one. The relevant sections of the regulation provide as follows:

> (a) *Introduction.* The Secretary may make determinations on the basis of the facts available whenever necessary information is not available on the record, an interested party or any other person withholds or fails to provide information requested in a timely manner and in the form required or significantly impedes a proceeding, or the Secretary is unable to verify submitted information. . . .

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[119] With respect to Section 782(e) of the Act, the SAA provides (at 865):

> New section 782(e) directs Commerce and the Commission to consider deficient submissions if the following conditions are met: (1) the information is submitted within the established deadline; (2) the information is verifiable to the extent that verification is required; (3) the information is sufficiently complete to serve as a reliable basis for reaching a determination; (4) the party has acted to the best of its ability in supplying the information and meeting the requirements established by the agencies; and (5) the agencies can use the information without undue difficulties. Commerce and the Commission may take into account the circumstances of the party, including (but not limited to) the party's size, its accounting systems, and computer capabilities, as well as the prior success of the same firm, or other similar firms, in providing requested information in antidumping and countervailing duty proceedings. "Computer capabilities" relates to the ability to provide requested information in an automated format without incurring an unreasonable extra burden or expense.

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.

> (b) *In general.* The Secretary may make a determination under the Act and this Part based on the facts otherwise available in accordance with section 776(a) of the Act.
>
> [. . .]
>
> (e) *Use of certain information.* In reaching a determination under the Act and this Part, the Secretary will not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the Secretary if the conditions listed under section 782(e) of the Act are met.[120]

The use of the discretionary "may" throughout the regulations implementing section 776(a), 782(d), and 782(e) of the Act supports the conclusion that the statutory provisions are not mandatory in nature and cannot violate U.S. WTO obligations.

f. India's Argument is Based on a Misinterpretation of Sections 776(a), 782(d), and 782(e) of the Act

141. In arguing that the U.S. statutory provisions relating to the use of facts available violate the AD Agreement "as such," India misinterprets both Article 6.8 and Annex II and sections 776(a), 782(d), and 782(e) of the Act. The United States has already explained how India misinterprets Article 6.8 and Annex II (*e.g.*, by interpreting the term "information" to mean "categories of information" and "should take into account" as "must use"). Accordingly, this section of our submission will focus on India's misinterpretation of U.S. law.

142. India claims that the interaction between sections 776(a) and 782(e) mandate WTO inconsistent action by "establishing two additional conditions" that allegedly "expand the extent to which USDOC can and must use 'facts available' instead of information actually submitted."[121] India's interpretation is flawed on several grounds. First, section 776(a) only requires the use of facts available where it is permissible to do so under Article 6.8. We explained this point in detail above.

143. Second, the conditions in section 782(e) do not expand the extent to which the Department must, or even may, use the facts available. India's entire argument on this point (at paras. 146 - 152) is based on a false premise. Contrary to India's assertion, section 782(e) *contracts* the Department's ability to use the facts available by *requiring* it to consider

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[120] 19 C.F.R. § 351.308 (2000), Exh. US-22.

[121] India's First Written Submission, para. 147.

information that meets the five statutory criteria ("shall not decline to consider").[122] By requiring the Department to consider submitted information, section 782(e) makes mandatory the permissive obligation to consider information as found in paragraph 3 of Annex II (information "should be taken into account"). Thus, to the extent that section 782(e) is "mandatory"at all, it is mandatory in a way that exceeds WTO obligations.

144. Third, India claims that the third condition of section 782(e) – that the information not be "so incomplete that it cannot serve as a reliable basis for reaching the applicable determination" – does not appear in paragraph 3 of Annex II and has not been imposed by earlier panel and Appellate Body reports. Neither point indicates that section 782(e) mandates WTO inconsistent action. The absence of the third condition from paragraph 3 of Annex II simply reflects that the provision accomplishes a different purpose than section 782(e): paragraph 3 of Annex II only establishes what an authority "should" do, while section 782(e) establishes what the Department "shall" do. The absence of any panel or Appellate Body decisions on this point is easily explained by the fact that previous "facts available" cases have involved only minor gaps in a respondent's submitted information. This is the first time a panel has been faced with a situation where a respondent has failed to provide the overwhelming majority of information needed to calculate an antidumping margin.

145. Finally, India admits that "the text of Sections 776(a) and 782(e) could be interpreted as applying to individual categories of information."[123] We have discussed at length why India is wrong to interpret "information" to mean "categories of information," and we have explained why adopting such an interpretation would undermine the goal of "objective decision-making based on facts." Nonetheless, if it is possible to interpret the statute in such a manner, then there is no basis to conclude that the statute mandates WTO inconsistent action.

3. The Panel Should Reject India's Attempt to Challenge the Department's Application of Section 776(a), 782(d), and 782(e) Based on USDOC "Practice"

146. Finally, in addition to challenging sections 776(a), 782(d) and 782(e) of the Act "as such," India also seeks to challenge the provisions based on USDOC "practice."[124] This attempted challenge to U.S. "practice" consists of nothing more than individual applications of the U.S. "facts available" provisions. As the panel noted in *Export Restraints*, administrative agencies are free under U.S. law to depart from past "practice" if a reasoned explanation is given

[122] India misrepresents section 782(e) when it claims that the provision merely "permits" the Department to take information into account. *See* India's First Written Submission at para. 142.

[123] India's First Written Submission at para. 140.

[124] India's First Written Submission at paras. 153-159.

for doing so,[125] and U.S. "practice" therefore does not have "independent operational status" that can independently give rise to a WTO violation.[126] Given India's admission that "the text of Sections 776(a) and 782(e) could be interpreted as applying to individual categories of information,"[127] there is no basis for its argument that sections 776(a), 782(d) and 782(e) "as interpreted" violate Article 6.8 and Annex II, paragraph 3.

147. Furthermore, even if "practice" could be considered as a measure, India's claims regarding U.S. facts available "practice" still would not be properly before this Panel. As the United States noted before the DSB in response to India's first and second requests for a panel, India did not identify U.S. facts available "practice" in its consultation request and the United States and India did not consult with respect to U.S. "practice."[128] Accordingly, India's claim fails to conform to Articles 4.7 and 6.2 of the DSU and must be rejected for that reason alone.

D. The Department's Facts Available Determination with Regard to SAIL Was Consistent with Article 6.8 and Annex II of the AD Agreement

148. In its first submission to the Panel, India has selectively portrayed the factual record relevant to Commerce's use of facts available. As demonstrated below, the full record evidence shows that Commerce's reliance on facts available for SAIL was consistent with Article 6.8 and Annex II of the AD Agreement.

1. Commerce gave SAIL notice of the information required at the outset of the investigation, consistent with Article 6.1 of the AD Agreement.

149. In order to collect the information necessary for an anti-dumping investigation, Commerce issued its standard antidumping questionnaire to SAIL.[129] In this questionnaire, Commerce requested general information concerning SAIL's corporate structure, business practices, and the merchandise under investigation (cut-to-length steel plate) that it sells. Commerce also requested listings of its sales in India and in the United States. Because the petition contained reasonable grounds to believe or suspect that SAIL had sold steel plate below its cost of production in the home market, it was necessary for Commerce to request information regarding the cost of production of the foreign like product and the constructed value of the

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[125] *United States – Measures Treating Export Restraints as Subsidies*, WT/DS194/R, 29 June 2001, para. 8.126.

[126] *See id*.

[127] India's First Written Submission at para. 140.

[128] *See* WT/DSB/M/106, 17 July 2001, para. 50; WT/DSB/M/107, 11 September 2001, para. 126.

[129] *USDOC Initial Antidumping Questionnaire to SAIL*, Sections A, B, C and D, dated 17 March 17 1999 (Exh. US-1)(excerpts).

merchandise under investigation. Consistent with Article 6.1.1 of the AD Agreement, Commerce gave SAIL more than 30 days for reply to the questionnaire.

2. Commerce identified deficiencies in SAIL's response and gave multiple opportunities to cure, consistent with Article 6.1 of the AD Agreement

150. Throughout the course of the investigation, Commerce identified deficiencies in SAIL's questionnaire responses and gave SAIL multiple opportunities to cure the deficiencies. For example, after careful review of SAIL's initial questionnaire responses, Commerce promptly notified SAIL that "there are two deficiencies which are major and need to be emphasized here."[130] First, Commerce noted that SAIL's failure to provide necessary information meant that its responses could not be used to calculate an antidumping margin:

> The first deficiency is that the response is substantially incomplete to the point where we may not be able to use the information contained therein to calculate a margin. Repeatedly throughout the questionnaire response you make the statement that certain data are unavailable and will be submitted later. For example, you only reported a subset of all your home market sales, and we cannot determine which sales have been reported. Because of your repeated failure to provide the information requested by the questionnaire, and incompleteness of your responses to other questions, we are unable to adequately analyze your company's selling practices.

As a result, Commerce explained that its *First Deficiency Questionnaire* was necessarily limited by SAIL's incomplete submissions and that further questions would be required once SAIL's questionnaire response became more complete.[131]

151. In addition to the general overall incompleteness of SAIL's responses, Commerce noted a second major deficiency: that SAIL's section D response, in which its was required to provide Cost of production data, was overwhelmingly incomplete.[132] Commerce stated that SAIL failed to provide any explanation of its response methodology and did not provide product-specific cost information.[133] In addition to these major discrepancies, Commerce notified SAIL of numerous deficiencies and areas requiring clarification in sections A-D of its questionnaire response.[134]

152. The information SAIL provided in response to these questions continued to be deficient. Commerce's June 11, 1999, *Second Deficiency Questionnaire* identified omissions in the

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[130] *USDOC First Deficiency Questionnaire to SAIL,* dated 27 May 1999 (Exh. US-8).

[131] *Id.*

[132] *Id.*

[133] *Id.* This information was requested in Section D of the initial questionnaire.

[134] *Id.*

information necessary for its investigation.[135] Commerce requested that SAIL provide more specific information on variables reported in its home market, U.S. sales and cost databases. Commerce's request also identified inconsistencies between SAIL's narrative explanation and its reported databases, inaccurate product control numbers necessary for product matching, and other necessary information.[136]

153. On June 18, 1999, Commerce issued a *Third Deficiency Questionnaire* which focused on SAIL's failure to provide product-specific costs.[137] Subsequent to the *Third Deficiency Questionnaire*, Commerce orally advised SAIL's counsel of additional deficiencies, and memorialized these requests in writing.[138]

154. In response to SAIL's cost data submission that was filed just prior to the preliminary determination, Commerce issued a *Fourth Deficiency Questionnaire* on August 2, 1999, that identified continued deficiencies in those costs.[139] In its August 3, 1999, *Fifth Deficiency Questionnaire*, Commerce advised SAIL that there continued to be deficiencies in the section A, B, and C responses.[140] In fact, there was necessary information that was asked in the original questionnaire that SAIL had yet to provide. *See, e.g.*, Question 4: "As requested by the original questionnaire issued on March 17, 1999, please respond to Question 1-h of Section A."[141]

155. In all, Commerce issued at least five major supplemental requests for information, on May 27, June 11, June 18, August 2, and August 3, 1999; in addition, there were oral requests (memorialized in writing) made during Commerce's attempts to assist SAIL. Nevertheless, by late August 1999, as Commerce was preparing for on-site verification of SAIL's information, SAIL had still not provided significant information necessary for the Department's antidumping analysis. For example, SAIL had not provided product-specific cost information, despite having been asked for such information five months previously in the initial questionnaire.[142] To a large extent, Commerce's efforts to identify deficiencies and give SAIL an opportunity to fix them were to no avail.

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[135] *USDOC Second Deficiency Questionnaire to SAIL*, dated 11 June 1999 (Exh. US-9).

[136] *Id.* at Attach. II.

[137] *USDOC Third Deficiency Questionnaire to SAIL*, dated 18 June 1999 (Exh. US-12).

[138] *USDOC Memorandum to File: Conversations with SAIL's Counsel*, dated 7 July 1999 (Exh. US-11).

[139] *USDOC Fourth Deficiency Questionnaire to SAIL*, dated 2 August 1999 at Attachment I (Exh. US-17).

[140] *USDOC Fifth Deficiency Questionnaire to SAIL*, dated 3 August 1999 (Exh. US-18).

[141] *Id.*

[142] *USDOC First Deficiency Questionnaire to SAIL,* dated 27 May 1999 (Exh. US-8).

3. Commerce made significant efforts to provide SAIL with sufficient time to provide necessary information

156. Acting in good faith, Commerce made significant efforts to provide SAIL with sufficient time to provide the necessary information. Commerce granted SAIL's requests for information on the initial questionnaire response.[143] In addition, SAIL requested – and was granted – multiple extensions for its supplemental questionnaire responses, the effect of which was to grant significant additional time for SAIL to respond to the initial request for necessary information.[144]

157. In addition to the extensions of time that SAIL actually requested, it also unilaterally granted itself extensions. For example, on June 29, 1999, SAIL filed a response to Commerce's *First Deficiency Questionnaire* that had been due more than two weeks earlier. In rejecting the submission as untimely, Commerce warned SAIL that

> repeated throughout your submissions is the statement that certain data are unavailable and will be supplied later. These statements are not substitutes for extension requests under 352.302 of the Department's regulations.[145]

158. During the investigations, SAIL never claimed that it could not provide the information. While it advised Commerce that it was experiencing difficulties in gathering and submitting the requested information, these difficulties were typically offered to justify additional time to submit information (which the Department repeatedly granted) and were often accompanied by assurances that the information would be forthcoming. For example, in its May 11, 1999, database submission, SAIL represented that

> some of the data requested by [Commerce] is still being collected (because, e.g. it is available only in handwritten form). As soon as these data are available we will submit them to the Department and revise the diskette accordingly.

159. SAIL never indicated that it would be unable to provide a usable database; on the contrary, it promised that such a database would be forthcoming. Yet much of this information still had not been provided by the time of the preliminary determination.[146]

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[143] *See Memoranda Granting Extensions*, dated 14, 16, and 30 April 1999 (Exh. US-5)

[144] *See, e.g., Letter from USDOC to SAIL Re: Granting of Extension of Time*, dated 16 August 1999 (Exh. US-19).

[145] *Letter from USDOC to SAIL Re: Return of Untimely Information*, dated 7 July 1999 (Exh. US-14).

[146] *DOC Memorandum Re: Preliminary Determination Facts Available for SAIL*, dated 29 July 1999, at Attach. I & II (Exh. US-16).

160. Another example of Commerce's significant efforts to assist SAIL was its decision to accept major submissions of information after the preliminary determination. For example, Commerce issued its *Fourth Deficiency Questionnaire* on August 2, 1999, two weeks after the preliminary determination.[147] This action arguably disadvantaged other interested parties who rely on the preliminary determination to identify issues that will be raised in subsequent briefing.

4. Commerce was unable to satisfy itself as to the accuracy of SAIL's information

161. At no point during the investigation process was Commerce fully able to satisfy itself that SAIL's information was accurate. A significant part of the problem was that SAIL's databases remained unusable throughout the proceeding; SAIL even attempted to provide a final workable computer tape during the on-site verification – too late to be used, because Commerce officials would have had no opportunity to analyze the tape prior to conducting verification.

162. More significantly, however, was that SAIL was unable to demonstrate the accuracy of its own information. 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.[148] Commerce was unable to verify the total quantity and value of home market sales. During the on-site cost verification, SAIL was unable to reconcile costs of production to its audited financial statements.[149] 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.[150] SAIL's U.S. sales database also contained 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."[151]

5. Commerce did not have necessary information to make its final dumping determination

163. At the time of the *Final Determination*, when Commerce should have had all the information necessary to conduct a definitive anti-dumping analysis, SAIL's information was filled with fatal gaps and could not be verified. Its home market sales database remained seriously deficient, as SAIL had failed to report all of its home market sales and gross unit prices. No workable cost of production or constructed value database was ever provided. SAIL made relatively few export sales to the United States, and yet even this data contained errors. At no

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[147] *USDOC Fourth Deficiency Questionnaire to SAIL*, dated 2 August 1999 (Exh. US-17).

[148] *Sales Verification Report*, dated 4 November 1999 (Exh. US-4) (public version) .

[149] *Cost Verification Report*, dated 4 November 1999 (Exh. US-3) (public version).

[150] *Id*.

[151] *USDOC Determination of Verification Failure Memorandum*, dated 13 December 1999 (Exh. IND-16).

point did SAIL indicate that the missing information was not in its control or possession. In fact, SAIL had repeatedly indicated that it would be able to provide the information and that it could be verified. In the end, however, SAIL was able to do neither.

6. Commerce's determination that SAIL had not acted to the best of its ability prior to disregarding SAIL's information was unbiased and objective

164. The facts of the record indicate that SAIL had the ability to provide the necessary information but failed to do so. SAIL is one of the largest integrated steel producers in the world, and its records reflect that it has an established accounting system that is audited annually.[152] All of SAIL's representations during the anti-dumping proceeding suggest that SAIL itself believed it could comply with the requests for information. Given the facts on the record, an unbiased and objective investigating authority would be justified in concluding that SAIL had failed to act to the best of its ability in providing the information requested.

7. The affidavit of Albert Hayes constitutes extra-record evidence that was never presented to the Department and thus is not properly within the scope of the Panel's review

165. In its first written submission, India seeks to support its arguments using extra-record evidence that SAIL did not make available to Commerce during the antidumping investigation at issue.[153] Under the standard of review which applies to a panel's review of an investigating authority's final dumping determination, this extra-record evidence is not properly part of the factual record before the Panel. For this reason, the affidavit of Albert Hayes is not properly part of the record of this proceeding. The Panel should disregard both the affidavit and the arguments that India makes on the basis of the affidavit.[154]

a. Under Article 17.5 of the AD Agreement, a panel's review of an investigating authority's final dumping determination is limited to the facts presented to the investigating authority

166. Article 17.6 of the AD Agreement establishes a special standard of review that applies when panels examine final dumping determinations for conformity with WTO rules. Under Article 17.6(i), the role of a panel with respect to the facts in such matters is to determine "whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective." The "facts" of the matter referred to in Article 17.6(i) are "the facts made available in conformity with the appropriate domestic procedures to the

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[152] *USDOC Redetermination on Remand* (September 27, 2001) (Exh. IND-21).

[153] India's First Written Submission, paras. 30 & n. 68, 110-111, and Exh. IND-24.

[154] Specifically, paras. 107, 108, 110, and 111.

authorities of the importing Member" under Article 17.5(ii).[155] The Appellate Body has noted the "clear connection" between these two provisions and observed that "Articles 17.5 and 17.6(ii) require a panel to examine the facts made available to the investigating authority of the importing Member."[156]

167. Given the plain language of these provisions, it would not be proper for a panel to review an antidumping determination on the basis of evidence that was not made available to the investigating authority during the underlying investigation. The *United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ("*Hot-Rolled Panel Report"*) Panel discussed this point in detail:

> 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 have been made available in conformity with the appropriate domestic procedures to the authorities of the investigating country during the investigation. . . . [Article 17.5(ii)] is a specific provision directing a panel's decision as to what evidence it will consider in examining a claim under the AD Agreement. Moreover, it effectuates the general principle that panels reviewing the determinations of investigating authorities in anti-dumping cases are not to engage in *de novo* review.[157]

As the panel noted, it is "not the panel's role to collect new data or to consider evidence which could have been presented to the decision maker but was not."[158]

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[155] The administrative record is the information presented during the investigation, in accordance with Article 17.5(ii) of the AD Agreement. The "appropriate domestic procedures" of the United States investigating authorities – the Department and the United States International Trade Commission - are detailed in 19 U.S.C. § 1516a(b)(2)(A), which states that the record consists of all information "presented to or obtained by . . . the administering authority . . . during the course of the administrative proceedings, . . .; and a copy of the determination, all transcripts or records of conferences or hearings, and all notices published in the Federal Register."

[156] *Thailand - H-Beams from Poland* at paras. 117-18.

[157] *United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products From Japan*, WT/DS184/R, adopted 23 August 2001, para. 7.6 ("*Hot-Rolled Panel Report*").

[158] *Hot-Rolled Panel Report*, para. 7.7, citing *United States-Definitive Safeguard Measures on Importation of Wheat Gluten from the European Communities*, WT/DS166/R, adopted 19 January 2001, para. 8.6 ("*United States - Wheat Gluten*").

b. The Panel must disregard the affidavit of Albert M. Hayes

168. The Hayes affidavit is an especially good example of the reasons why the AD Agreement does not permit panels to review determinations using evidence that was never presented to the investigating authority. Mr. Hayes is an employee of the law firm that is representing the government of India in this matter. His affidavit was prepared especially for purposes of supporting India's arguments in this case, more than two years after Commerce issued its final determination. His views, therefore, are neither timely nor objective.

169. Furthermore, the law firm representing India in this case did not represent SAIL in Commerce's antidumping investigation. As a result, Mr. Hayes was not involved in the investigation itself, and he has no first-hand experience with the issues that arose during the investigation. He did not testify before Commerce, and he did not otherwise provide his "professional opinion" during the antidumping investigation. SAIL never submitted his methodologies to the Department, and the methodologies themselves were not subject to scrutiny by the Department or other interested parties.

170. Although SAIL did assert in its administrative brief to the agency that Commerce could modify its programming language to addresses SAIL's failure to provide accurate information on the record, it did not explain how that "correction" could be made.[159] The suggestions offered by Mr. Hayes now, as well as his three proposed "alternative" margin calculations, were never on the record of the investigation and Commerce did not have the opportunity to consider this information during the proceeding.[160]

171. Neither Mr. Hayes' affidavit nor the evidence contained therein was part of "the facts made available in conformity with the appropriate domestic procedures to the authorities of the importing Member" during the Department's antidumping investigation. As such, it would not be permissible under Articles 17.5(ii) and 17.6(i) for the Panel to take them into account when it reviews the Department's determination.

8. Conclusion

172. Based on the facts as presented to the agency, Commerce met all of its obligations under the AD Agreement prior to relying on total facts available. Commerce notified SAIL of the required information and granted it ample opportunity to present that information as provided in Article 6.1, a fact that India does not dispute.

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[159] Exh. IND-14 at 2.

[160] SAIL did propose three "alternative" calculations in its administrative brief to the agency, but none of those proposed calculations are the same calculations as those now described by Mr. Hayes.

173. Commerce also informed SAIL of the reasons that its supplied information could not be accepted, with at least five deficiency questionnaires, and additional oral requests for data that were memorialized in writing. Pursuant to those questionnaires, SAIL was provided multiple opportunities to revise, correct, and complete that information. Finally, SAIL was afforded a further opportunity to explain its position in written briefs to Commerce and participated in a public hearing. All of these actions by Commerce are consistent with Annex II, paragraph 6, a point not in dispute by India.

174. Commerce's efforts to verify the accuracy of the information supplied by SAIL prior to basing its findings on that information were consistent with Articles 6.6, 6.7 and Annex I of the AD Agreement. India never disputed that Commerce's verification procedures were proper.

175. Commerce's decision to rely on facts available was consistent with Article 6.8 of the AD Agreement. When all of the facts of record are examined here, as set forth above, it is clear that SAIL did not provide necessary information within a reasonable period. The absence of this necessary information substantially hindered Commerce's ability to conduct an antidumping duty investigation. Thus, Commerce's determination to apply facts available was consistent with Article 6.8 of the AD Agreement.

176. Commerce's determination not to rely on SAIL's information was consistent with paragraph 3 of Annex II. Paragraph 3 of Annex II requires that information "should be taken into account" if it is verifiable, can be used without undue difficulties, is supplied in a timely fashion, and, where applicable, is supplied in a medium or computer language requested by the authorities. None of these conditions applied here. First, as described above, SAIL's information could not be verified.[161] Second, SAIL's information could not be used without undue difficulty.[162] Third, SAIL's information was untimely.[163] Finally, despite indicating that it could submit workable electronic databases, SAIL was unable to do so.[164] Therefore, there was no obligation on the part of Commerce to take SAIL's information into account.

177. Commerce's determination not to rely on SAIL's information was also consistent with paragraph 5 of Annex II. Paragraph 5 of Annex II states that even though information "may not be ideal in all respects," it should not be disregarded provided that the submitting party acted to

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[161] *See USDOC Determination of Verification Failure Memorandum*, dated 13 December 1999 (Exh. IND-16).

[162] *Final Determination* at 73130 (SAIL's cost submission "was not only incomplete, but also riddled with inaccuracies to the point where SAIL's data remains unuseable") (Exh. IND-17).

[163] *See, e.g., Cost Verification Report*, dated 4 November 1999 (Untimely cost database not accepted) (Exh. US-3) (public version).

[164] *Final Determination* at 73130 ("Regarding computer tapes, repeated technical problems with the submitted data resulted in our inability to load, run, and analyze the data, despite a significant amount of time and attention from the Department") (Exh. IND-17).

the best of its ability. SAIL's information certainly was not ideal in any respect. Nevertheless, because it failed to act to the best of its ability, there was no bar to Commerce's decision to disregard the information.

178. In sum, the full record evidence shows that Commerce's reliance on facts available for SAIL in this investigation was consistent with Article 6.8 and Annex II of the AD Agreement.

E. The Department's Facts Available Determination with Regard to SAIL Did Not Violate AD Agreement Articles 2.2, 2.4, 9.3, and Article V:1 and 2 of GATT 1994

179. According to India, Commerce's failure to use SAIL's U.S. sales data resulted in the levying of an antidumping margin that violated various provisions of the AD Agreement and GATT 1994 related to making a fair comparison and imposing a duty not to exceed the margin of dumping.[165] These allegations are dependent upon India succeeding on its primary argument that Commerce acted inconsistently with its WTO obligations when it based its determination on the facts available when SAIL had failed to provide a substantial amount of the necessary information for that determination. Because India's claims based on Article 6.8 and Annex II of the AD Agreement are misplaced, India's reliance on Articles 2.2, 2.4, 9.3 and Article VI:1 and 2 of GATT 1994 likewise must fail.[166]

F. India Has Failed to Establish that the Department's Conduct of its Antidumping Investigation Violated Article 15 of the AD Agreement

180. In addition to its broad challenge to the Department's use of the facts available, India claims (at paragraphs 175-178) that the Department violated Article 15 of the AD Agreement by allegedly failing to give "special regard" to India's status as a developing country Member when it applied the facts available in calculating an antidumping margin for SAIL. India's argument misinterprets the requirements of Article 15 and misstates the facts of the case as they pertain to this issue. Accordingly, there is no basis for the Panel to find that India has established a *prima facie* case of violation of Article 15.

1. Textual Analysis of Article 15 of the AD Agreement

181. Article 15 of the AD Agreement is composed of two sentences. The first sentence states that:

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[165] India's First Written Submission at para. 174.

[166] India's claim that SAIL's margin was overstated is particularly specious. It is not possible to know what SAIL's actual dumping margin was because SAIL failed to provide the information necessary to calculate SAIL's margin. Moreover, paragraph 7 of Annex II of the AD Agreement expressly provides that if an interested party does not cooperate and thus relevant information is being withheld, this situation could lead to a result which is less favorable to the party than if the party did cooperate.

> It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement.

182. As India argued to the panel in the *Bed-Linens* case, the first sentence of Article 15 does not impose any specific legal obligation on developed country Members.[167] It does not create an obligation to elect undertakings in lieu of antidumping duties, and it does not require developed country Members to impose such duties at less than the full extent of dumping. It also does not create an obligation to use different antidumping calculation methodologies based on whether the imports at issue originate in a developed country Member or a developing country Member. By its plain terms, the first sentence of Article 15 applies solely to the application of antidumping measures, not to the calculation of antidumping margins. Since India focuses its argument on the second sentence of Article 15, we will not discuss the first sentence further.

183. The second sentence of Article 15 states that:

> Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties when they would affect the essential interests of developing country Members.

There are three aspects of the second sentence of Article 15 that govern the substantive obligation contained therein. First, the obligation itself is limited to "exploring" the "possibility" of constructive remedies before applying antidumping duties. Nothing in the provision requires Members to accept such remedies in lieu of applying antidumping duties.[168]

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[167] *See European Communities - Antidumping Duties on Imports of Cotton-type Bed Linens from India,* WT/DS141/R, adopted 30 October 2000, para. 6.220 ("*Bed-Linens*"). The panel itself offered no views on the matter, observing that "[t]he parties are in agreement that the first sentence of Article 15 imposes no legal obligations on developed country Members." *Id.* at n. 85.

[168] *See Bed-Linens*, para. 6.233 (noting that "the concept of 'explore' clearly does not imply any particular outcome. . . . Article 15 imposes no obligation to actually provide or accept any constructive remedy that may be identified and/or offered."); *see also EC-Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, ADP/137, 4 July 1995 (hereinafter "*Cotton Yarn*"), in which a GATT panel interpreting the second sentence of Article 13 of the GATT Antidumping Code (Article 15's historical predecessor), concluded that:

> If the application of anti-dumping measures "would affect the essential interests of developing countries," the obligation that then arose was to explore the "possibilities" of "constructive remedies." It was clear from the words "possibilities" and "explored" that the investigating authorities were not required to adopt the constructive remedies merely because they were proposed.

Cotton Yarn, para. 584 (emphasis added). The panel also found that "there was no obligation to enter into the constructive remedies, merely to consider the possibility of entering into constructive remedies." *Id.*, para. 589.

184. Second, the obligation in the second sentence of Article 15 pertains solely to a developed country Member's consideration of remedies other than the application of antidumping duties. There is no basis in the text of the provision for an interpretation that would require a Member to consider alternative methodologies for calculating antidumping margins.[169] As the *Bed-Linens* panel concluded when it rejected India's argument that a Member must explore constructive remedies before imposing provisional measures, the term "anti-dumping duties" in Article 15 "refers to the imposition of definitive anti-dumping measures at the end of the investigative process."[170]

185. Finally, the obligation to explore constructive remedies arises only when the application of antidumping duties in a particular case "would affect the essential interests" of the developing country Member at issue. This conclusion is inescapable in light of the explicit language of the provision. To read the language otherwise – for example, by interpreting it to require Members to explore the possibility of constructive remedies in all investigations involving developing country Members – would ignore the strict limiting clause and thus violate the principle of interpretation known as the principle of treaty effectiveness (whereby an interpreter is not to assume that terms in a text are purely redundant and have no meaning).[171] The inclusion of the limiting clause is a critical part of the negotiated balance of rights and obligations underlying Article 15 that cannot be ignored.

186. Accordingly, when a developing country Member seeks the application of Article 15 in an antidumping investigation, it must first demonstrate to the investigating authority that there are "essential interests" implicated in the case that would be affected by the application of antidumping duties.[172] If it fails to do so, the obligation in the second sentence is not triggered, and the Member conducting the investigation is under no obligation to explore alternatives to the imposition of antidumping duties.

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[169] *See Bed-Linens*, para. 6.228 (noting that "Article 15 refers to 'remedies' in respect of injurious dumping.").

[170] *Bed-Linens*, para. 6.231 (emphasis added).

[171] As the Appellate Body has noted, "one of the corollaries of the 'general rule of interpretation' in the Vienna Convention is that interpretation must give meaning and effect to all terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility." *United States - - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, at 21.

[172] The term "essential" implies a very high standard for the level of national interest which the developing country Member must demonstrate would be affected by the application of antidumping duties. For example, since the payment of antidumping duties will always have some negative effect on one or more producer/exporters in a Member country, a situation which would affect the "essential" interests of the Member itself must mean something significantly more than that.

2. There is No Basis to Conclude that the Department Violated Article 15 because India Never Claimed that Applying Antidumping Duties to SAIL Would Affect Its Essential Interests

187. India claims (at paras. 175-178) that the Department violated Article 15 by allegedly failing to consider exploring the possibility of applying a price undertaking or other alternative remedy to SAIL in lieu of applying antidumping duties. As the record of the Department's investigation demonstrates, however, neither SAIL nor India ever suggested to the Department that applying antidumping duties to SAIL would affect India's essential interests. For that matter, neither party ever suggested that India had essential interests that were implicated by the investigation. SAIL's letter to the Department raising the possibility of entering into a suspension agreement also makes no reference to India's (or its own) essential interests.[173] Accordingly, there is no legal basis for the Panel to conclude that the Department has acted inconsistently with Article 15 by applying antidumping duties to SAIL.

3. Notwithstanding India's Failure to Demonstrate that Applying Antidumping Duties to SAIL Would Affect India's Essential Interests, the Department Did Explore the Possibility of Constructive Remedies

188. In spite of its failure to demonstrate that applying antidumping duties to SAIL would affect its essential interests, India argues (at para. 176) that the Department violated the second sentence of Article 15 by failing to explore the possibility of a suspension agreement (undertaking) in lieu of applying antidumping duties to SAIL. Even if the Department was obliged to make such an exploration in the present case, the factual record of the investigation demonstrates that it did so.

189. As we explain in the Factual Background section of this submission, SAIL's outside legal counsel filed a letter with the Department on July 30, 1999 that raised the possibility of entering into a suspension agreement. The Department then invited SAIL to meet with Department officials to discuss the matter. On August 31, 1999, SAIL's outside legal counsel met with the Assistant Secretary for Import Administration – the ultimate decision maker in the case – and expressed their views. The Assistant Secretary noted that Commerce would consider the request. He also noted that suspension agreements are rare and require special circumstances – circumstances which he believed might not exist at the present time in the case. Although India fails to note that the meeting took place, the Department memorialized its contents in an August

[173] *Letter from SAIL's Counsel to USDOC Re: Request for a Suspension Agreement*, dated 29 July 1999 (Exh. IND-10).

31, 2001 *ex parte* memorandum to the file. A copy of that memorandum is attached to this submission.[174]

190. As the complainant on this matter, India has the burden of establishing a *prima facie* case of violation of Article 15. It has failed to do so. Its claim (at para. 177) that the Department's mind was "closed" to the possibility of a suspension agreement is contradicted by record evidence demonstrating that the Department met with SAIL to discuss its suspension agreement proposal and that the Department stated it "would consider" the proposal. Its claim that the Department was unwilling to consider an agreement because of opposition from the domestic industry and the U.S. Congress is not supported by the administrative record, and SAIL did not suggest during the investigation that the *ex parte* memorandum was in any way inaccurate or incomplete. Its claim that the Department "did not treat SAIL any differently . . . when it issued final anti-dumping duties" is irrelevant because Article 15 "imposes no obligation" on developed country Members to accept "constructive remedies" even if they are identified or offered.[175] Finally, its suggestion that the Department was required to make a written response to SAIL's proposal finds no support in the text of Article 15.[176]

191. For all of these reasons, there is no factual or legal basis to find that the Department has acted inconsistently with Article 15.

V. CONCLUSION

192. For the foregoing reasons, the United States respectfully submits that India's claims are without merit and the Panel should reject them.

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[174] *USDOC Memorandum to the File re: Ex-Parte Meeting with Counsel for SAIL Regarding Possible Suspension Agreement*, dated 31 August 1999 (Exh. US-22).

[175] *Bed-Linens*, para. 6.233.

[176] India also suggests that the Department should have raised the possibility of applying a "lesser duty" to SAIL. United States law has no "lesser duty rule," and the AD Agreement does not require Members to offer such a remedy if they decide against accepting a suspension agreement. *See* Article 9.1 of the AD Agreement (stating that the amount of an antidumping duty is to be left to the authorities of importing Members).