

Notices

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This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Materials Processing Equipment Technical Advisory Committee; Notice of Open Meeting

The Materials Processing Equipment Technical Advisory Committee will meet on March 6, 2003 at 9 a.m. in Room 3884 of the Herbert C. Hoover Building, 14th Street between Pennsylvania and Constitution Avenues, NW., Washington, DC. The Committee advises the Office of the Assistant Secretary for Export Administration with respect to technical questions that affect the level of export controls applicable to materials processing equipment and related technology.

Agenda

1. Introductions and opening remarks.
2. Approval of minutes from previous meeting.
3. Presentation of papers or comments by the public.
4. Review of proposals submitted by the MPETAC.
5. Discussion on 5-axis issues.

The meeting will be open to the public and a limited number of seats will be available. Reservations are not accepted. To the extent that time permits, members of the public may present oral statements to the Committee. Written statements may be submitted at any time before or after the meeting. However, to facilitate distribution of public presentation materials to Committee members, the Committee suggests that presenters forward the public presentation materials two weeks prior to the meeting date to the following address: Ms. Lee Ann Carpenter, Advisory Committees MS: 3876, Bureau of Industry and Security, U.S. Department of Commerce, Washington, DC 20230.

For more information contact Lee Ann Carpenter at 202-482-2583.

Dated: February 13, 2003.

Lee Ann Carpenter,

Committee Liaison Officer.

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DEPARTMENT OF COMMERCE

International Trade Administration

[A-533-817]

Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measure on Certain Cut-to-Length Carbon-Quality Steel Plate Products From India

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: Pursuant to section 129 of the Uruguay Round Agreements Act, which governs administrative actions following World Trade Organization Panel reports, the Department of Commerce is issuing a second determination with respect to the antidumping duty investigation on cut-to-length carbon-quality steel plate from India. This determination is in conformity with the findings of a World Trade Organization Panel report, as adopted by the World Trade Organization Dispute Settlement Body.

FOR FURTHER INFORMATION CONTACT: Howard Smith, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482-5193.

The Applicable Statute

Unless otherwise indicated, all citations to the statute are references to the Tariff Act of 1930, as amended (the Act). In addition, unless otherwise indicated, all citations to Department of Commerce's regulations are references to the provisions codified at 19 CFR Part 351 (2001). Citation to "section 129" refers to section 129 of the Uruguay Round Agreements Act, codified at 19 U.S.C. 3538.

Background

On December 29, 1999, the Department of Commerce (Commerce) published a final determination of sales

at less than fair value in the antidumping duty investigation on cut-to-length carbon-quality steel plate (subject merchandise) from India.¹ During this proceeding, the sole Indian respondent, the Steel Authority of India, Ltd. (SAIL), acknowledged serious deficiencies with respect to its home market sales, cost of production, and constructed value information. However, SAIL argued that Commerce should use its submitted U.S. sales price information in the margin calculation, by comparing the prices of these sales to information concerning normal value from the petition.² Commerce rejected this request and based the dumping margin on total facts available.³ In determining to reject the partial information submitted by SAIL and rely entirely on the facts available, Commerce found that the information submitted did not meet any of the criteria established by section 782(e) of the Act. This included a finding, pursuant to section 782(e)(5), that the information could not be used without undue difficulties.⁴ Commerce's explanation for this finding was that "the U.S. sales database contained errors that, while in isolation were susceptible to correction, however when combined with the other pervasive flaws in SAIL's data lead us to conclude that SAIL's data on the whole is unreliable."⁵

Subsequently, the Government of India requested the establishment of a World Trade Organization (WTO)

¹ *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon-Quality Steel Plate Products from India*, 64 FR 73126 (December 29, 1999) (*Final Determination*). Following an affirmative injury determination issued by the United States International Trade Commission, Commerce issued an antidumping duty order on this product. See *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*, 65 FR 6585 (February 10, 2000).

² *Final Determination* at 73128.

³ Commerce selected, as facts available, the highest of the margins alleged in the petition, 72.49 percent.

⁴ *Final Determination* at 73127. Section 782(e)(5) lists, as a factor to consider in determining whether to accept information that does not meet all applicable requirements, whether "the information can be used without undue difficulties." The corresponding provision in the AD Agreement, which was the focus of the Panel ruling in this case, is at Annex II, paragraph 3.

⁵ *Id.*

dispute settlement panel (the Panel) to consider, *inter alia*, Commerce's rejection of SAIL's U.S. sales data in this case. The Panel issued its report on June 28, 2002.⁶ The WTO Dispute Settlement Body (DSB) adopted the findings in this report on July 29, 2002. On August 30, 2002, the United States informed the DSB that it would implement the recommendations of the DSB in a manner consistent with its WTO obligations.

On December 10, 2002, pursuant to section 129(b)(2) of the Uruguay Round Agreements Act (URAA), the U.S. Trade Representative (USTR) requested that Commerce issue a determination that would render its original antidumping determination in this matter not inconsistent with the findings of the Panel.

On December 26, 2002, Commerce issued its draft determination in this proceeding. See draft Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measure on Certain Cut-to-Length Carbon-Quality Steel Plate Products from India (Draft Determination) which is on file in the Central Records Unit, room B-099 of the main Commerce building. On January 2, 2003, SAIL submitted comments regarding Commerce's Draft Determination. On January 6, 2003, Bethlehem Steel Corporation and United States Steel Corporation (Petitioners) submitted rebuttal comments. A summary of these comments and rebuttal comments, as well as Commerce's response are included in this determination. On February 3, 2003, the USTR held consultations with Commerce and the appropriate congressional committees with respect to this determination. On February 7, 2003, the USTR directed Commerce to implement this determination.

WTO Panel Findings and Conclusions

In its report, the Panel found that the U.S. statutory provisions concerning use of facts available are not inconsistent with Article 6.8 and paragraphs 3, 5, and 7 of Annex II of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (AD Agreement).⁷ However, the Panel found that the application of these provisions in this case was inconsistent with Article 6.8 and paragraph 3 of Annex II of the AD Agreement.

Specifically, the Panel found that the United States had not provided a "legally sufficient justification" in the final determination for refusing to take into account U.S. sales price information submitted by SAIL and basing the dumping margin entirely on the facts available.⁸ The focus of any such justification, according to the Panel, should be on whether the information met the requirements set forth in paragraph 3, Annex II, of the AD Agreement, taking into account the interrelationship between the partial data at issue (U.S. sales data) and the other elements of the dumping analysis, for which, both sides agree, SAIL did not submit reliable information. In this regard, the Panel noted "we consider to be critical the question of whether information which itself may satisfy the criteria of paragraph 3 can be used without undue difficulties in light of its relationship to rejected information."⁹

The Panel did not consider as sufficient the statement in the final determination, without elaboration, that the U.S. database could not be used without undue difficulties because the errors in that database, when combined with the other pervasive flaws in SAIL's data, indicate the unreliability of SAIL's data on the whole.¹⁰ The Panel noted Commerce's acknowledgment that the errors in the U.S. database "in isolation were susceptible to correction,"¹¹ and stated that, in light of this, Commerce needed to provide a more adequate explanation for its decision to reject this information: "[W]e consider it imperative that the investigating authority explain, as required by paragraph 6 of Annex II, the basis of a conclusion that information which is verifiable and timely submitted cannot be used in the investigation without undue difficulties."¹²

Although the United States explained, during the panel proceedings, why it could not use SAIL's data without undue difficulty, the Panel focused on the need for Commerce itself to provide the explanation in its antidumping determination. "Even assuming we were persuaded by the United States" arguments before us that USDOC could have made the decision posited [to reject the U.S. sales data as unduly

difficult to use based on arguments made in dispute settlement], there is nothing in the record to indicate to us that it did make such a decision in the case."¹³

The Panel refused a request by India that it suggest the United States implement this finding by recalculating the dumping margin taking into account the U.S. price data at issue, stating that "[i]n this case, we see no particular need to suggest a means of implementation, and therefore decline to do so."¹⁴ The Panel added that "the choice of means of implementation is decided, in the first instance, by the Member concerned."¹⁵ The Panel then issued a general recommendation that the DSB request the United States "to bring its measure into conformity with its obligations under the AD Agreement,"¹⁶ which the DSB subsequently adopted.

Implementation

In order to bring the measure at issue into conformity with the AD Agreement, in this section 129 determination, we are providing the "legally sufficient explanation" that the Panel found lacking in the initial determination regarding why the U.S. sales information at issue could not be used "without undue difficulties" in calculating a dumping margin under the AD Agreement. The following "legally sufficient explanation" fully explains why Commerce is under no obligation to take SAIL's U.S. sales transactions into account in establishing a dumping margin for SAIL. Nonetheless, in implementing the DSB's recommendation, Commerce has given careful attention to the Panel's reasoning and has determined that it is appropriate, under the particular facts of this case, to give consideration to the U.S. sales information in a limited manner in determining the appropriate facts available margin to assign to SAIL. Each of these aspects of our implementation is explained below.

In its report, the Panel defined the term "undue difficulties" as those that "go beyond what is otherwise the norm in an anti-dumping investigation,"¹⁷ as opposed to difficulties that arise routinely during the course of an investigation and which are within the ambit of the "two-way process involving joint effort" between investigating authorities and respondents established

⁸ Panel Report, paragraph 8.1.

⁹ Panel Report, paragraph 7.61 (emphasis added). The Panel here refers to the "undue difficulties" standard contained in paragraph 3, Annex II of the AD Agreement. As noted, a corresponding standard is set forth at section 782(e)(5) of the U.S. antidumping law.

¹⁰ Panel Report, paragraph 7.69.

¹¹ *Final Determination* at 73127. See also Panel Report, paragraph 7.71.

¹² Panel Report, paragraph 7.74.

¹³ Panel Report, paragraph 7.69 (emphasis original).

¹⁴ Panel Report, paragraph 8.8.

¹⁵ *Id.*

¹⁶ Panel Report, paragraph 8.6.

¹⁷ Panel Report, paragraph 7.72.

⁶ United States—Antidumping and Countervailing Measures on Steel Plate from India, WT/DS206/R (June 28, 2002) (Panel Report), full text available at www.wto.org.

⁷ Panel Report, paragraph 8.2(a).

by Annex II of the AD Agreement.¹⁸ In situations involving the potential use of partial information submitted where other data has been rejected, the Panel focused on:

[W]hether a conclusion that some information fails to satisfy the criteria of paragraph 3, and thus may be rejected, can in any case justify a decision to reject other information submitted which, if considered in isolation, would satisfy the criteria of paragraph 3. We consider that the answer to this question is yes, in some cases, but that the result in any given case will depend on the specific facts and circumstances of the investigation at hand.¹⁹

While the Panel noted the fact-specific nature of this determination, it also discussed some general considerations regarding the interconnection between databases that could apply across cases. The Panel states, for instance, that:

We consider * * * that *the various elements, or categories, of information necessary to an antidumping determination are often interconnected*, and a failure to provide certain information may have ramifications beyond the category in which it falls. For instance, a failure to provide cost of production information would leave the investigating authority unable to determine whether sales were in the ordinary course of trade, and further unable to calculate a constructed normal value. Thus, a failure to provide cost of production information might justify resort to facts available with respect to elements of the determination beyond just the calculation of cost of production. *Moreover, without considering any particular "categories" of information, it seems clear to us that if certain information is not submitted, and facts available are used instead, this may affect the relative ease or difficulty of using the information that has been submitted and which might, in isolation, satisfy the requirements of paragraph 3 of Annex II.*²⁰

The Panel's hypothetical example underscores the impact that the failure to provide one element of necessary information (e.g., cost of production) can have on the usability of other elements. While the Panel does not take the view that a failure to provide one element of information automatically allows for disregarding all other information submitted,²¹ it makes clear in the report that the absence of one element can result in the failure of other elements to meet the requirements of paragraph 3:

[I]t may indeed be the case that a failure to provide *one* element of information undermines the usability of information that is submitted, *making it unduly difficult to*

use the information submitted in making determinations. * * * A panel reviewing such a decision must be able to conclude that the investigating authority considered the relationship between the missing information and the information submitted, and concluded in light of that relationship, the fact that one element of information was not submitted justified the conclusion that information submitted did not satisfy the criteria of paragraph 3 of Annex II.²²

The Panel's concern with the impact that a single missing element of information can have on other elements of information is particularly relevant to the investigation at issue because, in this investigation, SAIL failed to provide usable information not just for one of the major elements of information required, but for three out of four major elements of information required in an antidumping proceeding, namely home market sales, cost of production, and constructed value information.²³ As a result, the question under the facts of this determination is not whether SAIL's failure to provide a single element renders unusable the remainder of the information, but whether SAIL's failure to provide potentially usable information for all elements except U.S. sales renders this sole remaining element unduly difficult to use.

In addressing this question, Commerce has considered both the Panel's definition of undue difficulties as those that go "beyond what is otherwise the norm" in an antidumping case and its hypothetical example involving the impact of missing cost of production information on the relative ease or difficulty of using home market sales data. While certain minor data deficiencies may be the norm in antidumping cases, the absence of any information regarding normal value and production costs far exceeds that norm and, therefore, the difficulties faced in dealing with the absence of such information are far beyond the norm. As the Panel noted, a lack of usable cost of production information "*would leave the investigating authority unable to determine whether sales were in the ordinary course of trade and further unable to calculate a constructed normal value.*" Thus, a failure to provide cost of production information might justify resort to facts available with respect to elements of the determination beyond just the calculation of cost of

production."²⁴ In the hypothetical example posed by the Panel, the investigating authority would be unable to determine whether the partial information submitted satisfies the requirements of the AD Agreement (e.g., whether home market sales are in the ordinary course of trade as required by Article 2.1). Thus, the hypothetical suggests that one missing element of the information required for an antidumping analysis may render other elements of information submitted "unduly difficult" to use in a way that turns fundamentally on whether it is possible to calculate a meaningful and accurate dumping margin under these circumstances, given the interrelationship between the elements involved and the requirements of the AD Agreement.²⁵

Therefore, in considering whether it is unduly difficult to use SAIL's U.S. sales data under these circumstances, we have taken into account whether any such calculation would produce a meaningful and accurate result, in light of the interrelationship between elements in a dumping analysis, as well as the degree of difficulty that would be incurred in order to use the U.S. data to calculate a dumping margin in accordance with Article 2 of the AD Agreement. Applying these considerations to the facts of this case, we find that it is unduly difficult to use SAIL's U.S. data because it is not possible to calculate a dumping margin in the manner envisioned by the AD Agreement where the respondent has provided potentially usable information on only a single element of the dumping analysis, and where even that information has substantial flaws. Instead, any dumping margin determined under these circumstances is a facts available margin. We address this in more detail below.

In light of the relationship between SAIL's missing information (home market sales, cost of production, and constructed value data) and the information submitted (the U.S. sales data), SAIL's flawed U.S. data could not be used without undue difficulty in calculating a dumping margin in the manner envisioned by the AD Agreement.

In the context of the AD Agreement, which defines dumping based on a

²⁴ Panel Report, paragraph 7.60 (emphasis added).

²⁵ We note that the current proceeding represents a particularly extreme version of the scenario described by the Panel. In this proceeding, SAIL did not merely fail to provide cost of production information, rather it failed to provide any usable information for any of the required elements other than U.S. sales, and even its U.S. sales information is incomplete.

¹⁸ Panel Report, paragraph 7.73.

¹⁹ Panel Report, paragraph 7.62.

²⁰ Panel Report, paragraph 7.60 (emphasis added).

²¹ Id.

²² Panel Report, paragraph 7.67 (emphasis added).

²³ We refer to normal value, export price, cost of production, and constructed value information as major "elements" of information for an antidumping analysis, consistent with statements by India and the Panel. See, e.g., Panel Report, Paragraph 7.54–7.55.

comparison of the export price with the normal value of sales made in the ordinary course of trade, the information necessary for conducting an antidumping analysis includes prices of the subject merchandise in the domestic market of the exporting country, export prices of the subject merchandise, and, where needed (such as this case), cost of production and constructed value information.²⁶ A competent authority conducting an antidumping analysis requires each of these elements of information in order to calculate a respondent's dumping margin. Thus, there is an explicit relationship between SAIL's U.S. sales database and the information that was absent in this case: SAIL's home market price, cost of production, and constructed value information.²⁷ With such fundamental aspects of data entirely absent—a scenario that goes well beyond the norm in an antidumping investigation—a fair and objective investigating authority could reasonably determine that SAIL's U.S. sales database could not be used without undue difficulty in calculating a dumping margin consistent with the AD Agreement.

The interrelationship between elements in a dumping analysis starts with the basic measure of dumping in Article 2.1 of the AD Agreement—export sales prices compared with normal value—and extends to the numerous requirements throughout Article 2 establishing the circumstances under which export prices and normal value may be compared. This interrelationship is underscored by the fact that the basic purpose of each of the four major data elements required for a dumping analysis that come into play under Article 2—comparison market prices, export prices, cost of production, and constructed value—is defined in terms of its comparison with other elements. None of these elements serves any purpose in isolation, separate from the other aspects of the dumping analysis, and each requires adjustments that take into account the element against which it is being compared.

First, upon selection of the appropriate comparison market, sales in

that market must be analyzed to determine whether they are in the ordinary course of trade, as required by Article 2.1 of the AD Agreement. Most typically, this requires a comparison between the sales price element and the cost of production element in the comparison market, as governed by Article 2.2.1 and Article 2.2.1.1. As with other aspects of the analysis, this "cost test" does not concern the cost of production element alone but instead requires a comparison between major data elements, as illustrated by the hypothetical example discussed in the Panel Report. Where it is determined, under the criteria established in Article 2.2, that comparison market sales are not in the ordinary course of trade, constructed value may be used as normal value.

The prices of sales in the comparison market made in the ordinary course of trade must then be compared with sales prices to the export market. This in turn requires a comparison of a number of characteristics related to sales in each market, as described in Article 2.4. Sales in the two markets must be matched according to the physical characteristics of the products sold, and adjustment for any differences in physical characteristics must be made. Sales in the two markets must also be compared at the same level of trade, where possible, and an adjustment for any differences in level of trade must be made where such differences are demonstrated to affect price comparability. Article 2.4 requires that comparisons between markets be made at the ex-factory level, necessitating an adjustment for transportation and certain warehousing expenses in the two markets. Article 2.4 also requires that due allowance be made for a number of other differences that affect price comparability, including differences in terms and conditions of sale, taxation, quantities, and any other differences that affect price comparability. For instance, in the case of export price sales, such as the U.S. sales at issue, Commerce would normally adhere to the Article 2.4 requirement that an adjustment be made for differences in terms and conditions of sale by adding direct selling expenses incurred on export price sales to normal value, while deducting home market selling expenses. This adjustment would also be made when normal value is based on constructed value.²⁸ A proper comparison under Article 2 of the AD Agreement requires that we account for all such differences between

the export and comparison markets in our analysis.

It is important to note that these provisions of the AD Agreement enable the investigating authority to arrive at an accurate determination of whether dumping is occurring in the export market. For example, it is often the case that selling to an export market involves a higher level of expenses than selling in the domestic market, and such differences in terms and conditions of sale must be taken into account in determining whether price discrimination between markets is occurring.

In this case, the absence of usable data for all elements other than U.S. sales, along with the deficiencies relating to SAIL's U.S. sales data, leaves Commerce unable to conduct a meaningful dumping analysis under the framework discussed above. There are no usable home market sales prices for SAIL. Moreover, the sales expense and production cost information relating to those sales are not usable. Therefore, it is not possible to compare any of SAIL's home market sales prices to its U.S. sales prices. Any analysis attempted without such data would leave the investigating authority unable to adjust for all differences in terms and conditions of sale between U.S. sales and normal value. Further, it is not possible to match sales at the same level of trade, or to adjust for differences in levels of trade where price comparability is affected. In fact, the types of difficulties encountered by Commerce in attempting to conduct an antidumping analysis, given the pervasive reporting failures in this case, may be illustrated by examining the Article 2.4 requirements with respect to level of trade.

In its questionnaire response SAIL claimed that it made home market sales at multiple levels of trade, some of which corresponded more closely to the U.S. level of trade than others.²⁹ In order to meet the Article 2.4 requirements regarding levels of trade, we normally would first seek to compare U.S. sales with home market sales made at the same level of trade. If price comparisons could not be made at the same level of trade, we would attempt to compare U.S. and home market sales at different levels of trade while considering whether a level-of-trade adjustment was appropriate. If we were unable to make any price comparisons (because, for instance, home market sales were below the cost of production) and had to rely on

²⁶ In this case, cost of production and constructed value information was needed because Commerce was conducting a cost investigation.

²⁷ In fact, the explicit linkages between each of these elements needed to calculate an accurate dumping margin are reflected in SAIL's own questionnaire responses. In SAIL's export price response, for example, SAIL referred Commerce to its cost of production response—which SAIL and the Government of India have conceded was never usable—for cost information needed to measure differences in physical characteristics between products. SAIL Section C Response, at C-45 and C-50 (May 10, 1999).

²⁸ Many of the same allowances and adjustments must be made when constructed value is used.

²⁹ SAIL section B questionnaire response, B32–B35 (May 10, 1999).

constructed value, we would still take level of trade into account in calculating the selling expense and profit elements of constructed value. None of these considerations with respect to the comparison between U.S. prices and normal value is possible because SAIL provided no usable home market sales, cost of production, or constructed value information. Under these circumstances, despite the investigating authority's efforts, there is no way of knowing the extent to which a dumping margin is affected, upward or downward, by comparisons made at different levels of trade. Simply put, it is not possible, under these facts, to engage in partial, selective "gap-filling" of the sort that would allow for a meaningful determination of dumping as defined in the AD Agreement.

SAIL's argument that a dumping margin should be calculated by comparing its U.S. prices to the constructed value offered in the petition does nothing to remedy the data deficiencies that make calculating a dumping margin in the manner envisioned by the AD Agreement impossible. Moreover, there is no way to know whether substituting the constructed value from the petition for SAIL's entire home market sales and cost databases would adequately represent SAIL's home market pricing practices. Because the use of SAIL's U.S. sales information with the constructed value in the petition would not result in a dumping calculation as outlined in the AD Agreement, it would represent a facts available margin.

The facts available nature of the dumping determination under these circumstances is further underscored by the substantial flaws in the sole element of information for which SAIL provided potentially usable data. SAIL's U.S. data excluded necessary information on variable and total costs of manufacturing and misreported information on matching criteria for a majority of U.S. sales. At a minimum, as envisioned by Article 2 of the AD Agreement, Commerce would need the missing cost information in order to adjust for any differences in physical characteristics between the products SAIL sold in the United States and the product for which constructed value was calculated in the petition.³⁰ Those

physical characteristics include specification/grade, quality, thickness, and width of the subject merchandise. Differences in these physical characteristics affect both prices and costs of the subject merchandise. However, there is no way to make such adjustments using SAIL's reported data because the variable and total cost information is missing in its entirety from the U.S. database, and thus is not susceptible to correction. Moreover, while there were other errors in SAIL's U.S. sales database that "in isolation were susceptible to correction * * *" (*Final Determination* at 73127), correcting these errors would still leave the gap created by the missing U.S. cost information. This is because SAIL provided no usable cost of production or constructed value information anywhere on the record. This is not a case where Commerce could correct those errors that were susceptible to correction and fill the gap created by missing variable and total cost information on some U.S. sales by using accurate information provided on other U.S. sales. Nor can Commerce adapt cost information provided in the cost of production or constructed value portions of the response to fill the gap created by the missing information on U.S. sales, since there is no such information on the record that was capable of being verified. Thus, while some of the deficiencies in SAIL's U.S. sales information were correctable, these deficiencies, when combined with other missing U.S. sales information and an unusable home market sales and cost response made using SAIL's U.S. sales information in a dumping calculation unduly difficult. The lack of variable and total cost information for SAIL in this case leaves Commerce unable to calculate a dumping margin in accordance with the provisions of Article 2 of the AD Agreement (e.g., unable to make adjustments for differences in physical characteristics), which is similar to the position in which the investigating authority would find itself in the hypothetical example provided by the Panel where "a failure to provide cost of production information would leave an investigating authority unable to determine whether sales were made in the ordinary course of trade, and further unable to calculate a constructed normal value."³¹

Nevertheless, throughout the course of the dispute settlement proceeding,

differences in physical characteristics using SAIL's cost information, information which SAIL failed to provide.

³¹ Panel Report, paragraph 7.60.

the Government of India—on behalf of SAIL—offered a variety of proposals for using SAIL's U.S. sales data in the dumping analysis, including corrections to the data that it suggested could be employed. As noted by Commerce in its statements before the Panel, the first of India's proposals employed methodologies that were contrary to the requirements of the AD Agreement, while its latter proposals conceded that no more than 30 percent of SAIL's U.S. sales was even potentially suitable for comparison to the normal value in the petition.³² However, even if 30 percent of SAIL's U.S. sales was potentially suitable for comparison to the normal value in the petition because it matched the product for which the petition normal value was calculated, for the reasons noted above, any such comparison would not result in a dumping margin calculated in accordance with the provisions of Article 2 of the AD Agreement. Moreover, such a comparison would not account for the majority of SAIL's U.S. sales, and would require Commerce to determine the dumping margin for the majority of U.S. sales in a different manner. In light of these circumstances, the use of SAIL's U.S. sales data in calculating a dumping margin in accordance with the AD Agreement presented undue difficulties that Commerce was not obligated to undertake.

This position is reasonable, not only from the standpoint of satisfying the "unduly difficult" requirement of paragraph 3 of Annex II of the AD Agreement, but also when viewed in the broader context of the goals of the AD Agreement. The AD Agreement establishes certain requirements in making a comparison between export price and normal value in order to ensure that price discrimination is accurately measured. As explained above, a comparison of actual U.S. sales prices to a constructed value from the petition does not result in the accurate measurement of dumping envisioned by Article 2 because such a comparison

³² Commerce explained that the initial proposal submitted by India is flawed in many respects. In addition to offering new facts not presented to Commerce in the underlying investigation, this proposal offers three flawed options: (1) An option that would have Commerce use a below-cost price as normal value, contrary to the requirement that sales be in the ordinary course of trade; (2) an option that would have Commerce compare export prices to a normal value based on a different product without making an adjustment for differences in physical characteristics, contrary to the requirement in Article 2.4 of the AD Agreement that such an adjustment be made; and (3) an option that would have Commerce calculate a margin for SAIL using a small subset of SAIL's U.S. database.

³⁰ Normally, adjustments for differences in physical characteristics would not need to be made when comparing U.S. prices to constructed values because respondents provide the constructed value for each product sold to the United States. In this case, however, we have a constructed value for only one product. Thus, any comparison of SAIL's U.S. sales prices to the constructed value in the petition would have to take into account the adjustment for

cannot meet the requirements established by that Article.

For these reasons, we conclude that a calculation that cannot be made in accordance with Article 2 of the AD Agreement cannot somehow be more accurate than resorting to facts available. The facts available used in the investigation in this case are based on information from the petition, as authorized by Annex II, paragraph 1 of the AD Agreement. While the facts available contained in the petition may not account for all of the adjustments described above because it is based on information "reasonably available" to the party preparing the petition, it is not appropriate to assume, as SAIL has done, that the dumping margin derived from the petition overstates the margin that Commerce would have calculated if SAIL had provided all of the information requested by Commerce. There is no basis for determining whether this assumption is true. For example, there is no basis to know whether the petition normal value exceeds—or is even as high as—SAIL's actual normal value. Given the limited information available to a petitioner, a petition may understate the appropriate margin for any given respondent.³³ Thus, there is no way to determine the actual dumping margin with any degree of accuracy, or to know whether the respondent may benefit by not providing reliable information regarding its prices and costs. In cases such as this, given the nature of the information available, it may be appropriate to rely on information that ensures the respondent has not benefitted from its failure to provide information that is under its control. This is particularly true in this case, where the limited amount of potentially usable data submitted by SAIL raises basic questions owing to the respondent's control of the information relating to a dumping proceeding.

Nevertheless, ultimately, as the Panel indicated,³⁴ the determination whether to use or disregard partial information is a fact-specific judgment that must be made from case to case. The circumstances surrounding our disregard of SAIL's information are set forth above, and are clearly distinguishable from the majority of Commerce's determinations involving

facts available. In most cases, Commerce accepts imperfect, but adequate data supplied by respondents, and uses facts available to fill data gaps which are not so significant as to render a calculated dumping margin meaningless. Thus, in such cases where a respondent supplies information, Commerce does not, as a matter of practice, "disregard all of the information submitted and base its determination exclusively on the facts available."³⁵ Rather, as the Panel notes, Commerce frequently relies on "partial" facts available with respect to some piece of information that is not submitted by a party.³⁶ In deciding whether the use of total or partial facts available is appropriate, it is necessary to consider all of the objectives of the AD Agreement, namely, to calculate dumping margins in accordance with the guidelines of Article 2, provide respondents with the procedural protections established by the Agreement, and at the same time provide the appropriate incentives for parties that control the information necessary to perform a dumping calculation to supply that information in the most timely and accurate manner possible. The application of these principles under these facts supports the conclusion that it was unduly difficult to use SAIL's substantially incomplete data in a dumping calculation consistent with the AD Agreement.

Accordingly, in determining SAIL's dumping margin, Commerce is not required to attempt to match SAIL's U.S. sales data to a normal value derived from the petition given the "undue difficulties" that such usage would present within the meaning of paragraph 3, Annex II of the AD Agreement. Therefore, the use of total facts available is appropriate and consistent with the AD Agreement.

At the same time, in selecting the most appropriate basis for facts available, we have considered the Panel's recognition of the positive aspects of SAIL's U.S. information relative to the complete reporting failure on all other elements.³⁷ In light of this

aspect of the Panel's decision, and in response to comments submitted by the parties (see below), we have determined that under these circumstances it is appropriate to consider average U.S. pricing levels, as reported by SAIL, in selecting the most appropriate facts available, as described below.

The petition contains two sources of information on U.S. sales prices: (1) An offer for sale of subject merchandise (price quote); and (2) average unit values (AUVs) of subject merchandise based on U.S. import data provided by the Bureau of Census. In the final determination, Commerce relied solely on the price quote in deriving the dumping margin of 72.49 percent. However, upon reconsideration of this information in light of the minimum and average pricing levels of all Indian exports to the United States during the period of investigation (POI) (particularly the pricing levels of identical merchandise), which in this case are indicated by the U.S. sales information provided by SAIL since it accounted for virtually all Indian exports during the POI, we have determined that this price quote is atypical by comparison with all comparable prices. Therefore, it is appropriate under the circumstances of this case to consider the other information on the record regarding U.S. prices during the POI. Normally, in such circumstances, we would turn to the other source of petition information for use as facts available. However, in this case, the use of AUV data from the petition would benefit the respondent for its reporting failures because use of this data yields a lower margin compared with the flawed data submitted by SAIL. Accordingly, under the particular circumstances of this case, we have determined that it is appropriate, as facts available, to compare SAIL's average net U.S. price during the POI to the normal value provided in the petition. This average U.S. price is net of average movement expenses. See the memorandum Facts Available Analysis for the Section 129 Determination—Certain Cut-to-Length Carbon-Quality Steel Plate from India (Facts Available Memorandum), dated concurrently with this determination.

With respect to the facts available used for normal value, we note that SAIL's complete failure to report usable information for normal value leaves only one source of information appropriate for use in determining normal value, namely the constructed value information from the petition. The only other source of information on the record concerning normal value—home market price information from the

³³ See, e.g., *Notice of Final Determination of Sales at Less Than Fair Value: Steel Concrete Reinforcing Bars from the People's Republic of China*, 66 FR 33522, 33523 (2001) (petition margin understated margin calculated for respondent); *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod from Japan*, 63 FR 40434, 40435 (1998) (same).

³⁴ Panel Report, paragraph 7.62.

³⁵ Panel Report, paragraph 7.60. The Panel here is summarizing its view of the U.S. position regarding what an investigating authority may do under the AD Agreement. In our view, it is important to emphasize that Commerce does not, in the majority of its cases, use any such discretion to disregard all information submitted.

³⁶ Panel Report, paragraph 7.92.

³⁷ Panel Report at paragraph 7.71. While the Panel explicitly declined to determine whether SAIL's U.S. sales information was unduly difficult to use, it did find that the information met other requirements of paragraph 3, Annex II, namely that it was "capable of being verified" and "supplied in a timely fashion."

petition—is inappropriate due to a properly documented allegation that home market sales were made below the cost of production. However, because, as acknowledged by SAIL, the constructed value from the petition is suitable for comparison with no more than 30 percent of the company's U.S. sales, it is appropriate to base the total facts available margin, in part, on a constructed value adjusted to account for physical differences for the remaining non-identical U.S. sales. In this case, an adjustment applied in accordance with the guidelines of Commerce's normal practice adequately accounts for the physical differences. Specifically, we increased the constructed value from the petition by 20 percent of the total cost of manufacturing included in that value. This is in keeping with Commerce's normal practice of considering products whose variable costs differ by no more than 20 percent of the cost of manufacturing to be comparable. Hence, we have adjusted the cost of manufacturing to account for the physical differences, and revised the constructed value used as total facts available for non-identical merchandise.

Therefore, the redetermined facts available margin is based on a comparison of SAIL's average net U.S. price with the constructed value from the petition, adjusted, where appropriate, for physical differences in merchandise. Due to the lack of usable information on the record, the dumping margin determined under these circumstances departs from our normal methodology in a number of respects. First, unlike a calculated dumping margin, this redetermined facts available margin is an aggregate calculation that does not involve model-specific comparisons between U.S. prices and normal value. Aside from the general classification described above regarding the percentage of SAIL's U.S. sales involving "identical" vs. "similar" merchandise compared with the product used in determining normal value, the calculation involves no analysis of product characteristics and no "model match" methodology, as is normally done in accordance with section 771(16) of the Act.³⁸ As such, there is no reliance on any of the individual product characteristic fields developed for this investigation and included in the antidumping questionnaire, such as specification/grade, quality, thickness, and width of the subject merchandise, since the lack

of home market sales and cost information precludes comparisons made on the basis of these characteristics.

In addition, we have not matched sales by level of trade or otherwise adjusted for differences in levels of trade. As discussed above, the Department normally compares sales made at the same level of trade, where possible, pursuant to section 773(a)(1)(B)(i) of the Act. For comparisons involving different levels of trade, a level-of-trade adjustment is made pursuant to section 773(a)(7)(A) where it is established that any difference in levels of trade: (i) Involves the performance of different selling activities and (ii) is demonstrated to affect price comparability based on a pattern of consistent price differences between sales at different levels of trade in the country in which normal value is determined. While SAIL reported in the narrative portion of its questionnaire response that it made home market sales at multiple levels of trade, some of which corresponded more closely to the U.S. level of trade than others, the lack of any usable home market sales data precludes taking level of trade into account with respect to product matching and in determining whether a level-of-trade adjustment is appropriate.

Finally, while we were able to adjust SAIL's U.S. prices for inland freight expenses, thereby arriving at an ex-factory price as required by section 772(c)(2)(A) of the Act, the lack of any usable expense information relating to home market sales precluded making any adjustments for differences in circumstances of sale between the two markets, as required by section 773(a)(6)(C)(iii). See Facts Available Memorandum for more details on the dumping margin determined for SAIL in this section 129 determination.

While the margin determined for SAIL in this redetermination cannot, therefore, be considered a calculated margin in accordance with our normal methodology, we believe that this facts available margin reflects the Panel's recognition of the positive aspects of SAIL's participation in the investigation, while continuing to ensure that SAIL has not benefitted by its failure to provide usable information. The following section contains interested parties' comments and Commerce's response.

Interested Party Comments

Comment 1

SAIL argues that Commerce's Draft Determination fails to implement the DSB's rulings and recommendations.

SAIL notes that Commerce states in its Draft Determination that the Panel Report found "the United States had not provided a legally sufficient justification for its underlying determination."

However, SAIL maintains that the actual Panel finding was that the United States had acted inconsistently with the AD Agreement by refusing to take SAIL's U.S. sales data into account and making its determination regarding SAIL's dumping margin solely on the basis of facts available. Therefore, to the extent that Commerce continues to calculate SAIL's dumping margin entirely on the basis of facts available, it fails to implement the DSB decision. According to SAIL, during the Panel process, the United States attempted to provide a "legally sufficient justification" for its original determination, but the Panel considered it *post hoc* rationalization. In SAIL's view, nothing in the Panel Report suggests that repeating this rationalization in greater detail could constitute adequate implementation of the DSB ruling.

Petitioners disagree with SAIL's representations. According to Petitioners, the Panel did not accept Commerce's rejection of SAIL's U.S. sales data based solely on the flaws in the other information submitted; nor did the Panel accept India's claim that if one category of information is submitted, it must be used. Rather, the Panel decided that categories of information may be interconnected such that failure to provide certain information may make it unduly difficult to use other data. Moreover, with respect to undue difficulties, Petitioners maintain that the Panel was not only referring to difficulties in physically calculating a margin, but "to methodological difficulties that preclude the calculation of a dumping margin in a manner consistent with the AD Agreement." Petitioners note that the Panel found the issue of "undue difficulties" to be a highly fact-specific issue and stated that where these situations arise, the investigating authority is required to adequately explain why information that is timely and verifiable cannot, because of its relationship with rejected data, be used without undue difficulty. In this case, the Panel found Commerce failed to provide this explanation with respect to SAIL's U.S. sales data. Petitioners argue that the Panel would not have indicated that Commerce could provide a legally sufficient justification for rejecting the U.S. sales data if the Panel was requiring that those data be used. Moreover, in rejecting SAIL's request that the Panel instruct Commerce to recalculate the dumping

³⁸ The corresponding AD Agreement provision for comparisons and adjustments discussed in this section is Article 2.4.

margin using its reported U.S. sales data, the Panel left the decision regarding the manner of implementation to the United States and held open the option of explaining how in this case the rejected data undermined the usability of the company's U.S. sales data. Petitioners maintain that Commerce analyzed the facts of this case and concluded that "the absence of usable data for all elements other than U.S. sales, along with deficiencies relating to the U.S. sales themselves, leaves Commerce unable to conduct a meaningful dumping analysis * * *." Therefore, according to Petitioners, Commerce's Draft Determination is in full compliance with the Panel's decision and should not be modified in any way.

Petitioners further urge Commerce to reject SAIL's contention that providing a legally sufficient justification constitutes an improper *post hoc* rationalization. According to Petitioners, the Panel described the justification for rejecting U.S. sales data offered by Commerce in its written submissions to the Panel as *post hoc* rationalization because this justification was not on the record of the investigation and was offered only in argument in written submissions to the Panel.

As described above, Petitioners maintain that the Panel's decision permits Commerce to implement the findings in this WTO proceeding by explaining why SAIL's U.S. sales data is not usable. Petitioners argue that the justification in the section 129 determination for rejecting the U.S. sales data is being provided by the investigating authority to explain its determination and cannot possibly be considered a *post hoc* rationalization.

Commerce's Position

The Panel stated that, under the AD Agreement, before rejecting an element of information submitted and resorting to facts available, the investigating authority must evaluate the element of information in question against the criteria of paragraph 3 of Annex II. Observing that "the various elements, or categories of information necessary to an anti-dumping determination are often interconnected, and a failure to provide certain information may have ramifications beyond the category in which it falls," the Panel also acknowledged that the failure to provide one element of information can undermine the usability of information which, if considered in isolation, would satisfy the criteria of paragraph 3.³⁹

Further, the Panel took the view that the decision to reject, as unduly difficult to use, information that otherwise satisfies the criteria of paragraph 3 is a case-specific determination that is dependent upon the facts and circumstances of the investigation at hand. With respect to such a decision, the Panel noted that "[c]ritical to such a determination is the explanation by the investigating authority of its conclusion in this regard."⁴⁰

On this point, the Panel noted that while Commerce argued, during the Panel proceeding, that SAIL's U.S. sales data could not be used without undue difficulty, there was no evidence to indicate that Commerce had made such a determination on the record of this case. Based on the facts and explanations on the case record, the Panel stated that Commerce's decision to reject the U.S. sales information lacked a valid basis under paragraph 3, Annex II, of the AD Agreement. The Panel concluded its review by recommending that the United States bring its measures "into conformity with its obligations under the AD Agreement."

Therefore, consistent with the Panel Report, providing the legally sufficient justification that the Panel found lacking in Commerce's initial determination regarding why U.S. sales information could not be used without undue difficulties brings the decision into conformity with the United States' obligation under the AD Agreement. Moreover, as the justification is an integral part of Commerce's new determination, it cannot be viewed as *post hoc* rationalization.

Comment 2

According to SAIL, Commerce essentially offers two reasons for concluding that it is unduly difficult to use the U.S. sales data at issue in its dumping calculations, both of which SAIL rejects. SAIL maintains that the Panel already rejected one of Commerce's reasons for not using the U.S. sales data in a dumping calculation, namely that there is an explicit relationship between the U.S. data and the unusable information and thus it is reasonable to reject the U.S. sales data when fundamental aspects of other data are entirely absent. Specifically, SAIL maintains that this argument was addressed and dismissed by the Panel when it determined that the United States had not applied the criteria of paragraph 3, Annex II, of the AD Agreement to SAIL's U.S. sales data and found Commerce's decision

rejecting this sales information lacked a valid basis under the AD Agreement. SAIL notes that in accepting the argument that the absence of certain data may affect the usability of other data, the Panel stated that:

To accept that view does not necessarily require the further conclusion, espoused by the United States, that in a case in which any 'essential element' of requested information is not provided in a timely fashion, the investigating authority may disregard all the information submitted and base its determination entirely on facts available. To conclude otherwise would fly in the face of one of the fundamental goals of the AD Agreement as a whole, that of ensuring that objective determinations are made, based to the extent possible on facts.⁴¹

SAIL contends that despite this statement, Commerce continues, in its Draft Determination, to argue that there is an "explicit relationship" among essential data elements and to assume that where any "essential element" of data is missing, Commerce is always justified in rejecting the other "essential element" entirely. SAIL notes that Commerce attempts to defend this position by stating that, based on the dumping analysis called for under Article 2 of the AD Agreement, none of these elements serves any purpose in isolation. SAIL asserts, however, that even dumping margins based on facts available must be calculated under Article 2 of the AD Agreement. SAIL claims that the only difference between a determination based on facts available and one based on the respondent's submitted data is that the information is derived from different sources. SAIL also notes that, regardless of the source of the information, the dumping margin is calculated by comparing the export price with normal value.

Furthermore, SAIL argues that if Commerce cannot calculate a margin under Article 2 of the AD Agreement when one side of the equation is based on facts available, it is difficult to see how Commerce can establish a margin when both sides of the equation are based on facts available. Although Commerce attempts to address this point by noting that all the information required for each Article 2 adjustment may not be reasonably available to the petitioner, SAIL states that this argument underscores the obvious fact that the petition data is less accurate than the data submitted by SAIL and that Commerce has failed to "undertake a degree of effort" in selecting among the data in the petition and submitted by the respondent in order to calculate the most accurate

³⁹ Panel Report, paragraph 7.60.

⁴⁰ Panel Report, paragraph 7.67.

⁴¹ Panel Report, paragraph 7.60.

possible margin under Article 2.” SAIL maintains that Commerce “cannot fulfill its obligations under the AD Agreement simply by asserting that the use of actual data does not necessarily provide any meaningful information.” SAIL emphasizes that 30 percent of its U.S. sales involve a product that is identical to the one for which constructed value was calculated in the petition and could be used to calculate a dumping margin for SAIL that is more accurate and reliable than that based entirely on the petition.

SAIL also notes that Commerce resorts to its old defense in arguing that a respondent should not be allowed to “game” the process by selectively submitting information, but maintains that this claim is groundless in this case. SAIL states that it did not attempt to manipulate the system and there is nothing in the Panel Report to suggest that this argument provides a legally sufficient basis under the AD Agreement to discard SAIL’s U.S. sales information.

SAIL observes that Commerce’s second claim that it cannot use the U.S. data because the data are flawed attempts to disavow Commerce’s statement in the investigation that errors in the U.S. sales database “in isolation were susceptible to correction” by suggesting that there are other flaws in that database. However, other than claiming that missing cost of production data is a flaw in the U.S. sales database, SAIL contends that Commerce’s claim simply recycles its initial argument and does not provide a reason for rejecting use of the U.S. data.

Finally, SAIL notes that nothing in the Draft Determination suggests that Commerce even attempted to calculate a margin using its verified U.S. sales data. SAIL, therefore, asserts that Commerce is in no position whatsoever to state that it “encountered undue difficulty in doing so.”

Petitioners disagree with SAIL’s claim that Commerce continues to assume that “where any ‘essential element’ is missing (in this case, home market sales and cost), the investigating authority is always justified in rejecting the other ‘essential element’ entirely.” Petitioners argue that Commerce has discussed the data shortcomings in this case extensively and explained why the reported U.S. sales data is unduly difficult to use. In Petitioners’ view, Commerce has shown that “the egregiousness of the situation here goes well beyond the norm for an antidumping investigation.” Moreover, it is Petitioners’ contention that “the interrelationship between elements in a dumping analysis is embodied in the numerous requirements throughout

Article 2 of the AD Agreement.” Petitioners maintain that to conduct a fair comparison between markets, Article 2 requires that due allowance be made for differences in physical characteristics, level of trade and other terms and conditions of sale, taxation, and quantities that affect price comparability. Petitioners note that as Commerce has shown in its Draft Determination, SAIL failed to provide any usable home market sales, constructed value or adjustment data that could be used as the basis for establishing normal value in calculating a dumping margin. Petitioners assert that this lack of usable data, under the facts of this case, render it unduly difficult to use SAIL’s reported U.S. sales data in a manner consistent with Article 2. Petitioners’ argue that this is “the end of the matter as far as the reported U.S. sales data are concerned—Commerce may reject those data and use total facts available.” Commerce then has the discretion to choose the facts available to apply.

Petitioners also counter SAIL’s claims that the margin calculation in the petition suffers from the same flaws as a margin calculated using SAIL’s U.S. sales data and that the U.S. sales data are the most accurate data on the record. Petitioners argue, as described above, that once Commerce rejects the U.S. sales data as unduly difficult to use, it may use, and has the discretion to choose, the form of total facts available to apply. This includes use of the petition margin, just as Commerce did in this case. Petitioners claim that Commerce is under no obligation to prove that the facts available it selects are the most accurate. At the same time, Petitioners assert that “it does not follow that the petition margin is less accurate than the margin calculated by comparing SAIL’s reported U.S. sales data to the normal value in the petition. Without SAIL’s actual data, it is impossible to determine what its true margin is.” Petitioners point out that if SAIL’s assertions about the presumed lack of accuracy in a petition margin were accepted, Commerce would never be able to use the petition margin as facts available—an argument that is flatly inconsistent with the AD Agreement.

Petitioners dispute SAIL’s claim that some of its U.S. sales can be compared to the petition’s normal value arguing that the merchandise is not identical as SAIL purports and that Commerce cannot adjust for differences in the terms and conditions of these sales. Even if this were not the case, Petitioners further assert that this alternative is not acceptable as it

violates the object and purpose of the AD Agreement in calculating accurate and reliable margins. Petitioners argue that this approach forces Commerce to calculate a dumping margin for SAIL based on only a minority of its U.S. sales and would be subject to manipulation and abuse by respondents. Petitioners respond to SAIL’s claim that there is no evidence of “gaming” the process in this case by arguing that it would not be proper to require Commerce to produce such evidence. In Petitioners’ view, “to do so would require Commerce to assess the respondent’s mental state—something that is literally impossible to do.”

Finally, Petitioners argue that SAIL’s assertion that “Commerce does not provide any evidence that it actually attempted to use the verified U.S. sales data and encountered ‘undue difficulties’ in doing so” is irrelevant and should be dismissed. Petitioners note that this argument “focuses solely on the difficulties, or lack thereof, in physically calculating a dumping margin using its submitted data. As noted above, however, the Panel’s decision goes not only to the difficulties in physically calculating a dumping margin, but also to the methodological difficulties in determining the dumping margin in a manner consistent with the AD Agreement.” Petitioners maintain that Commerce has determined “that it is unduly difficult to use the U.S. sales data, including by using the methodologies proposed by India in the proceedings before the Panel, in a manner that is consistent with the AD Agreement.” As Commerce’s Draft Determination is fully consistent with the Panel’s decision, SAIL’s arguments should be rejected.

Commerce’s Position

The Panel has not rejected the position taken by Commerce in this determination, namely that SAIL’s U.S. data is unduly difficult to use based on both its attendant errors and its relationship with the home market and cost of production information that SAIL failed to provide. Rather, the Panel found that Commerce incorrectly rejected SAIL’s U.S. data on the basis of problems with other information without addressing whether the U.S. sales price information could be used without undue difficulties. In this determination, we have identified the undue difficulties attendant in calculating a dumping margin in the manner envisioned by the AD Agreement, including the fact that no more than 30 percent of SAIL’s U.S. sales are even potentially suitable for comparison to the product that served

as the basis for normal value in the petition. In its proposals, SAIL focuses on the ease of calculating a dumping margin using its U.S. sales data and the proffered calculation methodologies. However, as explained above, these methodologies do not, and cannot, account for all of the adjustments required under Article 2 of the AD Agreement because the information needed to make those adjustments is not on the record. Moreover, the proposed methodologies do not remedy the lack of useable home market sales and cost of production information. Where a lack of information precludes the investigating authority from applying the provisions of Article 2 of the AD Agreement in calculating a dumping margin, the authority is justified in finding potentially useable elements of information unduly difficult to use and basing the margin on facts available. The Panel recognized this possibility when it noted that a failure to provide cost of production information would leave the investigating authority unable to determine whether sales were in the ordinary course of trade (a requirement of Article 2) and thus might justify resorting to facts available with respect to elements of the determination beyond just the calculation of the cost of production.

Furthermore, although SAIL contends that Commerce continues to believe it is justified in always entirely rejecting the other "essential elements" of a response where any "essential element" is missing, Commerce has not in fact made this statement. The present case is not one where an "essential element" is missing; it is a case where *all* of the "essential elements" of information provided by SAIL, other than U.S. sales data, were unverifiable, with substantial additional problems associated with the U.S. data. Thus, of all the information requested by Commerce in order to calculate a margin in accordance with Article 2 of the AD Agreement, only a small portion of one of the "essential elements" of information needed to calculate a dumping margin is even potentially useable.

In the instant case, it was not possible for Commerce to conduct an antidumping duty calculation, as envisioned by the AD Agreement, because SAIL failed to properly provide most of the information that Commerce required. This was despite Commerce's actions throughout the investigation to actively cooperate with SAIL in obtaining an accurate and complete record with which to calculate a dumping margin in accordance with Article 2 of the Agreement. In fact, during the course of the investigation

Commerce provided SAIL with no fewer than five opportunities after its initial questionnaire response to supply useable information. As a result, the information-gathering stage of the investigation extended from the issuance of the initial questionnaire up to the preliminary determination, and was then further extended to a period well after the preliminary determination until just prior to verification. Each submission by SAIL required a separate analysis to identify remaining problems that needed to be addressed in order for the information to be used to calculate a dumping margin. Despite the numerous difficulties encountered prior to the preliminary determination, and the fact that Commerce made its preliminary determination entirely on the basis of facts available, Commerce sought to establish the validity of the information submitted by SAIL through extensive verifications undertaken in India. Thus, SAIL is incorrect when it claims that Commerce's position in this matter demonstrates that it fails to recognize the obligation on the investigating authority to cooperate with interested parties in making its determination and undertake a degree of effort in selecting between petition and respondent data for purposes of calculating a margin. Rather than failing to recognize this obligation, Commerce went far beyond what is otherwise the norm in an antidumping investigation in its attempts to base its determination on the data provided by SAIL.

Section 129 Determination Margin

As a result of the redetermination of the facts available margin, the following margins exist:

Exporter/Manufacturer	Margin (percentage)
Steel Authority of India, Ltd.	42.39
All Others	42.39

Continuation of Suspension of Liquidation

In accordance with section 129(c)(1)(B) of the URAA, we will instruct the U.S. Customs Service (Customs) to continue to suspend liquidation of all imports of certain cut-to-length carbon-quality steel plate from India that are entered, or withdrawn from warehouse, for consumption on or after February 7, 2003, the date on which the USTR directed Commerce under subsection (b)(4) of that section to implement this section 129 determination. Customs shall continue to require a cash deposit equal to the estimated amount by which the normal value exceeds the U.S. price. The

suspension of liquidation instructions will remain in effect until further notice.

The section 129 determination "all others" rate is the new cash deposit rate for all exporters of subject merchandise, other than SAIL. This rate will apply to entries of subject merchandise entered, or withdrawn from warehouse, for consumption on or after February 7, 2003.

This section 129 determination is issued and published in accordance with section 129(c)(2)(A) of the URAA.

Dated: February 7, 2003.

Faryar Shirzad,

Assistant Secretary for Import Administration.

[FR Doc. 03-3993 Filed 2-18-03; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

[A-570-848]

Notice of Preliminary Results of Antidumping Duty New Shipper Review: Freshwater Crawfish Tail Meat From the People's Republic of China

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) is conducting a new shipper review of the antidumping duty order on freshwater crawfish tail meat from the People's Republic of China (PRC) in response to a request from Weishan Zhenyu Foodstuff Co., Ltd. (Weishan Zhenyu). The period of review (POR) is September 1, 2001, through February 28, 2002.

The preliminary results are listed below in the section titled "Preliminary Results of Review." Interested parties are invited to comment on these preliminary results. (See the "Preliminary Results of Reviews" section of this notice.)

EFFECTIVE DATE: February 19, 2003.

FOR FURTHER INFORMATION CONTACT:

Douglas Kirby or Thomas Gilgunn, Office of AD/CVD Enforcement VII, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482-3782 or (202) 482-4236, respectively.

Background

The Department published in the **Federal Register** an antidumping duty order on freshwater crawfish tail meat from the People's Republic of China on September 15, 1997. (See *Notice of*