

by Annex II of the AD Agreement.<sup>18</sup> 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.<sup>19</sup>

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.*<sup>20</sup>

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,<sup>21</sup> 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.<sup>22</sup>

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.<sup>23</sup> 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."<sup>24</sup> 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.<sup>25</sup>

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

<sup>24</sup> Panel Report, paragraph 7.60 (emphasis added).

<sup>25</sup> 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.

<sup>18</sup> Panel Report, paragraph 7.73.

<sup>19</sup> Panel Report, paragraph 7.62.

<sup>20</sup> Panel Report, paragraph 7.60 (emphasis added).

<sup>21</sup> Id.

<sup>22</sup> Panel Report, paragraph 7.67 (emphasis added).

<sup>23</sup> 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.