

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).