

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.<sup>30</sup> 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."<sup>31</sup>

Nevertheless, throughout the course of the dispute settlement proceeding,

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

<sup>31</sup> 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.<sup>32</sup> 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

<sup>32</sup> 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.

<sup>30</sup> 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