

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.<sup>33</sup> 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,<sup>34</sup> 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."<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup> 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

<sup>33</sup> 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).

<sup>34</sup> Panel Report, paragraph 7.62.

<sup>35</sup> 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.

<sup>36</sup> Panel Report, paragraph 7.92.

<sup>37</sup> 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."