

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.