

margin using its reported U.S. sales data, the Panel left the decision regarding the manner of implementation to the United States and held open the option of explaining how in this case the rejected data undermined the usability of the company's U.S. sales data. Petitioners maintain that Commerce analyzed the facts of this case and concluded that "the absence of usable data for all elements other than U.S. sales, along with deficiencies relating to the U.S. sales themselves, leaves Commerce unable to conduct a meaningful dumping analysis * * *." Therefore, according to Petitioners, Commerce's Draft Determination is in full compliance with the Panel's decision and should not be modified in any way.

Petitioners further urge Commerce to reject SAIL's contention that providing a legally sufficient justification constitutes an improper *post hoc* rationalization. According to Petitioners, the Panel described the justification for rejecting U.S. sales data offered by Commerce in its written submissions to the Panel as *post hoc* rationalization because this justification was not on the record of the investigation and was offered only in argument in written submissions to the Panel.

As described above, Petitioners maintain that the Panel's decision permits Commerce to implement the findings in this WTO proceeding by explaining why SAIL's U.S. sales data is not usable. Petitioners argue that the justification in the section 129 determination for rejecting the U.S. sales data is being provided by the investigating authority to explain its determination and cannot possibly be considered a *post hoc* rationalization.

Commerce's Position

The Panel stated that, under the AD Agreement, before rejecting an element of information submitted and resorting to facts available, the investigating authority must evaluate the element of information in question against the criteria of paragraph 3 of Annex II. Observing that "the various elements, or categories of information necessary to an anti-dumping determination are often interconnected, and a failure to provide certain information may have ramifications beyond the category in which it falls," the Panel also acknowledged that the failure to provide one element of information can undermine the usability of information which, if considered in isolation, would satisfy the criteria of paragraph 3.³⁹

Further, the Panel took the view that the decision to reject, as unduly difficult to use, information that otherwise satisfies the criteria of paragraph 3 is a case-specific determination that is dependent upon the facts and circumstances of the investigation at hand. With respect to such a decision, the Panel noted that "[c]ritical to such a determination is the explanation by the investigating authority of its conclusion in this regard."⁴⁰

On this point, the Panel noted that while Commerce argued, during the Panel proceeding, that SAIL's U.S. sales data could not be used without undue difficulty, there was no evidence to indicate that Commerce had made such a determination on the record of this case. Based on the facts and explanations on the case record, the Panel stated that Commerce's decision to reject the U.S. sales information lacked a valid basis under paragraph 3, Annex II, of the AD Agreement. The Panel concluded its review by recommending that the United States bring its measures "into conformity with its obligations under the AD Agreement."

Therefore, consistent with the Panel Report, providing the legally sufficient justification that the Panel found lacking in Commerce's initial determination regarding why U.S. sales information could not be used without undue difficulties brings the decision into conformity with the United States' obligation under the AD Agreement. Moreover, as the justification is an integral part of Commerce's new determination, it cannot be viewed as *post hoc* rationalization.

Comment 2

According to SAIL, Commerce essentially offers two reasons for concluding that it is unduly difficult to use the U.S. sales data at issue in its dumping calculations, both of which SAIL rejects. SAIL maintains that the Panel already rejected one of Commerce's reasons for not using the U.S. sales data in a dumping calculation, namely that there is an explicit relationship between the U.S. data and the unusable information and thus it is reasonable to reject the U.S. sales data when fundamental aspects of other data are entirely absent. Specifically, SAIL maintains that this argument was addressed and dismissed by the Panel when it determined that the United States had not applied the criteria of paragraph 3, Annex II, of the AD Agreement to SAIL's U.S. sales data and found Commerce's decision

rejecting this sales information lacked a valid basis under the AD Agreement. SAIL notes that in accepting the argument that the absence of certain data may affect the usability of other data, the Panel stated that:

To accept that view does not necessarily require the further conclusion, espoused by the United States, that in a case in which any 'essential element' of requested information is not provided in a timely fashion, the investigating authority may disregard all the information submitted and base its determination entirely on facts available. To conclude otherwise would fly in the face of one of the fundamental goals of the AD Agreement as a whole, that of ensuring that objective determinations are made, based to the extent possible on facts.⁴¹

SAIL contends that despite this statement, Commerce continues, in its Draft Determination, to argue that there is an "explicit relationship" among essential data elements and to assume that where any "essential element" of data is missing, Commerce is always justified in rejecting the other "essential element" entirely. SAIL notes that Commerce attempts to defend this position by stating that, based on the dumping analysis called for under Article 2 of the AD Agreement, none of these elements serves any purpose in isolation. SAIL asserts, however, that even dumping margins based on facts available must be calculated under Article 2 of the AD Agreement. SAIL claims that the only difference between a determination based on facts available and one based on the respondent's submitted data is that the information is derived from different sources. SAIL also notes that, regardless of the source of the information, the dumping margin is calculated by comparing the export price with normal value.

Furthermore, SAIL argues that if Commerce cannot calculate a margin under Article 2 of the AD Agreement when one side of the equation is based on facts available, it is difficult to see how Commerce can establish a margin when both sides of the equation are based on facts available. Although Commerce attempts to address this point by noting that all the information required for each Article 2 adjustment may not be reasonably available to the petitioner, SAIL states that this argument underscores the obvious fact that the petition data is less accurate than the data submitted by SAIL and that Commerce has failed to "undertake a degree of effort" in selecting among the data in the petition and submitted by the respondent in order to calculate the most accurate

³⁹ Panel Report, paragraph 7.60.

⁴⁰ Panel Report, paragraph 7.67.

⁴¹ Panel Report, paragraph 7.60.