

possible margin under Article 2.” SAIL maintains that Commerce “cannot fulfill its obligations under the AD Agreement simply by asserting that the use of actual data does not necessarily provide any meaningful information.” SAIL emphasizes that 30 percent of its U.S. sales involve a product that is identical to the one for which constructed value was calculated in the petition and could be used to calculate a dumping margin for SAIL that is more accurate and reliable than that based entirely on the petition.

SAIL also notes that Commerce resorts to its old defense in arguing that a respondent should not be allowed to “game” the process by selectively submitting information, but maintains that this claim is groundless in this case. SAIL states that it did not attempt to manipulate the system and there is nothing in the Panel Report to suggest that this argument provides a legally sufficient basis under the AD Agreement to discard SAIL’s U.S. sales information.

SAIL observes that Commerce’s second claim that it cannot use the U.S. data because the data are flawed attempts to disavow Commerce’s statement in the investigation that errors in the U.S. sales database “in isolation were susceptible to correction” by suggesting that there are other flaws in that database. However, other than claiming that missing cost of production data is a flaw in the U.S. sales database, SAIL contends that Commerce’s claim simply recycles its initial argument and does not provide a reason for rejecting use of the U.S. data.

Finally, SAIL notes that nothing in the Draft Determination suggests that Commerce even attempted to calculate a margin using its verified U.S. sales data. SAIL, therefore, asserts that Commerce is in no position whatsoever to state that it “encountered undue difficulty in doing so.”

Petitioners disagree with SAIL’s claim that Commerce continues to assume that “where any ‘essential element’ is missing (in this case, home market sales and cost), the investigating authority is always justified in rejecting the other ‘essential element’ entirely.” Petitioners argue that Commerce has discussed the data shortcomings in this case extensively and explained why the reported U.S. sales data is unduly difficult to use. In Petitioners’ view, Commerce has shown that “the egregiousness of the situation here goes well beyond the norm for an antidumping investigation.” Moreover, it is Petitioners’ contention that “the interrelationship between elements in a dumping analysis is embodied in the numerous requirements throughout

Article 2 of the AD Agreement.” Petitioners maintain that to conduct a fair comparison between markets, Article 2 requires that due allowance be made for differences in physical characteristics, level of trade and other terms and conditions of sale, taxation, and quantities that affect price comparability. Petitioners note that as Commerce has shown in its Draft Determination, SAIL failed to provide any usable home market sales, constructed value or adjustment data that could be used as the basis for establishing normal value in calculating a dumping margin. Petitioners assert that this lack of usable data, under the facts of this case, render it unduly difficult to use SAIL’s reported U.S. sales data in a manner consistent with Article 2. Petitioners’ argue that this is “the end of the matter as far as the reported U.S. sales data are concerned—Commerce may reject those data and use total facts available.” Commerce then has the discretion to choose the facts available to apply.

Petitioners also counter SAIL’s claims that the margin calculation in the petition suffers from the same flaws as a margin calculated using SAIL’s U.S. sales data and that the U.S. sales data are the most accurate data on the record. Petitioners argue, as described above, that once Commerce rejects the U.S. sales data as unduly difficult to use, it may use, and has the discretion to choose, the form of total facts available to apply. This includes use of the petition margin, just as Commerce did in this case. Petitioners claim that Commerce is under no obligation to prove that the facts available it selects are the most accurate. At the same time, Petitioners assert that “it does not follow that the petition margin is less accurate than the margin calculated by comparing SAIL’s reported U.S. sales data to the normal value in the petition. Without SAIL’s actual data, it is impossible to determine what its true margin is.” Petitioners point out that if SAIL’s assertions about the presumed lack of accuracy in a petition margin were accepted, Commerce would never be able to use the petition margin as facts available—an argument that is flatly inconsistent with the AD Agreement.

Petitioners dispute SAIL’s claim that some of its U.S. sales can be compared to the petition’s normal value arguing that the merchandise is not identical as SAIL purports and that Commerce cannot adjust for differences in the terms and conditions of these sales. Even if this were not the case, Petitioners further assert that this alternative is not acceptable as it

violates the object and purpose of the AD Agreement in calculating accurate and reliable margins. Petitioners argue that this approach forces Commerce to calculate a dumping margin for SAIL based on only a minority of its U.S. sales and would be subject to manipulation and abuse by respondents. Petitioners respond to SAIL’s claim that there is no evidence of “gaming” the process in this case by arguing that it would not be proper to require Commerce to produce such evidence. In Petitioners’ view, “to do so would require Commerce to assess the respondent’s mental state—something that is literally impossible to do.”

Finally, Petitioners argue that SAIL’s assertion that “Commerce does not provide any evidence that it actually attempted to use the verified U.S. sales data and encountered ‘undue difficulties’ in doing so” is irrelevant and should be dismissed. Petitioners note that this argument “focuses solely on the difficulties, or lack thereof, in physically calculating a dumping margin using its submitted data. As noted above, however, the Panel’s decision goes not only to the difficulties in physically calculating a dumping margin, but also to the methodological difficulties in determining the dumping margin in a manner consistent with the AD Agreement.” Petitioners maintain that Commerce has determined “that it is unduly difficult to use the U.S. sales data, including by using the methodologies proposed by India in the proceedings before the Panel, in a manner that is consistent with the AD Agreement.” As Commerce’s Draft Determination is fully consistent with the Panel’s decision, SAIL’s arguments should be rejected.

Commerce’s Position

The Panel has not rejected the position taken by Commerce in this determination, namely that SAIL’s U.S. data is unduly difficult to use based on both its attendant errors and its relationship with the home market and cost of production information that SAIL failed to provide. Rather, the Panel found that Commerce incorrectly rejected SAIL’s U.S. data on the basis of problems with other information without addressing whether the U.S. sales price information could be used without undue difficulties. In this determination, we have identified the undue difficulties attendant in calculating a dumping margin in the manner envisioned by the AD Agreement, including the fact that no more than 30 percent of SAIL’s U.S. sales are even potentially suitable for comparison to the product that served