

dispute settlement panel (the Panel) to consider, *inter alia*, Commerce's rejection of SAIL's U.S. sales data in this case. The Panel issued its report on June 28, 2002.<sup>6</sup> The WTO Dispute Settlement Body (DSB) adopted the findings in this report on July 29, 2002. On August 30, 2002, the United States informed the DSB that it would implement the recommendations of the DSB in a manner consistent with its WTO obligations.

On December 10, 2002, pursuant to section 129(b)(2) of the Uruguay Round Agreements Act (URAA), the U.S. Trade Representative (USTR) requested that Commerce issue a determination that would render its original antidumping determination in this matter not inconsistent with the findings of the Panel.

On December 26, 2002, Commerce issued its draft determination in this proceeding. *See* draft Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measure on Certain Cut-to-Length Carbon-Quality Steel Plate Products from India (Draft Determination) which is on file in the Central Records Unit, room B-099 of the main Commerce building. On January 2, 2003, SAIL submitted comments regarding Commerce's Draft Determination. On January 6, 2003, Bethlehem Steel Corporation and United States Steel Corporation (Petitioners) submitted rebuttal comments. A summary of these comments and rebuttal comments, as well as Commerce's response are included in this determination. On February 3, 2003, the USTR held consultations with Commerce and the appropriate congressional committees with respect to this determination. On February 7, 2003, the USTR directed Commerce to implement this determination.

### WTO Panel Findings and Conclusions

In its report, the Panel found that the U.S. statutory provisions concerning use of facts available are not inconsistent with Article 6.8 and paragraphs 3, 5, and 7 of Annex II of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (AD Agreement).<sup>7</sup> However, the Panel found that the application of these provisions in this case was inconsistent with Article 6.8 and paragraph 3 of Annex II of the AD Agreement.

Specifically, the Panel found that the United States had not provided a "legally sufficient justification" in the final determination for refusing to take into account U.S. sales price information submitted by SAIL and basing the dumping margin entirely on the facts available.<sup>8</sup> The focus of any such justification, according to the Panel, should be on whether the information met the requirements set forth in paragraph 3, Annex II, of the AD Agreement, taking into account the interrelationship between the partial data at issue (U.S. sales data) and the other elements of the dumping analysis, for which, both sides agree, SAIL did not submit reliable information. In this regard, the Panel noted "we consider to be critical the question of whether information which itself may satisfy the criteria of paragraph 3 can be used without undue difficulties in light of its relationship to rejected information."<sup>9</sup>

The Panel did not consider as sufficient the statement in the final determination, without elaboration, that the U.S. database could not be used without undue difficulties because the errors in that database, when combined with the other pervasive flaws in SAIL's data, indicate the unreliability of SAIL's data on the whole.<sup>10</sup> The Panel noted Commerce's acknowledgment that the errors in the U.S. database "in isolation were susceptible to correction,"<sup>11</sup> and stated that, in light of this, Commerce needed to provide a more adequate explanation for its decision to reject this information: "[W]e consider it imperative that the investigating authority explain, as required by paragraph 6 of Annex II, the basis of a conclusion that information which is verifiable and timely submitted cannot be used in the investigation without undue difficulties."<sup>12</sup>

Although the United States explained, during the panel proceedings, why it could not use SAIL's data without undue difficulty, the Panel focused on the need for Commerce itself to provide the explanation in its antidumping determination. "Even assuming we were persuaded by the United States" arguments before us that USDOC could have made the decision posited [to reject the U.S. sales data as unduly

difficult to use based on arguments made in dispute settlement], there is nothing in the record to indicate to us that it did make such a decision in the case."<sup>13</sup>

The Panel refused a request by India that it suggest the United States implement this finding by recalculating the dumping margin taking into account the U.S. price data at issue, stating that "[i]n this case, we see no particular need to suggest a means of implementation, and therefore decline to do so."<sup>14</sup> The Panel added that "the choice of means of implementation is decided, in the first instance, by the Member concerned."<sup>15</sup> The Panel then issued a general recommendation that the DSB request the United States "to bring its measure into conformity with its obligations under the AD Agreement,"<sup>16</sup> which the DSB subsequently adopted.

### Implementation

In order to bring the measure at issue into conformity with the AD Agreement, in this section 129 determination, we are providing the "legally sufficient explanation" that the Panel found lacking in the initial determination regarding why the U.S. sales information at issue could not be used "without undue difficulties" in calculating a dumping margin under the AD Agreement. The following "legally sufficient explanation" fully explains why Commerce is under no obligation to take SAIL's U.S. sales transactions into account in establishing a dumping margin for SAIL. Nonetheless, in implementing the DSB's recommendation, Commerce has given careful attention to the Panel's reasoning and has determined that it is appropriate, under the particular facts of this case, to give consideration to the U.S. sales information in a limited manner in determining the appropriate facts available margin to assign to SAIL. Each of these aspects of our implementation is explained below.

In its report, the Panel defined the term "undue difficulties" as those that "go beyond what is otherwise the norm in an anti-dumping investigation,"<sup>17</sup> as opposed to difficulties that arise routinely during the course of an investigation and which are within the ambit of the "two-way process involving joint effort" between investigating authorities and respondents established

<sup>8</sup> Panel Report, paragraph 8.1.

<sup>9</sup> Panel Report, paragraph 7.61 (emphasis added). The Panel here refers to the "undue difficulties" standard contained in paragraph 3, Annex II of the AD Agreement. As noted, a corresponding standard is set forth at section 782(e)(5) of the U.S. antidumping law.

<sup>10</sup> Panel Report, paragraph 7.69.

<sup>11</sup> *Final Determination* at 73127. *See also* Panel Report, paragraph 7.71.

<sup>12</sup> Panel Report, paragraph 7.74.

<sup>13</sup> Panel Report, paragraph 7.69 (emphasis original).

<sup>14</sup> Panel Report, paragraph 8.8.

<sup>15</sup> *Id.*

<sup>16</sup> Panel Report, paragraph 8.6.

<sup>17</sup> Panel Report, paragraph 7.72.

<sup>6</sup> United States—Antidumping and Countervailing Measures on Steel Plate from India, WT/DS206/R (June 28, 2002) (Panel Report), full text available at [www.wto.org](http://www.wto.org).

<sup>7</sup> Panel Report, paragraph 8.2(a).