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EUROPEAN COMMUNITIES - ANTI-DUMPING DUTIES ON IMPORTS OF COTTON-TYPE BED LINEN FROM INDIA

Recourse to Article 21.5 of the DSU by India

Report of the Panel

The report of the Panel on *European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India - Recourse to Article 21.5 of the DSU by India* is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 29 November 2002 pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/452).

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I. INTRODUCTION

1.1 On 8 March 2002 India requested consultations with the European Communities pursuant to Articles 4 and 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter "DSU"), Article XXIII of the General Agreement on Tariffs and Trade, and Article 17 of the Agreement on Implementation of Article VI of the GATT 1994 (hereinafter "AD Agreement") concerning, *inter alia*, the European Communities alleged non-compliance with the DSB rulings and recommendations in the dispute "*European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*" and various provisions of the AD Agreement and Article VI of GATT 1994.[1] The European Communities and India consulted on 25 and 26 March 2002, but failed to settle the dispute.

1.2 On 7 May 2002, India requested the Dispute Settlement Body (hereinafter "DSB") to establish a panel pursuant to Articles 6 and 21.5 of the DSU, Article 17 of the AD Agreement and Article XXIII of GATT 1994, and as envisaged in a 13 September 2001 agreement on the "Agreed Procedures between India and the European Communities under Articles 21 and 22 of the DSU in the follow-up to the dispute '*European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*.'"[2]

1.3 At its meeting on 22 May 2002, the DSB referred this dispute to the original panel in accordance with Article 21.5 of the DSU to examine the matter referred to the DSB by India in document WT/DS141/13/Rev.1. At that meeting, the parties to the dispute also agreed that the Panel should have standard terms of reference. The terms of reference are, therefore, the following:

> "To examine, in the light of the relevant provisions of the covered agreements cited by India in document WT/DS141/13/Rev.1, the matter referred by India to the DSB in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements".

1.4 Article 21.5 of the DSU provides that a dispute under that provision shall be decided through recourse to the DSU, including, "wherever possible, resort to the original panel". In this case, one original panellist was unavailable to serve. On 25 June 2002, the parties agreed on a replacement panellist, and as a result the Panel was composed as follows:[3]

Chairman: Mr. Dariusz ROSATI

Members : Mr. Paul O' CONNOR
Mr. Virachai PLASAI

1.5 Japan, Korea and the United States reserved their rights to participate in the Panel's proceedings as third parties.

1.6 The Panel met with the parties on 10-11 September 2002. It met with the third parties on 11 September 2002.

[1] WT/DS141/12.
[2] WT/DS141/13/Rev.1.
[3] WT/DS141/14.

II. FACTUAL ASPECTS

2.1 This dispute concerns the parties' disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the DSB recommendation in the dispute "*European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India".*

2.2 On 12 March 2001, the DSB adopted the Report of the Appellate Body[4] and the Report of the Panel, [5] as modified by the Appellate Body, in the dispute "*European Communities – Anti-Dumping Duties On Imports Of Cotton-Type Bed Linen From India*" (WT/DS141). Pursuant to the recommendations of the Panel and Appellate Body, the DSB requested the European Communities to bring its measure into conformity with its obligations under the AD Agreement. [6]

2.3 On 26 April 2001, pursuant to Article 21.3(b) of the DSU, the EC and India mutually agreed on a reasonable period of five months and two days to implement the recommendations and rulings of the DSB.[7] This period expired on 14 August 2001.

2.4 Following adoption of the Panel and Appellate Body Reports, the EC undertook to reassess its findings in light of the Panel and Appellate Body decisions. On 3 July 2001, the EC held a hearing in the proceedings in this respect.

2.5 On 26 July 2001, the Council adopted Regulation 1515/2001 on the measures that may be taken by the EC following a report adopted by the Dispute Settlement Body concerning anti-dumping and anti-subsidy matters.[8]

2.6 On 7 August 2001, the Council of the European Union adopted Regulation 1644/2001 (hereinafter "redetermination" or "Regulation 1644/2001"), published 14 August 2001.[9] Regulation 1644/2001 amended the original definitive anti-dumping measure on bed linen from India. The redetermination established different, lower, dumping margins for imports from India. It did not address the dumping margins for the other countries originally investigated, Egypt and Pakistan. It further concluded that dumped imports from India, Egypt and Pakistan caused material injury to the EC industry. While concluding that the imports from India, Egypt and Pakistan were still injuriously dumped, the Council suspended the application of anti-dumping duties on imports of bed linen from India. The Regulation provided that if no review were initiated within 6 months, the anti-dumping duties would expire, but if a review were initiated, the application of the duties would continue to be suspended.[10]

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[4] Appellate Body Report, *European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* ("*EC-Bed Linen*") WT/DS141/AB/R, adopted 12 March 2001.

[5] Panel Report, *European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* ("*EC-Bed Linen*")(hereinafter "original Panel Report, *EC-Bed Linen*) WT/DS141/AB/R, adopted 12 March 2001.

[6] WT/DS141/9.

[7] WT/DS141/10.

[8] Council Regulation (EC) No 1515/2001 of 23 July 2001 on the measures that may be taken by the Community following a report adopted by the WTO Dispute Settlement Body concerning anti-dumping and anti-subsidy measures, published in Official Journal of the European Communities of 26 July 2001, L-series, No 201, (hereinafter "Regulation 1515/2001"), Exhibit-India-RW-16.

[9] Council Regulation (EC) No 1644/2001 of 7 August 2001 amending Regulation (EC) No 2398/97, imposing a definitive anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan and suspending its application with regard to imports originating in India, published in Official Journal of the European Communities of 14 August 2001, L-series, No 219, Exhibit- Indis-RW-18.

[10] Regulation 1644/2001.

2.7 On 19 December 2001, Eurocoton, the trade association acting on behalf of the EC industry, filed a request with the EC authorities for a review.[11] On 13 February 2002 the EC initiated a "partial interim review" of the dumping aspect of the measure respecting imports from India based on Eurocoton's request.[12] Pursuant to Regulation 1644/2001, the anti-dumping duties on imports from India remained suspended, and no anti-dumping duties have been collected pursuant to measure.

2.8 On 28 January 2002, the Council of the European Union adopted Regulation 160/2002. [13] This regulation amended the anti-dumping measures on imports of bed linen by terminating the proceeding against Pakistan. The regulation also provided that, unless a review were requested with respect to the anti-dumping measure against imports from Egypt, that measure would expire as of 28 February 2002. No review was requested with respect to imports from Egypt, and on 28 February 2002 the anti-dumping measure against imports from Egypt expired.[14]

2.9 On 19 April 2002, the EC held a hearing in connection with the on-going review proceeding.

2.10 On 22 April 2002 the Council of the European Union adopted Regulation 696/2002. [15] The Regulation states that, in light of the termination of the proceeding on imports from Pakistan and the expiry of the measure on imports from Egypt, the EC authorities considered it appropriate to reassess the findings, limited to the determination of injury and causal link to the extent that this determination had been based on the examination of the impact of imports from India, Egypt, and Pakistan on a cumulative basis. This reassessment resulted in a conclusion that there was a causal link between dumped imports from India and material injury to the EC industry, and a resulting conclusion confirming the definitive anti-dumping duty imposed on imports of cotton-type bed linen originating in India. Pursuant to Regulation 1644/2001, the anti-dumping duties on imports from India remained suspended.

2.11 On 8 March 2002 India had requested consultations under Article 21.5 of the DSU. In that request, India challenged the determination of the EC in Council Regulation 1644/2001, the redetermination, and the initiation of the partial interim review.[16] Although consultations were held, they failed to settle the dispute. India submitted a request for establishment of a panel under Article 21.5 of the DSU on 4 April 2002, challenging the redetermination, as well as the further actions taken by the EC.[17] A revised request for establishment of a panel, mentioning specifically the redetermination and the two subsequent regulations, was subsequently submitted by India on 7 May 2002,[18] and this Panel was established pursuant to that request on 22 May 2002.

[11] Exhibit-India-RW-21.

[12] Notice of initiation of a partial interim review of the anti-dumping measures applicable to imports of cotton-type bed linen originating in India, published in Official Journal of the European Communities of 13 February 2002, C-series, No 39. Exhibit-India-RW-23.

[13] Council Regulation (EC) No 160/2002 of 28 January 2002 amending Regulation (EC) No 2398/97 imposing a definitive anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan and terminating the proceeding with regard to imports originating in Pakistan, published in Official Journal of the European Communities of 30 January 2002, L-series, No 26, (hereinafter "Regulation 160/2002"). Exhibit-India-RW-22.

[14] Notice of the expiry of certain anti-dumping measures, published in Official Journal of the European Communities of 14 March 2002, C-series, No 65, page 12. Exhibit-India-RW-24.

[15] Council Regulation (EC) No 696/2002 of 22 April 2002 confirming the definitive anti-dumping duty imposed on imports of cotton-type bed linen originating in India by Regulation (EC) No 2398/97, as amended and suspended by Council Regulation (EC) No 1644/2001, published in Official Journal of the European Communities of 25 April 2002, L-series, No 109, (hereinafter "Regulation 696/2002"). Exhibit-India-RW-30.

[16] WT/DS141/12 .

[17] WT/DS141/13.

[18] WT/DS141/13/Rev.1.

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. INDIA

3.1 India requests that the Panel make the following findings:

(a) By failing to withdraw the measures found to be inconsistent with the AD Agreement and to bring its measures into conformity with its obligations under the AD Agreement within the mutually agreed reasonable period of time, the EC failed to comply with the DSB recommendations and rulings in this dispute; and

(b) The redetermination, as amended, and the subsequent actions, as identified above, are inconsistent with the following provisions of the AD Agreement and the DSU:

- Article 2.2.2(ii) of the AD Agreement by not properly calculating a "weighted average" of amounts for SG&A and profits;
- Articles 3.1 and 3.3 of the AD Agreement by cumulating Indian imports with those from a country for which no dumping was found;
- Article 5.7 of the AD Agreement by not simultaneously considering the evidence of dumping and injury;
- Articles 3.1 and 3.2 of the AD Agreement by not properly excluding the portion of non-dumped imports from the total volume of Indian imports;
- Articles 3.1 and 3.4 of the AD Agreement by reciting factors without even collecting them and by failing to enter into an overall reconsideration and analysis of the information in light of the requirements of the AD Agreement;
- Article 3.5 of the AD Agreement by incorrectly establishing a causal relationship between dumped imports and injury and by disregarding the non-attribution language;
- Article 15 of the AD Agreement by not exploring any remedy, constructive or otherwise; and
- Article 21.2 of the DSU by failing to pay particular attention to this matter affecting India; and which already had formed the subject of dispute settlement.

B. THE EUROPEAN COMMUNITIES

3.2 The European Communities requests that the Panel make the following preliminary rulings in accordance with paragraph 13 of its Working Procedures:

(a) Regulations 160/2002 and 696/2002 are not measures "taken to comply" with the DSB' s rulings and recommendations within the meaning of Article 21.5 of the DSU and therefore, are not within the Panel's jurisdiction;

(b) the relevant date for assessing the consistency of the measures "taken to comply" with the covered agreements is the date of establishment of the Panel;

(c) certain claims raised by India in its first submission with respect to findings set out in the original measure which were not challenged by India before the original Panel, and which have not been modified by the measures at issue in this dispute, are not properly before this Panel; and

(d) the following claims raised by India in its first submission were not stated in its request for establishment of the Panel, contrary to the requirement imposed by Article 6.2 of the DSU, and are, therefore, not within the Panel's terms of reference:

- the claim that the EC acted inconsistently with Article 4.1(i) of the AD Agreement by excluding from the "Community industry" a producer which had imported bed linen from Pakistan;
- the claim that the EC failed to respect the "reasonable period of time" agreed by the parties under Article 21.3 (b) of the DSU.

3.3 The EC further requests the Panel to find in the EC's favor on the claims submitted by India for the reasons stated in Section III of the EC's first written submission.

3.4 Finally, the EC requests that, should the Panel conclude that the EC has violated Article 2.2.2(ii) of the AD Agreement, it should find that such violation has not nullified or impaired the benefits accrued to India under that provision.

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties are set out in their submissions to the Panel. The parties' submissions are attached to this Report as Annexes (see List of Annexes, page v).

V. ARGUMENTS OF THE THIRD PARTIES

5.1 The arguments of the third parties, Japan, Korea, and the United States are set out in their submissions to the Panel and are attached to this Report as Annexes (see List of Annexes, page v).

VI. FINDINGS

A. GENERAL ISSUES

1. Standard of Review

6.1 Although neither party has explicitly addressed these general issues, we consider it useful to recall, at the outset of our examination, the standard of review we must apply to the matter before us.

6.2 Article 11 of the DSU sets forth the appropriate standard of review for panels. Article 11 imposes upon panels a comprehensive obligation to make an "objective assessment of the matter", an obligation which embraces all aspects of a panel's examination of the "matter", both factual and legal.

6.3 Article 17.6 of the AD Agreement sets forth the special standard of review applicable to anti-dumping disputes. Certain elements of Article 17.6 of the AD Agreement complement -- or supplement -- the standard contained in Article 11 of the DSU. In particular, with regard to factual issues, Article 17.6(i) provides:

> "in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned".

6.4 With respect to legal questions of the interpretation of the AD Agreement, Article 17.6(ii) provides:

> "the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations".

6.5 Thus, together, Article 11 of the DSU and Article 17.6 of the AD Agreement set out the standard of review we must apply with respect to both the factual and legal aspects of our examination of the claims and arguments raised by the parties.[19]

6.6 In light of this standard of review, in examining this matter referred to us under Article 21.5 of the DSU, we must evaluate the existence or consistency with a covered agreement of measures taken to comply with the recommendation of the DSB. We must find that a measure taken to comply with the recommendation of the DSB is consistent with the AD Agreement **if** we find that the EC investigating authorities properly established the facts and evaluated them in an unbiased and objective manner, **and** that the measure rests upon a "permissible" interpretation of the relevant provisions. Our task is not to perform a *de novo* review of the information and evidence on the record of the underlying anti-dumping investigation, nor to substitute our judgment for that of the EC investigating authority, even though we may have arrived at a different determination were we examining the record ourselves.

2. Burden of Proof

6.7 We recall that the general principles applicable to burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of the WTO Agreement by another Member must assert and prove its claim.[20] In these Panel proceedings, we thus observe that it is for India, which has challenged the consistency of the EC measure, to bear the burden of demonstrating that the measure is not consistent with the relevant provisions of the AD Agreement. We also note, however, that it is generally for each party asserting a fact, whether complainant or respondent, to provide proof thereof.[21] In this respect, therefore, it is also for the EC to provide evidence for the facts which it asserts. We also recall that a *prima facie* case is one which, in the absence of effective refutation by the other party, requires a panel, as a matter of law, to rule in favour of the party presenting the *prima facie* case. In addition, we consider that both parties generally have a duty to cooperate in the proceedings in order to assist us in fulfilling our mandate, through the provision of relevant information.[22]

B. REQUEST FOR PRELIMINARY RULINGS

6.8 The EC requested that the Panel make four preliminary rulings. Given that we held only one hearing in this matter, we did not rule on any of these requests during the course of the proceeding, as we considered that there would have been no signficant benefit to either the parties or the orderly conduct of the proceeding by early rulings in this case. However, we have now considered and disposed of the EC's request, and our findings in this regard are set out below.

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[19] Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ("*US - Hot-Rolled Steel*"), WT/DS184/AB/R, adopted 23 August 2001, at para. 54.

[20] Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India* ("*US – Wool Shirts and Blouses*"), WT/DS33/AB/R, adopted 23 May 1997, at p. 14, DSR 1997:I, 323, at 337.

[21] Appellate Body Report, *US – Wool Shirts and Blouses*, at p. 14.

[22] Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft ("Canada – Aircraft")*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377, at para. 190.

1. Regulations 160/2002 and 696/2002 are not measures "taken to comply" with the DSB's rulings and recommendations within the meaning of Article 21.5 of the DSU and, therefore, are not within the Panel's jurisdiction

(a) Arguments of the parties

6.9 The EC argues that the original Panel proceeding involved no claims against the findings of dumping with respect to imports originating in Pakistan and Egypt, and that consequently, no recommendations or rulings were made by the DSB with respect to those findings, and the EC had no implementation obligations with respect to those findings. The EC maintains that its authorities decided, on their own motion,[23] to apply the principles set out in the original Panel determination with respect to the calculation of the dumping margin, and particularly the prohibition on zeroing, to the findings of dumping with respect to imports from Pakistan and Egypt. That reassessment of Pakistani imports, set out in Regulation 160/2002, resulted in the conclusion that imports from Pakistan were not dumped,[24] and the proceeding was terminated with respect to those imports.[25] The EC authorities concluded that they lacked the necessary information to re-calculate the dumping margin for Egyptian producers, and consequently decided to suspend the application of the anti-dumping duties on imports from Egypt,[26] and provided that the duties would expire unless an interested party requested a review within a certain time-limit.[27] No such review was requested and the duties on imports originating in Egypt expired as of 28 February 2002.[28]

6.10 Subsequently, the EC authorities re-assessed the finding of injury in the context of the partial interim review that had been initiated based on Eurocoton's request, in order to determine whether imports from India were, on their own, causing injury to the domestic industry. The results of that re-assessment are set out in Regulation 696/2002, which concluded that imports from India, considered alone, caused material injury to the EC industry, and, therefore, confirmed the imposition of definitive anti-dumping duties on those imports.[29] At the same time, the EC authorities confirmed the suspension of the application of those anti-dumping duties.[30]

6.11 The EC argues that neither of these latter two measures, Regulations 160/2002 and 696/2002, were measures "taken to comply" with the DSB's recommendation in the original dispute, and that therefore any claims involving the findings made by the EC authorities in those two regulations are beyond this Panel's jurisdiction. The EC considers that since there were no rulings by the DSB concerning the anti-dumping measures against imports from Egypt and Pakistan, there was nothing for the EC to "comply" with, and no obligation to undertake any reassessment of the original findings. Therefore, the EC maintains that Regulation 160/2002 cannot be considered as a measure "taken to comply" within the meaning of Article 21.5. Similarly, the EC asserts that the injury redetermination in Regulation 696/2002 was rendered necessary by the decision of the EC authorities to re-examine the findings of dumping for Pakistan and Egypt, which decision was not itself a measure "taken to comply" with the DSB's recommendation. Thus, the EC asserts this measure was also independent, and not a measure "taken to comply". In the EC's view, India's claims against these two measures can only be heard in the context of a new dispute. Of the measures cited in India's panel request, the EC considers that the only measure "taken to comply" with the DSB's recommendation is Regulation

[23] In response to a question from the Panel, the EC indicated that there were in fact requests from Egyptian and Pakistani exporters to recalculate the dumping margins. It asserts that the statement that it acted "on its own initiative" is intended to mean that the EC was under no obligation to adopt the later two regulations pursuant to the WTO Agreement. EC's answer to the Panel's question 20 at para. 20, Annex E-2.

[24] Regulation 160/2002, at para.13.

[25] *Id.*, at Article 2.

[26] *Id.*, at Article 1.1.

[27] *Id.*, at Article 1.2.

[28] Notice of Expiry, published at OJ C65/12, 14 March 2002. Exhibit-India–RW–24.

[29] Regulation 696/2002, at Article 1.

[30] *Id.*

1644/2001. Accordingly, the EC argues that is the only measure which should be considered by the Panel when addressing India's claims.

6.12 India asserts that Regulations 1644/2001, 160/2002 and 696/2002 are closely connected to the Panel and Appellate Body reports in the original dispute. India maintains that it is important that the EC not be allowed to decide for itself what are measures "taken to comply", citing in this regard the decision of the Panel in *Australia–Salmon (Article 21.5-Canada)*.[31] India considers that the Panel should not rule on the EC's request without undertaking a substantive consideration of the issue, as this would leave it to the EC's discretion, as the implementing Member, to decide what are measures "taken to comply".

(b) Evaluation by the Panel

6.13 India is certainly correct that the EC is not entitled to determine which measures the Panel may consider as measures "taken to comply". The Panel in *Australia–Salmon (Article 21.5 – Canada)* considered this question, and stated:

> "We note that an Article 21.5 panel cannot leave it to the full discretion of the implementing Member to decide whether or not a measure is one "taken to comply". If one were to allow that, an implementing Member could simply avoid any scrutiny of certain measures by a compliance panel, even where such measures would be so clearly connected to the panel and Appellate Body reports concerned, both in time and in respect of the subject-matter, that any impartial observer would consider them to be measures "taken to comply"".[32]

6.14 Similarly, in *Australia – Automotive Leather II (Article 21.5 – US)*, the Panel rejected Australia's argument that a measure cited in the request for the establishment of a panel was not within the terms of reference of a panel since it was not part of the implementation of the DSB's ruling and recommendation:

> "For us to rule, as suggested by Australia, that we are precluded from considering the 1999 loan, would allow Australia to establish the scope of our terms of reference by choosing what measure or measures it will notify, or not notify, to the DSB in connection with its implementation of the DSB's ruling".[33]

6.15 Thus, it is clear that it is the Panel, and not the EC, which decides whether the measures cited by India in the request for establishment are to be considered "measures taken to comply" and therefore fall within the purview of this dispute. That said, however, it is also not India's right to determine which measures taken by the EC are measures taken to comply. Rather, this is an issue which must be considered and decided by an Article 21.5 panel.

6.16 In this case, the complaining Member, India, is arguing that the first of a series of measures was **inadequate** to establish compliance with the DSB's recommendation, and that subsequent measures demonstrate that fact in that they sought to remedy the inadequacies of the first measure. The EC considers that only the first measure was taken to comply with the DSB's recommendation to bring its measure into conformity, and that the subsequent measures were not taken to justify or

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[31] Panel Report, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada* ("*Australia – Salmon (Article 21.5 – Canada)*"), WT/DS18/RW, adopted 20 March 2000, DSR 2000:IV, 2035, at para. 7.10, subparagraph 22

[32] *Id.*, para. 7.10, subparagraph 22

[33] Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by the United States* ("*Australia – Automotive Leather II (Article 21.5 – US)*"), WT/DS126/RW and Corr.1, adopted 11 February 2000, DSR 2000:III, 1189, at para. 6.4.

remedy errors in the first measure.[34] The situation in this case is thus fundamentally different from that facing the Panel in the Article 21.5 proceeding in *Australia – Automotive Leather II (Article 21.5 – US)*. In that case, the complaining Member, the United States, argued that Australia had taken two measures, the first of which purported to implement the DSB's ruling, while the second measure undid the purported compliance. Australia argued that only the first measure was a "measure taken to comply", and that the second measure was not within the Panel's mandate.

6.17 While clearly, it is India in the first instance which decides the scope of its request for establishment, including the measures it wishes to challenge, the Panel is not without a role in establishing the scope of its mandate. The complaining Member in an Article 21.5 proceeding cannot be allowed to sweep into the dispute measures which are not "so clearly connected to the panel and Appellate Body reports concerned, both in time and in respect of the subject-matter, that any impartial observer would consider them to be measures "taken to comply""[35], any more than the implementing Member can be allowed to exclude such measures from the proceeding. To the extent a party may have challenged, in a request for establishment of an Article 21.5 panel, measures which were **not** "taken to comply" by the implementing Member, it is our view that a Panel may decline to address claims concerning such measures.

6.18 We consider that this is precisely the situation before us in this case. The original dispute did not involve the anti-dumping measures with respect to imports from Egypt or Pakistan. Thus, neither the Panel nor the Appellate Body found any violation with respect to the anti-dumping measures concerning imports from Egypt or Pakistan. As a consequence, the DSB's rulings cannot have touched upon these anti-dumping measures. Nor could the DSB have recommended that the EC bring into conformity with its obligations measures as to which there was no finding of violation. Thus, the EC was under no legal obligation to do anything with respect to the anti-dumping measures on imports from Egypt and Pakistan.[36]

6.19 The EC chose, at its own volition, to open the determinations of dumping with respect to imports from Egypt and Pakistan so as to apply to those determinations the conclusion of the adopted Reports finding the practice of "zeroing" to be inconsistent with the AD Agreement.[37] While this decision on the part of the EC may have been prudent, and is commendable, it was not required by the DSB's recommendation in the original dispute, which was to bring the measure at issue, *viz*., the anti-dumping measure on imports of bed linen from India, into conformity with the EC's obligations under the AD Agreement.[38] Therefore, we conclude that Regulation 160/2002 was not a measure "taken to

[34] The EC does argue that, if the Panel were to conclude that all three measures were "measures taken to comply", then the consistency of it compliance should be judged as of the date of establishment of the Panel, *i.e.*, with reference to the situation as it stood after all three measures had been adopted.

[35] *Australia - Salmon (Article 21.5 – Canada)*, at para. 7.10, subparagraph 22.

[36] The situation might be different had there been a claim in the original dispute challenging the cumulative assessment of the effects of imports from India, Egypt, and Pakistan.

[37] The EC clarified, in response to a question from the Panel, that while EC authorities adopted Regulation 160/2002 "on their own initiative", this did not suggest that they had not acted in response to a request from exporters, but rather that they were under no obligation to adopt that regulation. EC's answer to the Panel's question 20, at para. 20, Annex E-2. The EC further noted that both Pakistani and Egyptian exporters requested the EC to redetermine their dumping margins. *Id*. The EC has also provided exporters affected by the practice of zeroing in other cases the opportunity to request a re-examination in light of the adopted Reports. id. at paras. 18–19. At least one review has been initiated in response to the request of an exporter. id. at para. 18

[38] We note that the original dispute was not one in which India challenged the EC's law or regulations *per se*, and thus, the recommendation of the DSB had no necessary implications for anything other than the anti-dumping measure at issue in that dispute.

comply" and its consistency with the AD Agreement, or lack thereof, will not be considered in this proceeding.[39]

6.20 Similarly, the fact that the EC, subsequent to its re-examination of the dumping determinations with respect to imports from Egypt and Pakistan, and in the context of a review initiated based on the request of Eurocoton, carried out an analysis of whether injury was caused by imports from India alone does not, *ipso facto*, establish that Regulation 696/2002 is a measure "taken to comply". Rather the opposite would seem to be the case – that Regulation would seem to be an entirely new determination, reached as a result of events subsequent to the EC having adopted a measure to comply with the DSB's recommendation.

6.21 In this case, India argues that the first measure, Regulation 1644/2001 is insufficient to establish compliance, and that the subsequent two measures do not cure that insufficiency. It does not argue that the subsequent two measures undo the compliance effectuated by the first measure. In this circumstance, if we were to find that the first measure, Regulation 1644/2001, is sufficient to conclude that the EC has complied with the DSB's recommendation to bring its measure into conformity, there would be no need to go on to consider whether the two subsequent mesures were inconsistent with the AD Agreement, in the context of this Article 21.5 proceeding. This as well implies that only Regulation 1644/2001 is properly deemed a "measure taken to comply".

6.22 Based on the foregoing, we grant the EC's first request for preliminary ruling, and determine that Regulations 160/2002 and 696/2002 are not "measures taken to comply" with the DSB's recommendation. We therefore will not make any findings as to the consistency of those measures with the covered agreements in this dispute.[40]

2. The relevant date for assessing the consistency of the measures "taken to comply" is the date of establishment of the Panel

(a) Arguments of the parties

6.23 The EC notes India's argument that, even if the alleged inconsistencies with the AD Agreement in the redetermination, Regulation 1644/2001 had been "cured" by Regulations 160/2002 and 696/2002, those latter regulations cannot provide a valid "justification" because they were adopted outside the "reasonable period of time".[41] The EC asserts that India is incorrect in arguing that the scope of a panel's mandate in an Article 21.5 proceeding is limited to determining whether measures taken to comply **within the reasonable period of time** for implementation are consistent with the covered agreements. Rather, the EC submits that assuming the Panel were to conclude that the latter two measures are relevant to the assessment of the EC's compliance, that compliance should be judged as of the date of establishment of the Panel, and not as of the end of the reasonable period of time. Therefore, the EC considers, in the alternative, that the Panel should take into account any "cure" effected by the two later Regulations with respect to any inconsistencies in Regulation into account in assessing the EC's implementation.

6.24 India does not see any conflict between its position and the argument of the EC. India submits that it is possible to have the date of establishment of the Panel as the relevant date for assessing the *overall* consistency of the measures "taken to comply" while at the same time having the

[39] Our conclusion in this regard is bolstered by the consideration that, had India sought to challenge the EC's implementation for an alleged **failure** to enact this regulation, we would not have been able to find such failure alone demonstrated that the EC had not taken measures to comply with the DSB's recommendation.

[40] We note, in fact, that India has not actually made claims of violation with respect to these two regulations. Rather, India argues that the two latter measures cannot be considered as having "corrected" what India considers to be violations in the first measure.

[41] *See e.g.*, paras. 73, 82, 134 and 247 of India's First Written Submission (hereinafter "India's FWS"), Annex A-1.

date of expiration of the reasonable period of time for compliance as the relevant date for assessing the consistency of measures "taken to comply" *within* the reasonable period of time. Thus, India asserts, a panel should examine the consistency of measures taken to comply not only as a matter of substance, but also with respect to whether those measures were taken within the reasonable period of time. India argues that the end of the reasonable period establishes a deadline, under Article 21.3, for compliance, and that therefore whether compliance occurred within that period must be considered. Once the Panel has made a determination in this respect, and assuming it concludes that there was no compliance within the reasonable period of time, it can also examine measures taken to comply subsequently, outside the reasonable period of time, so as to establish whether, as of the date of establishment of the Panel, the recommendations of the DSB have been implemented.

(b) Arguments of third parties

6.25 The United States asserts that a Member's chance to comply with the recommendations and rulings of the DSB does not end with the reasonable period of time for compliance. Nothing in the DSU prevents a Member from modifying a compliance measure taken during the reasonable period of time, replacing it with another measure, or even taking its compliance measure for the first time after the end of the reasonable period of time. Furthermore, any of these measures could be subject to review by a panel under Article 21.5 of the DSU. The United States notes that the EC took its initial measure to comply, Regulation 1644/2001, within the reasonable period of time, and amended that measure in Regulation 696/2002, outside the reasonable period of time. In the US view, DSU does not support India's position that the EC may not demonstrate its compliance based on Council Regulation 696/2002, because the measure was taken after the end of the reasonable period of time. The United States considers that India itself provides no legal support for this contention. To the contrary, the United States notes that several DSU provisions appear to presume the possibility of a Member's bringing its measure into compliance after the reasonable period of time has expired, citing in this regard Articles 21.6 and 22.8 of the DSU.

6.26 The United States suggests that, to the extent India may be arguing that an obligation to comply with recommendations and rulings of the DSB before expiration of the reasonable period of time defines the bounds of the mandate of a panel proceeding under DSU Article 21.5, the text of the DSU belies this view. In the US view, the text of Article 21.5, viewed in its context, does not limit the Panel's mandate to examining measures taken before the reasonable period of time expired, or in any other way place a time limit on taking such measures. The United States considers that since Regulation 696/2002 predates both the request for establishment and the establishment of the Panel, there is no need in this proceeding to reach the issue of which is the proper benchmark.

(c) Evaluation by the Panel

6.27 As discussed above, we have concluded that only the first of the challenged measures in this dispute, Regulation 1644/2001, was a "measure taken to comply" with the DSB's recommendation that the EC bring its measure into conformity. There is no dispute that Regulation 1644/2001 was taken within the reasonable period of time agreed upon by the parties. Thus, we need not and will not address India's arguments with respect to whether, assuming Regulation 1644/2001 were found to be inconsistent with the covered agreements, that inconsistency could be cured by subsequent measures taken after the reasonable period of time to implement. As noted above, India has not made any specific claims with respect to the subsequent measures themselves.

6.28 We note, however, that India's position regarding the appropriate assessment of compliance evolved during the course of this proceeding. We understand India to argue that we may consider the latter two measures in determining whether the EC has complied with the DSB's recommendation to bring its measure into conformity, but that we must **first** determine whether it has done so within the reasonable period of time. Thus, it appears India considers that we must make two decisions on the existence or consistency of measures taken to comply – one as of the end of the reasonable period of

time, and one as of the date of establishment of the Panel.[42] We do not consider that it would be either necessary or appropriate, as a matter of judicial economy, to first examine whether compliance had occurred as of the end of the reasonable period of time, and second consider compliance as of the later date. There would be no useful purpose served by a ruling regarding compliance as of the end of the reasonable period of time in this case. India has made no specific claim of violation of any WTO Agreement with respect to the timing of the EC's compliance[43] – it has merely asserted that the first Regulation adopted by the EC did not bring the EC's measure into conformity with the AD Agreement, and that the later Regulations cannot be considered as curing the defects it alleges to exist in the first Regulation.

6.29 In any event, we have concluded that only Regulation 1644/2001 is a "measure taken to comply" with the DSB's recommendation and ruling, and the EC is content for us to judge its compliance only with reference to that measure. India has not, in fact, made any specific claims of violation in the subsequent measures, and we will not make any rulings regarding those measures. While we need not ignore the subsequent regulations, we consider them unnecessary to the resolution of the question whether the EC has complied with the DSB's recommendation.

3. Certain claims raised by India in this dispute with respect to aspects of the original measure which were the subject of claims by India, but were not pursued before the original Panel, are not properly before this Panel

(a) Arguments of the parties

6.30 The EC asserts that India has made claims in this proceeding concerning some of the findings in the original EC determination which were incorporated without change as part of the reasoning in the redetermination. The EC asserts that India did not challenge these aspects of the original determination in the original dispute, that the EC therefore had no implementation obligation with respect to those aspects of its original determination, and that the EC therefore did not modify them in the redetermination. Specifically, the EC notes that India's only claim under Article 3.5 of the AD Agreement in the original dispute was that the EC authorities had not established that injury had been caused "through the effects of dumping" because they had treated as "dumped imports" what India considered to be "non-dumped transactions".[44] That claim was dismissed by the Panel.[45] In this proceeding, however, India argues that the causality determination is inconsistent with Article 3.5, *inter alia*, because the EC authorities failed to properly examine the effects of "other factors" causing injury to the domestic industry, specifically, the effects of the increase in consumer prices,[46] and to separate the effects of the increase in the cost of raw cotton.[47]

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[42] Since the measures at issue in this respect were both adopted prior to the date of the revised request for establishment, and the consequent establishment of this Panel, which date is appropriate has no effect on our decision. We note, however, that in our view, the clear import of the decision of the Panel in *US – Shrimp (21.5 - Malaysia)* is that the appropriate date for assessing the compliance of a Member with the recommendations of the DSB is the date of establishment of the Article 21.5 panel. Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia* ("*US – Shrimp (Article 21.5 – Malaysia)*"), WT/DS58/RW, adopted 21 November 2001, as upheld by the Appellate Body Report, WT/DS58/AB/RW, at paras. 5.12 – 5.13.

[43] See discussion at paragraph 6.66 below. See also India's Second Written Submission (hereinafter "India's SWS"), Annex C-2, at paras. 47 - 50, and India's Closing Statement, Annex D-6, at para. 27.

[44] India's First Written Submission to the original Panel, paras. 4.217 - 4.220, reproduced in original Panel report, p. 221.

[45] Original Panel report, *EC - Bed Linen*, at para. 6.142.

[46] India's FWS, at para. 250.

[47] *Id.*, at para. 256.

6.31 The EC also points out that in the original proceeding, India's only claim under Article 3.4 was that the EC authorities had failed to consider all the relevant injury factors.[48] India prevailed on that claim, the Panel finding a violation in the failure to address all the Article 3.4 factors. In this proceeding, however, India contests the **adequacy** of the findings made by the EC authorities with respect to Article 3.4 factors which had been considered by the EC authorities in the original determination, and as to which the Panel made no finding of violation. The EC specifically points to India's claim that the evaluation of factors such as sales[49], market share[50], price development[51], production[52], profitability[53] or employment[54] is inadequate. The EC notes that its authorities did not make any new findings with respect to these factors, as Regulation 1644/2001 merely confirms the findings with respect to those factors that had been made in the original Regulation 1069/97.[55] In the EC's view, India is making claims which it could have, and should have, raised in the original proceeding.

6.32 The EC submits that, to the extent that the redetermination does nothing but confirm findings already set out in the measure at issue in the original dispute, it cannot be considered that the redetermination constitutes a measure "taken to comply" within the meaning of Article 21.5 of the DSU. Therefore, in the EC's view, any claims relating to those findings should be dismissed as not being properly before the Panel.

6.33 Finally, the EC argues that even if the Panel were to take the view that the claims at issue concern measures "taken to comply", by not raising those claims in a timely manner, India has acted inconsistently with the requirements of Article 3.10 of the DSU that Members engage in dispute settlement procedures "in good faith in an effort to resolve the dispute".

6.34 India argues, with respect to Article 3.5 and its claim concerning the failure of the EC to ensure that it did not attribute to dumped imports the injuries caused by other factors, that it **had** made a claim in this regard in the original proceeding, which India acknowledges was dismissed by the Panel for failure to make a *prima facie* case. Nonetheless, India argues that the factual premise for the EC's request is baseless. India also considers that the fact that the claim was dismissed in the original proceedings does not preclude the Panel from examining it in this Article 21.5 proceeding.

6.35 As regards Article 3.4, India notes that it is in part precisely the fact that the EC "confirmed" aspects of its original determination that India considers to constitute the inconsistency of the injury redetermination with the requirements of Article 3.4 of the AD Agreement. India's second argument under its claim 5 is that the EC did not engage in an overall reconsideration and analysis even though the findings of the Panel and the Appellate Body warranted exactly that.

6.36 Finally, India states that it "fails to see the problem"[56] of the EC as to alleged failure to raise the claims in a timely manner, as these were duly identified in the request for establishment and form part of the matter before the Panel.

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[48] India's First Written Submission to the original Panel, paras. 4.56 - 4.76, reproduced in original Panel report, pp. 170 - 177.

[49] India's FWS, at paras. 166 - 171.

[50] *Id.*

[51] *Id.*

[52] *Id.*, at paras. 180 - 182.

[53] *Id.*, at paras. 172 - 179.

[54] *Id.*, at paras. 201 - 204.

[55] Commission Regulation (EC) No 1069/97, of 12 June 1997, imposing a provisional anti-dumping duty on imports of cotton-type bed linen originating In Egypt, India and Pakistan, (OJ 13.6.97 L 156/11) (hereinafter "Regulation 1069/97") (Exhibit India – 8), at paras. 31, 34 and 36.

[56] India's SWS, at para. 39.

(b) Evaluation by the Panel

6.37 The EC argues that, to the extent the redetermination confirms findings set out in the original determination, the redetermination is not a "measure taken to comply", and the Panel should not rule on claims addressing the redetermination to the extent it is not a measure taken to comply. This request by the EC raises novel and difficult issues concerning the scope of a panel's mandate under Article 21.5 of the DSU. That provision states, in pertinent part:

> "Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings [of the DSB in the underlying dispute] such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel".

6.38 The concept of "measure" in an anti-dumping dispute has been addressed by the Appellate Body in the context of determining what constitutes the "measures" that may be challenged in an original dispute under the AD Agreement. In *Guatemala – Cement I*, the Appellate Body concluded that the measures that may thus be challenged are the imposition of a definitive anti-dumping duty, a provisional measure, and a price undertaking.[57]

6.39 The Appellate Body was, of course, considering the issue in the context of an original dispute, and not in the context of an Article 21.5 proceeding. If applied in the context of an Article 21.5 proceeding, this understanding of measure would imply that all aspects of the anti-dumping duty at issue, that is to say, all aspects of Regulation 1644/2001, may be challenged by a Member and must be resolved by the Panel. This would include underlying factual and legal issues that were not addressed by the original Report because no claim was made with respect to such issues, as well as issues that may have been resolved in favor of the defending Member. Thus, the application of this understanding of "measure" in the context of an Article 21.5 panel has troubling consequences which suggest to us the need for a thorough consideration of the EC's request.

6.40 As an extreme example, assume a complaining Member challenges an anti-dumping duty in dispute settlement, and alleges violations only in connection with the investigating authorities' determination of injury. Assume the Panel concludes that the anti-dumping duty is inconsistent with the AD Agreement because of a violation of Article 3.4 in the determination of injury, and the DSB recommends that the defending Member "bring the measure into conformity". Assume the defending Member re-evaluates only the injury aspect of its original decision, makes a new determination of injury, and continues the imposition of the anti-dumping duty on the basis of the new finding of injury and the pre-existing finding of dumping and causal link. If that anti-dumping duty, and all aspects of the determinations underlying that duty, are considered the "measure taken to comply", then the complaining Member could, in a subsequent Article 21.5 proceeding, allege a violation in connection with the dumping determination which had not been challenged in the original dispute. If the Article 21.5 panel found a violation of the AD Agreement in the determination of dumping, it would presumably conclude that the measure taken to comply is inconsistent with the AD Agreement. In this circumstance, the defending Member would have no opportunity to bring its measure into conformity with the AD Agreement with respect to the dumping calculation. Moreover, the defending Member would be subject to potential suspension of concessions as a result of a finding of violation with respect to the dumping aspect of the original determination which, because it was not

[57] Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico* ("*Guatemala – Cement I*"), WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, 3767, at para. 79. Subsequently, the Appellate Body has made it clear that a challenge can be brought concerning the consistency of anti-dumping legislation as such with the AD Agreement. Appellate Body Report, *United States – Anti-Dumping Act of 1916* ("*US – 1916 Act*"), WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, at para. 83.

the subject of any finding of violation in the original report, the Member was entitled to assume was consistent with its obligations under the relevant agreement. Such an outcome would not seem to be consistent with the overall object and purpose of the DSU to achieve satisfactory resolution of disputes, effective functioning of the WTO, to maintain a proper balance between the rights and obligations of Members, and to ensure that benefits accruing to any Member under covered agreements are not to nullified or impaired.[58]

6.41 This is, in fact, much the case that is before us, with the, to us, significant addition that the claim with respect to non-attribution to dumped imports of injuries caused by "other factors" which India is now pursuing was raised by India in the original proceeding, **and was dismissed** by the Panel, without a finding of violation. In the original dispute, India made two claims alleging violation of Article 3.5 of the AD Agreement. With respect to one of those claims, the Panel found no violation. With respect to the other claim, the Panel stated:

> "Finally, with respect to India's claim that the European Communities failed to properly consider "other factors" which might have been causing injury to the domestic industry, as required by Article 3.5 of the AD Agreement, we note that, with the exception of the argument concerning improper consideration of "dumped" imports, India has made no other arguments in support of this claim. Having rejected India's position in that regard, we consider that India has failed to present a *prima facie* case in this regard".[59]

6.42 In this proceeding, India again claims a violation of Article 3.5 of the AD Agreement, arguing, *inter alia*, that the EC failed to properly consider "other factors" which might have been causing injury to the domestic industry. The EC did not, however, undertake a reconsideration of the "other factors" identified by India. Rather, it referred back to and confirmed its original consideration of these factors. Thus, India is now challenging aspects of the EC determination that it raised, and could have pursued in the original dispute, but did not. Although India stated a claim in respect of the EC's consideration of "other factors" causing injury in the original Panel proceeding, other than an argument concerning the alleged obligation to distinguish "dumped" and "undumped" transactions in determining import volumes, which the Panel rejected, India made no arguments in support of its claim.

6.43 To rule on this aspect of India's claim under Article 3.5 in this proceeding would be to allow India a second chance to prevail on a claim which it raised, but did not pursue, in the original proceeding. We cannot conclude that such a result is required by Article 21.5 of the DSU, or any other provision. The possibility for manipulative or abusive litigation tactics that would be opened by allowing Members an opportunity to obtain a ruling in an Article 21.5 that they could have sought and obtained in the original dispute would, in our view, be inestimably harmful to the effective operation of the dispute settlement system.[60] We hasten to emphasise that we do not consider that India has engaged in any such harmful tactics, or has engaged in this dispute settlement procedure in anything other than entirely good faith in an effort to resolve the dispute, as required by Article 3.10 of the DSU. We nonetheless consider that a claim which, as a legal and practical matter, could have been raised and pursued in the original dispute, but was not, cannot be raised on the same facts and legal premises in an Article 21.5 proceeding to determine the existence or consistency of measures taken to comply with the recommendation of the DSB in the original dispute. In our view, this ruling furthers the object and purpose of the DSU..

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[58] See Articles 3.2 - 3.3 of the DSU.

[59] Original Panel Report, *EC-Bed Linen*, at para. 6.144.

[60] As the Appellate Body has noted, "The procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes". Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"* ("*US – FSC*"), WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, 1619, at para. 166.

6.44 India submits that while it may be clear at this point that it should have pursued its Article 3.5 claim concerning "other factors" causing injury in the original dispute, it did not do so, not because of a lack of good faith, but in order not to overload the original Panel with too many claims. India's argument also suggests that the Panel's decision in the original case was an exercise of judicial economy.[61] As noted, we do not ascribe any bad faith to India in this dispute – we are convinced that India is pursuing this matter in entirely good faith. However, the decision by the Panel to dismiss India's claim under Article 3.5 concerning "other factors" of injury in the original dispute was not an exercise of judicial economy, but a finding that India had failed to present a *prima facie* case of violation. In our view, it is entirely appropriate to hold a Member to the consequences of the choices it makes in dispute settlement –where the complaining Member has failed to pursue a claim by presenting arguments in support of that claim in the original dispute, we consider it would be unfair to the defending Member to entertain the same claim on the same unchanged aspects of the measure in an Article 21.5 proceeding. To conclude otherwise would allow a Member to state claims in a request for establishment, and preserve any arguments on those claims for a subsequent Article 21.5 proceeding.

6.45 India argues that prejudice to the defending Member from a lack of a reasonable period for implementation following a decision by an Article 21.5 panel on a claim that could have been asserted in the original dispute but was not, would only arise if the reasserted claim were the only claim in the Article 21.5 proceeding, or where the Article 21.5 panel found all other aspects of the measure taken to comply consistent with the defending Member's obligations.[62] However, in our view, a decision on this issue does not turn on the facts of any particular dispute, but on more overarching considerations of the appropriate functioning of Article 21.5 panels and the dispute settlement system as a whole. The accelerated process in Article 21.5 proceedings serves to ensure that a complaining Member, after having prevailed once in dispute settlement, is not obligated to nonetheless go through an entire dispute settlement proceeding if the implementing measure violates the provisions of a covered agreement.[63] On the other hand, the dispute settlement system provides Members with time to bring inconsistent measures into conformity, prefers mutually acceptable solutions, and provides for suspension of concessions only as a last resort.[64] Yet, a Member found to have violated a provision in an Article 21.5 proceeding pursuant to a claim that could have been pursued in the original dispute but was not would be deprived of the opportunity to seek a mutually acceptable solution, of the opportunity to bring its measure into conformity, and might, depending on the nature of the violation, be subjected to suspension of concessions.

6.46 India asserts that the Panel in *EC – Bananas III (Article 21.5 – Ecuador)* rejected the argument made by the EC in that case that the EC would be prejudiced if Ecuador were allowed to bring new claims in the Article 21.5 proceeding, because of a lack of time to implement. However, in that case, the measures challenged by Ecuador modified aspects of the EC's banana import regime that had been found by the original panel and Appellate Body reports to be inconsistent with the EC's obligations. Moreover, while the Panel observed that the issues raised by Ecuador were "quite similar" to those raised in the original dispute, there is no suggestion in the Report that Ecuador sought to raise claims in the Article 21.5 proceeding concerning unchanged aspects of the measures which it could have pursued in the original dispute but had not.[65]

6.47 India points out that, in *Canada – Aircraft (Article 21.5 - Brazil)*, the Appellate Body noted that

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[61] India's answer to the Panel's question 2 at para. 5, Annex E-1.
[62] India's answer to the Panel's question 2 at para. 6, Annex E-1.
[63] See *Australia - Salmon (Article 21.5 – Canada)* at para. 7.10, subparagraph 9.
[64] Articles 21.3 and 3.7 of the DSU.
[65] Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by Ecuador* ("*EC – Bananas III (Article 21.5 – Ecuador)*"), WT/DS27/RW/ECU, 12 April 1999, DSR 1999:II, 803, at paras. 6.8 - 6.10

> "in carrying out its review under Article 21.5 of the DSU, a panel is not confined to examining the "measures taken to comply", from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings".[66]

6.48 We agree with this conclusion of the Appellate Body. It may often be the case that the nature of the measure taken to comply is such that entirely new claims, and even claims under agreements not at issue in the original dispute, are appropriately raised in an Article 21.5 proceeding concerning that measure. However, the case before us here is very different from that before the Appellate Body in *Canada – Aircraft (Article 21.5 - Brazil*). In that case, Canada had implemented the recommendation of the DSB by adopting a new and different measure. In the Article 21.5 proceeding, Brazil made claims regarding that measure that it had not made in the original dispute. Canada objected to claims raised by Brazil against the new measure on the grounds that no similar claims had been raised against the original measure. Had Canada's objection been upheld, Brazil would have been barred from making claims that **could not** have been raised in the original proceedings. The issue before us is whether India should be allowed to raise, in this Article 21.5 proceeding, claims with respect to Article 3.5 which it **could and did** raise before the original panel, but which it did not pursue, and which the Panel dismissed for failure to present a *prima facie* case of violation.

6.49 Similarly, we do not disagree with the views of the Panel in *Australia – Salmon (Article 21.5 – Canada)*. In that case, the Panel concluded that:

> "Article 21.5 is not limited to consistency of certain measures with the DSB recommendations and rulings adopted as a result of the original dispute; nor to consistency with those covered agreements or specific provisions thereof that fell within the mandate of the original panel; nor to consistency with specific WTO provisions under which the original panel found violations".[67]

The Panel went on to rule, with respect to Australia's request to limit the scope of the Panel's examination to exclude claims of discrimination under Articles 2.3 and 5.5 of the SPS Agreement,

> "even assuming that no finding of discrimination under Articles 2.3 or 5.5 was made in the original dispute – a matter contested by Canada -- the fact that no such claim may have been dealt with in the original dispute does not prevent an Article 21.5 compliance panel from doing so. Nowhere in the DSU can we trace the requirement referred to by Australia that Article 21.5 compliance panels can only reconsider WTO provisions dealt with by the original panel in case of a "change in circumstances". If, indeed, no "change in circumstances" occurred, as a matter of substance, one could expect that a compliance panel would simply confirm the finding made by the original panel".[68]

Again, however, the facts of *Australia – Salmon (Article 21.5 – Canada)* are different. In that case, Canada argued first that Australia had failed to take measures necessary to comply with the DSB's recommendation, and, second, that even if it had implemented some measures purporting to comply, those new measures were themselves inconsistent with relevant covered agreements. Thus, again,

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[66] Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU* ("*Canada – Aircraft (Article 21.5 – Brazil)*"), WT/DS70/AB/RW, adopted 4 August 2000, at para. 41.

[67] Panel Report, *Australia – Salmon (Article 21.5 – Canada)* at para. 7.10, subparagraph 9 (emphasis in original).

[68] Panel Report, *Australia – Salmon (Article 21.5 – Canada)* at para. 7.10 subparagraph 14 .

there is no suggestion that Canada sought to pursue a claim in the Article 21.5 proceeding that it could have, but did not, pursue in the original dispute.

6.50 In our view, the case before us is more analogous to the situation faced by the Article 21.5 Panel in *United States – Shrimp (Article 21.5 - Malaysia)*.[69] In that case, the measure at issue – the measure taken by the United States to comply - consisted of three elements, section 609, the Revised Guidelines for the implementation of section 609, and the application in practice of both section 609 and the Revised guidelines.[70] Section 609 had been an element of the original measure, as well, and its wording had not changed since the original dispute. In the original proceeding, the Appellate Body had ruled that section 609 was entitled to "provisional justification" under Article XX of the GATT 1994, but found deficiencies in the application of the original measure that were unrelated to section 609 itself. In the Article 21.5 proceeding, the Panel found that since section 609 had not been changed, the findings of the Appellate Body concerning that provision remained valid. On appeal, Malaysia argued that the Panel failed to properly examine the consistency of the US measure with provisions of GATT 1994. The Appellate Body rejected this argument. The Appellate Body found that the Panel had properly examined section 609, correctly found it had not been changed since the original proceeding, and rightly concluded that the Appellate Body's ruling with respect to the consistency of section 609 therefore still stood. Thus, the Appellate Body rejected Malaysia's argument which it considered "seems to suggest as well that an Article 21.5 panel must re-examine, for WTO consistency, even those aspects of a new measure that were part of a previous measure that was the subject of a dispute, and were found by the Appellate Body to be *WTO-consistent* in that dispute, and that remain unchanged as part of the new measure".[71]

6.51 In reaching its conclusion, the Appellate Body stated that:

> "Appellate Body reports that are adopted by the DSB are, as Article 17.14 provides, "…unconditionally accepted by the parties to the dispute", and, therefore must be treated by the parties to a particular dispute as a final resolution to that dispute".[72]

We consider that the same principle applies to those aspects of the Panel's report that are not appealed and are thus not addressed by the Appellate Body. Thus, the portions of the original Report of the Panel that are not appealed, together with the Appellate Body report resolving the issues appealed, must, in our view, be considered as the final resolution of the dispute, and must be treated as such by the parties, and by us, in this proceeding.[73]

6.52 Neither the Panel nor the Appellate Body in the original dispute had the opportunity to consider arguments with respect to India's claim in the original proceeding concerning the consistency of the EC's anti-dumping duty with Article 3.5 of the AD Agreement concerning consideration of "other factors "of injury, because India did not present arguments in support of its claim. The Panel **did**, however, rule on India's claim, finding that India had failed to present a *prima facie* case on this claim, and that aspect of the Panel's report was adopted without modification. When considering the

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[69] Appellate Body Report, "*United States – Shrimp* (*Article 21.5 - Malaysia*)".
[70] *Id*., at para. 79.
[71] *Id*., at para. 89
[72] *Id*., at para. 97.
[73] We find support for our view in the finding of the Appellate Body in *Japan – Alcoholic Beverages II*:

> "Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, **except with respect to resolving the particular dispute between the parties to that dispute**".

Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* ("*Japan – Alcoholic Beverages II*"), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97 at pp. 14 - 15 (emphasis added).

status of adopted panel reports, the Appellate Body has indicated that they are binding on the parties "with respect to that particular dispute".[74] In our view, the Panel's ruling in the original dispute disposed of India's claim in this regard. Thus, we consider that India is precluded from reasserting in this proceeding and presenting arguments in support of a claim challenging the EC's consideration of "other factors" of injury.[75]

6.53 We therefore conclude that, with respect to India's claim 6, insofar as it concerns the consistency of the EC's measure with the obligation in Article 3.5 to ensure that injuries caused by "other factors" not be attributed to the dumped imports, the EC's request for preliminary ruling has merit. We consider that this aspect of India's claim is not properly before us, having been disposed of by the Panel in the original Report and not appealed, and will not make any ruling on it.

6.54 Turning to the second aspect of the EC's third request for preliminary ruling. In the original proceeding, India had alleged a violation of Article 3.4 of the AD Agreement, arguing specifically that the EC had failed to consider the following: productivity; return on investments; utilisation of capacity; magnitude of margin of dumping; cash flow; inventories; wages; growth; and ability to raise capital or investments. India prevailed on this claim, the Panel concluding that:

> " the European Communities did not conduct "an evaluation of all relevant economic factors and indices having a bearing on the state of the industry" and, therefore, failed to act consistently with its obligations under Article 3.4 of the AD Agreement".[76]

6.55 India made no claims or arguments concerning the substance of the EC's consideration of those Article 3.4 factors which the EC authorities did address in the original determination.

6.56 In the redetermination, with respect to those Article 3.4 factors which had been addressed in the original determination, the EC "confirmed" the findings in that original determination. With respect to those factors the Panel had found had not been considered in the original determination, the EC set out in Regulation 1644/2001 its consideration of those factors. India does not now dispute that the EC has considered "all relevant economic factors and indices having a bearing on the state of the industry" as required by Article 3.4. Rather, India now argues that the EC failed to carry out an overall reconsideration and analysis of the determination of injury, challenging the substance of the EC's evaluation of all the Article 3.4 factors, those factors that had been addressed in the original determination, and those factors that had not.

6.57 This latter is not a claim that India could have presented in the original dispute, as it relates primarily to the analysis in the redetermination. Thus, in our view, the EC's request for preliminary ruling is without merit insofar as it seeks to have us decline to rule on India's claim 5.

4. Claims not stated in the request for establishment of the Panel

(a) Arguments of the parties

6.58 The EC argues that certain claims raised by India in its first submission were not stated in its request for the establishment of the Panel, contrary to the requirement imposed by Article 6.2 of the DSU, and are, therefore, not within the Panel's terms of reference. Specifically the EC considers that (1) India's claim that the EC acted inconsistently with Article 4.1(i) of the AD Agreement by excluding from the "Community industry" a producer which had imported bed linen from Pakistan,

[74] Appellate Body Report, *Japan – Alcoholic Beverages II*, at p. 14.

[75] The EC confirmed the findings set out in the original determination, and expanded on them in respect of one element, the development of consumption of bed linen in the EC, in order to take into account slightly different figures on domestic industry sales. Regulation 1644/2001, at paras. 59 – 64. India's claim in this proceeding does not rely on this minor change.

[76] Original Panel Report, *EC - Bed Linen*, at para. 6.169.

and (2) India's claim that the EC failed to respect the "reasonable period of time" agreed by the parties under Article 21.3(b) of the DSU, are not within the Panel's terms of reference.

6.59 With respect to the first claim, the EC notes India's allegation that, by not taking into account for the purposes of the injury analysis evidence concerning a company which was excluded from the "Community industry" in the original investigation because it had imported the product under investigation from Pakistan, the EC did not base its injury determination on "positive evidence" and therefore acted inconsistently with Article 3.1. The EC recognizes that India has alleged only a violation of Article 3.1. However, in the EC's view, India's position necessarily involves a claim under Article 4.1(i). The EC considers that the Panel cannot find a violation of Article 3.1 as alleged by India unless it were to first determine whether the exclusion of the company concerned from the "domestic industry" was consistent with Article 4.1(i). As that provision does not appear as the subject of a claim in the request for establishment of this Panel, the EC argues that it is not within the Panel's terms of reference.

6.60 With respect to the second claim, that the EC failed to respect the agreed "reasonable period of time", the EC asserts that this claim is also not mentioned in the panel request. Furthermore, the EC maintains that India does not identify these allegations as a separate claim even in its first submission, and that India has cited the wrong legal basis for any such claim, which the EC maintains is Article 21.3 of the DSU, and not Article 21.5 as cited by India.

6.61 India considers that the EC has misrepresented the nature of India's claims and arguments. First, India maintains that it has not made any claim under Article 4(1)(i), and is not seeking a finding of violation of Article 4(1)(i). India asserts that the EC cannot create a claim by stating that India's claim under Article 3.1 "involves necessarily a claim based on Article 4(1)(i)".[77] India argues that in support of its claim 5, concerning alleged violations of Articles 3.1 and 3.4, it argues that factual evidence on the record concerning one producer was disregarded in the EC's analysis, despite having been verified. In India's view, the fact that this producer's information was excluded demonstrates that the EC failed to conduct an overall reconsideration of the evidence. Thus, while India considers that the EC's actions also violate Article 4(1)(i) separately, it has made no claim under that provision.

6.62 With respect to the EC's request concerning the reasonable period of time claim, India maintains that the EC has simply failed to grasp that there is no reason to allege a violation of Article 21.3, because India's claim is with respect to compliance with the ruling of the DSB within the reasonable period of time, and the Article 21.5 proceeding is intended to assess that compliance.

(b) Evaluation by the Panel

6.63 Article 6.2 of the DSU provides that the request for the establishment of a panel "shall provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". Thus, the complaining party must set out, with sufficient clarity, the claims it seeks to have resolved. The Appellate Body has observed in this context that:

> "**identification of the treaty provisions** claimed to have been violated by the respondent **is always necessary**… such **identification is a minimum prerequisite** if the legal basis of the complaint is to be presented at all". [78]

[77] First Written Submission of the European Communities (hereinafter "EC FWS"), at para. 54, Annex A-2.

[78] *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products* ("*Korea - Dairy Safeguard*"), Appellate Body Report, WT/DS98/AB/R, adopted 12 January 2000, at para. 124 (emphasis added).

The Appellate Body has distinguished between **claims** which must be specified in the request for establishment, and **arguments**, which may be developed throughout the course of the proceeding. For instance, in *EC-Bananas*, the Appellate Body noted that:

> "Article 6.2 of the DSU requires that the *claims*, but not the *arguments*, must all be specified sufficiently in the request for the establishment of a panel in order to allow the defending party and any third parties to know the legal basis of the complaint. If a *claim* is not specified in the request for the establishment of a panel, then a faulty request cannot be subsequently "cured" by a complaining party's argumentation in its first written submission to the panel or in any other submission or statement made later in the panel proceeding".[79]

On the other hand, there is no obligation on a party to limit its arguments to only those treaty provisions about which claims have been identified in the request for establishment.

6.64 In this case, the EC asserts that India has pursued claims in its first written submission with respect to treaty provisions which India did not identify at all in the request for establishment, specifically Article 4.1(i) of the AD Agreement, and Article 21.3 of the DSU. India has responded that the EC has misunderstood its position, and that its references to the referenced treaty provisions are simply aspects of its argument with respect to claims which are, undisputedly, identified in its request for establishment.

6.65 With respect to the putative claim under Article 4.1(i) of the AD Agreement, India has expressly stated that it is not seeking to have the Panel rule with respect to Article 4.1(i). The EC's position rests on its view that a claim under Article 4.1(i) is necessary in order for India to prevail. Whether or not this is the case is a question we may find necessary to consider in addressing India's claims. However, it does not, in our basis, constitute any basis for a preliminary ruling. India has stated that it makes no claim under Article 4.1(i).[80] As it is the complaining party that determines what claims it wishes to pursue, we respect India's statement of its claims, and will make no ruling with respect to Article 4.1(i).

6.66 The situation is similar with respect to the putative claim under Article 21.3 of the DSU. The EC's position rests on its view that India's assertion that the EC failed to respect the reasonable period of implementation can only be addressed in the context of a claim under Article 21.3(b), which the EC asserts India did not make. India responds that it did not make a claim under Article 21.3 because its dispute with the EC involves the alleged failure to **comply** with the recommendation of the DSU within the reasonable period of time, and thus it made no separate claim under Article 21.3(b) with respect to the timing of compliance.[81] As with the first part of the EC's request in this regard, we consider that the complaining Member is entitled to formulate its complaint as it wishes. Based on India's representations, we will make no ruling with respect to Article 21.3 of the DSU.

6.67 Of course, the fact that we will make no rulings concerning putative violations of Article 4.1(i) of the AD Agreement and Article 21.3 of the DSU does not mean that we may not address these provisions if we consider them relevant to our analysis of the claims India did make. However, if we were to conclude that a finding of violation under either Article 4.1(i) or Article 21.3 were a necessary predicate to allow us to reach a conclusion with respect to the alleged violations that **are** the subject of India's claims, we would be unable to resolve the claims India has actually made. We cannot exceed the scope of our mandate and cannot resolve claims that have not been properly

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[79] *European Communities - Regime for the Importation, Sale and Distribution of Bananas* ("*EC - Bananas*"), Appellate Body Report, WT/DS27/AB/R, adopted 25 September 1997, at para. 143.

[80] India's SWS at paras. 42, 46, and India's Closing Statement at para. 27.

[81] India's SWS at paras. 47 - 50, and India's Closing Statement at para. 27.

brought before us, even if this prevents us from ruling on claims that have been properly brought before us.

6.68 Based on the foregoing, we deny the EC's fourth request for preliminary ruling as unnecessary in light of the fact that India has not made the claims addressed by the request.

C. CLAIMS AND ARGUMENTS

1. Claim 1: The EC acted inconsistently with its obligations under Article 2.2.2(ii) of the AD Agreement

(a) Factual background

6.69 In its redetermination, Regulation 1644/2001, the EC recalculated dumping margins for five Indian producers/exporters on an individual basis.[82] On the basis of the recalculation, two companies were found to have a dumping margin of zero. In the redetermination, the EC used constructed normal value for all five companies for which individual dumping margins were calculated. The amounts for selling, general, and administrative expenses (SG&A) and for profits for one company, Bombay Dyeing, were established under the chapeau of Article 2.2.2 of the AD Agreement, that is, on the basis of Bombay Dyeing's actual data pertaining to production and sales in the ordinary course of trade of the like product. The other four companies receiving individual rates did not have sufficient sales in the ordinary course of trade to allow use of the chapeau methodology, and therefore the EC applied the method set out in Article 2.2.2(ii). That provisions calls for use of the "weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin" in constructing normal value. Taking into account the Appellate Body's ruling that the data of only one company could not be used in this context, the EC took the weighted average of the figures for Bombay Dyeing and Standard Industries. Standard Industries was not included in the sample, but information had been collected from that company in the original investigation and held in reserve in case of need. The EC weighted the data for SG&A and profits reported by these two companies on the basis of the net value of their domestic sales.

(b) Arguments of the parties

6.70 India argues that the EC erred by weighting the data for SG&A and profits by sales value, asserting that Article 2.2.2(ii) requires weighting on the basis of sales volume. India recognizes that the text of Article 2.2.2(ii) does not address this point. Nevertheless, India argues that Article 2.2.2(ii) does not permit the calculation of the weighted average on the basis of sales value. India asserts that the Appellate Body has held that the obligation to "weight" the average in Article 2.2.2(ii) is necessary to reflect the relative importance of the different companies whose data is being averaged. India maintains that weighting on the basis of sales value fails to accomplish this goal. India points to various provisions of the AD Agreement as contextual support for its position. India notes that footnote 2 of the AD Agreement, which defines when a company has sufficient sales in the domestic market to allow its own data to be used for the calculation of normal value, provides that such sales "shall normally be considered a sufficient quantity for the determination of the normal value if such sales constitute 5 per cent or more … ". (emphasis added). India also points to footnote 5, which defines when sales below cost are in sufficient quantities to allow them to be disregarded in the calculation of normal value. Finally, India points to Article 6.10 of the AD Agreement, which provides that in selecting a sample to be examined for the calculation of dumping, investigating authorities should use a sample which includes the largest percentage of the volume of exports which can reasonable by investigated. In India's view, these provisions recognize the importance of sales volume in establishing cut-off points pertaining to the relative importance of domestic sales, and

[82] Regulation 1644/2001, at paras. 5 – 14.

therefore provide contextual support for the proposition that the average calculated under Article 2.2.2(ii) must be weighted on the basis of sales volume, and not on the basis of sales value.

6.71 India also points to a case from the European Court of First Instance in which the court held that the EC had not acted improperly in considering sales volume, and not sales value, in applying a secondary cut-off in the determination of whether there were sufficient sales in the ordinary course of trade to allow determination of normal value on the basis of those sales.[83] Footnote 5 of the AD Agreement provides that where sales below unit costs are 20 percent or more of the domestic sales volume, such sales may be disregarded in determining normal value. The EC, after applying this test, normally bases its determination of normal value on the remaining sales, **except** where those sales are less than 10 percent of the total volume of domestic sales. In the case cited by India, the complaining party argued that the second part of the EC's test, the 10 percent cut-off, should be calculated on the basis of sales value, rather than sales volume. The Court rejected that argument. India refers to this Court case to argue that the EC authorities and the Court attach, in the context of measuring domestic sales, importance to volume rather than value.

6.72 India also argues that the EC has changed its position in this regard from that taken in the original Panel proceeding, asserting that during that proceeding, the EC had based its statements regarding the relative importance of Bombay Dyeing's sales in the domestic market on the basis of volume, not value.

6.73 The EC argues that Article 2.2.2(ii) does not establish any particular weighting factor as either necessary or appropriate. The EC further considers that the provisions of the AD Agreement cited by India are not relevant context for understanding Article 2.2.2(ii), and in any event do not establish that only volume may be used as the weighting factor under Article 2.2.2(ii). Rather, the EC asserts, the very fact that the cited provisions refer to quantity as the relevant criterion suggests that the specific reference was necessary, and that where a provision is silent, there is no obligation in this regard. The EC also considers that the judgement of the Court of First Instance does not constitute "context" for the interpretation of Article 2.2.2(ii) in terms of the Vienna Convention. Moreover, the EC maintains that the Court's judgment did not address the provision of EC law equivalent to Article 2.2.2(ii) of the AD Agreement, and in any event upheld the decision of the EC to rely on volume rather than value in applying the 20 percent rule as within the EC's discretion, not as a legal requirement.

6.74 Finally, the EC asserts that India is mistaken as a matter of fact in asserting that during the original Panel proceeding the EC relied on the volume of Bombay Dyeing's sales in making arguments about its relative importance in the domestic market. The EC states that the calculation of the relative importance of Bombay Dyeing's sales has always been based on value – the difference between the 80 percent figure referred to in the original proceeding and the 90 percent relied upon in calculating the weighted average under Article 2.2.2(ii) is because the denominator in the original case referred to domestic sales by all producers, while in the Article 2.2.2(ii) calculation, the denominator refers only to domestic sales by Standard and Bombay.

6.75 The EC asserts that the averaging method used in this case is the same as generally applied by the EC authorities when acting under Article 2.2.2(ii). Moreover, the EC asserts that, even assuming weighting the average by volume rather than value were appropriate or required, there is no reason to accept India's conclusions that the volume should be calculated on the basis of the number of units of bed linen sold. This calculation treats as equivalent a unit of one pillow case and a unit of an entire sheet set, depending on packaging, which the EC considers obviously inappropriate, as it entirely fails to reflect the relative importance of the producers' transactions in the domestic market. If sales

[83] Case T-118/96, Thai Bicycle Industry Co. Ltd v. Council of the European Union, Judgment of the Court of First Instance of 17 July 1998, Exhibit-India-RW-33, at para. 79.

volume were calculated by weight, the results would again be different, and would result in higher dumping margins than India's proposed method.

(c) Arguments of third parties

6.76 Korea considers that the EC did not act consistently with Article 2.2.2(ii) in relying on sales value to weight average SG&A and profit for purposes of constructing normal value. Korea recognizes that Article 2.2.2 (ii) does not prescribe the use of any specific weighting factor in determining the weighted average. Korea considers that the fact that the use of a weighted average is required under several provisions of the AD Agreement, but that none of them prescribes the factor to be used in weighting the average, implies not that the investigating authorities enjoy discretion in the choice of averaging factor, but that investigating authorities may choose an averaging factor of their choice, but the choice is not immune from scrutiny. Korea considers that the important question is that the weighted averaging should take into account in an appropriate manner the relative importance of different exporters. Korea is of the view that the use of sales value, rather than sales quantity or volume as the weight-averaging factor, resulted in distorting the relative importance of the exporters concerned, because it is biased towards overemphasis of the relative importance of a company with higher SG&A and profits – in this case, Bombay Dyeing - as SG&A and profits, and sales value, are price-related indexes. Therefore, weighting based on sales value leads to a higher weighted average SG&A and profits, and consequently a higher constructed normal value, in Korea's view thus artificially inflating the dumping margins. Korea notes that the EC uses sales value as the weighting factor in calculating the weighted average dumping margin under Article 9.4(i) of the AD Agreement. In Korea's view, because the dumping margin in Article 9.4 is independent of sales value, weighting the average on the basis of sales value will not distort the resulting weighted average dumping margin. The selling price of the company with the higher dumping margin can be lower than that of the company with a lower dumping margin because these two variables are not correlated. Therefore, Korea considers that weighting by sales value under Article 9.4(i) will not produce any distortion. Korea asserts that, *a contrario*, weighting by value for purposes of Article 2.2.2 (ii) would lead to distortion and thus inflate the dumping margin, as SG&A and profits, and sales value are positively correlated. Korea also considers that weighting the average based on volume of sales by weight, rather than by the number of transactions is inappropriate, as the averaging method should reflect the actual method of transactions and practice. Bed linen end-products are in general sold in different units and rarely, if ever, sold by weight or in bulk.

6.77 The United States disagrees with India’s position on Article 2.2.2(ii) of the AD Agreement. In the US view, although Article 2.2.2(ii) specifies that a weighted average is to be utilised, it does not specify the manner in which the weighting is to be performed, and provides no guidance, express or implied, as to whether the weighting should be done on the basis of sales value or sales volume. The United States also disagrees with India’s claim that the “context” of Article 2.2.2(ii) indicates that only a quantity-based weighted average is permissible. In the US view, the fact that distinct sections of the AD Agreement refer to sales volume and quantity cannot be taken as evidence that Article 2.2.2(ii) requires a quantity-based weighted average. The United States considers that, in the face of the silence of Article 2.2.2(ii) on this issue, India’s argument regarding “context” indicates that Members knew how to insert references to volume or quantity when they wanted to require a calculation to be performed on that basis. Thus, where they have omitted such a reference, it should be considered equally relevant. Moreover, the United States asserts that the sections relied on as "context" by India are wholly unrelated to the averaging of SG&A and profit. As both sales value and sales volume represent permissible bases for weight-averaging these figures, a Member conducting an investigation retains the discretion to choose between them. In the US view, if the Panel were to require use of a particular method, it would add to the obligations to which the WTO Members have agreed, in direct contravention of Article 3.2 of the DSU. The United States submits that the Panel should not disturb the EC’s reliance on a value-based weight-averaging in this instance.

(d) Evaluation by the Panel

6.78 The European Communities weight-averaged the data provided by two companies in determining the amounts for costs and profits to be used in constructing normal value. The EC weighted the data on the basis of the net value of the domestic sales of the two companies in question. India asserts that weighting on the basis of sales value is inconsistent with the requirements of Article 2.2.2(ii) of the AD Agreement, and that the EC has therefore violated this provision of the AD Agreement. The question before us, therefore, is whether Article 2.2.2(ii) imposes any requirement as to the basis on which the averages of the amounts for costs and profits, to be used in constructing normal value, must be weighted, and if so, whether the EC has acted inconsistently with that requirement in this case.

6.79 Article 17.6(ii) of the AD Agreement provides that a panel "shall interpret the relevant provisions of the AD Agreement in accordance with customary rules of interpretation of public international law". In this regard, the Appellate Body has stated that Article 31(1) of the *Vienna Convention on the Law of Treaties* ("Vienna Convention") "has attained the status of a rule of customary or general international law. As such, it forms part of the 'customary rules of interpretation of public international law'"[84]. Article 31(1) of the Vienna Convention provides:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[85]

Article 31 of the Vienna Convention goes on to provide:

> "2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties".[86]

6.80 We turn therefore to the text of Article 2.2.2(ii), which provides that, when, for the purposes of constructing normal value, the amounts for administrative, selling and general costs and for profits cannot be determined on the basis of actual data pertaining to production and sales in the ordinary

[84] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* ("*United States – Gasoline*"), WT/DS2/AB/R, adopted 20 May 1996, at p. 17 (footnote omitted).
[85] (1969) 8 International Legal Materials 679.
[86] (1969) 8 International Legal Materials 679.

course of trade of the like product by the exporter or producer under investigation, those amounts may be determined on the basis of, *inter alia*:

> "(ii) the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin".

6.81 It is clear from the text of Article 2.2.2(ii) that the amounts for SG&A and for profits to be used in constructing normal value must be weighted averages. However, nothing in the text specifies the factor to be used in calculating those weighted averages. There is clearly no specific direction requiring that the averages be weighted on the basis of volume, rather than value. Article 2.2.2(ii) is simply silent on this issue.

6.82 In this regard, we note the finding of the Appellate Body in *India – Patents (US)*:

> "The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the *Vienna Convention*. But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended".[87]

6.83 India argues that the Appellate Body has held that the obligation to weight the average calculated under Article 2.2.2(ii) is necessary to reflect the relative importance of the companies whose data is being averaged, and that this can only be done by weighting on the basis of volume. In this regard, India refers to the finding of the Appellate Body that

> "the "average" which results from combining the data from different exporters or producers must reflect the relative importance of these different exporters or producers in the overall mean.[41]

> [41] To weight" is defined as "multiply the components of (an average) by factors to take account of their importance". See *The Concise Oxford Dictionary of Current English*, *supra*, footnote 24, p. 1589. "Weighted average" is defined as "resulting from the multiplication of each component by a factor reflecting its importance". See *The New Shorter Oxford English Dictionary* (Clarendon Press, 1993), Vol. II, p. 3651".

6.84 To accept India's argument on this issue would be to accept as fact that an average weighted on the basis of sales value cannot reflect the relative importance of the different companies whose data is being averaged in a way that is meaningful in the context of the calculation that is at issue here. India has entirely failed to demonstrate this point. India asserts that "volume is neutral as regards the sizes of the companies and does not attach relatively more relevance to companies that sell at higher prices"[88] and suggests that therefore volume is a more appropriate basis for weighting. It is, however, clear that any factor may be used to weight an average, and the resulting weighted average will reflect the importance of each of the components in the average **with respect to that factor**. Thus, an average of two companies' data weighted on the basis of sales value reflects the relative importance of each of those companies in the total sales value. Similarly, an average of two companies' data weighted on the basis of sales volume reflects the relative importance of each of those companies in the total sales volume. Of course, in the context of Article 2.2.2(ii), it would be necessary to ensure that the relative importance of the components is considered in a manner that is relevant to the

[87] Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* ("*India – Patents (US)*"), WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9,at para. 45.

[88] India's answer to the Panel's question 12, Annex –E-1.

analysis. In our view, either volume or value may be relevant in the context of Article 2.2.2(ii), and both are "neutral" in the sense that the weighted average will reflect the relative importance of the companies with respect to that factor. The fact that the choice of the factor used in calculating the weighted average will affect the outcome is simply irrelevant to the question whether Article 2.2.2(ii) requires the use of one volume rather than value as the weighting factor.[89] In particular, the fact that using volume calculated in units may result in an outcome more favorable to exporters (i.e., a lower dumping margin) in a particular case is irrelevant to the interpretation of Article 2.2.2(ii).[90]

6.85 India refers to other elements of the AD Agreement as "context" for its position, arguing that these demonstrate that the "weighted average" required in Article 2.2.2(ii) must be weighted on the basis of volume. India refers to footnote 2 of the AD Agreement, which defines when a company has sufficient sales in the domestic market to allow its own data to be used for the calculation of normal value, footnote 5 of the AD Agreement, which defines when sales below cost are in sufficient quantities to be disregarded in the calculation of normal value, and Article 6.10 of the AD Agreement, which provides that investigating authorities may, in the calculation of dumping margins, limit their examination to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.

6.86 Under the Vienna Convention, the context of a particular provision is not an independent element giving meaning to the text of a provision. Rather, the text is to be read **in** its context and **in the light of** the object and purpose of the treaty. As the Appellate Body has stated, in *US – Shrimp*:

> "A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought. Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought".[91]

6.87 We note that there are other provisions of the AD Agreement which refer to the concept of a weighted average – Articles 2.2.1, 2.4.2(ii), and 9.4(i). None of these provisions contains any guidance on the factor or factors to be used in weighting the average to be calculated. Thus, what might be considered the most relevant context is entirely silent on the question at issue. The most logical conclusion to be drawn from this silence is that the choice of factor is up to the investigating authority.

6.88 None of the elements of the AD Agreement pointed to by India as contextual support refers to the calculation of averages, much less to the calculation of weighted averages or the basis on which

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[89] The EC pointed out that volume could be calculated on different bases, and the outcome would be different depending on whether it was calculated in units, or by weight, with one choice resulting in even higher dumping margins than the value-based weighing relied on by the EC. India indicated that it had not specified the basis on which volume should be calculated.

[90] Korea, as third party, asserts that calculation of weighted averages under Article 2.2.2(ii) based on sales value is biased towards overemphasising the relative importance of a company with higher SG&A and profits. Korea asserts that SG&A and profit, and sales value, are price-related indices, and in the majority of cases, the sales price of companies with higher SG&A and profits would be higher than those of companies with lower SG&A and profits. Thus, in Korea's view, normally an average weighted on the basis of sales value will be higher than an average weighted on the basis of sales volume, resulting in a higher constructed normal value, and higher dumping margins. However, even assuming Korea's analysis were factually correct in a particular case, we simply do not consider that the results in particular cases, whether more or less favorable to one or the other side in an anti-dumping investigation, are, in and of themselves, relevant to the interpretation of the legal obligations of the AD Agreement.

[91] *United States – Import Prohibition of Certain Shrimp and Shrimp Products* ("*US – Shrimp*"), Report of the Appellate Body, WT/DS58/AB/R, adopted 6 November 1998, at para. 114 (footnote omitted).

such averages must be weighted. Even assuming that provisions dealing with such entirely different matters may appropriately be considered "context" of Article 2.2.2(ii) and thus relevant to its interpretation in accordance with the Vienna Convention, there is nothing in these provisions which necessarily implies that, despite the lack of any specific textual directive, the averages calculated under Article 2.2.2(ii) must be weighted on the basis of sales volume. If anything, the provisions pointed to by India suggest that the drafters of the AD Agreement knew how to specify when certain calculations should be made on the basis of volume, indicating that where there is no such basis specified, the text simply does not establish any requirement, or prohibition, in this regard.

6.89 India also points to a case from the European Court of First Instance in which that Court approved an EC decision relying on sales volume in determining whether there was a sufficient quantity of sales made in the ordinary course of trade. India argues that the principle of good faith, as enshrined in the Vienna Convention, ensures that such case law can serve as relevant context. In this regard, India submits that the EC is "estopped" from advocating before us an interpretation of a provision of the AD Agreement which is different from the interpretation by the European Court of First Instance of a provision in the EC's municipal anti-dumping law which is identical to the AD Agreement provision. Alternatively, India argues that even if the Panel were to not accept the EC's argument, and were to "develop its own line of reasoning similar to the one contained in the interpretations proposed by the EC, the panel still should find a violation of the respective provision of the [AD Agreement] as being applied in bad faith".[92] It is in this sense that India considers the court decision cited to be relevant context for the interpretation of the AD Agreement under the Vienna Convention.

6.90 We note first that court decision referred to by India does not constitute "context", as that term is used in Article 31 of the Vienna Convention, for the interpretation of Article 2.2.2(ii). Thus, we do not consider it relevant to our interpretation of that provision. Moreover, the Court's judgment did not address the provision of EC law equivalent to Article 2.2.2(ii) of the Agreement.[93] Thus, its persuasive value on the issue before us, the proper interpretation of that provision, would be limited in any event.

6.91 More fundamentally, we reject the assertion that a WTO dispute settlement panel should find a violation of a provision of a covered agreement, not on the basis of inconsistency of a Member's measure with a provision of a covered agreement, but rather on the basis that a provision of a covered agreement is "being applied in bad faith". Whatever may be the implications of national court decisions for the arguments of Members before WTO dispute settlement panels, a question which we neither address nor resolve here, "estoppel" based on national court decisions interpreting municipal law does not limit the decisions of WTO panels interpreting a covered agreement. A WTO panel is obligated to interpret the terms of covered agreements in accordance with customary rules of interpretation of public international law.[94] We know of no basis in international law, and India has not cited any, that would require us to conclude that a measure which is consistent with a Member's obligations under a provision of a covered agreement that we have interpreted in accordance with

[92] India's answer to the Panel's question 4, Annex E-1.

[93] The case in question involves the application of what is referred to in EC practice as the "80-10 rule". Footnote 5 of the AD Agreement provides that where sales at a loss exceed 20 percent of the domestic sales volume, these may be disregarded in establishing the weighted average price. The EC, in practice, would then base itself on the remaining sales at a profit, **except** where the profitable remaining quantity of sales is less than 10 percent of the total quantity of sales. Since only the first part of this practice is found in the AD Agreement, and the relevant EC Regulation, the complaining party in the Court case argued, *inter alia*, that the 10 percent rule, the second cut-off point, should be calculated on the basis of value rather than volume, the basis on which the first cut-off is calculated. The Court rejected that argument, upholding the decision of the EC to rely on volume rather than value as within the EC's discretion. Case T-118/96, Thai Bicycle Industry Co. Ltd v. Council of the European Union, Judgment of the Court of First Instance of 17 July 1998, Exhibit-India-RW-33.

[94] Article 3.2 of the DSU.

customary rules of interpretation of public international law could nonetheless be found to be in violation of that provision on the basis of alleged "bad faith".

6.92 India also argues that during the original Panel proceeding, the EC had asserted that Bombay Dyeing, one of the two companies whose data was included in the weighted average, represented 80 percent of the Indian market, while it was now asserting that Bombay Dyeing's share in the average calculated under Article 2.2.2(ii), is 90 percent. India argues that an "unbiased and objective authority cannot be permitted to shift positions as regards important aspects of a proceeding, thereby rendering the outcome into a moving target, displaying various views as and when deemed fit".[95]

6.93 If India were arguing that the EC applied a different methodology in the redetermination that than used in the original determination, there might be a basis for concern. However, the factual premise for such an argument has not been alleged, much less established, in this case. The EC has explained that in both the original dispute, and in this proceeding, the calculation in question was based on sales value, but that in the original dispute, the reference pointed to by India was in a different context, referring to the share of Bombay Dyeing in the total domestic sales value **of all Indian producers**, while in calculating the weighted averages, the reference was to the share of Bombay Dyeing in the total domestic sales value **of the two companies whose data were being averaged**. Since the denominator was different, it is clear that Bombay Dyeing's share will be different.[96] India's argument is thus incorrect as a matter of fact, even assuming it were relevant to the legal question of the interpretation of Article 2.2.2(ii).[97] In any event, a Member's measures are judged for consistency with its obligations under the AD Agreement, and not with consistency to statements in arguments that Member may have made or positions it may have taken in dispute settlement involving that measure, or any other.[98]

6.94 In the absence of any guidance in the text, and in view of the fact that weighting on the basis of sales value **does** reflect the relative importance of the two companies in the resulting weighted average on a relevant basis, we conclude that India has failed to demonstrate that the EC's calculation of an average weighted on the basis of sales value violates Article 2.2.2(ii).

2. Claims 2 and 3: The EC acted inconsistently with its obligations under Articles 3.1, 3.3 and 5.7 of the AD Agreement

(a) Factual background

6.95 On 12 March 2001, the Dispute Settlement Body (hereinafter "DSB") adopted the Report of the Appellate Body[99] and the Report of the Panel, [100] as modified by the Appellate Body, in the dispute "*European Communities – Anti-Dumping Duties On Imports Of Cotton-Type Bed Linen From India*" (WT/DS141). Pursuant to the recommendations of the Panel and Appellate Body, the DSB

[95] India's FWS at paragraph 65.

[96] We note as well that the amounts used for weighting the averages for selling, general and administrative costs and profits were based on revised figures for sales value supplied by Standard in its questionnaire response during the course of the investigation, and not the original figures relied on in the first calculation. Exhibit EC-1.

[97] We note that, in response to a question from the Panel, the EC has specified that it is the standing practice of the EC to use sales value to weight average the amounts of selling, general and administrative costs and profits, and that it believed there was no case in recent years where this practice was not followed. EC's answer to the Panel's question 16, at paras. 4 and 6, Annex E-2.

[98] We note in this context that we did not find either pertinent or persuasive arguments to the effect that the EC had taken a position in dispute settlement involving some other matter which position or analysis, if applied to the issues this case, might lead to a different result than that advocated by the EC in this case.

[99] Appellate Body Report, *EC-Bed Linen*..

[100] Original Panel Report, *EC-Bed Linen*..

requested the European Communities to bring its measure into conformity with its obligations under the AD Agreement.[101]

6.96 On 26 July 2001, the Council adopted Regulation 1515/2001 regarding measures that may be taken by the EC following adoption of a report by the Dispute Settlement Body in an anti-dumping or countervailing measure dispute.[102] That regulation provides, *inter alia*, that the Council, acting on a proposal by the Commission, may repeal or amend the disputed measure, or adopt any other special measures deemed appropriate in the circumstances. It also provides that the Commission may request interested parties to provide information and may conduct reviews, and that the Council may suspend the disputed or amended measure. The Regulation provides that the Council may repeal or amend a non-disputed measure, or adopt any other special measures deemed appropriate in the circumstances, if such action is considered appropriate, in order to take into account the legal interpretations made in a report adopted by the DSB. Finally, the Regulation states that the Commission may request interested parties to provide information and may conduct a review, and the Council may suspend the non-disputed measure.

6.97 Following adoption of the Panel and Appellate Body Reports, and having regard to Regulation 1515/2001, the EC reassessed the anti-dumping duties imposed on imports of bed linen from India, Egypt and Pakistan, in light of the Panel and Appellate Body decisions. On 7 August 2001, the Council of the European Communities adopted Regulation 1644/2001. Regulation 1644/2001 amended the original definitive anti-dumping measure on bed linen from India.

6.98 In the redetermination, the EC calculated and established different (lower) dumping margins for imports from India, but did not address the dumping margins for the other countries originally investigated (Egypt and Pakistan). The EC concluded that dumped imports from India, Egypt and Pakistan caused material injury to the EC industry.

6.99 Notwithstanding this conclusion, the Council did not "consider it appropriate to continue to collect duties for exports from India".[103] Therefore, in the same Regulation, the EC suspended the collection of duties at the rates established in the redetermination, and invited all interested parties to submit comments and/or a review request. The Regulation further provided that, if no review were initiated within six months of entry into force of the Regulation, the anti-dumping measure would automatically expire with regard to imports originating in India, but if such review were initiated, the suspension should continue during the review investigation.[104] On 19 December 2001, Eurocoton, the trade association acting on behalf of the domestic industry, filed a request with the EC authorities for a review of the redetermination.[105] On 13 February 2002 the EC initiated a "partial interim review" of the dumping aspects of the measure with respect to Indian imports based on Eurocoton's request.[106] That review is still on-going, and consequently, no anti-dumping duties have as yet been collected pursuant to the redetermination.

6.100 On 28 January 2002, the Council adopted Regulation 160/2002. This EC authorities in this Regulation, acting pursuant to the authority provided for in Regulation 1515/2001, considered it appropriate to take into account the legal interpretations of the DSB in the bed linen dispute with regard to the anti-dumping measures on imports of bed linen from Egypt and Pakistan. The EC made a redetermination with respect to dumping for Pakistan, and concluded that since the revised calculation showed no dumping by the producers for which an individual margin of dumping was

[101] WT/DS141/9.
[102] Regulation 1515/2001.
[103] Regulation 1644/2001, at para.72 and Article 2.
[104] *Id.* at paras. 75 and 78 and Article 2.
[105] Exhibit-India-RW-21.
[106] Notice of initiation of a partial interim review of the anti-dumping measures applicable to imports of cotton-type bed linen originating in India, published in Official Journal of the European Communities of 13 February 2002, C-series, No 39. Exhibit-India-RW-23.

calculated, the proceeding should be terminated.[107] With respect to Egypt, the EC found that there were insufficient data to allow the recalculation of dumping margins. Therefore, the EC considered it appropriate to suspend the anti-dumping measure on imports of bed linen from Egypt and provide an opportunity to request a review. If no review were requested, the anti-dumping measure would automatically expire, and if a review were requested, the measure would remain suspended during the review investigation.[108] No review was requested, and on 28 February 2002 the anti-dumping measure on imports of bed linen from Egypt expired.[109]

6.101 On 22 April 2002 the EC issued Council Regulation (EC) No 696/2002. The EC considered it appropriate, in light of the termination of the proceeding regarding imports from Pakistan and the expiry of the anti-dumping measure on imports from Egypt to undertake a reassessment. The reassessment was limited to the determination of injury and causal link to the extent that this determination had been based on an examination of the impact of imports from India, Egypt, and Pakistan on a cumulative basis. Thus, the EC reconsidered injury and causal link on the basis of the dumped imports from India alone. The EC confirmed the amended and suspended definitive anti-dumping duty imposed on imports of cotton-type bed linen originating in India.[110]

(b) Arguments of the parties

6.102 India asserts that the EC acted inconsistently with its obligations under Articles 3.3 and 3.1 of the AD Agreement by cumulating imports which were not dumped in making its injury assessment in Regulation 1644/2001. India relies on the fact that imports from Pakistan were subsequently determined (in Regulation 160/2002) not to be dumped. Moreover, India argues that should the EC rely on the fact that Regulation 160/2002 was made at a later date than the injury determination in Regulation 1644/2001, this would evidence that the EC did not act within the reasonable period of time. In addition, in this latter situation, India submits that the EC acted contrary to Article 5.7 by failing to consider the evidence of dumping and injury simultaneously. In any event, India also submits that the EC acted contrary to Article 5.7 when it separately considered the dumping determination for Pakistan in Regulation 160/2002 of 28 January 2002 and the subsequent injury reassessment in Regulation 696/2002 of 22 April 2002.

6.103 The EC argues that since only the redetermination in Regulation 1644/2001, is a "measure taken to comply", that is the only measure within the Panel's jurisdiction. The EC asserts that at the time that Regulation 1644/2001 was adopted, the EC authorities were entitled to treat imports originating in Pakistan as "dumped" and, consequently, to cumulate them with imports from India.

6.104 The EC considers that India cannot rely on the finding of no dumping reached subsequently in Regulation 160/2002 in order to claim that imports from Pakistan were "in fact" not dumped when Regulation 1644/2001 was adopted. The EC further argues that, should the Panel take the view that the other regulations cited in India's panel request are also measures "taken to comply" and, therefore, within its jurisdiction, the Panel should recognise that the EC subsequently established, in Regulation 696/2002, that imports from India, taken in isolation, were a cause of injury. Therefore, as of the date of establishment of the Panel, the "measures taken to comply" were not based on the cumulation of imports from India with non-dumped imports from Pakistan.

6.105 With respect to India's argument concerning Article 5.7, the EC asserts that Article 5.7 applies only with respect to the original investigation, but does not apply to subsequent reviews. In the EC's view, Articles 11.2, which provides for a review limited to dumping or to injury, and Article 11.4,

[107] Regulation 160/2002.
[108] *Id.* at paras. 14, 22, 25, and Article 1.
[109] Notice of the expiry of certain anti-dumping measures, published in Official Journal of the European Communities of 14 March 2002, C-series, No 65. Exhibit-India-RW-24.
[110] Regulation 696/2002.

which does not include Article 5.7 among the procedural provisions that apply to reviews carried out under Article 11, confirm its view. The EC submits that, by the same token, Article 5.7 does not apply to the redetermination of dumping or injury findings for the purposes of implementing the DSB's recommendation, even assuming such redeterminations may be characterised as reviews under Article 11.2. In the EC's view, implementation redeterminations do not involve an "investigation", but rather a reassessment of the evidence.

(c) Arguments of third parties

6.106 The United States notes that measures not "taken to comply with the recommendations and rulings" are not within the scope of Article 21.5 of the DSU. Thus, the United States considers that, to the extent that the EC's re-examination of its application of anti-dumping duties to Pakistan in Regulation 160/2002 was independent of the measure it took to comply with the recommendations and rulings of the DSB, it is not subject to this Article 21.5 review.[111] The United States notes India's reliance on the EC's independent examination of imports from Pakistan, after the measures taken to comply, to assert that the EC improperly cumulated imports from India with non-dumped imports from Pakistan. However, the United States points out that the EC found in the original investigation that imports from Pakistan were dumped, and India did not in the original dispute challenge that finding, or the cumulation of imports from India with those from Pakistan. Under those circumstances, the United States considers that the EC did not act inconsistently with the AD Agreement or the DSU by continuing to treat the imports from Pakistan as dumped for the purposes of making its redetermination with regard to imports from India.

6.107 The United States also considers India's reliance on Article 5.7 of the AD Agreement to show noncompliance by the EC is unavailing.[112] The United States agrees with the EC's position that Article 5.7, which addresses the simultaneous consideration of both dumping and injury, applies only to the initiation and the "course of the [original] investigation". In the US view, neither Article 5.7 nor any other provision of the AD Agreement requires investigating authorities to revisit aspects of the determination that were upheld or were not subject to the dispute. For example, the DSB might recommend that a Member bring an anti-dumping measure into conformity with its obligations based on a finding that one discrete aspect of an injury determination, such as the evaluation of one relevant factor reflecting the condition of the domestic industry, was inconsistent with those obligations. Nothing in Article 5.7 or elsewhere in the Anti-Dumping Agreement would support a view that the Member in those circumstances had an obligation to perform the entire investigation anew, including reaching a new dumping determination.

(d) Evaluation by the Panel

6.108 We have concluded, in our consideration of the EC's requests for preliminary rulings, that our evaluation of the existence and consistency of measures taken by the EC to comply with the DSB's recommendations should be undertaken with respect to Regulation 1644/2001. Article 3.3 of the AD Agreement provides that, in certain circumstances, investigating authorities may cumulatively assess the effects of imports from more than one country. A primary criterion for such cumulative assessment is that the margin of dumping for imports from each country is more than *de minimis*. At the time the EC adopted the redetermination, Regulation 1644/2001, the outstanding determination with regard to dumping by Pakistani producers, set forth in the original Regulation 2398/97, was affirmative – that is, the margin of dumping for imports from Pakistan was more than *de minimis*. That finding had not been challenged in dispute settlement, and the EC was entitled to continue to consider imports from Pakistan as dumped for purposes of the redetermination. It would be entirely

[111] The United States notes that the EC makes the same point with respect to imports from Egypt, but remarks that since the United States limited its discussion to certain arguments raised by India in this proceedings, only imports from Pakistan were referred to in its argument.

[112] India's FWS, at paras. 73 - 84.

unreasonable to find a violation of the AD Agreement in the redetermination based **exclusively** on subsequent events of which the EC could have had no knowledge at the time. Thus, the EC was not precluded, on the basis of that criterion, from undertaking a cumulative assessment of imports from India and Pakistan in the redetermination.[113]

6.109 Assuming, however, that the subsequent EC regulations are relevant to our assessment of the EC's compliance in this dispute, we turn to a further consideration of India's arguments. As noted above, at the time the EC adopted regulation 1644/2001, the only determination in effect regarding imports of bed linen from Pakistan established that those imports were dumped. Thus, in our view, there can have been no violation of Article 3.3 of the AD Agreement in that aspect of the redetermination. As noted above, it would violate fundamental precepts of fairness to hold the EC accountable for a subsequent change in the determination regarding dumped imports from Pakistan. This is particularly the case when the EC was under no obligation to reconsider the question of dumping with regard to imports from Pakistan. That determination had not been the subject of dispute settlement, so the EC did not undertake that reconsideration in order to comply with a recommendation of the DSB.

6.110 India argues that by first reconsidering the question of dumping with respect to imports from India, and undertaking a cumulative assessment of the effects of imports from India and Pakistan (and Egypt), and subsequently reconsidering the question of dumping with respect to Pakistani imports, and finally reassessing the question of injury and causation with respect to imports from India alone, the EC violated Article 5.7. The EC, on the other hand, asserts that Article 5.7 does not apply in reviews under Article 11, and by the same token does not apply to the redetermination of dumping or injury findings for the purposes of implementing DSB recommendations and ruling, regardless of whether such redeterminations may be considered "reviews" under Article 11.2.

6.111 Article 5.7 provides:

> "The evidence of both dumping and injury shall be considered simultaneously (a) in the decision whether or not to initiate an investigation, and, b) thereafter, during the course of the investigation, starting on a date not later that the earliest date on which in accordance with the provisions of this Agreement provisional measures may be applied".

6.112 As always, we apply the rules of the Vienna Convention to elucidate our understanding of this provision.

6.113 Article 5.7 requires that the evidence of dumping and injury be considered simultaneously in certain circumstances. It is found in Article 5 of the AD Agreement, which is entitled "Initiation and Subsequent Investigation". Thus, at first glance, Article 5.7 would be expected to apply in those two situations – initiation and investigation. Of course, a closer look must be taken at the specific text of Article 5.7, in its context and in light of its object and purpose, to see whether it should be understood to apply in other situations.

6.114 It is clear to us that the text of Article 5.7 is specific as to when it applies. As might be anticipated from the title of Article 5, Article 5.7 specifies that the obligation in that provision applies first, in the initiation decision, and subsequently, during the course of the investigation. We agree with the view stated by another panel that, "In the context of Article 5 of the AD Agreement, it is clear to us that the term "investigation" means the investigative phase leading up to the final

[113] The other criteria for a cumulative assessment set out in Article 3.3 are not at issue in this dispute, and we have not considered them. Furthermore, India has made no argument with respect to cumulation of imports from Egypt, and we do not address that question.

determination of the investigating authority".[114] Thus, we consider that the obligation set out in Article 5.7 to consider evidence of dumping and injury simultaneously simply does not apply in the circumstances of the redetermination and subsequent Regulations at issue here.

6.115 We note, moreover, that to find otherwise could have absurd consequences. Assume a dispute under the AD Agreement in which only the determination of injury is challenged. Assume further that the Panel finds a violation of the AD Agreement in the determination of injury, and the DSB recommends that the measure be brought into conformity with the requirements of the AD Agreement. In principle, the Member whose measure was found to be inconsistent with the AD Agreement may undertake to bring its measure into conformity by re-examining the injury determination and issuing a redetermination. There would be no need in such a case to re-examine the calculation of the dumping margin, as the finding of violation in connection with the injury determination could have no effect on the calculation of the margin. Yet under India's theory, the redetermination in such a situation would violate Article 5.7. India, in response to this proposition, asserts that "once both dumping and injury are under review the synchronicity requirement should be respected".[115] However, while this might be a useful principle, it finds no support in the text of Article 5.7.[116] We therefore consider that the obligation of Article 5.7 applies only during the course of original investigations, and thus that India's claim under Article 5.7 does not have merit.

6.116 We thus conclude that, even assuming that the subsequent Regulations 160/2002 and 696/2002 properly formed part of our evaluation of the EC's compliance in this case, the EC did not violate Articles 3.1, 3.3, or 5.7 in this case in conducting a cumulative assessment of the effects of dumped imports from India and Pakistan (and Egypt) in Regulation 1644/2001, in subsequently re-examining the question of dumping with respect to imports from Pakistan (Regulation 160/2002), and in subsequently reassessing the effects of dumped imports from India alone (Regulation 696/2002).

3. Claim 4: The EC acted inconsistently with its obligations under Articles 3.1 and 3.2 of the AD Agreement

(a) Factual background

6.117 In the original measure imposing anti-dumping duties (Regulation 2398/97 imposing definitive duties), the EC's injury determination was based on the total volume of dumped imports

[114] Panel Report, *United States - Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (Drams) of One Megabit or Above from Korea* ("*US – DRAMS*"), WT/DS99/R, adopted 19 March 1999, DSR 1999:II, 521, at footnote 519.

[115] India's SWS at para. 117.

[116] India also relied on the fact that the EC in a different dispute, under the Agreement on Subsidies and Countervailing Measures (SCM Agreement), argued that the *de minimis* standard set out in Article 11.9 of the SCM Agreement, in the section entitled "Initiation and Subsequent Investigation", should be understood to apply in the context of a review under Article 21.3 of that Agreement. The Panel in that dispute found in the EC's favor on that issue. *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* ("*US – Carbon Steel*"), WT/DS213/R and Corr.1, circulated 3 July 2002. While we note that it might be desirable for Members to be consistent in the positions adopted in WTO dispute settlement, there is no rule in WTO dispute settlement that requires such consistency. In any event, India's argument is not, in our view, compelling on the issue before us. In the first place, it is not clear that the redetermination at issue here may be considered a "review" in the sense of Article 11 of the AD Agreement, the analogous provision to Article 21.3 of the SCM Agreement. In addition, the Panel in that case relied heavily on considerations of the object and purpose of the *de minimis* provision. Consideration of object and purpose may not be relevant here. Indeed, India does not even argue that the object and purpose of Article 5.7 suggest that it should apply in the context of a review, much less in the context of a redetermination such as that at issue here. Finally, we note that the decision of the Panel in that *US – Carbon Steel* has been appealed. Thus, as an unadopted Panel report, it has no legal status in the WTO system, although we could find useful guidance in its reasoning if we considered it to be relevant. *Japan – Alcohol* at p. 15. As discussed above, we are doubtful of the relevance of that decision in this case.

from all three countries under investigation. (Egypt, India, and Pakistan). In the redetermination, Regulation 1644/2001, the injury findings were based on the total volume of dumped imports from Egypt and Pakistan and the volume of dumped imports from India. The EC calculated the volume of dumped imports from India in the alternative, both including and excluding imports attributable to the two Indian companies, Omar and Prakash, which were found not to be dumping, and made alternative determinations based on these two volume calculations. The two Indian producers found not to be dumping accounted for 53 percent of the imports from the five companies for which individual margins of dumping were calculated. The EC calculated margins of dumping for all other Indian producers on the basis of the margins calculated for the individually investigated producers or on the basis of facts available, resulting in different margins for cooperating and non-cooperating producers. The EC considered all imports from all Indian sources for which margins of dumping were not individually calculated to be dumped, and included them in the volume of dumped Indian imports, even when it excluded imports attributable to Omar and Prakash.

(b) Arguments of the Parties

6.118 India argues that the EC should have excluded from the volume of dumped imports considered in the injury analysis the same proportion, 53 percent, of imports from producers not included in the sample for which dumping was not individually determined.[117] In India's view, imports from producers for which an individual determination of dumping is not made as part of the sample must be presumed to be not-dumped in the same proportion as imports which were determined to be not-dumped from producers for which an individual determination of dumping was made. Any other approach, India argues, violates the obligation of Article 3.1 to base injury determinations on "positive evidence" and an "objective examination". India maintains that the proportion of imports found to be dumped from producers in the sample is the only positive evidence of the proportion of imports from producers not included in the sample that is dumped.

6.119 India bases its argument in part on the statement of the original Panel that:

> "It is possible that a calculation conducted consistently with the AD Agreement would lead to the conclusion that one or another Indian producer should be attributed a zero or *de minimis* margin of dumping. In such a case, it is our view that the imports attributable to such a producer/exporter may not be considered as "dumped" for the purposes of injury analysis".[118]

6.120 India considers that the five producers selected by the EC, after consultation with the Indian exporters, for individual examination of dumping constitute a sample which represents the whole of the Indian industry. Relying on the definition of "sample" as a "a relatively small part or quantity intended to show what the whole is like; a specimen"[119], India maintains that the proportion of imports from those five companies found not to be dumped shows what proportion of imports from companies not included in the sample must be treated as not dumped. India adds that in the context of statistics, sample is defined as "a portion selected from a population, the study of which is intended to provide statistical estimates relating to the whole".[120]

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[117] India argues that if the dumping margins were recalculated using a volume-weighted amount for SG&A and profits in the construction of normal value, a third producer, Madhu, would be found to be not dumping, and the proportion of non-dumped imports in the sample be 70 percent, and that proportion of imports from producers not included in the sample should be considered as not dumped. However, as we have decided above that a volume-based weighted average is not required by Article 2.2.2(ii), we do not consider this argument further.

[118] Original Panel Report, *EC – Bed Linen*, at para. 6.138.

[119] New Shorter Oxford Dictionary, Clarendon Press, 1993.

[120] *Id*.

6.121 The EC notes that the Panel statement relied on by India was an element of the original Panel's rejection of India's argument in the original dispute that only the volume of imports attributable to **transactions** for which a margin of dumping was found could be considered dumped for purposes of the injury analysis. The EC had argued that dumping was determined for countries as a whole, and that therefore it was entitled to consider as dumped all imports from a country for which a determination of dumping was made. The Panel did not rule on this aspect of the EC's argument, and in the original determination, no Indian producers for which dumping was separately determined had been found not to be dumping.

6.122 The EC maintains that it is entitled to treat as dumped all imports from producers for which it did not make a determination of no dumping, whether or not individually investigated, including all cooperating and non-cooperating producers not included in the sample. In this regard, the EC notes that Article 6.10 of the AD Agreement allows investigating authorities to separately investigate dumping for only a limited number of producers. The EC maintains that in this case, it followed the second option provided for under Article 6.10, and calculated individual dumping margins for a sample comprising the five Indian producers accounting for the largest percentage of exports which could reasonable be investigated. The EC then points out that Article 9.4 of the AD Agreement defines the maximum anti-dumping duty that may be applied to exports from producers for which an individual dumping margin is not separately calculated, but Article 9.4 does not limit the volume of imports from such non-investigated producers to which that maximum dumping margin may be applied. Consequently, the EC argues, all imports from such uninvestigated producers, for which a dumping margin above *de minimis* is calculated, may be considered to be dumped for purposes of injury analysis.

(c) Arguments of third parties

6.123 Japan, in response to questions from the Panel, took the view that the term "dumped imports" used in Articles 3.1 and 3.2 means those imports from suppliers which are found to be dumped (with a dumping margin in excess of the *de minimis* threshold) in accordance with Articles 2 and 6, which provide for substantive rules for the determination of dumping and evidentiary rules, respectively. With respect to unexamined producers for which a determination of individual dumping margin has not been made in accordance with Article 2, Japan considers that Article 6.10 would apply, and obligate the investigating authorities, if it is impracticable to determine an individual margin of dumping for each known exporter or producer, to "limit their examination … to a reasonable number of interested parties or products by using samples which are *statistically val*id …" (emphasis added) Japan posits that "statistical validity" is required directly for *sampling*, but would be required indirectly for the *estimation* of the individual margin of dumping using samples; these two processes are logically intertwined and inseparable. Japan also notes the obligation to provide a detailed explanation for the estimation of individual dumping margins of unexamined producers pursuant to Article 12.2. Japan considers, however, that the authorities may not base the estimation methodology on Article 9.4. Article 9.4 sets forth restrictions on the amount of anti-dumping duties imposed on unexamined producers (the calculation of the so-called "all others rate") after the investigating authorities determine to impose an anti-dumping duty. In the view of Japan, this is irrelevant to the determination of injury and causation under Article 3. Japan considers that the text of Article 9.4 demonstrates Members' understanding that this Article applies only to the determination of dumping duties, not to the determination of "dumping". Indeed, the formula set forth in Article 9.4 presupposes that *some* amount of anti-dumping duties should be imposed on unexamined producers. Thus, Japan considers that Article 9.4 is applicable to anti-dumping cases only after the authority finds that all the requirements for imposing anti-dumping duties, i.e. dumping, injury and causation, are met with respect to unexamined producers in accordance with the relevant Articles, in particular, Articles 2, 3 and 6. Japan asserts that if Article 9.4 were to be applied to the determination of "dumping", it could result in illogical and unreasonable consequences.

6.124 The United States, in response to questions from the Panel, notes that in its original report the Panel in this dispute thoroughly addressed the meaning of the term "the dumped imports" as used throughout Article 3 of the AD Agreement.[121] The Panel found that the dumping determination is made with reference to a *product*, not with reference to individual transactions.[122] Consequently, the Panel correctly concluded that investigating authorities may treat all imports from producers/exporters for which an affirmative determination has been made as "dumped imports" for the purposes of the injury analysis.[123] The United States agrees with the analysis and findings of the original Panel. In the United States' view, the rationale for the Panel's original findings clearly extends to show that the injury analysis under Article 3 may include consideration of the volume and price effects of imports from unexamined producers for which a determination of dumping under Article 2 has not been made. Article 2.1 defines *dumped* products "[f]or the purpose of [the AD] Agreement," on a countrywide basis. In the US view, the references to "dumped imports" in Articles 3.1 and 3.2 and throughout Article 3 therefore refer to all imports of the product from the countries subject to the investigation.[124] The United States considers that "the dumped imports" referenced in Article 3 are not confined to particular companies which have been examined for dumping determinations. This interpretation is consistent with the AD Agreement's recognition that it will be impracticable in some cases to make individual dumping determinations for each known exporter or producer. In those cases, Article 6.10 allows the authorities to limit their dumping examination to either a sampled selection or the largest percentage of the volume of exports from the subject country which "can reasonably be investigated". In addition, Article 9.4 provides bases for determining the anti-dumping duty margin to be applied to the non-examined exporters or producers. In each of the circumstances illustrated above, the dumping determinations for examined companies would apply equally to the non-examined companies. All imports subject to either their own calculated margin or to a dumping margin for other imports should be treated as "dumped imports" for purposes of the injury determination. The United States further notes that Article 6.10 of the AD Agreement sets forth the circumstances under which an administering authority need not individually determine the margin of dumping for each known exporter or producer of a product under investigation. When Article 6.10 has been invoked to limit the number of examined exporters or producers, Article 9.4 provides bases for determining the anti-dumping duty to be applied to the non-examined exporters or producers. Finally, the United States considers that there are no specific provisions in the AD Agreement which either prohibit the analysis applied by the EC or require the analysis proposed by India. However, the United States asserts that Article 9.4 of the AD Agreement permits the EC analysis.

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[121] Original Panel Report, *EC – Bed Linen*, at paras. 6.121–141.

[122] *Id*., at para. 6.136.

[123] *Id*., at paras. 6.136 and 6.139.

[124] The United States clarified its view on the question of whether dumping is determined for countries. *See id*., at para. 6.131 and note 50. The United States agrees with the EC that dumping is determined for countries. In the original panel proceedings in this dispute, the Panel asked the third parties to comment on –

> *whether, in their view, investigating authorities are obligated to exclude, from their examination of volume and price effects, imports attributable to companies for which a negative determination of dumping has been made based on the determination of a zero or de minimis margin of dumping.*

The United States explained in its response to this question that its own practice is to exclude from the injury evaluation companies for which a negative determination of dumping margins has been made based on the determination of a zero or *de minimis* margin.

Thus, once there has been a specific negative dumping determination made with respect to imports from a particular company, the investigating authorities examining injury will not consider those imports as "dumped" for the purposes of the injury evaluation. Absent a negative dumping determination, the Agreement permits, and it is the US practice to include in its injury evaluation, *all* imports from the subject country. The United States notes that this approach is consistent with the analysis and findings of the Panel in paragraph 6.138 of the original Panel Report in *EC – Bed Linen.*

(d) Evaluation by the Panel

6.125 Articles 3.1 and 3.2 of the AD Agreement provide, in pertinent part:

> "3.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both *(a)* the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and *(b)* the consequent impact of these imports on domestic producers of such products.
>
> 3.2 With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member…".

6.126 India's argument is essentially that the volume of dumped imports must be determined, for purposes of Articles 3.1 and 3.2, by reference to the proportion of the imports from "sampled" producers which is actually found to be dumped, because the sample is the only "positive evidence" of the volume of dumped imports from uninvestigated producers. Thus, India's argument rests on the premise that the volume of "dumped imports" for purposes of Article 3.1 and 3.2 is determined independently of the calculation of dumping margins. We do not agree.

6.127 While Articles 3.1 and 3.2 refer to the volume of "dumped" imports, those provisions are in a section of the AD Agreement entitled "Determination of Injury", and contain no guidance whatsoever regarding the determination of the volume of dumped imports. We do not consider that the requirement in Article 3.1 of the AD Agreement, that an injury determination "shall be based on positive evidence and involve an objective examination of … the volume of dumped imports" establishes that the volume of dumped imports must be determined independently of the determination of dumping, based on the calculation of dumping margins in accordance with the AD Agreement.

6.128 In considering the meaning of the term "dumped imports" as used in Articles 3.1 and 3.2, we are, as always, guided by the Vienna Convention. As noted, there is nothing in the text of those Articles which specifically informs the term "dumped imports". Looking to other provisions of the AD Agreement, we note that Article 2 is entitled "Determination of Dumping". This suggests to us that the question of what constitutes "dumped imports" must be made by reference not to Article 3 alone, but by reference to other provisions of the AD Agreement, starting with Article 2, which govern the determination of dumping by establishing rules for the calculation of dumping margins.

6.129 Looking at Article 2, we note that it defines when a product is to be considered as dumped, in Article 2.1, as the case where

> "the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country".

6.130 Article 2 then goes on to establish rules for the determination of the export price, the normal value, and the comparison of the two, which result in the calculation of a dumping margin for the imported products. As the Panel found in the original proceeding, all imports from a producer for which an affirmative determination of dumping is made are properly considered "dumped imports", without regard to the price differences calculated for individual transactions in the process of calculating the dumping margin. It appears to us that the calculation of a dumping margin pursuant to Article 2 constitutes a determination of dumping.

6.131 We agree fully with the observation of the Panel in the original proceeding that :

> "It is possible that a calculation conducted consistently with the AD Agreement would lead to the conclusion that one or another Indian producer should be attributed a zero or *de minimis* margin of dumping. **In such a case, it is our view that the imports attributable to such a producer/exporter may not be considered as "dumped" for the purposes of injury analysis**".[125]

The logical corollary to this observation is that imports attributable to a producer/exporter for which a calculation conducted consistently with the AD Agreement yields a greater than *de minimis* margin of dumping may properly be considered as "dumped" for injury purposes.[126]

6.132 We thus turn to the question of how dumping margins are to be calculated consistently with the AD Agreement. Of course, Article 2 is the principal provision in this regard, setting forth detailed rules for the calculation of normal value, export price, and the comparison of the two to yield a dumping margin. However, other provisions of the AD Agreement are also relevant to this question.

6.133 Article 6.10 of the AD Agreement provides, in pertinent part:

> "The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation".

Thus, the AD Agreement contemplates that a determination of dumping, that is the calculation of a dumping margin, will as a rule be made for each producer or exporter of the product. Thus the question of which imports are to be considered dumped is readily answered – "dumped imports" are all imports attributable to producers or exporters for which a margin of dumping greater than *de minimis* is calculated. This was the decision of the original Panel in this dispute, rejecting the argument that the imports attributable to a single producer found to be dumping should be divided into two categories – "dumped" and "not-dumped" sales transactions. The problem posed in this dispute arises when, as in this case, the investigating authorities do **not** calculate a dumping margin for each producer or exporter, and thus do not make an individual determination of dumping for each producer or exporter.

6.134 Article 6.10 recognizes that it may not be feasible to calculate an individual dumping margin for each producer or exporter, providing:

> "In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated".

Thus, the AD Agreement sets out two bases on which fewer than all producers and exporters of the product subject to investigation may have an individual margin calculated. Investigating authorities may limit their efforts to the calculation of individual dumping margins for producers or products

[125] Original Panel Report, *EC - Bed Linen*, at para. 6.138 (emphasis added). We note that, contrary to the statements in argument by India, the Panel did not find a violation on this basis in the original dispute, as there had been no claim of violation in this regard.

[126] We note that, in response to a question from the Panel asking whether it considered "that the calculation of a dumping margin above de minimis for unexamined producers (i.e. those not examined as part of the sample) constitutes a determination of dumping with respect to those producers?", the EC responded "Yes". EC's answer to the Panel's question 19, at para. 17, Annex E.2.

constituting a "statistically valid" sample **or** may limit their efforts to the calculation of individual dumping margins for those producers accounting for the "largest percentage of the volume of the exports…which can reasonably be investigated".

6.135 In this case, the EC chose the latter option.[127] India does not contend that the EC did not properly follow Article 6.10 in establishing the sample of Indian producers for which individual dumping margins would be calculated. The question before us is thus, in such a case, how is existence (or not) of dumping to be determined for those producers for which a dumping margin is not individually calculated – that is, the producers or exporters not included in the sample, or "unexamined producers".

6.136 We can find no provision of the AD Agreement which specifically addresses this issue, nor have the parties pointed to any provision which does so. However, Article 9.4 of the AD Agreement is relevant to this question. That Article provides:

> "When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:
>
> (i) the weighted average margin of dumping established with respect to the selected exporters or producers or,
>
> (ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined,
>
> provided that the authorities shall disregard for the purpose of this paragraph any zero and *de minimis* margins and margins established under the circumstances referred to in paragraph 8 of Article 6. The authorities shall apply individual duties or normal values to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation, as provided for in subparagraph 10.2 of Article 6".

6.137 Thus, Article 9.4 allows anti-dumping duties to be **collected** on imports from producers for which an individual determination of dumping, based on the calculation of a dumping margin under Article 2, was not made. It also establishes an upper limit for any such duties. In our view, the fact that an anti-dumping duty may properly be collected on imports from producers for which an individual calculation of dumping was not made, necessarily entails that such producers are properly considered to be dumping. Consequently, we consider inescapable the conclusion that the imports from those producers are properly considered as "dumped imports" for the purposes of Articles 3.1 and 3.2.

6.138 India argues that the proportion of imports of bed linen found to be dumped within the sample constitutes "positive evidence" of the proportion of imports from producers outside of the sample which may be considered as "dumped imports" for purposes of Articles 3.1 and 3.2. We disagree.

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[127] In a letter to the representatives of the Indian exporters and their association, TEXPROCIL concerning the selection of Indian companies to be included in the sample, the EC specified:

> "The aim of this exercise is to select a **sample representing the largest volume of exports which can reasonably be investigated within the time available** taking also into account the need to cover companies with domestic sales as well as companies of different types (i.e. integrated, semi-integrated, merchant exporters)". (emphasis added).

This letter was attached as Annex 22 to India's First Written Submission to the original Panel, and is cited in the EC's Comments to India's Answers to the Panel's questions at para. 2, Annex E-9.

Positive evidence concerning whether imports are dumped may be found in the analysis and determination of the existence of dumping pursuant to the AD Agreement. If the determination of a maximum rate of dumping under Article 9.4 is sufficient evidence to allow anti-dumping duties to be collected, in our view it must constitute "positive evidence" of dumping with respect to the imports of the producers to which that rate is applicable sufficient for purposes of the analysis of injury under Article 3.1 of the AD Agreement.

6.139 We can find no textual obligation in the AD Agreement to separate out the unexamined producers' imports into dumped and not dumped for purposes of the injury analysis based on the proportion of the imports attributable to sampled producers found not to be dumping. In the original dispute, the Panel considered, and rejected, an argument by India similar to the one it now makes. In that case, India argued that only imports attributable to transactions in which normal value was greater than export price could be considered as "dumped imports" for purposes of injury analysis under Article 3. In rejecting India's position, the Panel noted:

> "Attempting to segregate individual transactions as to whether they were "dumped" or not, even assuming it could be done, would leave investigating authorities in a quandary in cases in which the dumping investigation is undertaken for a sample of companies or products. Such sampling is specifically provided for in the AD Agreement, yet it would not be possible, in such cases, accurately to determine the volume of imports attributable to "dumped" transactions.[53]
>
> ---
>
> [53] India's argument suggests that the proportion of imports attributable to dumped transactions for one producer or country could be applied to determine the volume of dumped imports for a different producer or country. We do not consider that such a practice would satisfy the general requirements of the AD Agreement for consideration of positive evidence and objective decision-making".[128]

There is an obvious difference between imports from producers **specifically found not to be dumping**, and imports from producers **for which a dumping margin is not individually calculated**. In the former case, there is a determination of no dumping, and thus no legal basis for the consideration of such imports as "dumped imports", while in the latter case, there is no such determination.

6.140 Moreover, Article 9.4 requires the calculation of an individual rate of duty for any unexamined producer or exporter who has provided the necessary information during the course of the investigation, but was not examined individually in accordance with Article 6.10. Finally, Article 9.3 requires Members to establish a system for granting refunds or reimbursement of amounts collected in excess of actual rates of dumping on import transactions. The results of these proceedings may establish a basis for a review of the injury determination, under Article 11.2 of the AD Agreement. Thus, to the extent the consideration of imports from unexamined producers or exporters during the investigation may have been inaccurate, the AD Agreement itself contains mechanisms for remedying that situation. This supports our view as to the interpretation and application of the relevant provisions of the AD Agreement.

6.141 The treatment of a proportion of imports from unexamined producers as dumped based on the proportion of the imports from individually examined producers as dumped, on the other hand, leads to bizarre and unacceptable results, for which there is no remedial mechanism in the AD Agreement. Assume an investigating authority, under Article 9.4, calculates a maximum rate of duty for unexamined imports and imposes anti-dumping duties on imports from those producers on

[128] Original Panel Report, *EC - Bed Linen*, at para. 6.140.

that basis. Under India's approach, only a portion of imports from producers subject to that anti-dumping duty could be considered as "dumped" for injury purposes. This effectively treats the imports from the same producers as dumped for purposes of duty assessment, and not dumped for purposes of injury analysis. In our view, this is an unacceptable outcome, suggesting that the analysis which leads to it is untenable.

6.142 In response to a question on this point, India asserts that:

> "the rules on the collection and imposition of duties must be separated from the rules that establish dumping and injury. …The dumping and injury findings logically precede the establishment of the level of a duty. The determination of the level of a duty takes place only if and when dumping and injury have been found to exist. The Article 9 that regulates the imposition of a duty is also clearly separate from the rules on the determination of dumping, injury, and the use of a sample".[129]

6.143 While we agree that the findings of dumping, injury, and causation logically precede the imposition of any anti-dumping duty, we do not agree that Article 9.4 is "clearly separate" from the rules on the determination of dumping, injury and the use of a sample. In the first place, Article 9.4 specifically refers to Article 6.10, which governs the use of sampling, and as noted, specifies the maximum duty that may be collected on imports from producers or exporters for which an individual dumping margin was not calculated. For those producers for which an individual dumping margin was calculated, Article 2 serves the same purpose, as specified in Article 9.3, which provides that the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2. Moreover, we can see nothing in the text which suggests that a determination of the volume of "dumped imports" for purposes of Article 3 can be made on any basis other than a determination of dumping based on the calculation of dumping margins for the producers or exporters of the imports in question. We can see nothing in the AD Agreement which provides for a determination of dumping on any basis other than the calculation of a dumping margin, whether on an individual or collective basis.

6.144 We consider that the AD Agreement does **not** require an investigating authority to determine the volume of imports from producers outside the sample that is properly considered "dumped imports" for purposes of injury analysis on the basis of the proportion of imports from sampled producers that is found to be dumped. Consequently, we conclude that the EC did not act inconsistently with Articles 3.1 and 3.2 of the AD Agreement in its consideration of "dumped imports" in this case.

4. Claim 5: The EC acted inconsistently with its obligations under Articles 3.1 and 3.4 of the AD Agreement

(a) Factual background

6.145 In the redetermination, Regulation 1644/2001, the EC reassessed its original findings on injury, taking account of the recommendations in the adopted Reports, and on the basis of information collected in the original investigation. The EC recalled that the original Panel had concluded that the EC had failed to evaluate all relevant factors having a bearing on the state of the Community industry, and specifically all the factors set forth in Article 3.4 of the AD Agreement. In this respect, the EC recalled that the Panel had mentioned specifically productivity, inventories, utilisation of capacity, ability to raise capital or investments, cash flow, wages, and the magnitude of dumping. The EC specifically addressed all the Article 3.4 factors in the redetermination, setting forth its consideration of the information previously collected.

[129] India's answers to the Panel's question 6(D), Annex E-1.

(b) Arguments of the parties

6.146 India argues first that the EC had never collected data on some of the Article 3.4 factors, and since data not collected cannot be evaluated, the EC's redetermination is perforce inconsistent with the AD Agreement, as it is not based on positive evidence as required by Article 3.1

6.147 In making this argument, India relies on the statement of the Panel in the original Report that:

> "[i]t appears from this listing [in the Provisional Regulation] that data was not even collected for all the factors in Article 3.4, let alone evaluated by the EC investigating authorities".[130]

6.148 In India's view, the Panel concluded that there had been no collection of data with respect to certain factors. The EC did not collect any additional data for purposes of the redetermination. Therefore, India asserts, in the redetermination the EC could not have had data on the Article 3.4 factors for which the EC did not collect any new data prior to making the redetermination. India points specifically to the factors of inventories (stocks) and utilisation of capacity in connection with this argument. With respect to inventories, India asserts that the EC's redetermination first explained that this factor did not have a bearing on the state of the industry, and then stated that "some increase in stocks was observed in some companies", but that "neither the complainant [sic] nor any sampled Community producer adduced increase in stocks as evidence of injury". With respect to capacity utilisation, India maintains that the EC first explained why the factor did not have a bearing on the industry, and then explained that reliable figures were extremely difficult to establish. It then explains that there was a high rate of capacity utilisation, to the extent that some production had to be sub-contracted. In India's view, the EC's approach puts the cart before the horse, by stating the lack of relevance of the factor before evaluating the data on the factor, and only last indicating what the data is. With respect to the latter aspect, India maintains that as the data on these points was not requested in the questionnaire, it is clear that no data were collected.

6.149 India also argues that even if there had been data collected and evaluated, the findings of the Panel and the Appellate Body necessitated an "overall reconsideration and analysis" of the determination of injury. Such an overall reconsideration and analysis was necessary, India maintains, in view of the findings of the Panel which had an impact on the dumping margin, an impact on the definition of the domestic industry, and an impact on which dumped imports to consider. India asserts that the EC failed to undertake such an overall reconsideration and analysis.[131] In India's view, the redetermination merely puts a new gloss on the original determination, but fails to remedy the errors in that determination. Furthermore, India considers that the EC's injury findings contain factual errors, which demonstrate that no objective examination on the basis of positive evidence was undertaken.

6.150 India addresses the EC's analysis of each of the injury factors, and sets out what it considers to be the inadequacy of the analysis, or asserts that "analysis", as opposed to unsupported conclusions, did not even take place. India also points to what it considers to be errors in the facts as stated in the redetermination, which in India's view invalidate the redetermination. India asserts that the existence of such errors makes it clear that the EC's evaluation was not based on positive evidence and also casts doubt on the objectivity of the examination.

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[130] Original Panel Report, *EC - Bed Linen*, at para. 6.167.

[131] In this regard, India relies on Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States - Recourse to Article 21.5 of the DSU by the United States* ("*Mexico – Corn Syrup (Article 21.5 – US)*"), WT/DS132/RW, adopted 21 November 2001, as upheld by the Appellate Body Report, WT/DS132/AB/RW, at para. 6.37.

6.151 The EC disputes India's charge that information on certain of the Article 3.4 factors was never collected. It points out that the statement relied upon by India was in the context of the original Panel's assessment of the original determination. The EC had argued in the original dispute that it had in fact considered all of the Article 3.4 factors, but that it had concluded that some were not relevant to its determination, and had not addressed them explicitly in its provisional or definitive Regulations. The Panel concluded that it could not determine, from the EC Regulations, that certain of the Article 3.4 factors were in fact considered in making the injury determination, and that it would not assume that such consideration had taken place. In the context of this conclusion, the Panel observed that the EC had listed, in the Regulation, parties from whom it had collected certain information, and that this listing did not refer to all of the Article 3.4 factors. However, the EC asserts that the Panel did not conclude, as a matter of fact, that information had never been collected regarding certain of the Article 3.4 factors. Rather, the EC maintains, the Panel stated that in the absence of any reference to certain of the Article 3.4 factors in the determination, it could not simply assume that those factors had been considered by the EC. The EC notes that the Panel continued, immediately after the sentence quoted by India, to state:

> "While some of the data collected for the factors that are mentioned in the Provisional Regulation by the EC authorities may have included data for the factors not mentioned, we cannot be expected to assume that this was the case without some indication to that effect in the determination".[132]

The EC always asserted, even during the original investigation, that information was, in fact, in the record on all of the Article 3.4 factors, but that since some of the factors, and the relevant information, were not considered relevant, there was no discussion on the face of the determination.

6.152 Now, in making its redetermination, the EC argues that it has explicitly addressed that information on the face of the redetermination, evaluated it together with the information it had evaluated in the original determination, and made a new conclusion regarding injury based on a consideration of all the Article 3.4 factors.

6.153 The EC then details its consideration of the data, and asserts that the evaluation of the information was adequate and reasonable, and supported its conclusion of material injury. The EC notes that part of India's argument rests on the premise that where the EC "reconfirmed" findings made in the original determination, it failed to reconsider the information. The EC asserts that this is a purely formalistic argument and must be rejected. The EC argues that the original determination, where reconfirmed, and the new determination (Regulation 1644/2001) must be read together as constituting the analysis underlying the conclusions reached. The EC disputes India's allegations of factual error, and submits that it undertook an overall reconsideration and analysis of the economic indicators pertain to injury, concluding that despite some positive indicators, the declining and inadequate profitability of the industry warranted a conclusion of material injury.

(c) Arguments of third parties

6.154 Japan notes that it generally agrees with India’s Claim 5, in that information related to factors listed in Article. 3.4 of the AD Agreement must be collected and adequately evaluated to determine injury to the domestic industry. Accordingly, Japan requests that the Panel carefully examine the consistency of the EC measure at issue with Article 3.4 of the AD Agreement.

6.155 Korea is of the view that the EC acted inconsistently with Articles 3.1 and 3.4 because it failed to collect sufficient data prior to making its evaluation in the redetermination. Korea notes that in order to comply with the recommendation of the DSB, the EC reassessed and evaluated all of the relevant injury factors, but it did not collect additional information for the redetermination, and thus

[132] Original Panel Report, *EC - Bed Linen*, at para. 6.167.

its findings are based on information collected during original investigation. In Korea's view, the EC took account of this problem in the redetermination and suspended the imposition of the anti-dumping duty on imports of bed linen from India.

6.156 Korea considers that the original Panel found that necessary data was not even collected for all the factors listed in Article 3.4 of the AD Agreement. Thus, in Korea's view, the Panel concluded that the EC did not conduct an objective evaluation of all relevant economic factors and failed to act consistently with its obligations under Article 3.4 of the Agreement. Korea believes that the EC's redetermination, based on the original information without any additional collection of information, does not satisfy the recommendations or rulings of the DSB. Korea notes that Article 3.1 states that an injury determination shall be based on positive evidence and an objective examination of the injury factors mentioned on Article 3.4. Korea considers that the EC's redetermination does not meet this requirement, and that in order to fully carry out implementation, the EC should have collected additional information for the redetermination.

6.157 The United States takes no view on the facts of the EC's injury determination, but makes several general observations about the EC's obligations under Article 3.4 of the AD Agreement as it relates to the direction of the Panel in its original Report. The United States notes India's reliance on the observation of the Panel in the original Report that "the text of Article 3.4 indicates that the listed factors are *a priori* 'relevant' factors 'having a bearing on the state of the industry,' and therefore must be *evaluated* in all cases".[133] The United States considers that the discussion that followed that comment set the actual framework for what the Panel believes a Member's obligations are under Article 3.4, and, in particular what the EC was obligated to do to bring its measure into compliance. In the US view, the Panel recognized that, depending on facts and circumstances of the industry in question, a particular factor "either is or is not relevant to the determination of whether there is injury".[134] The Panel did not determine that every enumerated factor was relevant nor did it impose an obligation on the EC to *rely* on any particular factor. Rather, the Panel simply found that because the EC's determination did not even refer to certain of the Article 3.4 factors, there was nothing in the determination to indicate that the authorities considered them not to be relevant.[135] The United States notes that Article 12.2 of the AD Agreement requires only that the authorities set forth "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities." In light of Article 12.2, the United States considers that investigating authorities are not required in each case to make a specific finding on each enumerated factor in Articles 3.2 and 3.4, but, as the United States maintains the original Panel found, it should be discernible from the authorities' determination that they evaluated each of the enumerated factors.

(d) Evaluation by the Panel

6.158 We start, as always, with the text of the AD Agreement. Article 3.1 sets forth a fundamental obligation that informs the remainder of Article 3 of the AD Agreement. Article 3.1 provides:

> "A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both *(a)* the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and *(b)* the consequent impact of these imports on domestic producers of such products".

6.159 The term "positive evidence" relates to the quality of the evidence upon which the authorities may rely in making a determination. We understand the word "positive" as meaning that the evidence

[133] *Id.*, at para. 6.155 (emphasis added).
[134] *Id.*, at para. 6.168.
[135] *Id.*

must be of an affirmative, objective and verifiable character, and that it must be credible.[136] While the term "positive evidence" focuses on the facts underpinning and justifying the injury determination, the term "objective examination" is concerned with the investigative process itself. We see the term "examination" as relating to the way in which the evidence is gathered, inquired into and, subsequently, evaluated. Thus, this term relates to the conduct of the investigation generally. The qualifying term, "objective", indicates that the "examination" process must conform to the dictates of the basic principles of good faith and fundamental fairness. We consider that, as the Appellate Body has noted, an "objective examination" requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation. The duty of the investigating authorities to conduct an "objective examination" recognizes that the determination will be influenced by the objectivity, or any lack thereof, of the investigative process.[137]

6.160 Article 3.4 of the AD Agreement provides that,

> "The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance".

It is by now undisputed, and the parties in this case agree, that all of the listed factors must be evaluated in every anti-dumping injury investigation. India does not now dispute that the EC has, in fact, evaluated all the Article 3.4 factors. Rather, India challenges the adequacy of that evaluation.

6.161 Our task in this instance is thus to examine the adequacy of the evaluation by the European Communities of each of the listed factors. The focus of our examination is whether the treatment of the listed Article 3.4 factors in the EC investigation and determination is sufficient to satisfy the requirements of Article 3.4 concerning the "evaluation" of the listed factors having a bearing on the state of the industry.

6.162 The term "evaluate" is defined as: "To work out the value of …; To reckon up, ascertain the amount of; to express in terms of the known;"[138] "To determine or fix the value of; To determine the significance, worth of condition of usually by careful appraisal or study".[139] These definitions reveal that an "evaluation" is a process of analysis and assessment requiring the exercise of judgment on the part of the investigating authority.[140] It is not simply a matter of form, and the list of relevant factors to be evaluated is not a mere checklist.[141] As the relative weight or significance of a given factor may naturally vary from investigation to investigation, the investigating authority must therefore assess the role, relevance and relative weight of each factor in the particular investigation. Where the authority determines that certain factors are not relevant or do not weigh significantly in the determination, the authority may not simply disregard such factors, but must explain their conclusion as to the lack of

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[136] Appellate Body Report, *US - Hot-Rolled Steel*, at para. 192.

[137] *Id*., at para. 193.

[138] New Shorter Oxford English Dictionary, Clarendon Press, 1993..

[139] Merriam-Webster's Collegiate Dictionary online: http://www.m-w.com.

[140] Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey* ("*Egypt –Steel Rebar*"), WT/DS211/R, adopted 1 October 2002, at para. 7.43.

[141] Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia* ("*US – Lamb*"), WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, at , para. 104.

relevance or significance of such factors.[142] The assessment of the relevance or materiality of certain factors, including those factors that are judged to be not central to the decision, must therefore be at least implicitly apparent from the determination. Silence on the relevance or irrelevance of a given factor will not suffice.[143] Moreover, an evaluation of a factor is not limited to a mere characterization of its relevance or irrelevance.[144] Rather, we believe that an "evaluation" implies the analysis of data through placing it in context in terms of the particular evolution of the data pertaining to each factor individually, as well as in relation to other factors examined.[145]

6.163 Finally, we note that there is no requirement in Article 3.4 that each and every injury factor, individually, must be indicative of injury. Indeed, Article 3.4 itself is quite clear on this point, stating that the list of factors is not exhaustive, and "nor can one or several of these factors necessarily give decisive guidance". If no one factor can give decisive guidance on the question of the state of the domestic industry, it is self-evident that the fact that one or more factors do not, taken individually, point toward injury, does not preclude the possibility of a finding that there is material injury. An examination of the impact of the dumped imports on the domestic industry under Article 3.4 includes an evaluation of all relevant economic factors having a bearing on the state of the industry to produce an overall impression of the state of the domestic industry. We must consider whether, in light of the interaction among injury indicators and the explanations given in the redetermination, the information before the EC precluded a finding by an unbiased and objective investigating authority that the domestic industry was injured. We therefore find unpersuasive India's contentions, with respect to certain of the Article 3.4 factors, that they do not, individually, point toward injury.

(ii) Alleged failure to collect data

6.164 Before turning to our assessment of the EC's evaluation of the Article 3.4 factors, we must first, however, dispose of India's allegation that no data were ever collected with respect to certain of the Article 3.4 factors, and in particular, the factors regarding inventories and utilisation of capacity. India's argument, as noted above, is premised on a statement in the original Panel report. We have considered carefully that statement, and are persuaded that India has misunderstood its import and the context in which it was made. Contrary to India's understanding, the original Panel did not **find**, as a matter of fact or law**,** that no information had been collected on certain of the Article 3.4 factors. Rather, as alluded to by the EC, the Panel was making an observation as to the lack of any basis, on the face of the provisional and definitive Regulations, for a conclusion that certain of the factors had actually been considered by the EC authorities in making their determination. Indeed, the Panel specifically went on to note that, in the absence of any reference to the relevant information in the Regulations, it was not willing to assume that such data had been considered.[146]

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[142] Original Panel Report, *EC–Bed Linen* para. 6.162.

[143] *Id.*, at para. 6.168.

[144] Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* ("*Thailand – H-Beams*"), WT/DS122/R, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS122/AB/R, at para. 7.236.

[145] Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ("*US – Hot-Rolled Steel*"), WT/DS184/R, adopted 23 August 2001 as modified by the Appellate Body Report, WT/DS184/AB/R, at paras. 7.232, 7.233. In this context, we note and agree with the view of the Appellate Body that "Articles 3.1 and 3.4 indicate that the investigating authorities must determine, objectively, and on the basis of positive evidence, the importance to be attached to *each* potentially relevant factor and the weight to be attached to it. In every investigation, this determination turns on the "bearing" that the relevant factors have "on the state of the [domestic] industry"". See Appellate Body Report, *US – Hot-Rolled Steel*, at para. 197

[146] "While some of the data collected for the factors that are mentioned in the Provisional Regulation by the EC authorities may have included data for the factors not mentioned, we cannot be expected to assume that this was the case without some indication to that effect in the determination".

6.165 It is clear, and the EC acknowledges, that no new or additional information was collected in the course of the redetermination. Therefore, whatever information is discussed in the redetermination must have been in the record of the original investigation. Indeed, India does not assert otherwise. In the redetermination, the EC has set out its consideration of that information, with respect to all the Article 3.4 factors. Nonetheless, India maintains that no data had been collected, and points to the discussion of two of the Article 3.4 factors in the redetermination in support of its view.

6.166 India appears to argue that because the EC's redetermination sets out the conclusion at the outset, and only then addresses the information in support of that conclusion, this somehow indicates that fact collection followed the conclusion. India asserts that "the very order of the sequence evaluating the facts and setting forth the conclusions based on the data on record could indeed and very well negatively affect the result. The formal aspect of data collection and the substantive aspect of objective evaluation of the data should not be mixed".[147] While certainly, we agree that facts must be collected before they can be evaluated, there is no indication that the EC pre-judged the outcome of the fact collection. Indeed, the fault found with the original determination was, as pointed out above, not that information was not collected, but that there was no basis on which the Panel could conclude that there had been an evaluation of information with respect to certain of the Article 3.4 factors.

6.167 In our view, it is clear that the EC had, in its record, information on stocks and utilisation of capacity, as well as the other Article 3.4 factors. As it had asserted in the original determination, it did not consider the information on inventories and capacity utilisation to have a bearing on the state of the EC industry. However, unlike the original determination, the EC's consideration of these factors is clearly set out on the face of the redetermination.

6.168 It is true that the EC opens its discussion of these two factors in the redetermination by observing "These indicators were found not to have a bearing on the state of the Community industry".[148] However, in our view, the order of the discussion has no implications for whether or not information was actually collected. Merely that the conclusion of the analysis is stated in the determination before the supporting evidence and analysis is meaningless with respect to the question at issue here. Moreover, the next paragraph of the report addresses the information and analysis on which that conclusion is based, starting: "As to stocks, this is the case for two reasons".[149] The remainder of the paragraph addresses these two reasons, and notes that some increase in stocks was observed in some companies, but that this was not considered as evidence of injury. Similarly, the following paragraph addresses the reasons the EC considered production capacity and utilisation to not have a bearing on the state of the industry, and in so doing notes that reliable production capacity figures were difficult to establish because of the relative ease with which equipment could be bought, sold, or used for other products. It concludes by noting that many producers were able to maintain high rates of capacity utilisation.

6.169 It is thus apparent to us, on the face of the redetermination, that the EC did, in fact, have information on the Article 3.4 factors, which is specifically addressed. Thus, we find this no basis as a matter of fact for this aspect of India's claim.

(iii) Alleged inadequacy of evaluation of the Article 3.4 factors

6.170 Turning then to the evaluation of the Article 3.4 factors in the redetermination, we recall that India's claim is two-fold. India argues that the EC's evaluation was inadequate because the EC failed to carry out an "overall reconsideration and analysis", and that errors in the factual record invalidate the redetermination.

Original Panel Report, *EC - Bed Linen*, at para. 6.167.

[147] India's answer to the Panel's question 8, Annex E-1.

[148] Regulation 1644/2001, at para. 28.

[149] *Id.*, at para. 29.

6.171 With respect to the first argument, we note that India argues that the examination by the EC of the Article 3.4 factors is "curt and includes references to the original provisional Regulation, in itself a sign that no re-consideration took place".[150] We disagree. The original Panel Report in this dispute found a violation of Article 3.4 in that the EC had failed to consider all the Article 3.4 factors, and the DSB recommended that the EC bring its measure into conformity. There were no suggestions as to what action the EC might take to bring its measure into conformity with its obligations under the AD Agreement. One possible method would be to issue an entirely new determination, with an explicit consideration and new overall evaluation of all the Article 3.4 factors. This would appear to be what India would have preferred. The EC chose another way. Thus, in the redetermination, the EC addressed the Article 3.4 factors in different ways – the EC in some cases set out the information on a particular factor and evaluated it, and in other cases referred to and confirmed the evaluation of a factor in the original determination. We do not consider that this choice, and the resulting redetermination, which includes a section setting out the EC's conclusions on injury, necessarily demonstrates that no "overall reconsideration and analysis" took place.

6.172 The situation facing us with respect to the redetermination in this case is much like the situation facing the original Panel with respect to the original Provisional and Definitive Regulations. In its report, the original Panel noted:

> "Finally, we note that, as a general matter, the object of a panel's review of a final anti-dumping measure focuses on the final determination of the investigating authority, in this case, the European Communities' Definitive Regulation (Exhibit India-9). However, it is clear to us, and the European Communities has confirmed, that in EC practice the Definitive Regulation does not stand alone as the final determination. Rather, the European Communities reaches many of its conclusions in the preliminary phase of the investigative process, and announces those decisions in the Provisional Regulation (Exhibit India-8). Unless there is a change in the substance of such decisions during the final phase of the investigative process, these decisions are often simply confirmed in the Definitive Regulation, without repeating the underlying analysis and facts in detail, although there may be additional facts or explanation given. Thus, to the extent we seek to understand the European Communities' analysis and explanation concerning any given element of its final determination in order to evaluate India's claims, we consider it appropriate to look to both the Provisional Regulation and the Definitive Regulation to inform ourselves as to the substance of the challenged decision".[151]

6.173 We consider the relationship between the original determination (which as noted comprised elements of both the Provisional and Definitive Regulations) and the redetermination to be analogous. Thus, with respect to those elements in the redetermination as to which the EC confirmed or adopted its original views as set out in the original determination, we must look to the original determination to assess the adequacy of the evaluation. With respect to the adequacy of the evaluation of the elements as an overall matter, we look to the explanation of the EC regarding its conclusions, based on the combination of elements discussed in the original determination and redetermination. While this is perhaps less straightforward than we might wish, it is clear to us that merely because the redetermination confirms or adopts certain findings made in the original determination does not **demonstrate** a failure to carry out an overall evaluation of the information in making the injury redetermination.

6.174 We thus come to the assessment of the EC's evaluation of the Article 3.4 factors and its conclusions regarding injury. As we stated above in paragraphs 6.162 and 6.163, we do not consider the fact that one or another factor does not show a decline or does not individually indicate injury to

[150] India's FWS at para. 164.
[151] Original Panel Report, *EC - Bed Linen*, at para. 6.47.

be determinative. The evaluation of the Article 3.4 factors having a bearing on the state of the industry must be adequate to produce an overall understanding of the state of the domestic industry. Our task, therefore, is to determine whether, in light of the overall development and interaction among injury indicators taken together, the evidence before the EC, in light of the explanations given, would preclude a finding by an unbiased and objective investigating authority that the domestic industry was injured. Against that standard, we have examined carefully the EC's discussion of the Article 3.4 factors, as set out below.

Sales, market share, prices

6.175 India argues that the EC found that sales[152] and market share increased, and that since sales value increased more than sales volume, average prices also increased. India then asserts that the EC did not evaluate these three factors, which in India's view do not point towards injury. Finally, India contends that the EC's statement that the increase in market share was due to sales of higher value niche products "does not meet any standard of a proper evaluation". India maintains that this observation is contrary to the conclusion that there is one like product, and that the market is characterized by product substitutability and transparency.

6.176 The EC argued that, while it was undisputed that average prices increased, this did not take into account the change in product mix sold by the EC producers. The EC noted that this change in product mix was obvious when the average prices, which increase, are compared with data for the defined reference products, which decreased over roughly the same period. We reject India's argument that this explanation undermines the EC's finding of one like product, and the characterization of the market. While it is clear that the EC is obligated to make its determination with respect to the domestic industry, this does not mean that the EC was precluded from considering the information on prices with respect to defined reference products within the like product in order to be able to understand the dynamics of the market and the impact of imports, so long as it ultimately reached conclusions with respect to the industry as a whole.[153] Moreover, it is apparent to us that the statement that the product mix sold changed, as producers sold more higher value niche products, does not undermine the conclusion that there is one like product. It was undisputed in the original investigation, and is not challenged here, that there is a great diversity of bed linen products.[154] The EC did not consider that these differences required a conclusion that there was more than one like product, and that determination has never been challenged. The fact that the increase in overall prices and in market share was found to be explained by the shift in the product mix does not demonstrate that the EC failed to evaluate these indicators at the level of the industry producing the single like product bed linen. Moreover, the fact that the market for bed linen is characterised by product substitutability does not necessarily undermine the finding that there are some high quality niche products. Indeed, it seems entirely reasonable that, while the highest and lowest quality of bed linen may not be perfectly substitutable with one another, they may be sufficiently substitutable to be considered a like product.

[152] With respect to the sales information, India appears to suggest that the EC should have ignored the information on sales from the sample of domestic producers, and relied only on the information for the "industry as a whole". There is no basis for a requirement to ignore any relevant information in an anti-dumping investigation, and to the extent India relies on statements in the original panel Report in this regard, we consider that those statements have been misunderstood. In any event, our reading of the redetermination, together with the original determination, makes clear that the EC did consider the information for the domestic industry as a whole.

[153] *Cf.* Appellate Body Report, *US – Hot-Rolled Steel*. In that case, the Appellate Body noted that "it seems to us perfectly compatible with Article 3.4 for investigating authorities to undertake, or for a Member to require its investigating authorities to undertake, and evaluation of particular parts, sectors or segments within a domestic industry. Such a sectoral analysis may be highly pertinent, from an economic perspective, in assessing the state of an industry as a whole". *Id.*, at para. 195 (footnote omitted).

[154] *E.g.*, Regulation 1069/97 at paras. 69, 72, 75.

Profits

6.177 India asserts that the entire injury determination is based on what it characterizes as "a doubtful and limited piece of information", the profits of the sampled producers.[155] Moreover, India states that it "has reservations with the absolute figures of profits attributed to the "domestic industry" in paragraph 36 of the redetermination".[156] In any event, India points out that it is undisputed that the sampled companies were profitable throughout the investigation period. India maintains that the EC does not evaluate this profit figure other than to confirm the provisional Regulation, which found that the profit was below the minimum level of 5 per cent. In India's view, the EC did not demonstrate that this was indeed a "minimum" level of profit. It only stated that this minimum was the level of profits made in 1991, prior to the injury investigation period. Accordingly, India submits that the EC has failed to adequately evaluate the factor profits.

6.178 We have reviewed the data regarding profits in the original determination and in the redetermination, and consider that it is clear that the EC evaluated profitability for the sampled domestic producers, and considered this to be representative of the industry as a whole. India has not challenged the EC's investigation or determination on the basis of the decision to sample domestic producers. Thus, we find no merit in India's suggestion that an analysis of profits which did not include an evaluation of profits for all EC producers fails to meet the requirements of objectivity in Article 3.1. The obligation of objective evaluation under Article 3.1 of the AD Agreement is with respect to the examination of the information gathered. It does itself not address the completeness or the level at which the information was gathered.[157]

6.179 It is not disputed that the profit rates of sampled producers decreased by over 50 per cent from 3.6 per cent to 1.6 per cent.[158] The EC found that that the sampled producers had achieved higher profits in the past, in a year in which dumped imports were 30 per cent lower than in the IP, and based the 5 percent minimum on that information.[159] The EC considered it significant that profit rates had declined and were significantly below that level.

Output

6.180 India notes that the output of the domestic industry increased. In India's view, this factor clearly does not point toward injury. India points out that the EC had found that output increased because a number of producers had ceased operations, and those which remained, and whose output increased as a result, were those "strong enough" to survive competition from dumped imports.[160] In India's view, this reference to producers outside the domestic industry is not to be considered part of the EC's redetermination, noting the EC's statement in paragraph 19 of the redetermination that the references to producers not forming part of the Community industry should be considered eliminated. India considers either that the EC has not addressed output, if the relevant paragraph is eliminated from the redetermination, or else it is relying on producers outside the industry, which the original Panel found to be in violation of the EC's obligations.

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[155] India's FWS at para. 173.

[156] *Id.* at para. 174.

[157] This is not to suggest that an investigating authority has no obligations in this regard with respect to the proper establishment of facts.

[158] The EC acknowledges that the information it disclosed to the parties during the redetermination was incorrect, due to a clerical error. In the disclosure document, the turnover for sampled producers is shown as ECU 276.9 million in 1992 and ECU 281.2 million in the IP. The actual, correct figures are found in paragraph 83 of the Provisional Regulation, Regulation 1069/1997, 280.6 million in 1992 and ECU 285.3 million in the IP. We agree with the EC's characterization of this error as minor, and do not consider that it had any effect on the EC's analysis.

[159] Regulation 1069/97, at para.89.

[160] *Id.*, at para. 81.

6.181 The EC found that output increased, and attributed this fact to circumstances involving producers that were not part of the domestic industry. While it is true that the original Panel found that the EC had acted inconsistently with the AD Agreement by basing conclusions regarding injury on negative developments for producers that were not part of the domestic industry, we do not understand the Panel's determination to have precluded references to producers that are not part of the domestic industry in an effort to put in context the information relating to the domestic industry. Moreover, the EC points out that from 1994 to the IP the domestic industry's output actually decreased by 1.6 per cent.[161] Furthermore, exports had also increased, which the EC considered to have also contributed to the overall increase in production.[162]

Productivity

6.182 India asserts that the productivity of the domestic industry increased by 11 per cent from the beginning to the end of the injury investigation period. It appears that India is relying on the "productivity index" calculated for sampled EC producers, which increased from 100 in 1992 to 111 in 1996.[163] In India's view, this factor remains completely unevaluated and does not point towards injury.

6.183 The EC concluded that this increase was explained by the combination of increased total production and a decline in employment. For the industry as a whole, production increased by 8.7 percent during the IP, while employment declined by 5.3 percent, and the sampled producers showed the same trends.[164] The investigation showed that the gain in productivity occurred mainly in the period from 1992 to 1994 when most of the jobs were lost.[165]

Return on investments

6.184 India asserts that the investments made throughout the entire injury investigation period were substantial, stating that "investments by sample companies for Bed Linen production were over 20 per cent (!) for *each year* (!) of the injury investigation period".[166] India also asserts that throughout the injury investigation period the companies obtained a positive return on investments. India maintains that there was no evaluation of this factor, and that the this factor does not point toward injury.

6.185 The EC points out that the figures for investments referenced by India represent accumulated and not yearly amounts.[167] Moreover, the EC notes that while the return on investments remained positive throughout the injury analysis period, it decreased by over 50 per cent.[168]

Capacity utilisation

6.186 India makes no argument concerning the consideration of capacity utilisation beyond the allegation that no data were obtained and that therefore no proper evaluation could be made. As we have found above that this argument is without merit, as the EC clearly did have information on this

[161] The "IP" refers to the period covered by the investigation of dumping, in this case 1 July 1995 to 30 June 1996. The investigation of parameters relevant in the injury assessment covered the period 1 January 1992 to the end of the IP, 30 June 1996 (the "injury investigation period"). Regulation 1644/2001, at para. 4.

[162] Regulation 1069/97 at para.81.

[163] Regulation 1644/2001, at para. 32.

[164] *Id*., at para. 31.

[165] *Id*., at para. 31.

[166] India's FWS at para. 184. It is not clear how India has derived this figure from the cited source, the table attached to Exhibit-India-RW-5.

[167] The EC points to the table at page 8 of the EC's fax to Texprocil of 27 July 2001 (Exhibit-India-RW-17), in support of this contention.

[168] Regulation 1644/2001, at para. 39.

factor, we do not consider it necessary to address the adequacy of the EC's consideration of this element.

6.187 We note, however, that the EC found, based on information which was submitted in the original investigation and verified, that reliable statistics on production machinery for the product concerned were extremely difficult to establish because the machinery can be bought, sold or used for different products with relative ease.[169] As the same machinery could have different capacity ratings depending on the product mix, it would be difficult to obtain any meaningful data. The EC did find that a number of producers were contracting out surplus production and may therefore have been able to maintain a high rate of capacity utilisation, but this data was not available for all sampled producers or the domestic industry for the reasons explained above. Thus, the EC concluded that in the absence of meaningful data for all companies in the sample, this factor did not "have a bearing on the state of the Community industry".[170]

Factors affecting domestic prices

6.188 India notes that the EC refers to the contraction in demand and raw cotton prices as factors affecting domestic prices. In India's view, the EC did not evaluate the first factor, but merely concluded that "given that the prices of the dumped imports were the lowest", "the contraction in demand in itself did not have an overriding impact on prices".[171] India also considers as incomprehensible the statement of the EC that "contraction of demand in itself did not have an overriding impact on prices" because the prices of dumped imports were the lowest of all operators in the market.

6.189 As regards the price of raw cotton, the EC found that the price of raw cotton "can represent up to 15 per cent" of bed linen costs, that the price of raw cotton "increased significantly",[172] and that EC producers were not able to pass on this cost increase. In India's view, this is a factor that has nothing to do with imports from India.

6.190 The EC found, with respect to the increase in raw cotton prices, that in fair market conditions, and in the absence of other factors preventing it, domestic producers should have been able to increase prices and pass on to their customers the increase in the cost of the raw material.[173] Furthermore, the EC found that despite the contraction in demand, the EC industry should have been able to benefit from the gap in supply left by factory closures, but instead, the growth of the Community industry was negative between 1994 and the IP in terms of sales volume.[174] The EC also noted that between 1994 and the IP, dumped imports increased by 35 percent, and increased their market share by up to 6.2 percentage points.[175]

The magnitude of the margin of dumping

6.191 India notes that the EC concluded that the dumping margins found in the redetermination were "still substantial and distinctly above *de minimis* levels". India considers this statement to be at odds with the facts. In India's view, two producers had zero dumping margins, one producer had a

[169] We reject India's suggestion that the EC's discussion of capacity utilization under the heading "production capacity" confused the two factors. India argues that the EC confuses "production capacity" and "utilisation of capacity". In order to analyse utilisation of capacity, as noted, it is necessary to consider the level of production capacity. The EC addressed both elements under the heading "capacity".

[170] Regulation 1644/2001, at para. 28.

[171] *Id*., at para. 44.

[172] Regulation 1069/97 states, at para. 88, that prices of raw cotton increased by 48 percent between 1992 and the IP, or by 59 percent between 1993 and the IP.

[173] Regulation 1644/2001, at para. 45. See also Regulation 1069/97, at para. 88.

[174] *Id*., at para. 43.

[175] *Id*.

margin of 3 per cent, which India considers not to be consistent with the statement, and these three producers represented 70 per cent of the imports attributable to the sampled producers. Thus, India considers that the evaluation by the EC was cursory, inadequate and factually incorrect.

6.192 In our view, the EC's conclusion is not unreasonable in light of the fact that the dumping margins found for Indian producers ranged from 3 percent to 9.8 percent.

Cash flow

6.193 India asserts that the evaluation of cash flow is restricted to two sentences, which state that cash flow remained positive but declined from 25 million ECU to 18 million ECU, and that cash flow followed a similar decreasing trend as profitability.

6.194 The EC found that as with profitability, cash flow had decreased by 28 per cent from 1992 to the IP. This is not disputed.

Inventories

6.195 India makes no argument concerning the consideration of inventories beyond the allegation that no data for inventories were obtained and that therefore no proper evaluation could be made. As we have found above that this argument is without merit, because the EC clearly did have information on this factor, we do not consider it necessary to address the adequacy of the EC's consideration of this element.

6.196 Nonetheless, we observe that the EC explained, at paragraph 29 of Regulation 1644/2001, that production of bed linen often takes place in response to or in anticipation of orders placed by particular clients. The EC continued to observe that inventory valuation often takes place at 31 December, which is towards the end of a peak period for the bed linen sector. While some increase in inventories was observed in some companies, there was no suggestion that this was evidence of injury. An increase in inventories or decrease in inventories in this sector can thus indicate actual or anticipated orders rather than unsold production.[176] Consequently, the EC concluded that inventories did not have a bearing on the state of the domestic industry.[177]

Employment

6.197 India notes that the EC found that employment decreased. India objects to the EC having discussed employment together with production and productivity. In India's view, "under the EC's logic, the producers suffered from imports, had to lay off 300 jobs, managed to force the remaining labour to work 8.7 per cent per cent harder (without any trade union protests), and—notwithstanding their injured position, spent 20 per cent on investments in new Bed Linen machinery".[178] India considers that such reasoning is fallacious. Instead, India considers it more probable that investments in new machinery resulted in increased production, and the increased production from more efficient machines could have been the reason to the 300 lay-offs in the sector. India also considers that since production increased during the same period the decrease in employment was not caused by imports but was a function of the productivity increase. India also asserts that there is a factual error in the redetermination, in the calculation of the percent decline in employment.

[176] *Id*., at para. 29.

[177] As regards India's argument that inventory levels should have been taken into account when establishing consumption, the EC pointed out that complete industry data was not available from all the Community producers. The EC observed that this was often the case in anti-dumping investigations, and that consumption is analysed in such circumstances on the basis of apparent consumption, without taking account of inventories. The EC pointed out that during the original investigation neither India nor any other interested party questioned this calculation

[178] India's FWS at para. 201.

6.198 India has proffered an alternative explanation for the decline in employment. However, there is no specific evidence cited by India that would suggest that only this view of the facts could be taken by an unbiased and objective investigating authority. Moreover, contrary to India's theory, there was a decrease in production in the period overlapping the period in which employment in the EC industry decreased.[179] With respect to the alleged factual error, paragraph 91 of Regulation 1069/97 states that direct employment in the Community industry decreased from "around 7000 jobs to 6700". The exact figures (7059 in 1992 to 6684 in the IP) correspond to the percent decline, 5.3 percent mentioned in the redetermination.[180]

Wages

6.199 India notes that the EC found that wages increased during the injury investigation period. India asserts that the EC's evaluation is limited to the observation that for part of the injury investigation period the wages went up in line with consumer prices, which India considers inadequate, and in any event, India maintains that the factor does not point towards injury. There is no dispute that wages increased over the injury investigation period.[181]

Growth

6.200 In India's view, the EC's evaluation of growth of the Community industry is restricted to part of the facts, data from 1994 to the IP, and to data regarding sales volume. India asserts that the EC disregards that overall sales volume increased, and that other important growth factors such as output, productivity, capacity utilisation, market share, wages, ability to raise capital, all showed a positive trend. India considers that the evaluation was not adequate.

6.201 The EC notes that sales volume overall increased, but that growth was negative for a significant period of the injury analysis period, i.e. between 1994 and the IP, and that growth in market share was also limited during that period. The EC maintains that in analysing the trends over the whole of the injury investigation period an investigating authority cannot be expected to ignore clear negative trends during that period, citing the statement of the Appellate Body in *Argentina – Footwear Safeguard*:

> "we do not dispute the view and ultimate conclusion that the competent authorities are required to consider the *trends* in imports over the period of investigation (rather than just comparing the end points) under Article 4.2 (a)".[182]

6.202 Moreover, the EC argues that a comparison of the growth of the domestic industry to the growth of the dumped imports shows that growth in the EC industry was far less significant in both absolute and relative terms.

Ability to raise capital

6.203 India points out that the sampled producers were able to raise capital throughout the injury investigation period at a stable and eventually increasing level. In India's view, the EC's evaluation is limited to the observation that there was no claim nor any indication that there were problems to raise capital. India considers that the EC's statement that no major investments were made is belied by the fact that the average yearly investments amounted to approximately 20 per cent. India considers that

[179] Exhibit–India-RW-5, at table 1.
[180] Exhibit-India-RW-18, at para. 31.
[181] Regulation 1644/2001, at para. 33.
[182] Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear* ("*Argentina – Footwear (EC)*"), WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515, at para. 129.

the evaluation was factually wrong, not adequate and that also this factor does not point towards injury.

6.204 The EC evaluated the sampled producers' ability to raise capital and found that the level of credits increased by 3 per cent from 1992 to the IP. While the level of credits raised first decreased and then increased during the IP, there was no indication that the Community industry had encountered difficulties in raising capital. The fact that credits raised increased does not necessarily indicate that sampled producers were performing better. Indeed, while the level of credits remained fairly stable, the debt ratio was particularly high. Moreover, as discussed above in paragraph 6.184, India appears to have misunderstood data on overall investment as annual investment rates.

(iv) Facts allegedly ignored

6.205 India also argues that facts on the record have been ignored. In this respect, India notes that in the original determination, the EC had excluded one company from the domestic industry, presumably as a related party, under Article 4.1(i), because it imported bed linen from Pakistan, and had not considered that company's data in evaluating the domestic industry.[183] India maintains that, since Pakistan was not dumping, in the redetermination, the EC should have included the information for this producer in its evaluation of injury.

6.206 As discussed above at paragraph 6.116, at the time the redetermination was made, the EC was entitled to treat Pakistani imports as dumped. Consequently, and assuming that the import of product from Pakistan was in fact the reason for the exclusion of this producer, there was no reason for the EC to reconsider that decision in making the redetermination. In any event, as India has not made a claim under Article 4.1(i) in connection with this aspect of the redetermination, we can discern no basis on which we could rule whether the exclusion of this company was consistent with the AD Agreement or not. India insists that it is alleging a violation of the Article 3.1 obligation to rely on "positive evidence" in this connection. However, as discussed above, we consider the notion of "positive evidence" to refer to the quality of the evidence relied upon. There is no dispute as to the quality of the evidence supplied by this producer, or of the evidence relied upon by the EC. Rather, India argues that some evidence excluded from the "positive evidence" considered by the EC should have been included. Absent some basis in the text of the AD Agreement for the conclusion that it was improper to exclude this company's evidence, we find India's position that the EC disregarded positive evidence to be without merit.

(v) Facts allegedly changed without explanation

6.207 India argues that the facts concerning sales value for sampled producers and market share were different in the redetermination than in the provisional regulation, and no explanation was given for this change. India asserts that despite the difference in the sales value figures, the profit rate reported by the EC remained the same.

6.208 The EC acknowledged a clerical error in respect of sales values as disclosed to the Indian producers during the course of the redetermination, but maintains that the facts concerning profit rate as reported in the redetermination are correct. India has not disputed this assertion. Therefore, we consider that the clerical error does not establish that the facts relied upon by the EC changed from the provisional Regulation to the redetermination. With regard to market share, there was no change in the data. Rather, the first set of figures referred to by India concerned market share by value, while the second set of figures referred to by India concerned market share by volume. India acknowledged this fact in its second written submission.[184]

[183] Regulation 1069/97, at para. 54.
[184] India's SWS at 187. See Regulation 1069/97, at para. 85, and Regulation 1644/2001, at para. 35.

(vi) Facts allegedly misrepresented

6.209 India maintains that the redetermination misrepresents information on profits, cash flow, and return on investments. India asserts that the redetermination states that the EC collected information on profit, cash flow, and investments only for the sampled EC producers. Nonetheless, India argues that the EC made conclusions for the EC **industry** with regard to profits on the basis of data for the sampled producers. India asserts that the same errors are repeated for cash flow and for investments.

6.210 The EC explained, in paragraph 19 of Regulation 1644/2001, that certain information was collected only at the level of the sampled producers. The fact that India points this provision out itself demonstrates that it was not misled by any of these figures, rather, it understood perfectly well that they related to sampled producers. That the EC drew conclusion on the basis of information regarding the sampled producers as representing the domestic industry is, in our view, entirely reasonable. This particularly so with respect to factors such as profits, cash flow, and return on investments, where the only source of information is likely to be the producers themselves. India has never challenged the EC's reliance on a sample of domestic producers in the context of the injury determination. We do not consider that there is any error in the redetermination in this regard.

6.211 India also considers as a misrepresentation the statement in Regulation 696/2002, the re-examination of injury with respect to imports from India alone, that "the dumping margins found are still substantial and distinctly above *de minimis* levels".[185] India notes that the dumping margin for two of the exporters was zero, lower than *de minimis*, and argues that therefore, the statement is clearly not true. India finds puzzling the statement in paragraph 19 of that Regulation that "one third of the undercutting would have disappeared if the imports from India had not been dumped". India considers these alleged misrepresentations to be material, since the conclusions drawn are based on these misrepresentations.

6.212 As discussed above, we do not consider Regulation 696/2002 to be properly before us in this dispute, and therefore will not make any rulings with regard to that determination. In any event, we note that India has made no claims with respect to the substance of that determination, merely vague allegations of misrepresentation of facts. We do not consider that these would form any basis for a finding of error on the EC's part.

(vii) Alleged failure to conduct an overall reconsideration and analysis

6.213 As we discussed above in paragraphs 6.162, 6.163, and 6.174, an analysis of injury does not rest on the evaluation of the Article 3.4 factors individually, or in isolation. Nor is it necessary that all factors show negative trends or declines. Rather, the analysis and conclusions must consider each factor, determine the relevance of each factor, or lack thereof, to the analysis, and consider the relevant factors together, in the context of the particular industry at issue, to make a reasoned conclusion as to the state of the domestic industry.

6.214 In this case, the EC found that the volume of imports was high, and that the market share of dumped imports increased, while prices of dumped imports declined and there was significant price undercutting. The EC specifically addressed the information relevant to each of the Article 3.4 factors, concluding that some of them (inventories, production capacity and capacity utilisation) were not relevant to its analysis. The EC concluded that although the domestic industry managed to increase production and to slightly increase its sales volume and market share by concentrating on sales of higher value niche products, it nevertheless suffered declining and inadequate profitability, which was basically the result of price suppression – the inability, due to the presence of low priced dumped imports, to pass along increases in costs. The EC found that information regarding cash flow, return on investments and employment also showed declining trends. The EC thus confirmed the

[185] Regulation 1644/2001, at para. 19

conclusion in the original determination that the domestic industry had suffered material injury "On this basis, and in particular because of the declining and inadequate profitability and price suppression suffered by the Community industry".[186]

6.215 In our view, it is clear that the EC did conduct an overall reconsideration and analysis of the facts on the record with respect to the injury determination. The redetermination, read together with the original determination, presents information on each of the Article 3.4 factors, and presents the investigating authorities' analysis and conclusions as to why, overall, that information indicated the existence of material injury.

6.216 In our view, India has essentially presented alternative interpretations of the facts. However, as noted above, pursuant to the standard of review in anti-dumping disputes, our role is not to assess whether there is an alternative view of the facts that might be supported, but to determine whether an objective and unbiased investigating authority could have reached the conclusions that were reached by the EC. India has failed to demonstrate that, based on the information before the EC authorities, and in light of the analysis in the redetermination as we understand it, an objective and unbiased investigating authority could **not** have reached the conclusions that were reached by the EC.

6.217 We therefore find that the EC's analysis and conclusions regarding injury are not inconsistent with Articles 3.1 and 3.4 of the AD Agreement.

5. Claim 6: The EC acted inconsistently with its obligations under Article 3.5 of the AD Agreement

(a) Arguments of the parties

6.218 India asserts that the EC's determination is inconsistent with the AD Agreement because the EC failed to demonstrate that the dumped imports caused material injury, in particular, because the EC failed to ensure that the injurious effects of other known factors were not attributed to dumped imports, as is required by Article 3.5 of the AD Agreement. India asserts that the EC completely failed to ensure that the injurious effects of the other known factors are not "attributed" to dumped imports. As an example, India notes that the fact that prices of bed linen were not able to keep pace with inflation in prices of consumer goods, is not even discussed in the context of other factors causing injury. India also points to the fact that the EC's conclusion that "increases in raw material prices had caused injury",[187] is not separated and distinguished from the injury caused by dumped imports. India also asserts that further factors that are curtly discussed, are also not separated, and are merely lumped together and remain indistinguishable from alleged injury caused by dumped imports. In India's view, in the absence of separation and distinction of the different injurious effects, the EC had no rational basis to conclude that the dumped imports were indeed causing injury. Accordingly, India considers that the EC acted contrary to Article 3.5 when it concluded, without more, that the alleged injury was caused by the dumped imports.

6.219 India reads the decision of the Appellate Body in *US - Hot-Rolled Steel* as imposing the obligation to separate and distinguish the different injurious effects caused by other factors, from the effects of the dumped imports. In India's view, the EC did not engage in such separation nor did it distinguish the different injurious effects. In support of its view, India asserts that the EC nowhere separated the injurious effects caused by the increase in the price of raw cotton and distinguished them from the effects of the dumped imports.

[186] *Id*., at para. 51.
[187] Regulation 1069/97, at para. 103.

6.220 India also asserts that, in any event, the EC's determination of causality is incorrect. India considers that the EC concluded that the increase in market share of dumped imports from India was "*the cause*" of the decline in domestic industry profits.

6.221 The EC considers that India's claim and its arguments are both legally and factually erroneous. The EC asserts that Article 3.5 does not require that dumped imports be the sole cause of injury. The EC further maintains that, assuming the Panel reaches the question of the adequacy of the EC's consideration of "other factors" causing injury, that the EC did properly consider whether other factors were causing injury and did not attribute to dumped imports injury caused by such other factors..

6.222 The EC contends that India's argument with respect to market share is legally and factually incorrect. The EC considers that Article 3.5 does not require that dumped imports be the sole cause of injury, and that in any event injury can be found to exist even if dumped imports have not gained market share. The EC also contends that its finding of injury was not based on loss of market share by the domestic industry. Finally, the EC asserts that the increase in the market share of the dumped imports was, in any event, significant.

6.223 The EC asserts that India misrepresents the EC's findings when it argues that the EC found that the increase in consumer prices was one of the causes of injury but then failed to examine it as an "other factor" under Article 3.5. The EC maintains that its authorities did observe that prices of the domestic industry did not keep pace with inflation in consumer prices, but did not identify that fact as a cause of injury, but rather as part of the assessment of the state of the domestic industry. The EC considers unsupported India's allegation that the EC authorities failed separate and distinguish the effects of dumped imports from those of other, unspecified, causes of injury. The EC notes that India presents argument in this regard only with respect to one alleged "other factor", the increase in the cost of raw cotton. In this context, the EC again considers that India's arguments misrepresent the findings of the EC authorities. The context of the statement of the EC authorities that the increase in the cost of raw cotton "had caused injury", makes it clear that the EC authorities did not consider that factor as a separate cause of injury -- that is, the EC authorities considered that the increase in the cost of raw cotton "had caused injury" only because the EC industry was unable to reflect that increase in its prices – and consequently the EC industry had suffered price suppression. The EC authorities found that the reason the EC industry could not pass on the cost increases was the downward pressure on prices exerted by the dumped imports. Since the increase in the cost of the raw cotton was not a separate cause of injury, its injurious effects cannot possibly be "separated/distinguished" from those of the dumped imports.

(b) Arguments of third parties

6.224 Japan notes that it agrees with India's Claim 6. Japan considers that Article 3.5 of the Anti-Dumping Agreement requires that investigation authorities, as part of their causation analysis, examine *all* "known factors", "other than dumped imports", which are causing injury to the domestic industry "at the same time" as dumped imports. Investigation authorities also must ensure that injuries, which are caused to the domestic industry by known factors other than dumped imports, are not "*attributed* to the dumped imports." Accordingly, Japan requests that the Panel carefully examine the consistency of the EC measures at issue with this Article.

6.225 The United States agrees with the EC's position that Article 3.5 does not require that the dumped imports be the sole cause of injury, or that the dumped imports alone have caused the injury. To the extent India suggests that the absence of absolute or relative increases in the volume of subject imports defeats an affirmative determination, the United States agrees with the EC that the AD Agreement does not require that there be an increase in import volume in order to find that the dumped imports caused material injury to the domestic industry. Moreover, the United States points out that the AD Agreement recognizes that in some investigations, the causal effects of the dumped

imports may be manifested through price effects, notwithstanding small or stable volumes of imports, referring in this regard to Article 3.2 of the AD Agreement. The United States also asserts that in certain market conditions even declining import volumes can produce injurious effects.

(c) Evaluation by the Panel

6.226 We have concluded above, in paragraph 6.53, that India's claim with respect to the EC's analysis of "other factors" causing injury to the domestic industry is not properly before us, having been disposed of by the Panel and not appealed in the original dispute.

6.227 Nonetheless, we consider it appropriate, in order to ensure prompt resolution of this Article 21.5 dispute, to make, in the alternative, findings on India's claim in this regard. In this way, should our findings be subject to appellate review, and should the Appellate Body deem it necessary to complete the analysis by making findings regarding this claim for the purpose of effectively settling this dispute, it could do so notwithstanding our decision that this claim is not properly before us.[188] We emphasize that no recommendation or ruling by the DSB would be necessary with respect to our alternative findings if our preliminary ruling, that India's claim concerning "other factors" causing injury is not properly before us, is adopted.

6.228 One aspect of India's claim under Article 3.5 is not disposed of by our preliminary ruling, as it relates to the determination of causal link *per se*, and not the consideration of other factors causing injury. We therefore address that aspect before setting forth our alternative findings.

6.229 India maintains that the EC has not adequately "proven" that the increase in market share of dumped imports from India was the cause of the decline in the EC industry's profit rate from 3.6 to 1.6 per cent over a period of five years. India asserts that the market share of dumped Indian imports increased 1.9 per cent over a five year period, which period coincided with an increase in the market share of the Community industry. We note first that the market share figures referred to by India are not those on which the EC based its decision. The EC made its determination on the basis of a

[188] We find support for this manner of proceeding in Panel Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products* ("*Canada – Dairy*"), WT/DS103/R, WT/DS113/R, adopted 27 October 1999, as modified by the Appellate Body Report, WT/DS103/AB/R and Corr.1, WT/DS113/AB/R and Corr.1, DSR 1999:VI, 2097, at para. 7.119. In that dispute, the Panel made alternative findings on Article 10.1 of the Agreement on Agriculture, despite having made findings under Article 9.1 of that Agreement which, if adopted, would exclude the possibility of concurrent findings under the mutually exclusive provisions of Articles 9.1 and 10.1. The Panel made the alternative findings in order to i) enable the Appellate Body and the DSB to make findings on Article 10.1 in the event that it considers it necessary and (ii) avoid a continuation of the dispute. The Panel specifically noted that it included the examination of Article 10.1 as one on which no recommendation or ruling by the DSB would be necessary if its findings under Article 9.1 were adopted. We note, as did the *Canada - Dairy* Panel, the Appellate Body's statements in *Australia – Measures Affecting Importation of Salmon* (WT/DS18/AB/R, adopted 6 November 1998), where the Appellate Body, after having reversed certain Panel findings, was "unable to come to a conclusion on [the claim under Article 5.6 of the SPS Agreement] due to the insufficiency of the factual findings of the Panel and of facts that are undisputed between the parties" (para. 213; see also para. 241), and in *Canada – Certain Measures Concerning Periodicals* (WT/DS31/AB/R, adopted 30 July 1997, p. 22, where the Appellate Body stated: "We note that, due to the absence of adequate analysis in the Panel Report in this respect, it is not possible to proceed to a determination of like products [under Article III:2, first sentence, of GATT 1994]"). *See also* Panel Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* (WT/DS50/R, adopted 16 January 1998) where the Panel decided to continue its examination under Article 63 of the TRIPS Agreement after it had found a violation under Article 70.8 of that Agreement (para. 7.44: "Although the United States formulates it [the Article 63 claim] as an alternative claim in the event that the Panel were to find that India has a valid mailbox system in place, and we have, as stated above, found that the current mailbox system in India is at variance with Article 70.8(a) of the TRIPS Agreement, we believe it necessary to make our findings clear on the issue of transparency in order to avoid a legal vacuum in the event that, upon appeal, the Appellate Body were to reverse our findings on Article 70.8").

cumulative assessment of dumped imports from all three countries investigated, India, Egypt, and Pakistan, and considered as "dumped" all imports attributable to all producers for which the EC did not make a negative determination of dumping. We have found these aspects of the EC's determination not inconsistent with the AD Agreement. Thus, the EC was entitled to rely on the fact that dumped imports increased by 30 percent during the period considered, and that the market share of dumped imports increased by 40 percent, representing more than 21 percent of the EC market during the IP.189

6.230 Moreover, in this case, the EC did not ground its finding of causation in an increase in market share held by dumped imports. The EC found that dumped imports suppressed prices, thereby causing material injury to the EC industry. We note that India's argument suggests that if the level of, or the increase in, the market share of dumped imports is relatively small, those imports cannot be considered a cause of injury. That suggestion is incorrect. We find nothing in the text of Article 3 to support such a suggestion, and indeed, India has not specifically argued otherwise. We note that Article 3.2 of the AD Agreement requires the investigating authorities to consider not only the volume of imports, but also the effect of the dumped imports on prices. Clearly, the existence of price depression and price suppression may support a finding of injury, yet neither of these would necessarily require an increase in dumped import volume or market share at the same time. Indeed, there could be price depression or price suppression in a situation where there is no increase, or even in some circumstances a decrease, in the volume or market share of dumped imports.

6.231 Article 3.5 provides that "It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The **demonstration of a causal relationship** between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities" (emphasis added). We consider that there is no obligation under the AD Agreement for the investigating authority to determine that dumped imports are the sole cause of injury. We note in this regard the Panel Report in *US – Hot-Rolled Steel*. In that case, the Panel found that there is no obligation in Article 3.5 of the AD Agreement that an investigating authority "demonstrate that dumped imports alone have caused material injury by deducting the injury caused by other factors from the overall injury found to exist, in order to determine whether the remaining injury rises to the level of material injury".[190] [191]

6.232 In this respect, we note that the EC did not, in our view, determine that the increase in market share was **the** cause of the EC industry's declining and inadequate profits. Indeed, it is clear that the EC considered the principle cause of the poor profit picture to be price suppression, which resulted from the increased volume of dumped imports from all three countries investigated entering the EC market at prices which undercut the domestic industry's prices by significant margins. Those dumped imports prevented price increases which otherwise would have occurred, during a period when the industry's costs increased.

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[189] Regulation 1644/2001, at para. 22.

[190] Panel Report *US – Hot-Rolled Steel*, at para. 7.260. This aspect of the Panel's decision was not raised on appeal.

[191] Interpreting similar language in Article 4.2 (b) of the *Agreement on Safeguards*, which provides that a determination of causal link shall not be made unless "investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof", the Appellate Body stated "the language in the first sentence of Article 4.2 (b) [of the *Agreement on Safeguards*] does not suggest that increased imports be the sole cause of injury, or that "other factors" causing injury must be excluded from the determination of serious injury. To the contrary, the language of Article 4.2 (b), as a whole, suggests that "causal link" between increased imports and serious injury may exist, even though other factors are also contributing, "at the same time", to the situation of the domestic industry". Appellate Body Report, *United States – Definitive Safeguard Measure on Imports of Wheat Gluten from the European Communities* ("*US – Wheat Gluten*"), WT/DS166/AB/R, adopted 19 January 2001, at para. 67. See also, Appellate Body report in *US – Lamb* at para. 166.

6.233 We consider that India has failed to demonstrate on this basis that the EC's causation determination is one that an unbiased and objective investigating authority could not reach on the basis of the facts before the EC. We therefore conclude that the EC's finding of causal link is not inconsistent with the requirements of Article 3.5 of the AD Agreement.

(d) Additional finding in the alternative

6.234 We come then to our alternative findings with respect to India's claim that the EC failed to separate and distinguish the different injurious effects caused by other factors from the effects of the dumped imports. Turning first, as always, to the text, we note that Article 3.5 of the AD Agreement provides

> "It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. **The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports.** Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry". (emphasis added).

6.235 With respect to the non-attribution requirement of Article 3.5 of the AD Agreement the Appellate Body in *US - Hot Rolled Steel* noted that:

> "222. This provision requires investigating authorities, as part of their causation analysis, first, to examine *all* "known factors", "other than dumped imports", which are causing injury to the domestic industry "at the same time" as dumped imports. Second, investigating authorities must ensure that injuries which are caused to the domestic industry by known factors, other than dumped imports, are not "*attributed* to the dumped imports." (emphasis in original)
>
> 223. The non-attribution language in Article 3.5 of the *Anti-Dumping Agreement* applies solely in situations where dumped imports and other known factors are causing injury to the domestic industry *at the same time*. In order that investigating authorities, applying Article 3.5, are able to ensure that the injurious effects of the other known factors are not "attributed" to dumped imports, they must appropriately assess the injurious effects of those other factors. Logically, such an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports. If the injurious effects of the dumped imports are not appropriately separated and distinguished from the injurious effects of the other factors, the authorities will be unable to conclude that the injury they ascribe to dumped imports is actually caused by those imports, rather than by the other factors. Thus, in the absence of such separation and distinction of the different injurious effects, the investigating authorities would have no rational basis to conclude that the dumped imports are indeed causing the injury which, under the *Anti-Dumping Agreement*, justifies the imposition of anti-dumping duties.
>
> 224. We emphasize that the particular methods and approaches by which WTO Members choose to carry out the process of separating and distinguishing the

> injurious effects of dumped imports from the injurious effects of the other known causal factors are not prescribed by the *Anti-Dumping Agreement*. What the Agreement requires is simply that the obligations in Article 3.5 be respected when a determination of injury is made.
>
> 228. … If the injurious effects of the dumped imports and the other known factors remain lumped together and indistinguishable, there is simply no means of knowing whether injury ascribed to dumped imports was, in reality, caused by other factors. Article 3.5, therefore, requires investigating authorities to undertake the process of assessing appropriately, and separating and distinguishing, the injurious effects of dumped imports from those of other known causal factors".[192]

6.236 India asserts that the statement of the EC in the redetermination that injury was "basically the result of prices which had not been able to reflect the increases in the costs of raw cotton or to keep pace with inflation in prices of consumer goods" indicates that injury was caused by other factors than dumped imports, *viz*. the increase in costs of raw cotton, and/or inflation. Thus, India maintains that the EC failed to ensure that the injurious effects of the other known factors were not "attributed" to dumped imports, and failed to separate and distinguish the injury caused by these factors from the injury caused by dumped imports. India also asserts that "further" factors are only curtly discussed, and are also not separated but are merely lumped together and remain indistinguishable from alleged injury caused by dumped imports. In this respect, India points to the statement in the redetermination that "the analysis of the effects of other factors than dumped imports on the state of the Community industry has likewise confirmed the … direct causal link".[193] In India's view, in the absence of separation and distinction of the different injurious effects, the EC would have no rational basis to conclude that the dumped imports were causing injury. Accordingly, India considers that the EC acted contrary to Article 3.5 when it concluded, without more, that the alleged injury was caused by the dumped imports.

6.237 As we have noted above in paragraph 6.230, Article 3.5 provides that "It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The **demonstration of a causal relationship** between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. **The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports**" (emphasis added).

6.238 India argues that paragraph 50 of the redetermination contains a "declaration" that injury was actually caused by another factor, when it states that the declining and inadequate profitability of the EC industry is "basically the result of prices which had not been able to reflect the increases in the costs of raw cotton or to keep pace with inflation in prices of consumer goods". We note that this paragraph is in the part of the redetermination entitled "Conclusions on injury", in which the EC described the situation of the domestic industry. In our view, India takes this passage out of context in asserting that it constitutes a "recognition" by the EC that these factors were "other factors" causing injury. We consider that this passage does not address causation at all.

6.239 India maintains that the effect of increases in the cost of raw cotton must be considered an independent factor causing injury, whose effects must be "separated and distinguished" from the effects of the dumped imports. The EC considered that "the extent of [injury due to increases in raw material prices] depends on the ability of the producer to pass on some or all of the increased cost. In this case, it was reasonable to asses that the dumped imports were the main reason why such pass-

[192] Appellate Body Report, *US – Hot-Rolled Steel*, at paras. 222
[193] Regulation 1644/2001, at para. 69.

through did not occur."[194] India does not now argue, and did not argue before the investigating authority, that EC producers should have adjusted to cost increases in an effort to maintain profit levels in some other fashion than by increasing prices. Nor did India assert before the investigating authority, or argue before us now, that any factor other than dumped imports prevented EC producers from increasing prices in light of the increased costs. The EC considered that increased costs of raw cotton would under normal competitive conditions, have resulted in an increase in the price charged by EC bed linen producers. However, the EC concluded that the presence of low priced dumped imports in the EC market, which undersold the EC product by significant margins, prevented EC producers from passing along the cost increases. This is a classic example of a cost-price squeeze and price suppression – that is, the effect of imports preventing price increases which otherwise would have occurred. In the circumstances of this case, we cannot conclude that India has demonstrated that the conclusion reached by the EC, that increased raw material costs **alone** were not a factor causing injury independent of the effect of dumped imports, could not have been reached by an objective and unbiased investigating authority.

6.240 With respect to inflation, the EC observed that the prices of the domestic industry did not keep pace with inflation in consumer prices, but did not identify this fact as a cause of injury. Rather, it was cited as an indication of price suppression and inadequate profitability.[195] Again, we simply do not view the reference to the failure of bed linen prices to increase commensurate with inflation to be a reference to a "cause" of injury. In our view, it rather reflects a symptom of injury, as, all other things being equal, one might expect that bed linen prices would increase equivalent to consumer inflation – the fact that they did not might be viewed as indicating injury.

6.241 India considers that the EC's determination on causation contains some "perplexing" factual determinations. Although India fails to explain how, in its view, these alleged factual errors undermine the conclusions reached by the EC, we have nonetheless considered the arguments in this regard. India argues that the redetermination is somehow internally inconsistent, in that in paragraph 53, it states that the EC does not consider relevant the references to producers not forming part of the Community industry; yet in paragraph 61 the EC includes such a reference. We do not consider that India has demonstrated a legal or logical basis for concluding that this fact demonstrates that the EC failed to adequately consider the injurious effect of "other factors". It appears that India's criticism is based upon a statement in the original Report,

> "information concerning companies that are not within the domestic industry is irrelevant to the evaluation of the 'relevant economic factors and indices having a bearing on the state of the industry" required under Article 3.4".[196]

We understand the original panel to have found that information concerning producers that are not within the domestic industry is irrelevant for the purpose of assessing the question of injury. However, paragraph 61 of Regulation 1644/2001 addresses the question of causation, and not the state of the EC industry producing bed linen. We understand paragraph 61 to state that the domestic industry was not affected to any significant degree by the decrease in consumption, which affected rather producers not considered part of the domestic industry. In this sense, we do not consider that there is any basis to conclude that the EC was precluded from drawing the conclusion set forth in paragraph 61.

6.242 With respect to India's assertions concerning the alleged "errors" in the calculation of the volume of dumped imports, as we have found above, the EC was entitled to consider imports from Pakistan and Egypt as dumped in its redetermination. India also asserts that the EC's statements, in

[194] Regulation1069/97 at para. 103. The EC confirmed this finding in Regulation 1644/2001, at para. 60.

[195] Regulation 1644/2001, at para. 44, Regulation 1069/97 at para. 86.

[196] Original Panel Report, *EC – Bed Linen*, at para. 6.182.

paragraphs 55 and 57 of the redetermination, that (1) the weighted average sales price was "by and large stable" and "average sales prices did not increase", cannot be correct, since sales prices increased by 3.1 percent, while a decrease in profits of 2 percent was described as "declining".[197]

6.243 In this regard, we note that India's comparison is misleading. India compares a decrease in **percentage points**, for profits, to an increase in **percentage**, for sales. These two are simply not comparable figures. The EC points out that, in percentage terms, profits fell by 56 percent, which certainly merits the description "declining". Nor do we consider it necessarily inaccurate for the EC to have described prices, which increased by 3.1 percent over five years, as "by and large stable". With respect to the statement that "average sales prices did not increase", we note that the EC explained that this referred to the average price per kilogram of the specified reference products, which fell between 1993 and the IP,[198] as opposed to the average price per kilogram for all bed linen products, which increased over the same period.[199] Thus, we do not find that there is any inconsistency in the EC's statements. In any event, as discussed above, the EC's conclusion on causation was based on its findings regarding price suppression, and not on a decrease in sales.[200]

6.244 With respect to India's arguments regarding Regulation 696/2002, as we have found that that regulation is not a measure taken to comply, we make no findings concerning it. In any event, India has made no specific claims of violation of the AD Agreement with respect to that regulation.

6.245 Thus, we consider that the "other causes" of injury allegedly not adequately addressed by the EC were not, in fact, "causes" of injury at all. We consider that the EC's explanations in its determinations of how the dumped imports caused injury through price suppression are reasonable, and are consistent with the facts that were before the EC at the time of its original determination, and its redetermination. Given the standard of review under which we operate, we could not in any event substitute our judgement for that of the EC authorities in this regard, even if we ourselves had a different view of the facts.

6.246 We therefore conclude, in the alternative, that the EC's measure is not inconsistent with Article 3.5 for failure to properly ensure that injuries caused by other factors are not attributed to dumped imports.

6. Claim 7: The EC acted inconsistently with its obligations under Article 15 of the AD Agreement

(a) Factual background

6.247 Following adoption of the Panel and Appellate Body Reports, and having regard to Regulation 1515/2001,[201] the EC reassessed the anti-dumping duties imposed on imports of bed linen from India, Egypt and Pakistan, in light of the Panel and Appellate Body decisions. On 7 August 2001, the Council of the European Communities adopted Regulation 1644/2001. Regulation 1644/2001 amended the original definitive anti-dumping measure on bed linen from India. In the redetermination, the EC calculated and established different (lower) dumping margins for imports from India, but did not address the dumping margins for the other countries originally investigated (Egypt and Pakistan). The EC concluded that dumped imports from India, Egypt and Pakistan caused material injury to the EC industry.

[197] Regulation 1644/2001, at para. 50.
[198] Regulation 1069/97, at para. 86.
[199] EC's answer to the Panel's question 22 at paras. 30 - 31, Annex E-2. As we have noted, the EC attributed this increase to the change in the product mix sold to higher value niche products.
[200] *Cf.* Regulation 1644/2001, at paras. 50 and 51.
[201] Regulation 1515/2001 .

6.248 Notwithstanding this conclusion, the Council did not "consider it appropriate to continue to collect duties for exports from India".[202] Therefore, in the same Regulation, the EC suspended the collection of duties at the rates established in the redetermination, and invited all interested parties to submit comments and/or a review request. The Regulation further provided that, if no review were initiated within six months of entry into force of the Regulation, the anti-dumping measure would automatically expire with regard to imports originating in India, but if such review were initiated, the suspension should continue during the review investigation.[203] On 19 December 2001, Eurocoton, the trade association acting on behalf of the domestic industry, filed a request with the EC authorities for a review of the redetermination.[204] On 13 February 2002 the EC initiated a "partial interim review" of the measure with respect to Indian imports based on Eurocoton's request.[205] That review is still on-going, and consequently, no anti-dumping duties have been collected pursuant to the redetermination.

(b) Arguments of the parties

6.249 India argues that the EC failed to explore the possibilities of constructive remedies prior to the application of anti-dumping measures, as required by Article 15. India acknowledges that the EC suspended the application of anti-dumping measures, but argues that a decision not to apply an anti-dumping duty is not a remedy of any kind, citing the original Panel report, and therefore is inadequate to fulfill the requirement of Article 15.

6.250 The EC notes that the obligation to explore constructive remedies set out in Article 15 must be fulfilled before “applying” anti-dumping duties. The EC argues that it has suspended the application of anti-dumping duties on imports of bed linen from India, and that therefore it has no obligation as yet under Article 15. If and when the EC authorities decide to apply anti-dumping duties as a result of the ongoing review, the EC asserts they will, as required, explore the possibilities of constructive remedies, and more specifically the possibility of a price undertaking with the Indian exporters. In the meantime, the EC maintains that India’s claim is premature and should be rejected by the Panel.

6.251 Furthermore, assuming *arguendo* that the EC authorities had been required to explore possibilities of constructive remedies, notwithstanding their decision to suspend the application of the duties, the EC submits in the alternative that such suspension would qualify as a “constructive remedy” for the purposes of Article 15.

(c) Evaluation by the Panel

6.252 Article 15 provides:

> “It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members".

6.253 We turn our attention to the text of the second sentence of Article 15, which is the basis of India's claim. This provision was specifically addressed by the Panel in the original dispute, which concluded that Article 15 required a Member to actively consider, with an open mind, the possibility

[202] Regulation 1644/2001, at para. 72 and Article 2.
[203] *Id.*, at paras. 75 and 78 and Article 2.
[204] Exhibit-India-RW-21.
[205] Notice of initiation of a partial interim review of the anti-dumping measures applicable to imports of cotton-type bed linen originating in India, published in Official Journal of the European Communities of 13 February 2002, C-series, No 39. Exhibit-India-RW-23.

of applying a constructive remedy provided for under the AD Agreement, before it applied a final anti-dumping measure that would affect the essential interests of a developing country.[206]

6.254 The issue before us is whether the EC was obligated to explore possibilities of constructive remedies in the circumstances of this case, in which, at the same time as it adopted the regulation imposing anti-dumping duties on imports of bed linen from India, the EC suspended the application of those anti-dumping duties, has not collected any anti-dumping duties on imports of bed linen from India, and has represented that it will explore possibilities of constructive remedies, in particular price undertakings, before anti-dumping duties are applied.[207] India argues that the suspension is irrelevant in this case, because in its view, "the suspension of an imposition of duties can in itself also qualify as a form of application".[208] Thus, in India's view, the EC has "applied" an anti-dumping duty without first exploring the possibilities of constructive remedies. We must therefore consider what it means to "apply" anti-dumping duties as used in the phrase "applying anti-dumping duties" in Article 15.

6.255 The verb "apply" is defined, *inter alia*, as "be operative".[209] Thus, it would seem that whether anti-dumping duties are "applied" in a particular case might be understood to refer to whether they have legal effect, that is, whether they are operative as a matter of law. That is, one might consider an anti-dumping duty to be "applied" when it is legally in effect with respect to imports of the product in question. We find contextual support for this understanding in the use of the term "apply" in Article 10.1 of the AD Agreement. That Article provides:

> "Provisional measures and anti-dumping duties shall only be applied to products which enter for consumption after the time when the decision taken under paragraph 1 of Article 7 and paragraph 1 of Article 9, respectively, enters into force, subject to the exceptions set out in this Article".

The decisions referred to in Article 10.1 are the decisions, respectively, to "apply" provisional measures and to "impose" an anti-dumping duty. This suggests to us a distinction between the decision **authorizing** or **justifying** the application of anti-dumping duties, and the application of anti-dumping duties itself.

6.256 India argues that the anti-dumping duties apply in this case, stating "The measures are dormant, but they apply. If they would not apply then there would be no need to suspend their imposition. This suspension is conditional upon the partial review not being concluded. There is therefore a very clear timing condition within which imports have to take place – a condition which moreover will soon run out and after which no more imports can take place".[210] India relies, in support of its argument, on the statement of the Appellate Body in *US – Line Pipe* that

> "duties are "applied against a *product*" when a Member imposes conditions under which that product can enter that Member's market – including when that Member establishes, as the United States did here, a duty to be imposed on over-quota imports. Thus, in our view, duties are "applied" irrespective of whether they result in making

[206] *See* Original Panel Report, *EC - Bed Linen*, at para. 6.233.

[207] "[W]ere the EC to end the suspension in place, it would explore first the possibilities of constructive remedies". EC's answer to India's question 10, at para. 14, Annex E-3.

[208] India's SWS at para. 226. See also Comments of India on Answers of the European Communities to the Questions from India, Comment on answer to India's question 4, Annex E-8, where concerning the "suspension of anti-dumping duties" India states that "Undoubtedly, the latter is a form of application of anti-dumping measures".

[209] New Shorter Oxford English Dictionary, Clarendon Press, 1993.

[210] India's SWS at para. 228.

> imports more expensive, in discouraging imports because they become more expensive, or in preventing imports altogether".[211]

6.257 India's reliance upon the report of the Appellate Body in *US – Line Pipe* is unavailing. The facts in the *US-Line Pipe* dispute and this case are so different as to render any comparison unfruitful. In the *US-Line Pipe* case, the United States argued that the safeguard measure at issue did not "apply" to imports from developing countries accounting for less than three per cent of imports because imports below 9,000 tons were exempted and the US authorities "expected" that any country exceeding that limit would, in practice, account for more than three per cent of total imports. Thus, the US contention that the safeguard measure did not "apply" to imports from developing countries with a small share of imports was speculative, based on the expectation that imports from those countries would not reach the level that triggered the application of the safeguard measure. The Appellate Body rejected the U.S. argument. In fact, however, it is clear that the measure was legally in force, and the duty applied to all imports from all sources that exceeded the 9,000 ton limit.

6.258 In this case, however, the measure is not in force as a matter of law – its application is suspended, and thus the EC has, at present, imposed no "conditions" on the entry of bed linen from India into the EC market. The Council of the European Union has adopted a regulation which authorizes an anti-dumping duty, but at the same time states clearly that "the application of the anti-dumping duty shall remain suspended" until the currently pending review proceeding is completed.

6.259 This establishes explicitly, in our view, that the anti-dumping duty on imports of bed linen from India authorized by the Regulation does not and will not "apply" to such imports while the currently pending review is on-going. It seems clear to us that the EC has taken a decision authorizing the application of anti-dumping duties on imports of bed linen from India, but that as a result of the suspension of the application, the anti-dumping duties have no legal effect with respect to imports of bed linen from India pending completion of the on-going review. The application of the measure is suspended as a matter of EC law, and imports of bed linen may enter the EC free of any anti-dumping duties, and no circumstance triggered by changes in the level of imports or their prices will change that fact. The EC has stated in this proceeding that "This legal situation will remain unchanged as long as the Council of the European Union does not adopt another regulation repealing formally the decision to suspend the application of the duties".[212] We accept this statement as an accurate representation of EC law in this regard.[213] Presumably, at the conclusion of the review, the anti-dumping duty on imports of bed linen from India may be confirmed, terminated, or modified. The EC has represented in this proceeding, and we accept that representation, that before applying an anti-dumping duty on imports of bed linen from India, (assuming such a duty is confirmed or modified in the review), the EC authorities will explore the possibilities of constructive remedies.

6.260 In these circumstances, we conclude that the EC did not violate Article 15 by failing to explore possibilities of constructive remedies before applying anti-dumping duties, because it has not, as yet, applied such duties in this case.

6.261 Having determined that the EC has not violated Article 15, because it is still in the period "before" applying anti-dumping duties, we do not address the EC's alternative argument that, assuming *arguendo* that the EC was required to explore possibilities of constructive remedies prior to the suspension, such suspension would qualify as a "constructive remedy" for the purposes of Article 15.

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[211] India's SWS at para. 227, quoting Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* ("*US – Line Pipe*"), WT/DS202/AB/R, adopted 8 March 2002, at para. 129

[212] EC Oral Statement at para. 118, Annex D-3.

[213] We note that questions of municipal law are treated as matters of fact.

7. Claim 8: The EC acted inconsistently with its obligations under Article 21.2 of the DSU

(a) Arguments of the parties

6.262 In India's view, Article 21.2 of the DSU sets out a clear obligation that must be fulfilled once the two criteria in that provision, that the matter affect the interests of a developing country, and have been subject to dispute settlement, are satisfied. India maintains that it is indisputable that the EC anti-dumping measure affects India's interests, and has been subject to dispute settlement. India asserts that "the EC did not pay any particular attention to the Article. Nothing particular happened, except the suspension of measures, which, however, as already indicated by the original panel, is not a remedy of any type, constructive or otherwise". Moreover, India notes, the EC is yet again investigating dumped imports of bed linen from India.

6.263 The EC maintains that Article 21.2 of the DSU is not a mandatory provision, and therefore imposes no binding obligations upon developed country Members, such as the EC. In any event, the EC asserts that its authorities did pay "particular attention" to the interests of India.

(b) Arguments of third parties

6.264 The United States concurs with the EC's conclusion that Article 21.2 is not mandatory. The United States emphasizes that, as used in the covered agreements, "should" is a hortatory term, and not a mandatory term. Moreover, if the use of "should" were to create an obligation, it would have the same meaning as "shall". In the US view, this would deprive the decision by the drafters of the covered agreements to use one term rather than the other all significance, thus violating the principle that "words must not be read into the Agreement that are not there".

(c) Evaluation by the Panel

6.265 Article 21.2 of the DSU provides that:

> "Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement".

6.266 India asserts that this provision is mandatory, arguing that the use of the word "should" establishes that fact. However, India has not indicated what specific obligation it considers is imposed by Article 21.2 but which the EC has failed to perform. Rather, India asserts, the provision is clear that "*Particular attention **should*** be paid, yet the EC did entirely nothing".[214] India suggests that the concept of "particular attention" can encompass a decision not to act, and asserts that a published decision not to initiate (presumably the review proceeding) could have qualified. India argues that even if parameters are not defined, that does not mean that nothing should be done.[215] In response to a question from the Panel on this issue, India stated that the specific obligation imposed by Article 21.2 should be decided on a case-by-case basis, and that the EC had violated Article 21.2 by initiating a partial interim review of the anti-dumping measure against India, and by failing to comply with the original Panel finding under Article 15 of the AD Agreement.[216]

6.267 Turning first to the text of Article 21.2, we find nothing in that provision which explicitly requires a Member to take any particular action in any case. Nor has India pointed to any contextual element which would suggest that the hortatory word "should" must nonetheless be understood, in Article 21.2 of the DSU, to have the mandatory meaning of "shall". India merely argues that in

[214] India's SWS at para. 248.
[215] India's SWS at para. 250.
[216] India's answer to the Panel's question 31, Annex E-1.

another case, the Appellate Body found that the word "should" had the meaning of "shall", and asserts, without more, that the same result is appropriate in this case. We disagree. The case India relies upon, *Canada –Aircraft*, involved a very different provision of a different agreement, concerning the duty of Members to respond promptly and fully to requests for information from Panels. Moreover, even in that case, the Appellate Body noted the dictionary definition of "should" "ordinarily impl[ies] duty or obligation; although usually no more than an obligation of propriety or expediency, or moral obligation, thereby distinguishing it from 'ought'".[217] In addition, the fact that there is no specific action set out in Article 21.2 makes it unlikely that Members intended the provision to be mandatory – the lack of specificity in this regard implies rather a hortatory use of should.

6.268 In light of this, we cannot agree with India's conclusion that Article 21.2 imposes some obligation to act. Moreover, we cannot accept India's argument that what action will satisfy the obligation can only be determined based on a case-by-case basis. As was recently stated by another Panel considering similar text in Article 15 of the AD Agreement, "Members cannot be expected to comply with an obligation whose parameters are entirely undefined".[218] The Panel in that case was considering the first sentence of Article 15 of the AD Agreement, which provides "It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement". We note that the Panel made its decision in that case notwithstanding the use of the word "must", which more clearly suggests an obligation than the word "should" in Article 21.2. In our view, Article 21.2 imposes no specific or general obligation on Members to undertake any particular action.

6.269 That said, we do not consider that Article 21.2 is devoid of meaning. It clearly reflects the concern of Members with ensuring that appropriate attention is given the interests of developing Members, and thus states an important general policy. As was noted by the Arbitrator in *Indonesia – Autos*,[219] "Although the language of this provision [Article 21.2] is rather general and does not provide a great deal of guidance, it is a provision that forms part of the context for Article 21.3".[220] The Arbitrator went on to take account of the fact that Indonesia was not only a developing country, but in a dire economic and financial situation, in deciding to award an additional period of time for Indonesia to implement the DSB's recommendation in that dispute. In our view, the Arbitrator's decision reflected one appropriate consideration of the instruction in Article 21.2. However, that is different from a conclusion that Article 21.2 establishes a binding obligation on Members to do, or not do, particular things in the context of their efforts to comply with a DSB ruling in a dispute that affects the interests of a developing country. There may be any number of ways in which the policy set forth in Article 21.2 might be effectuated. However, nothing in that provision obliges any Member actually to effectuate that general policy, or to do so in any particular way in any particular case.

6.270 Thus, we cannot accept India's assertion that the EC's initiation of a partial interim review of the anti-dumping measures regarding imports of bed linen from India violates Article 21.2.[221] The

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[217] Appellate Body Report, *Canada – Aircraft*, at para. 187, note 120, citing, *inter alia*, *Black's Law Dictionary*, (West Publishing Co., 1990), p. 1379.

[218] Panel Report, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India* ("*US – Steel Plate*"), WT/DS206/R and Corr.1, adopted 29 July 2002, at para. 7.110.

[219] Award of the Arbitrator, *Indonesia – Certain Measures Affecting the Automobile Industry – Arbitration under Article 21.3(c) of the DSU* ("*Indonesia – Autos*"), WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12, 7 December 1998, DSR 1998:IX, 4029.

[220] *Id.* at para. 24.

[221] India suggests that a published decision not to initiate the pending review could have qualified as "particular attention" in this case. India's SWS at para. 249. This, and the initiation of the review itself, are the only specific acts referred to by India in the context of its argument regarding the interpretation and application of Article 21.2 of the DSU.

review of anti-dumping measures is specifically provided for in Article 11 of the AD Agreement. As there is no claim that the EC violated this provision in initiating a partial interim review, we must assume it to be consistent with the requirements of the AD Agreement. In light of this, we fail to see how the legitimate initiation of a proceeding specifically provided for in the AD Agreement could be considered to violate Article 21.2 of the DSU. With respect to India's assertion that the failure of the EC to comply with the original Panel finding under Article 15 of the AD Agreement constitutes a violation, there has been no finding that the EC failed to comply with the original Panel finding regarding Article 15. Nor have we concluded that the EC acted inconsistently with Article 15 in the course of the redetermination proceeding. Therefore, even assuming we had found Article 21.2 of the DSU to impose some obligation on the EC in this case, there would be no basis to find a consequent violation of Article 21.2 in this regard.

6.271 We consequently conclude that the European Communities did not act inconsistently with Article 21.2 of the DSU.

VII. CONCLUSIONS AND RECOMMENDATION

7.1 In light of the findings above, we conclude that the EC's definitive anti-dumping measure on imports of bed linen from India, EC Regulation 1644/2001, is not inconsistent with the AD Agreement or the DSU.

7.2 We therefore consider that the EC has implemented the recommendation of the original Panel, the Appellate Body, and the DSB to bring its measure into conformity with its obligations under the AD Agreement.

7.3 In the light of our conclusions, we make no recommend ations under Article 19.1 of the DSU.

ANNEX A

First Submission by the Parties

ANNEX A-1

FIRST WRITTEN SUBMISSION OF INDIA

(15 July 2002)

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OLD EXHIBITS

(ATTACHED FOR EASY REFERENCE)

INDIA-8	PROVISIONAL REGULATION
INDIA-9	DEFINITIVE REGULATION

I. INTRODUCTION

1. On 12 March 2001, the Dispute Settlement Body (hereinafter: "DSB") adopted[1] the Appellate Body Report[2] and the Panel Report[3] as modified by the Appellate Body, in the dispute "*European Communities – Anti-Dumping Duties On Imports Of Cotton-Type Bed Linen From India*" (WT/DS141). These Reports concluded that the EC's imposition of definitive anti-dumping duties on imports of Cotton-Type Bed Linen from India had been inconsistent with the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (hereinafter: "Anti-Dumping Agreement" or "ADA"). Pursuant to the recommendations of these Reports, the DSB requested the European Communities to bring its measure into conformity with its obligations under the Anti-Dumping Agreement.

2. On 26 April 2001, in accordance with Article 21.3(b) of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), the EC and India mutually agreed on a reasonable period of five months and two days to implement the recommendations and rulings of the DSB.[4] This reasonable period of time (RPT) expired on 14 August 2001.

3. Regulation 1644/2001, *amending the original definitive anti-dumping duties on Bed Linen from India* (hereinafter: "re-determination" or "Regulation 1644/2001"), adopted by the Council of the European Union on 7 August 2001, and published on 14 August 2001[5], is the measure taken by the EC, ostensibly to comply with the recommendations and rulings of the DSB, following the proceedings before the Panel and the Appellate Body.

4. In the view of India this re-determination does not, however, bring the EC into compliance with those recommendations and rulings and, moreover, introduces further inconsistencies with the ADA and the DSU, for the reasons that India will explain in detail below. Although the application of the re-determination is currently suspended, this suspension is tantamount to a virtual sword of *Damocles*: since the EC is presently conducting, with full speed, a "partial interim review" of the dumping margins, new results are imminent.[6] Accordingly, once these new dumping margins are confirmed, they can, under EC law, enter into force based on the injury and causality "findings" of the re-determination. This imminent re-introduction of anti-dumping measures will then enable an expiry review to start before 28 November 2002, which, in turn, can extend the duration of the anti-dumping measures with, at least, another five years.

5. Section II will summarize, in chronological form, the factual events following 12 March 2001 and is limited to essential information. More details about the re-determination and the surrounding actions will be provided, as and when needed. Section III contains an executive summary of the claims. Section IV will elaborate these claims in detail. Section V will conclude this Submission.

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[1] WT/DS141/9 of 22 March 2001, copy attached as Exhibit-India-RW-1.

[2] WT/DS141/AB/R of 1 March 2001.

[3] WT/DS141/R of 30 October 2000.

[4] WT/DS141/10 of 1 May 2001, copy attached as Exhibit-India-RW-2.

[5] Council Regulation (EC) No 1644/2001 of 7 August 2001 amending Regulation (EC) No 2398/97, imposing a definitive anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan and suspending its application with regard to imports originating in India, published in Official Journal of the European Communities of 14 August 2001, L-series, No 219, pages 1-11. Due to the chronology of events, set forth below in Section II, a copy of this Regulation is attached as Exhibit-India-RW-18.

[6] The speed with which this review is being conducted is unprecedented. In fact, the EC has already disclosed new dumping margins. Based on calculation techniques with which all Indian exporters take issue, and in direct contradiction with the text of Article 11.2 ADA, it transpires that the EC seeks to impose duties that are even higher than in the original provisional Regulation.

II. FACTUAL BACKGROUND AND SEQUENCE OF EVENTS

6. In this second section, India will summarize, in chronological order, the events that followed the adoption of the Reports on 12 March 2001. Where necessary, further factual details will be provided in the subsequent sections. In light of the fact that the Panel is well aware of the background of this dispute through its work on the original Panel Report, this factual summary omits events from before that date. However, for the sake of easy reference, India attaches additional copies of the original provisional and definitive Regulations.[7]

7. As noted above, on 26 April 2001, in accordance with Article 21.3(b) of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), the EC and India mutually agreed on a reasonable period of five months and two days to implement the recommendations and rulings of the DSB.[8]

8. On 19 June 2001, the Commission Services faxed the general disclosure document to the Indian trade association 'TEXPROCIL'[9], with a copy to the Embassy of India in Brussels. Simultaneously, the EC faxed copies of company-specific disclosure documents to the five exporting producers that originally constituted the main sample.[10] In these faxes the Commission Services granted ten days to comment on the disclosure and also inquired whether the law firm involved in the original proceeding was still representing TEXPROCIL and/or any of its members. On the same day, TEXPROCIL clarified that the law firm was still representing it,[11] and subsequently the EC faxed a copy of the general disclosure document to the law firm.[12]

9. The copies of the company-specific disclosures for Bombay Dyeing, Madhu, Omkar, Prakash, and Anglo-French were faxed to the law firm on, respectively, 20 June 2001[13], 22 June 2001[14], 22 June 2001[15], 25 June 2001[16], and 25 June 2001.[17]

10. On 25 June 2001 the law firm noted that the rights of defence of its clients were being impeded because of the delay in the transmission of the disclosure documents. In that fax the law firm also requested the detailed dumping calculations for the company Standard Industries of the reserve sample, as well as access to the non-confidential file.[18]

11. In response, the EC sent a fax on the same day in which it stated that the rights of defence were not impeded.[19] The EC also clarified that no dumping calculations existed for Standard Industries, and that the non-confidential files had not been changed since the original investigation.

12. On 26 June 2001 the law firm sent another fax to the EC in which it, *inter alia*, again requested access to the calculation details pertaining to Standard Industries.[20] On 27 June 2001, the

[7] To avoid confusion these copies are separately attached and carry the same number as the original Exhibits, *i.e.* Exhibit-India-8 and Exhibit-India-9, respectively.
[8] WT/DS141/10 of 1 May 2001, copy attached as Exhibit-India-RW-2.
[9] Copy attached as Exhibit-India-RW-3.
[10] *I.e.*, Anglo-French, Bombay Dyeing, Madhu, Omkar, and Prakash.
[11] Copy attached as Exhibit-India-RW-4.
[12] Copy attached as Exhibit-India-RW-5.
[13] Copy attached as Exhibit-India-RW-6.
[14] Copy attached as Exhibit-India-RW-7.
[15] Copy attached as Exhibit-India-RW-8.
[16] Copy attached as Exhibit-India-RW-9.
[17] Copy attached as Exhibit-India-RW-9.
[18] Copy attached as Exhibit-India-RW-10.
[19] Copy attached as Exhibit-India-RW-11.
[20] Copy attached as Exhibit-India-RW-12.

EC (finally) released calculation details insofar as they contained information pertaining to Standard Industries.[21]

13. On 3 July 2001 a hearing took place. The oral statement presented during that hearing is attached.[22] On the same day, TEXPROCIL also filed its written disclosure comments.[23]

14. On 26 July 2001, the Council of the European Union adopted Council Regulation 1515/2001 on the measures that may be taken by the EC following a report adopted by the Dispute Settlement Body concerning anti-dumping and anti-subsidy matters.[24]

15. On 27 July 2001, the EC sent a fax to TEXPROCIL in which it reacted to the disclosure comments and the arguments presented during the hearing.[25] A copy of this fax was sent to Ministry of Textiles in New Delhi, the Embassy of India in Brussels, and the law firm in Brussels.

16. On 7 August 2001 the Council of the European Union adopted Regulation 1644/2001 amending the original definitive anti-dumping duties on Bed Linen from India, purporting to comply with the DSB's recommendations and rulings, whilst simultaneously suspending its application.[26] This latter measure is hereinafter referred to as the "re-determination". India strongly disagreed that this re-determination complied with the findings of the Panel and Appellate Body.[27]

17. The re-determination, *inter alia*, provided for the expiry of the amended measures within six months after entry into force of the re-determination, unless a review had been initiated before that date. For this reason, and in an attempt to de-escalate the dispute, the matter was laid to rest by India in the belief that the illegal measure would, although clearly outside the 'reasonable period of time', finally, expire by 14 February 2002.

18. On 19 December 2001, the association EUROCOTON filed a request with the EC authorities to re-examine the dumping margins.[28]

19. Council Regulation (EC) No 160/2002 of 28 January 2002 terminating the proceeding against Pakistan,[29] amended the re-determination.

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[21] Copy attached as Exhibit-India-RW-13.

[22] Copy attached as Exhibit-India-RW-14.

[23] Copy attached as Exhibit-India-RW-15.

[24] Council Regulation (EC) No 1515/2001 of 23 July 2001 on the measures that may be taken by the Community following a report adopted by the WTO Dispute Settlement Body concerning anti-dumping and anti-subsidy measures, published in Official Journal of the European Communities of 26 July 2001, L-series, No 201, pages 10-11. Copy attached as Exhibit-India-RW-16.

[25] Copy attached as Exhibit-India-RW-17.

[26] Council Regulation (EC) No 1644/2001 of 7 August 2001 amending Regulation (EC) No 2398/97, imposing a definitive anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan and suspending its application with regard to imports originating in India, published in Official Journal of the European Communities of 14 August 2001, L-series, No 219, pages 1-11. Copy attached as Exhibit-India-RW-18.

[27] WT/DS141/11 of 21 September 2001, a copy of which is attached as Exhibit-India-RW-19. WT/DSB/M/108 at paragraph 85, a copy of which is attached as Exhibit-India-RW-20.

[28] Copy attached as Exhibit-India-RW-21.

[29] Council Regulation (EC) No 160/2002 of 28 January 2002 amending Regulation (EC) No 2398/97 imposing a definitive anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan and terminating the proceeding with regard to imports originating in Pakistan, published in Official Journal of the European Communities of 30 January 2002, L-series, No 26, pages 1-4. Copy attached as Exhibit-India-RW-22.

20. On 13 February 2002 the EC initiated a so-called "partial interim review" against India.[30]

21. On 28 February 2002 the anti-dumping measures against Egypt expired.[31]

22. On 8 March 2002 India initiated procedures under Article 21.5 of the DSU by requesting the EC to enter into consultations. The request was circulated in document WT/DS141/12 of 14 March 2001.[32]

23. On 14 March 2002 the EC faxed a disclosure of "re-assessed" injury findings to TEXPROCIL and to the law firm in Brussels.[33] On 25 March 2002 TEXPROCIL provided disclosure comments in writing and requested a hearing.[34]

24. On 25 and 26 March 2002 consultations were held in Geneva. In the view of India these consultations failed to settle the dispute. Accordingly, India requested a Panel under the procedures of Article 21.5 DSU on 4 April 2002.[35]

25. On 18 April 2002, the EC faxed a reply to the disclosure comments of TEXPROCIL.[36] On 19 April 2002 a hearing took place in connection with the disclosure provided on 25 March.

26. On 22 April 2002 the Council of the European Union adopted Regulation (EC) No 696/2002 confirming the definitive anti-dumping duty imposed on imports of cotton-type bed linen originating in India by Regulation (EC) No 2398/97, as amended and suspended by Council Regulation (EC) No. 1644/2001.[37]

27. On 7 May 2002 India reiterated its request for the original Panel to be re-convened to examine this issue under Article 21.5 of the DSU.[38] India also requested that the Panel be established with standard terms of reference set out in Article 7 of the DSU.

28. The Panel was established on 22 May 2002.

29. The Panel was composed on 25 June 2002.

III. EXECUTIVE SUMMARY OF CLAIMS

30. There is disagreement between India and the EC as to the consistency with the WTO Covered Agreements, including GATT 1994, of measures taken to comply with the recommendations and rulings of the DSB within the meaning of Article 21.5 of the DSU.

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[30] Notice of initiation of a partial interim review of the anti-dumping measures applicable to imports of cotton-type bed linen originating in India, published in Official Journal of the European Communities of 13 February 2002, C-series, No 39, pages 17-19. Copy attached as Exhibit-India-RW-23.

[31] Notice of the expiry of certain anti-dumping measures, published in Official Journal of the European Communities of 14 March 2002, C-series, No 65, page 12. Copy attached as Exhibit-India-RW-24.

[32] WT/DS141/12 of 14 March 2002, copy attached as Exhibit-India-RW-25.

[33] Fax of 14 March 2002, with EC reference 052697. Copy attached as Exhibit-India-RW-26.

[34] Copy attached as Exhibit-India-RW-27.

[35] WT/DS141/13. Copy attached as Exhibit-India-RW-28.

[36] Copy attached as Exhibit-India-RW-29.

[37] Council Regulation (EC) No 696/2002 of 22 April 2002 confirming the definitive anti-dumping duty imposed on imports of cotton-type bed linen originating in India by Regulation (EC) No 2398/97, as amended and suspended by Council Regulation (EC) No 1644/2001, published in Official Journal of the European Communities of 25 April 2002, L-series, No 109, pages 3-13. Copy attached as Exhibit-India-RW-30.

[38] WT/DS141/13/Rev.1. Copy attached as Exhibit-India-RW-31.

31. India is of the opinion that the re-determination, and the surrounding actions, as identified above, did not bring the EC into compliance with the recommendations and rulings of the DSB. The re-determination suffers from similar inconsistencies as regards Articles 2, 3, and 15 of the Anti-Dumping Agreement. Notably, parts of the re-determination took place outside the reasonable period of time, in the form of an amendment or confirmation. Moreover, India is of the view that the re-determination and the other actions have introduced further inconsistencies with the Covered Agreements and the DSU.

32. Accordingly, India has requested that the Panel be established with standard terms of reference set out in Article 7 of the DSU. Pursuant to Article 21.5 of the DSU India has also requested that, if possible, the DSB refer the matter to the original Panel.

33. The mandate of the Panel pursuant to Article 21.5 of the DSU, and in light of Article 17 of the Anti-Dumping Agreement, is

> "to examine, in light of the relevant provisions of the covered agreements cited by India in document WT/DS141/13/Rev.1, the matter referred by India to the DSB in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."[39]

34. India will summarize the reasons why it considers that the re-determination failed to comply with the DSB recommendations and rulings by the due date and why the EC's actions are inconsistent with ADA. In particular, India will claim and respectfully request the Panel to find that:

> **Claim 1: The EC acted inconsistently with its obligations under Article 2.2.2(ii) of the Agreement on Implementation of Article VI of GATT 1994**
>
> The EC did not properly calculate a "weighted average" of amounts for SG&A and profits. By taking an about-turn in the presentation of the relative size of Bombay Dyeing and Standard Industries the EC continued to miscalculate and overstate the dumping margins;
>
> **Claim 2: The EC acted inconsistently with its obligations under Articles 3.1 and 3.3 of the Agreement on Implementation of Article VI of GATT 1994**
>
> The EC cumulated Indian imports with those from a country for which no dumping was found;
>
> **Claim 3: The EC acted inconsistently with its obligations under Article 5.7 of the Agreement on Implementation of Article VI of GATT 1994**
>
> The EC did not simultaneously consider the evidence of dumping and injury. Instead, the EC resorted to *ex-post* 'reparations', which further undermine the re-determination. Even these reparations took place in various episodes and after the deadline;
>
> **Claim 4: The EC acted inconsistently with its obligations under Articles 3.1 and 3.2 of the Agreement on Implementation of Article VI of GATT 1994**

[39] WT/DS141/14, as corrected by WT/DS141/14/Corr.1. Copy of both documents attached as Exhibit-India-RW-32.

The EC did not properly exclude the portion of non-dumped imports from the total volume of Indian imports. By misrepresenting that proportion from the sample that was non-dumped the EC significantly overstated the total volume of dumped imports;

Claim 5: The EC acted inconsistently with its obligations under Articles 3.1 and 3.4 of the Agreement on Implementation of Article VI of GATT 1994

The EC evaluated factors without even collecting data on them. The re-determination merely puts a gloss on the original finding. A proper implementation of the Panel's findings would have required not a mere recitation of injury factors but an overall reconsideration and analysis of the information in light of the requirements of the Anti-Dumping Agreement;

Claim 6: The EC acted inconsistently with its obligations under Article 3.5 of the Agreement on Implementation of Article VI of GATT 1994

The EC incorrectly established a causal relationship between dumped imports and injury. The EC disregarded the non-attribution language.

Claim 7: The EC acted consistently with its obligations under Article 15 of the Agreement on Implementation of Article VI of GATT 1994

The EC did not explore any remedy, constructive or otherwise. Quite on the contrary, a review was initiated and new results, higher than ever, are imminent; and

Claim 8: The EC acted inconsistently with its obligations under Article 21.2 of the DSU

The EC did not pay any particular attention to this matter which affects India and which has been the subject of dispute settlement.

35. For the sake of brevity India will not pursue its claims under Articles 11 and 18 of the ADA, even though it considers that the EC did not respect its obligations under these Articles.[40]

36. In presenting its claims, India is mindful of the standard of review as, for example, clarified in cases such as *US–Hot Rolled Steel*:[41]

> " … Article 17.6(i) requires panels to make an "assessment of the facts". The language of this phrase reflects closely the obligation imposed on panels under Article 11 of the DSU to make an "objective assessment of the facts". Thus the text of both provisions requires panels to "assess" the facts and this, in our view, clearly necessitates an active review or examination of the pertinent facts.
>
> …
>
> Panels must assess if the establishment of the facts by the investigating authorities was proper and if the evaluation of those facts by those authorities was unbiased and objective." (Emphasis added)

[40] There is therefore no need for the EC to request a preliminary ruling on Articles 11 and 18 ADA, since India's claims under these Articles are not pursued in the context of this Article 21.5 proceeding for the above-mentioned sake.

[41] *US–Hot Rolled Steel*, AB, paras. 55-56.

37. India is of the view that the EC did not meet those (latter two) broad standards when establishing facts nor when evaluating facts (keeping in mind the interpretative guidance provided under 17.6(ii) ADA).[42]

38. In view of its eight claims presented India is also mindful about the possibility for a Panel to apply judicial economy. In this latter regard however India recalls the case law of the Appellate Body in *Australia–Salmon*[43] where it was made clear that only a partial resolution of the matter would be *false judicial economy*. In this latter light India finds compelling, for example, the findings in other cases where Panels recognized but refused to apply judicial economy.[44] Therefore, India requests the Panel to rule on all eight claims so as to enable the DSB to make sufficiently precise recommendations and rulings. Only that would allow prompt compliance by the EC in order to ensure an effective resolution of this dispute.

39. Accordingly, India will, in its conclusions, request the Panel to find that:

1. By failing to withdraw the measures found to be inconsistent with the Anti-Dumping Agreement and to bring its measures into conformity with its obligations under the Anti-Dumping Agreement within the mutually agreed reasonable period of time, the EC has failed to comply with the DSB recommendations and rulings in this dispute; and

2. The re-determination, as amended, and the subsequent actions, as identified above, are inconsistent with the above provisions of the Anti-Dumping Agreement and the DSU.

IV. CLAIMS AND ARGUMENTS

A. THE EC CONTINUED TO MISCALCULATE AND OVERSTATE THE DUMPING MARGINS

1. Claim 1: The EC acted inconsistently with its obligations under Article 2.2.2(ii) of the Agreement on Implementation of Article VI of GATT 1994

(a) Introduction

40. In its re-determination, the EC recalculated the dumping margins for India for the five companies of the main sample.[45] This re-calculation was performed, ostensibly, to comply with the findings of the Panel and the Appellate Body with respect to the correct interpretations of Articles 2.2.2(ii) and 2.4.2. If, however, the re-calculation is scrutinized in greater detail, it becomes clear that the requirement of "weighted average", as stipulated in Article 2.2.2(ii), and as interpreted by the Appellate Body, has not been properly respected.

41. The issue is material. Instead of two companies found not to have dumped in the re-determination, there were in fact *three* companies without dumping. *I.e.*, not only Omkar and

[42] India is mindful of the number of cases addressing the question of standard of review. For the sake of brevity India does not here repeat this case law. For a concise overview India refers to, paras. 5.13 thru 5.16 of the recent Panel report in *United States–Countervailing Duties on Certain Corrosion Resistant Carbon Steel Flat Products from Germany*, WT/DS213/R of 3 July 2002. India considers that the additional considerations in those paragraphs apply *mutatis mutandis* to the current dispute.

[43] *Australia–Salmon AB*, para. 223.

[44] *E.g. Brazil–Aircraft 21.5 II*, paras. 5.56 and 5.208.

[45] Recitals (5) – (14) of the re-determination.

Prakash, but also *Madhu* should have been properly attributed its zero margin. Further, the dumping margin for Anglo-French would have been much lower, thereby also affecting the *residual* duty, which would then become based on the margin of Bombay Dyeing. This would also affect the *weighted average* duty, which would then become based on the average of Anglo-French and Bombay Dyeing.

42. More specifically, the differences between the current re-determination and a calculation that properly respects the requirements of Article 2.2.2(ii) can be summarized as follows:

	EC: dumping margins as per new weighted average of re-determination	**India: dumping margins as per weighted average based on previous EC data**
Anglo-French	9.8%	3.8%
Bombay Dyeing	5.5%	5.5%
Madhu	3.0%	0%
Omkar	0%	0%
Prakash	0%	0%
Weighted average margin for co-operating companies	5.7%	4.6%
Residual	9.8%	5.5%

43. How these overstatements occurred can, perhaps unfortunately, only be grasped by going into the details of the calculations; those details will reveal the about-turn, between the facts of the original panel proceeding and the facts of the re-calculation, as performed by the EC. Since these details, however, are a pre-requisite for the proper understanding of this claim, we respectfully request the Panel to bear with us, and to review these differences in calculation method. After having unveiled the differences in question, we will explain our claim in further detail and set forth the arguments on the basis of which it will become clear that the EC's method was not permissible.

(b) Facts

44. In the re-determination, the EC has, for producers without sufficient domestic sales, calculated the amounts for SGA and profits, as well as the amounts for allowances to be made to the constructed normal value so arrived at, on the basis of an amalgamation of data. *I.e.*, whilst no longer basing the SGA and profits, and allowances, solely on the data of Bombay Dyeing, the EC has combined the data of Bombay Dyeing and Standard Industries.

45. In so doing, the EC has taken as a basis the following sets of figures:

Base data as per disclosure[46]	**Bombay Dyeing**	**Standard Industries**
SGA percentage	10.39%	19.15%
Profit percentage	12.09%	(35.49%)
Allowance percentage	(2.23%)	(0.37%)
Overall addition to COP	20.25%	(16.71)

46. Up to this stage, these figures appear undisputed.[47]

[46] Negative amounts are put in brackets.
[47] The direct source is page 2 of Exhibit-India-RW-13.

47. The divergence of views as to the correct interpretation stems from the manner in which these percentages are to be combined or, more to the point, "weighted". The EC has applied the following proportion in its weighing technique:

New EC method	Bombay Dyeing	Standard Industries
Total net sales value	134,154,064	13,276,083
Relative weight in the mean	91%	9%

Thus, the EC has weighted on the basis of sales value.

48. In the view of India, the correct interpretation, the arguments for which will be provided below, would have necessitated a weighing on the basis of sales quantities, as follows:

Correct weighted average and previous EC position	Bombay Dyeing	Standard Industries
Total domestic sales quantity (in units/sets)	627,764	179,775
Relative weight in the mean	77.74%	22.26%

49. The overall impact of proper volume-based weighing becomes clear when comparing the resulting weighted averages:

	New EC Method ('value'-based)	Correct weighted average and previous EC position ('volume'-based)
Overall percentage for SGA, profits, and allowances to be added to cost	16.93% (18.99-2.06)	12.03% (13.84-1.82)

50. The resulting difference is clear. By employing the method as it did, the EC was able to minimize the impact of Standard Industries. By doing so the EC inflated the constructed normal values and the resulting dumping margins by 4.90 per cent. By contrast, India's understanding of the interpretation of the Appellate Body's finding would have led to constructed normal values (and dumping margins) that are approximately 4.9 per cent lower.[48]

(c) Arguments

(i) Argument 1: The text of the Article and its interpretation by the Appellate Body do not permit a value-based weighing in the circumstances under consideration

[48] The difference for Anglo-French and Madhu is not exactly 4.9 per cent but could be more. This is due to the effects of negative dumping: where constructed normal values for certain "models" become lower, they may at some point drop below the weighted average export price, as a result of which the negative dumping amounts that so ensue, offset possible positive dumping amounts of other models. The resulting difference on the dumping margin by virtue of a 4.90 per cent drop in the constructed normal value is therefore mathematically equal to, or greater than, 4.90 per cent.

51. First of all, India recalls that the text of the relevant part of Article 2.2.2(ii) mandates SGA and profits to be determined on the basis of:

> "the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin".

52. In interpreting this provision we recall the pertinent observation of the Appellate Body in paragraph 74 of its Report:

> " . . . the textual directive to "weight" the average further supports this view because the "average" which results from combining the data from different exporters or producers **must reflect the relative importance** of these different exporters or producers in the overall mean." (underlining and emphasis added)

53. It is submitted that by choosing the method as it did, the EC did *not* reflect the relative importance of these two exporters in the mean. Even if there were to be two permissible interpretations, which India will show below there are not, the very choice for the method that weighted the amounts based on value, significantly understated the relative importance of Standard Industries as the second company on the Indian domestic market. As the EC previously did, when it chose to zero amounts that were negatively dumped, it has again chosen that method which results in the highest possible dumping margins. By doing so, the relative importance of Standard Industries has become trivialized to reflect less than $1/10^{th}$ of the mean. This has, in these circumstances, in the words of the Appellate Body:

> "substantially emptied the phrase "weighted average" of meaning."[49]

54. Since an interpreter is not free to adopt a reading that reduces terms to redundancy or inutility,[50] the EC has acted contrary to that principle by applying a method which *de facto* deprived the term "weighted average" of meaning.

(ii) Argument 2: The context of the Article as well as case law of the European Court of Justice representing consistent EC administrative practice do not permit a value-based average in the circumstances under consideration

55. Article 2.2.2(ii) does not operate in a vacuum nor does it lead its own life outside the framework of the Anti-Dumping Agreement. The Article should also be seen in its context. In the framework of this question this context can be sub-divided in 'direct context' such as Article 2 itself, as well as 'indirect context' such as Article 6.

56. Direct context is provided in Article 2 itself. In this Article 2 it is clear that the two normative cut-off points that pertain to the relative importance of domestic sales always hinge on a *quantity*-(volume)-parameter: first of all, the five-per cent rule, enshrined in Article 2.2 and footnote 2 of the Anti-Dumping Agreement bases itself on quantity of sales:

> " … shall normally be considered a sufficient quantity for the determination of the normal value if such sales constitute 5 per cent or more … ". (underlining added)

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[49] Appellate Body Report on *Bed Linen* at paragraph 75, last sentence.

[50] *Ut res magis valeat quam pereat.* This principle of *effectiveness* has become consistent case law since *United States–Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body, WT/DS2/AB/R of 29 April 1996, page 23.

57. Secondly, the test laid down in Article 2.2.1 chapeau, *juncto* footnote 5, which decides when sufficient quantities of sales are made at a loss, and may therefore be disregarded as not being in the ordinary course of trade, also bases itself on quantity:

> "Sales below per unit costs are made in substantial quantities when … the volume of sales below per unit costs represents not less than 20 per cent of the volume sold … ". (underlining added)

58. Article 6 also provides context. This Article attaches significance to the percentage of volume of exports from the country in question. Clearly, where the volume is the benchmark on the export-sales-side of the exporters, the same benchmark should apply on the domestic-sales-side of the exporters. Applying different standards to the two sides does not do justice to the requirement of a proper establishment of the facts and the requirement of an unbiased and objective evaluation.

59. Moreover, it is not only these provisions in the ADA themselves, but also the European Court of First Instance that has pronounced itself in its case-law on the application of volume as a benchmark. In an important judgment on the question whether the Community Institutions had correctly based themselves on volume, rather than value, for the determination of the "10 per cent rule" in the context of the ordinary course of trade test,[51] the Court upheld the choice of the institutions for the use of *volume*.[52]

60. In the context of these important Articles, and in the context of the relevant case law of the ECJ, all enshrining *quantity* as a basis for the determination of relative importance of domestic sales in a set, it is illegal to interpret Article 2.2.2(ii) in a different fashion. Indeed, the "value-method" does no justice to the important observations of the Appellate Body that the relative importance of producers **must** be reflected and that words "weighted average" should not become bereft of meaning.

(iii) Argument 3: The current weighing on value-basis contradicts the previous position of the EC

61. In connection with this claim it is also important to recall that the EC *itself*, during the original Panel proceedings, made no secret of the fact that Bombay Dyeing represented *eighty* per cent, rather than (now, and suddenly), ninety per cent, of the mean. We only need to refer to paragraph 190 of the EC's first written submission to the Panel where the EC noted that

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[51] Case T-118/96, Judgment of the Court of First Instance of 17 July 1998, notably recital 79. Copy of judgment attached as Exhibit-India-RW-33. Here it may be noted, for the sake of understanding the so-called '10 per cent rule', that the EC institutions have developed, in their own practice, a secondary rule in addition to the '20 per cent rule' as foreseen in footnote 5 of the ADA. *I.e.*, as per footnote 5, where sales at a loss exceed 20 per cent of the domestic sales volume, these may be disregarded in establishing the weighted average price. The EC would then base itself on the remaining sales at a profit, except where the profitable remaining quantity is less than 10 per cent of the total quantity. This practice of using an upper and lower cut-off point in terms of quantity is often referred to as the "80-10 rule". The lower cut-off point is this '10 per cent rule'. Since only the first part of that rule is written in the ADA and the EC Regulation, the *applicant* in this Court case argued, *inter alia*, that the 10 per cent rule (the second cut-off point) should be calculated on value, rather than volume. In view of the structure of the Regulation the Court rejected that plea, recitals 76-79, and underlined that volume should be the norm. For the record, India disassociates itself from this and other arguments put forward by the applicant in that case. India solely refers to this Court case as a means of illustration to show that, *within the EC jurisdiction, the authorities and the Court attach, in the context of the size of measuring domestic sales, the importance to volume, rather than value*. The Court has found that the 'volume'-context of the Regulation was sufficient to override any preference for a value-based determination. It is also in this light that the current sudden and impulsive choice of the EC for a value-based criterion should be dismissed as incongruous, and inconsistent with normal practice.

[52] *I.e.* to act inconsistent with its own case law would be contrary to the principle of good faith, enshrined in Article 31.1 of the Vienna Convention.

" … Bombay Dyeing has almost 80 per cent of the domestic market … ".

62. This statement was not accidental, but repeated in various instances. For example, in the next sentence the EC stated:

"That one producer can have 80 per cent of its domestic market … ".

63. In the oral statements the EC repeated these views. One may for example look at the first oral statement at paragraph 52 *in fine* or the second oral statement at paragraph 39:

" … how a company with 80 per cent of the market can be more << anomalous and peculiar >> than one with only 14 per cent."

64. Suddenly, and surprisingly, however, when it comes to the actual weighing of the relative importance of the companies and their amounts, the EC shifted its position in the re-determination and came up with a calculation technique that changed 80 per cent into 90 per cent and that, accordingly, marginalizes the influence of Standard Industries.

65. It is submitted that an unbiased and objective authority cannot be permitted to shift positions as regards important aspects of a proceeding, thereby rendering the outcome into a moving target, displaying various views as and when deemed fit. On the contrary, it would have been prudent and bearing witness of impartiality, if the EC's previous arguments, pronounced during earlier submissions had been followed up and if the consequences would have been taken to its logical conclusion. India deplores the EC's sudden shift in position and hopes that the Panel can underline India's view as to the correct interpretation of Article 2.2.2(ii) given the factual circumstances of this case.

2. Intermediate conclusions

66. In view of the above, India considers that it has presented a *prima facie* case as to the fact that the EC has engaged in an incorrect application of Article 2.2.2(ii) insofar as the weighing was based on value. India has cited the pertinent considerations of the Appellate Body concerning the interpretation of the *text* of the provision, the relevant *context* in which the provision operates, and the *factual history* of this panel proceeding (with the previous' EC position) in the context of which the EC re-calculated the dumping margins. The unexpected choice for weighing based on value was incongruous with these three important considerations. The weighing did no justice to the actual absence of dumping by the company Madhu and has led to an overstatement of the dumping margins for Anglo-French, the co-operating non-sampled producers, as well as the residual dumping margin.

67. India respectfully requests that the Panel conclude that the EC acted inconsistently with its obligations under Article 2.2.2(ii) of the Anti-Dumping Agreement. India is mindful of the technical nature of this first claim and would therefore be happy to present any additional and/or specific information that might assist the Panel in reaching its conclusion.

B. THE EC RESORTED TO UNWARRANTED CUMULATION AND *EX-POST* 'REPARATIONS'

1. Claim 2: The EC acted inconsistently with its obligations under Articles 3.1 and 3.3 of the Agreement on Implementation of Article VI of GATT 1994

2. Claim 3: The EC acted inconsistently with its obligations under Article 5.7 of the Agreement on Implementation of Article VI of GATT 1994

(a) Introduction

68. In this section, India will put forward its claim with respect to Articles 3.3 and 3.1. India considers that the EC acted manifestly inconsistently with its obligations under Articles 3.3 and 3.1, when it cumulated India's imports with the non-dumped imports of Pakistan. In case the EC were to argue that the dumping determination against imports from Pakistan was made at a later stage than the injury determination in Regulation 1644/2001, then that argument in itself would be clear proof that the EC did not respect the deadline of 15 August 2001. Moreover, in such latter case India submits that the EC acted contrary to Article 5.7. In any event, India also submits that the EC (again) acted contrary to Article 5.7 when it separately considered the dumping determination for Pakistan in Regulation 160/2002 of 28 January 2002 and the related injury determination in Regulation 696/2002 of 22 April 2002.

(b) Facts

69. Article 3.3 stipulates, in the relevant part that:

> "Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that (a) the margin of dumping established in relation to the imports from each country is more than de minimis … " (underlining added)

(c) Arguments

(i) Argument 1: In view of the fact that the imports from Pakistan were not dumped, the EC acted inconsistently with Article 3.3 when it cumulated these imports with those of India

70. In Regulation 1644/2001 (the re-determination) the EC cumulated Indian exports with those of Pakistan. Pakistani imports were in fact not dumped, a fact which was revealed to India by publication of Regulation 160/2002. India cannot be blamed for the fact that the EC revealed this absence of dumping on part of Pakistan only by the end of January 2002, *i.e.* more than five months after the publication of Regulation 1644/2001.

71. Accordingly, by cumulating (partly dumped) imports from India with the non-dumped imports from Pakistan, the EC acted directly contrary to Article 3.3 of the basic Regulation. The word 'only' in Article 3.3 denotes a clear prohibition: cumulation is not permitted when a country does not dump. The fact that such cumulation nevertheless took place is therefore directly inconsistent with the text of Article 3.3.

72. Accordingly, by relying on evidence that was not 'positive' and thereby not 'credible', the EC also acted inconsistently with Article 3.1.

(ii) Conditional argument 2: In case the EC were to argue that the dumping determination against imports from Pakistan was made at a later stage, then the EC acted contrary to Article 5.7

73. The EC might, perhaps, argue that the revised dumping determination against Pakistan was made only after August 2001. Of course, that itself would be clear proof that the EC did not respect the deadline of 15 August 2001 since the EC was required to prepare a legally correct re-

determination within the deadline. Such reasoning on part of the EC would run directly counter to the text of Article 5.7 which requires that:

> "The evidence of both dumping and injury shall be considered simultaneously … during the course of the investigation …" (underlining added)

74. It is clear from the text of this Article that all evidence must be considered at the same time. If the drafters had wished to be so lenient and allow for some evidence to be considered at some time, and some evidence at another date, the Article could have been drafted differently, for example,

> "evidence of dumping and injury shall be considered during the course of the investigation."

75. Clearly, this latter discretion was not the intention, as a result of which the text of the actual provision is mandatory: the words "the", "both" and "shall" leave no room for doubt. In case the EC wishes to defy common sense by arguing that the investigation was only against India, then we have no choice but to refer to the published notices such as the Notice of initiation, which clearly clarifies that the proceeding was against Egypt, India, and Pakistan.

76. Hence, by not considering all *the* evidence on dumping within the mutually agreed reasonable period of time the EC clearly acted contrary to the text of Article 5.7.

(iii) Argument 3: By not simultaneously considering the evidence on both dumping and injury the EC again acted contrary to Article 5.7 when it separated the dumping and injury findings in Regulations 160/2002 and 696/2002

77. The violation of Article 5.7 did not stop after the set of facts addressed in the second argument. When the EC published Regulation 160/2002 it clearly had not re-considered the injury findings.

78. On 8 March 2002, when India requested consultations, India cited the above-mentioned pertinent and repeated violations of Articles 3.3 and 5.7 in its written request. In reaction, the EC quickly came up with a new injury disclosure on 14 March 2002.[53] This disclosure later led to the adoption of Regulation 696/2002, published on 25 April 2002.

79. Thus, the EC through Regulations 160/2002 and 696/2002 also violated Article 5.7 since it acted directly contrary to the explicit requirements of the text of that provision. It *first* "revised" dumping aspects and *later* injury aspects. Again, this means that, it was not "the" evidence of "both" dumping and injury that was considered—as stipulated in Article 5.7—but only *part* of the evidence in January and another part in April.

80. Indeed, Regulation 696/2002 of April 2002 tries to justify, in retrospect, how the EC could have known, in *August 2001*, that the measures of Regulation 1644/2001 could also be based on the imports of India alone. The puzzling question of how the EC could already have guessed in *August 2001* that the measures against Egypt—failing a complaint—were going to expire in *February 2002*[54] remains.

81. Moreover, India recalls, it is well-established case law that such afterthoughts, or *ex-post facto* justifications, are not permissible. As the EC argued in *Argentina–Floor Tiles*:

[53] See the EC disclosure of 14 March 2002, Exhibit-India-RW-26.
[54] Clearly, February 2002 was well before the regular (five year) expiry date of 28 November 2002.

" … It was no more than an *ex-post facto* justification and, as such, should be rejected by the Panel"[55]

82. Accordingly, Regulation 696/2002 cannot provide a valid legal ground for justifying actions that were illegal in the past. In any event Regulation 696/2002 took place outside the reasonable period of time and is therefore also for that reason a non-permissible "justification".

3. Intermediate conclusions

83. India considers that it has provided convincing arguments showing that the EC acted manifestly contrary to Articles 3.3, 3.1, and 5.7. Cumulation took place that was not permitted. Determinations regarding dumping and injury took place at different times, but never simultaneously. The justification of actions in the form of afterthoughts is contrary to consistent case law as well as to the EC's own views. In any event, the reasonable period of time was a cut-off point to which the EC itself had agreed. Even that period of time was not respected.

84. India therefore considers that it has presented a *prima facie* case showing where and how Articles 3.1, 3.3 and 5.7 were violated. Accordingly, India respectfully requests the Panel to find that the EC acted inconsistently with its obligations under Articles 3.1, 3.3, and 5.7 of the Anti-Dumping Agreement. India would be pleased to answer any questions from the Panel in case there are any issues that require clarification.

C. THE EC OVERSTATED THE VOLUME OF DUMPED IMPORTS FROM INDIA

1. Claim 4: The EC acted inconsistently with its obligations under Articles 3.1 and 3.2 of the Agreement on Implementation of Article VI of GATT 1994

(a) Introduction

85. In order to facilitate the understanding of this claim of India, we briefly recall the facts as they unfolded during the various injury determinations of the EC authorities.

86. In the original measure imposing anti-dumping duties (Regulation 2398/97 imposing definitive duties), the injury determination was based on the total volume of imports from all three countries (Egypt, India, and Pakistan).

87. In the "re-determination" of August 2001, the injury findings were based on (a) the volume of dumped imports from Egypt; (b) the volume of non-dumped imports from Pakistan; and (c) the volume of dumped imports as well as most of the volume of non-dumped imports from India.

88. In another, more recent, determination (Regulation 696/2002), "confirming" the injury established in August 2001, the injury findings were based on (a) part of the volume of imports from India and, specifically, not on (b) the volume of dumped imports from Egypt nor on (c) the non-dumped imports from Pakistan.

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[55] *Argentina–Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS189/R of 28 September 2001 at paragraph 4.262. The fact that afterthoughts are not permitted is also consistent case law, such as for example witnessed by *Brazil–Milk*, Report of the Panel adopted by the Committee on Subsidies and Countervailing Measures on 28 April 1994 (SCM/179, and Corr.1*), at para. 312: "For the Panel to take into account such considerations would be tantamount to allowing a Party to modify and rationalize its determination *ex post facto*". Clearly, Regulation 696/2002 is way beyond the RPT of 15 August 2001.

89. This claim concerns specifically the EC's calculation of the portion of dumped imports out of the total Indian imports. For this purpose India will first recall the pertinent facts in more detail after which it will present its arguments.

(b) Facts

90. It is first recalled that the *total* volume of imports from India developed as follows:

	1992	**1993**	**1994**	**1995**	**IP**
India's total import volume in tonnes[56]	11,845	12,424	13,113	17,998	18,428

91. Secondly, it is recalled that the total volume of imports of Indian sample developed as follows:

	1992	**1993**	**1994**	**1995**	**IP**
India's sample import volume in tonnes	3,016	3,016	4,405	4,753	4,888

Out of this sample, the non-dumped imports developed as follows:

	1992	**1993**	**1994**	**1995**	**IP**
Volume of non-dumped imports of the sample[57]	1,612	1,612	2,354	2,540	2,612
Percentage of non-dumped imports of the sample[58]	53%	53%	53%	53%	53%

92. In other words, the non-dumped imports in the sample represented more than half (53 per cent) of the volume of the sample. In case the error in the dumping margin for Madhu is corrected the amount of non-dumped imports in the sample represents more than two-thirds (70 per cent) of the imports of the sample.

93. Up to here, it would appear that the figures are undisputed.

94. The divergence of views between the EC and India results however from how the non-dumped imports of the sample should be treated. We assume that both the EC and India wish to respect the important finding of the Panel that:

> "… It is possible that a calculation conducted consistently with the AD Agreement would lead to the conclusion that one or another Indian producer should be attributed a zero or *de minimis* margin of dumping. In such a case, it is our view that the

[56] *E.g.*, Regulation 696/2002 at rec. (5).
[57] *E.g.*, Regulation 696/2002 at rec. (45).
[58] Volume of non-dumped imports of the sample expressed as percentage of total volume of imports of the sample.

imports attributable to such a producer/exporter may not be considered as "dumped" for the purposes of injury analysis."[59]

95. In reaching this view the Panel took into account, *inter alia*, the consideration that the interpretation of the term "dumped imports" should be "workable"[60] and that it was in line with the findings of the GATT Panels in the *Salmon* cases.[61]

96. While it is further clear that the Panel reached no explicit conclusions,[62] it is equally clear that the EC has, in its re-determination, purported to pay heed to the Panel's finding.[63]

97. It is therefore no longer a question **whether** dumped imports should be considered: on this issue both the EC and India seem to be in agreement (non-dumped imports should not be considered, as was the view of the Panel). The question has instead come down to the difference in approach as to **how** imports from companies *in a sample* that are not dumping should be approached.

98. Basically, in the view of the EC, the total volume of imports in absolute terms should in principle be considered dumped, but from this total should be deducted the absolute amount of non-dumped imports *from the sample*. This method was applied by the EC in its injury findings of Regulation 1644/2001 and its injury findings of Regulation 696/2002. Thus, in these two Regulations the EC considered the total absolute volume of 18,428 tonnes as dumped, but deducted the non-dumped *absolute* amount of the non-dumping companies from the sample (2,612 out of 4,887).

99. Basically, India considers that the *sample* (with a volume of 4,887 tonnes) was meant to *represent* the total volume of India's exports (18,428).[64] When, 53 per cent (or 70 per cent, if the mistake for Madhu is corrected) of that *sample* was found not dumped, the view of India is that this 53 per cent (70 per cent) should be applied to the total of 18,428 tonnes on a *pro rata* basis. Thus, in the view of India the same proportion of non-dumped imports of the sample (currently 53 per cent) should also be considered non-dumped when looking at the total, thereby resulting in a *non*-dumped amount of 9,767 tonnes.[65] Hence, in the view of India, the absolute amount of the total imports and the relative absolute amount of the sample should not be improperly mixed.

100. In the view of India, the issue is material. Basically, the entire import volume of dumped imports and non-dumped imports is dramatically different in absolute and relative terms, once the calculation is performed properly:

	1992	**1993**	**1994**	**1995**	**IP**
Consumption	199,838	194,524	193,674	189,233	185,825
A. Total imports from India	11,845	12,424	13,113	17,998	18,428
B. Market share of A.	5.9%	6.4%	6.8%	9.5%	9.9%
C. EC view of absolute amount of dumped import volume	10,233	10,812	10,758	15,458	15,816
D. Market share of C. (EC view)	5.1%	5.5%	5.5%	8.2%	8.5%

[59] Panel Report at paragraph 6.138.
[60] Panel Report at paragraph 6.139.
[61] Panel Report at paragraph 6.141. The Panel stated at that para:
" … In that case, the "dumped imports" included all imports from all producers in the country without distinction by transactions. In our view, this conclusion is consistent with an interpretation of the phrase "dumped imports" as referring to all imports of the **product** from producers/exporters as to which an affirmative determination of dumping has been made." (underlining added, emphasis in original).
[62] Panel Report at paragraph 6.138, last sentence.
[63] Re-determination, recital (22).
[64] On the exact meaning of a *sample* see paragraphs 102 *ff.*, *infra.*
[65] 18,428*53 per cent. Some small differences could result from rounding.

	1992	1993	1994	1995	IP
E. Absolute amount of dumped imports if sample truly serves as a ***sample*** (*i.e.* 53% non-dumped, 46% dumped)	5,449	5,715	6,032	8,279	8,477
F. Market share of E. as % of EC market	**2.7%**	**2.9%**	**3.1%**	**4.4%**	**4.6%**

101. This table illustrates,[66] the point that by interpreting the term dumped imports as it did, the EC's entire foundation for its injury determination was incorrect since it was not based on credible evidence.

(c) Arguments

(i) Argument (1): A 'sample' is intended to show what the whole is like. By disregarding this fact, the EC neither based itself on positive evidence nor engaged in an objective examination

102. According to the *New Shorter Oxford Dictionary*, the noun sample, in its third meaning is described as:

> "A relatively small part or quantity intended to show what the whole is like; a specimen."

103. In the context of *statistics* this dictionary adds that a sample is:

> "a portion selected from a population, the study of which is intended to provide statistical estimates relating to the whole."

104. Thus, in the view of India, the exports from the sample were intended to show what the whole of the imports were like; it should have served as a basis to provide an estimate relating to the whole of the imports.

105. By contrast, according to the EC, a sample only serves as a basis to show what the whole is like as far as dumped imports are concerned. To the extent that a sample does not show dumping then only the remaining portion of the sample is relevant for the analysis.

106. The EC, clearly, has tried to defy common sense as well as accepted definitions and understandings of what is a 'sample'.

107. Article 3.1 stipulates that the determination of injury shall be based on "positive evidence" and involve an "objective examination".

108. In *US–Hot Rolled Steel* the Appellate Body recalled its finding in *Thailand—H-Beams*. The Appellate Body stated at paragraph 192 with respect to "positive evidence":

> "The thrust of the investigating authorities' obligation, in Article 3.1, lies in the requirement that they base their determination on "positive evidence" and conduct an "objective examination". The term "positive evidence" relates, in our view, to the quality of the evidence that authorities may rely upon in making a determination. The

[66] The table is restricted to the absence of dumping as established for Prakash and Omkar. The figures would be even more dramatic once Madhu is properly attributed its zero margin.

> word "positive" means, to us, that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible."[67]

109. In paragraph 193 of *US–Hot Rolled Steel* the Appellate Body clarified the meaning of an "objective examination":

> "The term "objective examination" aims at a different aspect of the investigating authorities' determination. While the term "positive evidence" focuses on the facts underpinning and justifying the injury determination, the term "objective examination" is concerned with the investigative process itself. The word "examination" relates, in our view, to the way in which the evidence is gathered, inquired into and, subsequently, evaluated; that is, it relates to the conduct of the investigation generally. The word "objective", which qualifies the word "examination", indicates essentially that the "examination" process must conform to the dictates of the basic principles of good faith and fundamental fairness."[68]

110. Turning back to the specifics of the re-determination.

111. It is well known and undisputed that the EC authorities selected a *sample* of exporters in order to investigate the total Indian exports.[69] The exports of the five companies that were investigated, were a specimen "to see what the rest was like"; the sample was intended to provide statistical estimates relating to the whole.

112. The *evidence* that was available is that (slightly over) 53 per cent of the sample was not dumped, while (slightly over) 46 per cent was dumped. It was the positive evidence of this sample pool that should have formed the basis for the examination. There is no *evidence* with respect to the dumping or non-dumping of the remainder of the exports which was not sampled.

113. Hence, by deducting an absolute amount calculated from a sample *representing a total amount of exports*, the EC has neither based itself on positive evidence nor engaged in an objective examination. *Instead*, however, the EC 'concluded' that, *based on the evidence that 53 per cent of the sample was not dumped*, a mere 14 per cent of the total [(2,612/18,428)*100] was not dumped!

114. India considers that such conclusion is not objective, since it involves an inappropriate mix of a relative amount with an absolute total. Following the EC's "logic" India could equally argue that if dumping was only found for 47 per cent of the sample, only 12 per cent [(2,276/18,428)*100] of the total imports was dumped. Neither of such methods would draw "objective" conclusions based on "positive evidence".

115. The correct approach would have been that for the remainder (or *total*) of exports an *objective examination* should therefore take place: based on the positive evidence of the sample, the authorities should have objectively examined how the rest (total) of the exports looked like.

116. The EC's method runs therefore directly contrary to Article 3.1, as interpreted by the Appellate Body, which mandates such objective examination based on positive evidence. This inconsistency with Article 3.1 also results in a direct inconsistency with Article 3.2 since the failure to correctly establish the "volume of the dumped imports" leads automatically to the impossibility to correctly "consider whether there has been a significant increase in dumped imports".

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[67] *United States–Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, Report of the Appellate Body, WT/DS184/AB/R of 24 July 2001.

[68] *Ibid.*

[69] *E.g.* see Panel Report, Section II Factual Aspects, paragraph 2.5.

(ii) Argument 2: The EC's 'legal justification' is tantamount to a pretext

117. The EC, probably fully aware of its fatal fallacy in the re-determination did not want to correct this enormous error, since it would take away the entire fundamentals of its 'finding' of injury. Instead of acknowledging its mistake the EC resorted to a pretext, possibly in order to be able to continue the investigation.

118. More specifically, in its reply of 27 July 2001, the EC mentions:

> "their [the non-sampled exporter's] dumping margin was determined pursuant to Article 9(6) of the Basic Regulation and, on that basis, these imports were found to be dumped."

119. Article 9(6) of the Basic Regulation is (more or less) the equivalent of Article 9.4 of the ADA. It deals with the determination of an anti-dumping ***duty*** with respect to non-sampled co-operating producers. In that calculation of a dumping duty authorities disregard *zero*, *de minimis*, and margins based on *facts available*. This Article however has no bearing to the question under consideration, which is the volume of dumped imports for injury purposes. The EC conveniently forgets to mention that Article 9.4 ADA (and its domestic equivalent) specifically states that the rules in this paragraph, including the obligation to disregard, are restricted "for the purpose of this paragraph". Article 9.4 does therefore not operate elsewhere, and especially not in the context of an injury determination. Indeed, Article 9 refers to the *imposition and collection of anti-dumping duties*, and does not bear on the determination of injury—including the volume of dumped imports—under Article 3.

120. It is recalled that also in the context of Article 2.4.2 the EC previously tried to justify its actions with a resort to Article 9. In that instance the Appellate Body did not (wish to) spend more than one footnote dismissing such type of 'justification'.[70]

121. The EC's 'justification' is therefore incorrect and irrelevant in the context of properly establishing the total volume of dumped imports. The EC's 'justification' has nothing to do with a proper injury determination.

(iii) Argument 3: Taking the EC's reasoning to its ultimate consequence

122. An illustrative example may clarify the ultimate and absurd consequence of the EC's position, if the EC's reasoning is pushed to its limits.

123. Suppose that this time the total export volume was 100,000. Suppose that the investigating authority would resort to sampling. Suppose that that sample consists of 5 producers. Suppose that these five producers have a total export volume of 5,000 tonnes. Suppose that there are four producers in that sample who are not dumping. Suppose that these four producers represent 95 per cent of the exports in that sample. Suppose therefore that these four producers represent 4,750 tons out of that sample and that therefore 4,750 tons out of 5,000 tons are not dumped. *Then it is the EC's position that for the purpose of injury, it should consider 95,250 tons as <u>dumped</u>!* Or in other words: even though 95 per cent of the sample (representing the total exports) is not-dumped, then still 95 per cent of the total exports will be considered dumped.

124. In the view of India such absurd results can only be avoided when the requirements of Articles 3.1 and 3.2 are duly respected. There should be *positive evidence* involving an *objective*

[70] Footnote 30 of *Bed Linen* Appellate Body Report.

examination. An objective examination involves, *inter alia*, respect for elementary principles of mathematics and statistics. This means that if, in a certain case, 53 per cent of a sample is non-dumped, then 53 per cent of the total should also be considered as non-dumped. The EC's view results in the opposite conclusion.

125. Furthermore, for all practical purposes, if the EC's interpretation is correct, then no country can ever "win" any dumping case against the EC on no-injury grounds since all the EC has to do is find one producer with a dumping margin slightly over the *de minimis* threshold, and a subsequent finding of injury is guaranteed.

(iv) Argument 4: The EC's view on a sample is inherently contradictory

126. Finally, as is known, the EC did also engage in sampling on the side of the domestic industry. Clearly, on that side of the investigation the EC did consider that the result of the sample (on the state of the industry) should represent the *Community industry*.

127. Hence, by applying different standards, as to what a sample is supposed to mean, on the export and domestic side of an investigation, the EC has clearly not engaged in an objective examination as mandated by Article 3.1 of the ADA.

2. Intermediate conclusions

128. India considers that it has provided a *prima facie* case showing that the EC's actions run counter to the basic fundamentals of Articles 3.1 and 3.2, as interpreted by the Appellate Body. For these reasons India respectfully requests the Panel to conclude and find that the EC acted inconsistently with its obligations under Articles 3.1 and 3.2 of the Anti-Dumping Agreement. India would be pleased to answer any question from the Panel should the Panel require any further information.

D. THE EC 'EVALUATED' DATA WITHOUT EVEN COLLECTING THEM. THE RE-DETERMINATION MERELY PUTS A GLOSS ON THE ORIGINAL FINDING

1. Claim 5: The EC acted inconsistently with its obligations under Articles 3.1 and 3.4 of the Agreement on Implementation of Article VI of GATT 1994

(a) Introduction

129. The Panel, in its Report, found that:

> "[i]t appears from this listing [in the Provisional Regulation] that data was not even collected for all the factors in Article 3.4, let alone evaluated by the EC investigating authorities."[71]

130. On this basis the Panel found that a violation of the *substantive* requirement under Article 3.4 had taken place. Notably, the Panel added, in a later part of its Report, when dismissing India's claim 13, that:

> "if the determination was substantively inconsistent with the relevant legal obligations, the adequacy of the notice is meaningless."[72]

[71] Panel Report paragraph 6.167. Relevant details of the Panel's determination are well known and are set forth in paragraphs 6.153 through 6.169 of the Panel Report.

131. These findings, *inter alia*, implied that absence of data collection in the first place could impossibly be repaired by a mere re-statement of the notice.

132. Not disturbed by these clear-cut findings of the Panel, the EC in its re-determination simply stated: "the determinations … [in the original measure] were not fully described."[73] This put paid to the entire DSB deliberations, by creating facts whose existence itself had neither been brought on record before, nor were accepted by, the Panel.

133. Even if the facts had originally been duly collected and evaluated—*quod non*—then also the other findings of the Panel and the Appellate Body, as well as the results of these other findings, should have necessitated an *overall reconsideration and analysis* of the determination of injury.[74] Such overall reconsideration and analysis was all the more necessary in view of the other findings of the Panel which had an impact on the dumping margin, an impact on the definition of the domestic industry, and an impact on which dumped imports to consider.

134. Moreover, such overall reconsideration and analysis should have taken place within the mutually agreed reasonable period of time ('RPT').

135. Furthermore, India wishes to point out that the EC's injury 'findings' contain certain factual errors. These errors are also witness to the fact that no objective examination has taken place on the basis of *positive evidence*.

(b) Facts

136. The Panel will appreciate that this claim is part of a 'rich' factual and legal record—a large part of which is known from the original proceedings. Accordingly, rather than trying to summarize all facts, India proposes to refer to the relevant facts, as when presenting its arguments hereinafter.

(c) Arguments

(i) Argument 1: Data which were not collected cannot be evaluated

137. As noted, the Panel originally found a violation of the **substantive** requirement of Article 3.4 and did not merely relate to the explanation of the EC's notice.[75] The Panel found that it appeared from the listing in the Provisional Regulation that for a number of injury factors listed in Article 3.4 data collection had not even taken place,[76] let alone evaluated.[77]

138. The Panel added, in a later part of its Report, when dismissing India's claim 13 (regarding the inadequacy of the explanation), that:

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[72] Panel Report paragraph 6.259.

[73] Re-determination, recital 17 (ii), second sentence.

[74] *Mexico–Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, Panel Report, WT/DS132/RW, at paragraph 6.37. This argument is further developed, *infra*, at para. 0 *ff*.

[75] The EC did not appeal this finding.

[76] The Panel refers in its conclusion in para. 6.169 to the "foregoing" which includes the reference in para. 6.167 that it appears that data was not even collected. The "foregoing" also includes the Panel's dismissal in para. 6.168 of the EC's argument that data were evaluated but not discussed.

[77] *Ibid*.

> "if the determination was substantively inconsistent with the relevant legal obligations, the adequacy of the notice is meaningless."[78]

139. These two findings of the Panel implied, *inter alia*, that the original absence of data collection and evaluation could impossibly be repaired by a mere re-statement of the notice.

140. Despite these clear-cut findings of the Panel, the EC in its re-determination merely stated that: "the determinations … [in the original measure] were not fully described."[79]

141. The Commission Services continued this line of reasoning in recital (19) of the re-determination:

> "The approach described in recital 62 of the provisional Regulation was revised by eliminating data relating to producers which were not part of the Community industry. In the present Regulation, the data were analysed as follows:
>
> (i) at the level of the Community industry, for trends concerning production, sales by volume, market share, employment and growth. The relevant data were obtained from the verified questionnaire responses of the 17 sampled producers, and from the information collected with regard to the further 18 producers forming part of the Community industry;
>
> (ii) at the level of the sampled Community producers, for the trends concerning prices and profitability, cash flow, ability to raise capital and investments, stocks, utilisation of capacity, wages and productivity, on the basis of the aforementioned questionnaire responses.
>
> In addition, the magnitude of the margin of dumping was examined."

142. This line of reasoning permits two observations from India.

143. *Firstly*, in view of the findings of the Panel that a **substantive** violation of Article 3.4 had occurred, and specifically not Article 12, it is impossible that such data are subsequently evaluated without first being collected.[80]

144. In case the Panel at the time would merely have taken issue with the problem of an *adequate explanation*, then the Panel would have acted in accordance with the case law of the Appellate Body in *Thailand–H-Beams*:

> " … Article 12, like Article 6, sets forth important procedural and due process obligations. However, as in the case of Article 6, there is no justification for reading these obligations into the substantive provisions of Article 3.1. We do *not*, however, imply that the injury determination of the Thai authorities in this case necessarily met the requirements of Article 12. This issue was not considered by the Panel, since Poland did not make a claim under this provision.
>
> 111. We consider, therefore, that the requirement in Article 3.1 that an injury determination be based on "positive" evidence and involve an "objective"

[78] Panel Report paragraph 6.259.
[79] Re-determination, recital 17 (ii), second sentence.
[80] It appears from the record, and is undisputed by the EC, that after 12 March 2001, and during the reasonable period of time, no new collection of data took place whatsoever.

> examination of the required elements of injury does *not* imply that the determination must be based only on reasoning or facts that were disclosed to, or discernible by, the parties to an anti-dumping investigation. Article 3.1, on the contrary, permits an investigating authority making an injury determination to base its determination on *all* relevant reasoning and facts before it."[81]

145. In India's view it remains therefore impossible that data are now suddenly evaluated in the re-determination if they were not even collected. For this reason India will not (again) enter into (endless) discussions as to whether the EC collected information in the questionnaires since the Panel had already factually established this absence of data collection as part of the substantive violation of Article 3.4.

146. *Secondly*, India will highlight two economic factors that are illustrative as to the fact that no data had been collected.

Inventories

147. While the EC makes no secret of the fact that stock data were not even taken into account when establishing consumption,[82] this absence of data collection for inventories is replicated at the level of the description of the sampled EC producers.

148. At the level of the sampled producers[83] the EC *first* explains why, in the abstract, it considered that the indicator stock did not have a bearing on the state of the Community industry:

> "As to stocks, this is the case for two reasons. Firstly, … Secondly … "

149. Only *then* did the EC reveal part of the allegedly collected facts: "While some increase in stocks was observed in some companies … ".[84]

150. The EC then mentions that with respect to these partially revealed facts "neither the complainant [sic] nor any sampled Community producer adduced increase in stocks as evidence of injury."[85]

151. Clearly, such 'evaluation' turns the world on its head. It can only be understood if no data collection had taken place. By contrast, the original Panel, also referring to the Panel in *Korea – Dairy Safeguards* made abundantly clear how a proper fact finding and subsequent evaluation should take place:[86]

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[81] *Thailand–H-Beams*, WT/DS122/AB/R of 12 March 2001, section VII, notably paragraphs 110 and 111.

[82] Recital (20) of the re-determination confirms recital (63) of the provisional Regulation. Recital (63) of the provisional Regulation measured consumption as production plus imports minus exports but without taking account for stocks. Clearly, while no auditor in her or his right mind would ever approve of measuring consumption whilst purposefully disregarding inventories, this non-consideration of stocks is in itself already a first indication that information on inventories was simply never collected.

[83] Re-determination, recital (29).

[84] Up to the present date, it is anyone's guess how stocks developed for all companies.

[85] One may only wonder what the complainant has to do with the investigation. Once an investigation has started a complainant should normally not form part of the investigative process. One may also wonder why an investigating authority considers this (*i.e.* whether a "complainant … [or] producer adduced increase in stocks as evidence of injury") to be a 'criterion' to determine whether or not a factor is relevant.

[86] Panel Report, paragraph 6.155.

"… In our view, the text of Article 3.4 indicates that the listed factors are *a priori* "relevant" factors "having a bearing on the state of the industry", and therefore must be evaluated in all cases.[55]

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[55] We note, in this regard, that the Panel in *Korea – Dairy Safeguard*, interpreting the language of Article 4.2 of the Agreement on Safeguards, which provides that, in making a determination of serious injury or threat thereof in a safeguard investigation, the investigating authority:

"shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, …"

The Panel concluded that the text of this provision made it clear that:

"among "all relevant factors" that the investigating authorities "shall evaluate", the consideration of the factors listed is always relevant and therefore required, even though the authority may **later** dismiss some of them as not having a bearing on the situation of that industry". *Korea – Dairy Safeguard*, Panel Report, para. 8.123." (underlining and emphasis added)

152. Clearly, facts pertaining to a certain factor must *first* be collected and brought on record, *after* which they can be evaluated. The EC's current determination switches this around. Following such a sequence of 'reasoning', facts could equally not have been collected.

Utilization of Capacity

153. The same observation goes, for example, for the factor "utilization of capacity".[87] The EC *first* tries to explain as to why the factor did not have a bearing on the industry. It *then* explains that reliable figures were extremely difficult to establish. It *subsequently* explains however that there was a high rate of capacity utilization where production *even* had to be sub-contracted.

154. The subsequently—barely revealed—factual data follow the *a priori* dismissal of the relevance of the factor. Moreover, the factual data, if anything, do not point towards injury at all, on the contrary.[88]

155. Clearly, and as pointed out by the original Panel which cited *Korea – Dairy Safeguards*, facts pertaining to a certain factor must *first* be collected and brought on record, *after* which they can be evaluated.

156. Finally, it may be noted that whilst for some of the other factors the EC in the re-determination suddenly and purportedly came up with some 'hard and fast' figures and indices,[89] the

[87] Re-determination, paragraph 30. In the re-determination this factor 'utilization of capacity' is described under the title 'production capacity' which, of course, something different. The discussion itself also confuses the two factors. While India can only speculate that this mistake stems from a basic misunderstanding of the difference between these two factors, India will at present make no argument on this puzzle since that would not seem to add to the substance of the issue of 'utilization of capacity'.

[88] High capacity utilization was maintained; this does not point towards injury. Production had to be sub-contracted; this means that own capacity was not even sufficient to keep up with the demand. High utilization even took place during depressed periods; this means that even in so-called 'depressed' periods the capacity utilization was high. None of these three observations points to injury at all, *on the contrary*!

"evaluation" of inventories and utilization of capacity remained stranded in vague generalizations about allegedly collected facts.

(ii) Argument 2: Even if data had been collected—quod non—there should have been an overall reconsideration and analysis; the evaluation should be adequate

157. In the view of India the EC has in fact done nothing else other than to issue a new determination that, while professing to comply with the Panel's conclusions and findings, is essentially a restatement of its original determination. Information is mis-characterized and there is no reasoned explanation why improvements in trends were not probative in ascertaining the condition of the industry. The new gloss that the EC has put on its original determination cannot hide the fact that the finding of injury continues to be contradicted by facts on the record.

158. In short: The new gloss does not remedy the errors found by the Panel.

159. Examples of important changes as a result of the original Panel Report that *should* have been taken into account by the EC for the determination of injury included, for example, the observations from the Panel that:

- information was never collected let alone evaluated;
- the EC may for its injury determination not rely on companies outside the Community industry;
- only countries found to be dumping should be considered; and
- only *dumped* imports from India should be considered.

160. Also the reduction in dumping margins should have been considered.

161. The Panel will be aware of a recent similar case where the Mexican authorities also re-stated their original determination in a manner found to be inconsistent with the ADA. In the 'compliance Panel' regarding *HFCS*, it was found that a proper implementation of the Panel's findings requires not only a recitation of those injury factors which should have been examined in the original investigation, but an overall positive injury determination in line with the requirements of the ADA:

> " … Part of the difficulty with SECOFI's redetermination in this case is that while SECOFI apparently undertook to respond to the specific criticisms set out in the original Panel's report, and has set out additional information relevant to the specific points made by the Panel in that report, there does not appear to have been an **overall reconsideration and analysis** of the information in light of the requirements of the AD Agreement, as clarified by the original Panel."[90] (emphasis added)

162. The *HFCS* compliance Panel Report was upheld by the Appellate Body.[91]

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[89] The data are less 'hard and fast' than the figures wish the reader to believe. While India will devote a separate section *infra* (*i.e.* paras. 214 ff.), to factual errors, it may be pointed out here that while most data pertain to the period 1992–I.P., the increase on consumer prices (recital (33)) starts only with the year 1993, and the factor *growth* is, without rhyme or reason, restricted to the period 1994–I.P.

[90] *Mexico–Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, Panel Report, WT/DS132/RW, at paragraph 6.37.

[91] WT/DS132/AB/RW of 22 October 2001.

163. Hence, in order to comply with the original Panel Report, the re-assessment carried out by the Commission Services must show that there has been an overall reconsideration and analysis of the injury factors listed in Article 3.4 of the ADA. Not only should all factors be evaluated, but the evaluation of each factor should also be *adequate*.

164. Despite these findings of the compliance Panel in *HFCS*, the 'analysis' of the state of the domestic industry was apparently carried out as follows. First the Commission Services professed to have examined data with regard to the relevant injury factors listed in Article 3.4. Yet, the 'examination' is curt and includes references to the original provisional Regulation, in itself a sign that no re-consideration took place. The original reliance on information regarding companies outside the Community industry is allegedly disregarded (by alleged 'elimination' of such data[92]) although the EC continues to refer to them in at various parts of the re-determination.[93]

165. We now turn to the EC's analysis of the injury factors and will show examples of the inadequate analysis or examples of the fact that analysis did not even take place.

Actual and potential decline in sales, Market share, Price development

166. The sales volume of the Community industry went *up* from 36,205 tonnes in 1992, to 36,553 tonnes in the IP.[94] The sales turnover of the Community industry also went *up* from ECU 428.6 million in 1992 to ECU 446.6 million in the I.P. While sales information on the sampled producers is also available, that information can be set aside in a situation where positive information on the *entire* domestic industry is available, since the issue to be resolved is exactly the state of the entire domestic industry.[95]

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[92] Re-determination, recital (19).

[93] *E.g.*, re-determination recital (44) second paragraph. This also happened in the context of causation, *e.g.*, recital (61) second paragraph.

[94] Recital (35) re-determination.

[95] In line with the reasoning of the original Panel at 6.181:

" … anti-dumping investigations should be fair and … investigating authorities should base their conclusions on an objective evaluation of the evidence. It is not possible to have an objective evaluation of the evidence if some of the evidence is required to be ignored, even though it relates precisely to the issues to be resolved."

The Appellate Body in *Hot Rolled Steel* also expressed its views on a limited examination of the domestic industry. (*United States–Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, Report of the Appellate Body, WT/DS184/AB/R of 24 July 2001.) While the Appellate Body in that case did not object to a limited investigation *as such*, it offered important warnings with respect to such approach:

"195. … Similarly, it seems to us perfectly compatible with Article 3.4 for investigating authorities to undertake, or for a Member to require its investigating authorities to undertake, an evaluation of particular parts, sectors or segments within a domestic industry. Such a sectoral analysis may be highly pertinent, from an economic perspective, in assessing the state of an industry as a whole.

196. However, the investigating authorities' evaluation of the relevant factors must respect the fundamental obligation, in Article 3.1, of those authorities to conduct an "objective examination". If an examination is to be "objective", the identification, investigation and evaluation of the relevant factors must be even-handed. Thus, investigating authorities are not entitled to conduct their investigation in such a way that it becomes more likely that, as a result of the fact-finding or evaluation process, they will determine that the domestic industry is injured.

…

204. … where investigating authorities undertake an examination of one part of a domestic industry, they should, in principle, examine, in like manner, all of the other parts that make up the industry, as well as examine the industry as a whole. Or, in the alternative, the investigating authorities should provide a

167. According to the original EC's provisional regulation, the market share of the domestic industry went *up* from 22.4 per cent to 25.1 per cent.[96] According to current facts as disclosed, the market share of the domestic industry went *up* from 18.12 per cent to 19.67 per cent.[97] While India does not quite understand the difference in figures it appears that under both calculations the market share went up.

168. Since the increase of (domestic) sales in value terms[98] is greater than the increase in volume terms[99] it is also clear that average prices went up.[100]

169. Information on export sales has not been collected let alone been evaluated. In the absence of information on inventories, it is in fact impossible to calculate how export sales have performed.

170. Clearly, the factors sales, market share, as well as price development do not point towards injury. The EC does not evaluate nor offer any comment on these three factors that all do not point towards injury. The only remark that is offered is that market share increase was due to sales of "higher value niche products".[101] Clearly, such kind of observation from the EC does not meet any standard of a proper evaluation. Nor does the observation conform to the findings of the Appellate Body with respect to the existence of one like product:

> " … Having defined the *product* as it did, the European Communities was bound to treat that *product* consistently thereafter in accordance with that definition."[102]

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satisfactory explanation as to why it is not necessary to examine directly or specifically the other parts of the domestic industry. Different parts of an industry may exhibit quite different economic performance during any given period. Some parts may be performing well, while others are performing poorly. To examine only the poorly performing parts of an industry, even if coupled with an examination of the whole industry, may give a misleading impression of the data relating to the industry as a whole, and may overlook positive developments in other parts of the industry. Such an examination may result in highlighting the negative data in the poorly performing part, without drawing attention to the positive data in other parts of the industry. We note that the reverse may also be true – to examine only the parts of an industry which are performing well may lead to overlooking the significance of deteriorating performance in other parts of the industry.

205. Moreover, by examining only one part of an industry, the investigating authorities may fail properly to appreciate the economic relationship between that part of the industry and the other parts of the industry, or between one or more of those parts and the whole industry. For instance, we can envisage that an industry, with two parts, may be overall in mild recession, where one part is performing very poorly and the other part is performing very well. It may be that the relationship between the two parts is such that the healthier part will lead the other part, and the industry as a whole, out of recession. Alternatively, the healthy part may follow the other part, and the industry as a whole, into recession.

206. Accordingly, an examination of only certain parts of a domestic industry does not ensure a proper evaluation of the state of the domestic industry as a whole, and does not, therefore, satisfy the requirements of "objectiv[ity]" in Article 3.1 of the *Anti-Dumping Agreement*." (footnotes omitted)

[96] Provisional Regulation, recital (85): " … market share by volume: … Community industry … gained market share, from 22.4 per cent to 25.1 per cent … ".

[97] Volume as disclosed in re-determination divided by consumption disclosed in fax of EC of 27 July 2001, page 12. (36,205 ./.. 199,838)*100 = 18.12 per cent and (36,553 ./.. 185,825)*100 = 19.67 per cent. These market share figures coincide with the market share figures in recital (35) of the re-determination.

[98] From 428.6 million Ecu to 446.6 million Ecu.

[99] From 36,205 tonnes to 36,553 tonnes.

[100] From 11.8 Ecu/kg to 12.2 Ecu/kg.

[101] Re-determination, recital (35).

[102] Appellate Body, *Bed Linen*, at paragraph 53.

171. In fact, the EC's remark that market share increase was due to sales of "higher value niche products" is also at odds with its determination in recital (97) of the provisional Regulation where it argued that "the market for bed linen is characterized by product substitutability and transparency."

Profits

172. As a preliminary remark it is noted that during all these years the EC has been suspiciously silent on the profits achieved by the *Community industry*. In view of the fact that profit reduction formed the main, if not only, factor on which alleged injury is based it would have been not more than prudent to reveal those profits.

173. The entire injury determination is therefore based on a doubtful and limited piece of information, *i.e.* the profits of the *sampled* producers. The EC allegedly did possess information on the total sales *values* and *volumes* of the domestic industry *and* the sampled producers but, surprisingly, profits only for the *sampled* producers. If this vital information was indeed not collected at the level of the domestic industry, then this fails to meet the standard pronounced by the Appellate Body on the requirements of objectiv[ity] of Article 3.1 of the Anti-Dumping Agreement. As the Appellate Body, quoted in more detail above,[103] noted:

> " … an examination of only certain parts of a domestic industry does not ensure a proper evaluation of the state of the domestic industry as a whole, and does not, therefore, satisfy the requirements of "objectiv[ity]" in Article 3.1 of the *Anti-Dumping Agreement*."

174. Moreover, India has reservations with the absolute figures of profits attributed to the "*domestic industry*" in recital (36) of the re-determination; according to India this was the profit amount for the *sampled* producers. To be sure, India takes no issue with having the sample *representing* the total;[104] however, India (again) takes issue with attributing *absolute* amounts of a sample to a total pool. Furthermore, India can only wonder how the change in turnover of the sampled producers between the provisional Regulation and the re-determination still managed to result in the same profit figures.[105]

175. In any event, it is undisputed that the sampled companies *made a profit* throughout the investigation period. The EC does not further evaluate this profit figure. The EC in the re-determination merely confirms the provisional Regulation. The provisional Regulation in turn did nothing more than allege that the profit is below the minimum level of 5 per cent. The EC does not provide any proof for such minimum level of profit. It only states that this minimum was the level of profits made in 1991, *i.e.* a year outside the injury investigation period.

176. In this connection India also recalls the finding of the panel concerning India's previous arguments regarding the reasonability of profits in the context of normal value:

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[103] *United States–Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, Report of the Appellate Body, WT/DS184/AB/R of 24 July 2001, at para. 206.

[104] Indeed, this is what a sample is for, as argued earlier.

[105] In the provisional Regulation the value of Bed Linen sales by the sampled producers rose from ECU *280.6* million in 1992 to ECU *446.6* million in the investigation period. In the provisional Regulation the corresponding profits dropped from 3.6 per cent to 1.6 per cent. In the disclosure of 19 June 2001, the EC table at page 13 shows a turnover of ECU *276.9* million in 1992 and ECU *281.2* million in the I.P. The profit for these two years however remained the same at 3.6 and 1.6 per cent respectively.

> " … Merely that these other profit rates are lower does not, in our opinion, make them more "reasonable" than the rate actually calculated and applied by the EC."[106]

177. Now that the reverse situation occurs on the side of the domestic industry, in the context of injury, the Panel would not hesitate to draw the mirror-conclusion: that the actual profit rates of EC producers are lower than those achieved in another year (outside the IIP) does not *ipso facto* render those actual profits less adequate.

178. Finally, it may be added that these were profits *after* (very) significant investments. The sampled producers were profitable even after making all the investments that they made. One could only imagine the profit levels had no such heavy investments been made. Indeed, if one takes away the average yearly investments of 20 per cent, the profit margins would have consistently exceeded 20 per cent.

179. Accordingly, India submits that the EC has failed to adequately evaluate the factor profits. India has provided four straightforward reasons for this assertion. (1) This being the single most important factor for injury for the EC's determination it should have tried to obtain (or, perhaps, reveal) the information for the entire domestic industry. (2) There are factual contradictions between the original Regulation and the re-determination which remain unexplained. (3) No objective proof has been provided for the fact that profit levels obtained throughout the period were not adequate. (4) On the contrary, profit was achieved throughout the IIP, even after significant yearly investments of over 20 per cent.

Output

180. The domestic industry *increased* its output from 39,370 tonnes to 42,781 tonnes. Recital (31) of the re-determination refers to the (short) statement in recital (81) of the provisional Regulation. Other than recital (81) this factor remains unevaluated. In recital (81) the EC states:

> "The Commission concluded that the Community industry represented those companies which were **strong enough** to survive competition from dumped imports and which to a certain extent had benefited from the demise of those which had not so survived."(Emphasis added)[107]

181. If anything, this factor clearly does not point towards injury since output *increased*, and the Commission considers the producers of the Community industry were "strong enough". Other than that, India considers that this factor has not been adequately evaluated.

182. Indeed, if India understands the EC's logic pronounced in recital (19) of the re-determination the references to producers not forming part of the Community industry should have been considered eliminated. It is therefore unclear if and how recital (81) of the provisional Regulation should be read: if recital (81) is indeed eliminated the EC has not discussed output. If recital (81) is not eliminated it refers to producers outside the domestic industry. In such latter case India objects to the EC trying to introduce alleged injury by references to non-industry through the backdoor (a practice which the panel disallowed).

Productivity

183. Productivity increased with 11 per cent from the beginning to end the injury investigation period. The factor remains completely unevaluated and, if anything, does not point towards injury.

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[106] Panel Report, para 6.100, last sentence.
[107] Provisional Regulation recital (81).

Return on investments

184. The investments made throughout the entire injury investigation period were substantial. The table attached to the fax of 19 June 2001[108] shows that investments by sample companies for Bed Linen production were over 20 per cent (!) for *each year* (!) of the injury investigation period.[109] This is remarkable since the EC noted in recital (90) of the provisional Regulation that " … the industry in question is not capital intensive".

185. Throughout the injury investigation period the companies obtained a positive return on investments. Again, India takes issue with the mistake that in the re-determination the EC refers to the *sampled companies* as *Community industry*. This error will be addressed below.

186. In any event, no evaluation takes place of the factor. The EC merely states that "the maintenance of production tools was the main purpose of the Community industry's [sic] investments during the period concerned" and "the overall trend followed by the return on investments is similar to that of profitability." India considers that this is not an adequate evaluation of a factor which in essence does not point towards injury. The high level of the investments moreover does not point towards a mere maintenance of tools at all, but points towards significant upgrading of machinery.[110]

Factors affecting domestic prices

187. The EC refers to the contraction in demand and raw cotton prices.

188. As regards contraction in demand (*i.e.* decrease in consumption), no evaluation takes place. The EC merely concludes that "given that the prices of the dumped imports were the lowest", "the contraction in demand in itself did not have an overriding impact on prices".[111] No reasoning or logic is provided which adequately explains this statement. The conclusion that "contraction of demand in itself did not have an overriding impact on prices" because India's imports were allegedly among the lowest of all operators is equally incomprehensible.

189. As regards the price of raw cotton there again seems to be a problem with the evaluation of the evidence. The EC merely states that price of raw cotton "can represent up to 15 per cent" and "increased significantly". It is then stated that producers should have been able to pass on this cost increase but were not able to do so. Clearly, if it is true then this is another factor affecting prices and has nothing to do with the imports from India.

190. In the more recent injury 're-confirmation'[112] the EC suddenly refers to "gap left by Community factory closures", the "fall in imports from certain other third countries" and the "imports from India, which most were found to be dumped." Apart from the fact that 53 per cent of the sample imports from India were not dumped, India fails to see what factory closures of producers not belonging to the Community industry have to do with the state of the domestic industry.[113] Again,

[108] Exhibit-India-RW-5.

[109] The total investments of the sampled companies for Bed Linen for five years amounted to more than 300 million ECU.

[110] Normal repair and maintenance would not have been booked as separate investments. Nor would they have ever reached such enormous levels. Normal maintenance in the textile sector would not exceed a few percentage points, at most.

[111] Re-determination recital (44).

[112] Regulation 696/2002.

[113] As the original Panel stated in para. 6.182:

"Information concerning the Article 3.4 factors for companies outside the domestic industry provides no basis for conclusions about the impact of dumped imports on the domestic industry itself."

India objects to the EC trying to introduce alleged injury by references to non-industry through the backdoor.

The magnitude of the margin of dumping

191. We first recall the meaning of the word "magnitude".

192. According to the *New Shorter Oxford Dictionary* magnitude is, in its second meaning, described as: "great size or extent; great degree or importance."

193. Fact is that the dumped imports from the Indian sample represented, as shown above, less than half. The two largest exporters from India, representing more than 50 per cent of the exports of the sample were not dumping. One further dumping margin was 3 per cent. These three margins represented over 70 per cent of the sample.

194. While there could perhaps be many perceptions of the words "great size or extent; great degree or importance" it appears unlikely that the absence of dumping by two producers, and one producer with 3 per cent would be covered by such understanding. This was perhaps also the view of EUROCOTON by filing its recent complaint which has lead to *Bed Linen-III* initiated in February 2002; if EUROCOTON would have considered that the duties, all based on the dumping margins, would have been of such "great size or importance", it would not have filed yet another complaint.

195. Again, in the recent "re-confirmation" the EC concludes that the dumping margins found:

"are still substantial and distinctly above *de minimis* levels."

196. This statement is at odds with the facts, which showed that two producers had zero dumping margins. Also the margin of 3 per cent can also hardly qualifies for the statement to be correct. Again, these three producers represented 70 per cent of the sample. These examples illustrate that the assertion of the EC in the last sentence of recital (19) is also incorrect.

197. India considers that the evaluation by the EC, restricted to a cursory one sentence, was inadequate and factually incorrect.

Actual and potential negative effects on cash flow

198. The 'evaluation' of cash flow is restricted to two sentences.[114] It is mentioned that cash flow remained positive but declined from 25 million Ecu to 18 million Ecu It is then mentioned that cash flow followed a similar decreasing trend as profitability.

199. Apart from the fact that India does not consider this 'evaluation' adequate at all, it is also based on a factual error. As will be explained further below, the cash flow declared in the re-determination was the cash flow of the *sampled* producers, not that of the *Community industry*.

Inventories

200. India has earlier signalled its fundamental objections against the manner in which the item inventories has been addressed. In India's view information was not collected, let alone evaluated, let alone evaluated adequately.

[114] Re-determination recital (37).

Employment

201. Employment decreased from 7,000 to 6,700.[115] The EC has clubbed the discussion of employment with that of production and productivity. Under the EC's logic, the producers suffered from imports, had to lay off 300 jobs, managed to force the remaining labour to work 8.7 per cent per cent harder (without any trade union protests), and—notwithstanding their injured position, spent 20 per cent on investments in new Bed Linen machinery. India considers that such reasoning is fallacious.

202. Instead, based from the facts on the record it seems more probable that the continuous investments in new machinery resulted in an increased production. The increased production from more efficient machines could have been the reason to the 300 lay-offs in the sector.

203. In other words, since production increased during the same period with 8.7 per cent (a productivity increase of 11 per cent), the decrease in employment is not caused by imports but rather is a function of the productivity increase (India notes in this context the data on investments in new machinery showing heavy investments of over 20 per cent being made throughout the injury investigation period).

204. In any event, India also takes issue with the factual error in the re-determination. While it is stated in recital (91) of the provisional Regulation that employment in the Community industry decreased from 7,000 to 6,700, the EC's re-determination qualifies this as a decline of 5.3 per cent. However, if we express 300 as a percentage of 7,000 or 6,700 then the result is either 4.28 per cent or 4.47 per cent. The EC has yet to account for its 5.3 per cent.

Wages

205. Wages *increased* during the injury investigation period. The evaluation of the EC is restricted to the observation that for part of the IIP the wages went up in line with consumer prices. India does not consider this evaluation adequate. In any event the factor does not point towards injury.

Growth

206. The evaluation of growth of the Community industry is restricted to part of the facts, *i.e.* from 1994 to the I.P. and is restricted to sales volume. The EC disregards that overall sales volume *increased*, and that other important growth factors such as output, productivity, capacity utilization, market share, wages, ability to raise capital, all showed a *positive* trend.

207. The EC then even refers to the supposed *growth of the dumped imports* which has nothing to do with the "state of the domestic industry". India is of the opinion that it is the *growth* of the *domestic industry* that should be evaluated. In any event the data that allegedly refer to the "low-priced dumped imports" are wrong, since they include a country that did not dump. In its recent injury 're-confirmation' the EC changed this discussion into the imports from India. As pointed out earlier in this submission, the calculation of dumped imports from India was wrong. In any event, the alleged increase of dumped imports is not directly relevant in the context of growth of the *domestic industry*.

208. India considers that the evaluation was not adequate.

[115] Provisional Regulation recital (91).

Ability to raise Capital

209. The sampled producers were able to raise capital throughout the IIP at a stable and, eventually, increasing level.

210. The EC's evaluation is however restricted to the observation that there was no claim nor any indication that there were problems to raise capital. The EC then even goes on to state that no major investments were made, despite the fact on the record that the average yearly investments amounted to approximately 20 per cent. India considers that the evaluation was factually wrong, not adequate and that also this factor does not point towards injury.

EC's conclusion on injury

211. The conclusion that follows in recitals (48) through (51) of the re-determination is in itself wrong since it bases itself on wrong figures; for example, the data in recital (48) regarding the volume of imports cannot be sustained by facts. Based on such wrong base-data, it is impossible that the conclusion could be correct. Accordingly, by not basing itself on positive evidence, the EC in its conclusions acted contrary to Article 3.1.

212. Moreover, in the conclusions in recitals (50) and (51) the EC misleadingly attribute the actual absolute data of the *sampled producers* to the *Community industry*.[116] Such factual errors in themselves taint the conclusions.

213. In any event, the EC's conclusion is based on inadequate or poor evaluations, as shown above. Also in the conclusions there is a clear absence of an overall reconsideration and analysis, as would have been in line with the requirements of *HFCS 21.5* (as confirmed by the Appellate Body). The complete inadequacy of the examination, renders the EC's conclusion inconsistent with the requirements of Articles 3.1 and 3.4.

(iii) Argument 3: Errors on the factual record invalidate the re-determination

214. The re-determination also contains factual errors that might be pointed out. The existence of such errors makes it not possible that the evaluation was based on positive evidence. It also casts doubt on the objectivity of the examination. We will distinguish between facts that appear to have been ignored, facts that appear to have changed without explanation, and facts that have been misrepresented.

3.a Facts on the record appear to have been deliberately ignored

215. Recital (54) of the original provisional Regulation indicated that the EC had eliminated (the data from) one sampled company, *after verification*, because it imported Bed Linen from Pakistan. In this regard the EC had (presumably) resorted to Article 4.1(i) of the ADA, which is the only legitimate justification on the basis of which such elimination can legally be explained.

216. Hence, since Pakistan was not dumping, the re-investigation of injury should have included the verified information of that sampled producer. There was no legal justification to continue to exclude (or disregard) information on the record pertaining to that producer. Article 4.1(i) could not be invoked. The consideration of this available and verified evidence should have taken place before the deadline of 15 August 2001. However, consideration of that evidence never took place within the

[116] For example, absolute figures on profits, cash flow, *etc*. are all erroneously attributed as belonging to the Community industry.

RPT. The consideration of that evidence did also not take place in the "re-confirmation" issued eight months after the RPT.

217. The result is that by examining only a certain part of the information pertaining to the domestic industry, the EC did not properly evaluate the state of the domestic industry as a whole. The EC has purposefully disregarded "positive evidence" on the record. Therefore, this failure to consider the evidence pertaining to the company in question is inconsistent with the requirements of an objective examination in Article 3.1 of the Anti-Dumping Agreement.

3.b Facts on the record appear to have changed without explanation

218. In the provisional Regulation the sales values of the sampled producers for Bed Linen rose from ECU 280.6 million in 1992 to ECU 285.3 million in the I.P.[117] In the re-determination, these sales values changed into ECU 276.9 million and ECU 281.2 million, respectively.[118] The EC did not provide any explanation for this change in facts. Despite this change in turnover, the alleged profit reduction remained the same: from 3.6 per cent to 1.6 per cent.

219. A similar change took place as regards the market share of the Community industry. In the provisional Regulation this market share allegedly developed from 22.4 per cent to 25.1 per cent (+2.7 per cent).[119] In the re-determination, this market share increased from 18.1 per cent to 19.7 per cent (+1.6 per cent).[120] While under both calculations the share went *up*, the EC did not provide an explanation for this apparent change in facts.

3.c Facts on the record are misrepresented

220. Also important, the re-determination contains errors as regards the information presented on profits, cash flow, and return on investments.

221. Starting with recital (19), it is clear that the EC asserts that information on factors such as profit, cash flow, and investments was only collected at the level of the *sample*. As far as profits are concerned, the provisional Regulation contained the same assertion.[121] Allegedly (and unfortunately) profits for the *Community industry* were never collected (or revealed).

222. Yet despite the assertion that this information was collected at the level of the *sample*, the EC suddenly, further in the re-determination at recital (36), asserts that profitability of the *Community industry* shrunk from ECU 10 million to ECU 4.6 million. In the table that accompanies the disclosure of 19 June 2001 the EC also refers to the profit figures of 10 million and 4.6 million. These latter *profit* data pertain to sales turnovers of ECU 276 million and ECU 281 million, which were the turnovers of the *sampled* producers.[122] This implies that the profit reduction from to 10 to 4.6 million is that of the *sampled* producers and not, as explicitly asserted, those of the *Community industry*.

223. The same errors are repeated for cash flow and for investments.

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[117] Provisional Regulation recital (83).

[118] See, table attached to disclosure of 19 June 2001 (Exhibit-India-RW-5). The table is attached to the end of this disclosure; the turnovers are reported on page 1 of that table.

[119] Provisional Regulation, recital (85).

[120] Re-determination, recital (35).

[121] Re-determination, recital (89).

[122] Since the sales of the Community industry was 428.6 million in 1992 and 446.6 million in the I.P., the data in the disclosure of 19 June 2001 (276 and 281 million respectively) can logically only relate to the sales of the sampled producers.

224. As another example of misrepresentation of facts can serve the recent injury 're-confirmation.' In recital (19) it is stated that:

> "the dumping margins found are still substantial and distinctly above *de minimis* levels."

225. Clearly, this is not true. The dumping margins for the two largest exporters from the sample were zero, *i.e.* lower than *de minimis*. This means that the statement of recital (19) is factually wrong.

226. Similarly, the statement in the next sentence of the recital, that "one third of the undercutting would have disappeared if the imports from India had not been dumped" is equally puzzling. The EC conveniently forgets that normal value is one part of the dumping margin and that a change in normal value does nothing to the margins of undercutting.

227. The issue of these misrepresentations is material, since the conclusions that are drawn in the re-determination, in recitals (50) and (51), as well as in the re-confirmation, are all based on these misrepresentations and other errors. Accordingly, the EC did not base itself on positive evidence when drawing its conclusions. It therefore acted contrary to Article 3.1. Equally, the examination cannot be said to have been objective since the evaluation is based on misrepresented facts; this again is therefore contrary to Article 3.1.

2. Intermediate conclusions

228. India considers that it has presented a *prima facie* case with respect to the inconsistencies with Articles 3.1 and 3.4. Data were evaluated which had not even been collected. No overall re-consideration and analysis has ever taken place. Injury is based on reduction in profit of a profitable sample, while price depression is the other reason mentioned (even though average prices increased). Most, if not all, injury factors point towards a healthy industry making significant investments over a long period of time. Important factors such as market share, output, and productivity all showed positive trends and there was no reasoned nor fact-supported explanation concerning why these improvements were not probative in ascertaining the condition of the industry.

229. For these reasons an objective injury determination did not take place and the EC acted contrary to Articles 3.1 and 3.4. In case the Panel would require any further clarifications that may be of assistance in making its findings India would be pleased to provide these clarifications.

E. THE EC IMPROPERLY 'ESTABLISHED' A CAUSAL LINK. THE EC DISREGARDED THE NON-ATTRIBUTION LANGUAGE

1. Claim 6: The EC acted inconsistently with its obligations under Article 3.5 of the Agreement on Implementation of Article VI of GATT 1994

(a) Introduction

230. Not only the injury finding, but also the determination of the alleged cause of the alleged injury is of concern to India.

231. In its conclusions the EC declares in recital (50) that the declining and inadequate profitability is:

> "basically the result of prices which had not been able to reflect the increases in the costs of raw cotton or to keep pace with inflation in prices of consumer goods."

232. Despite this pertinent statement on what is, in effect, *causation* of alleged injury by *other factors*, the EC under point 5 again discusses causation.

233. In that point 5 of the re-determination however the EC completely fails to ensure that the injurious effects of the other known factors are not "attributed" to dumped imports. For example, one factor mentioned in recital (50), the result of prices not being able to pace with inflation in prices of consumer goods, is not discussed at all in point 5.3. Another fact, that in the provisional Regulation the Commission had "concluded that increases in raw material prices had caused injury",[123] is not separated and distinguished from the alleged injury caused by dumped imports.

234. Further factors that are curtly discussed are also not separated and are merely lumped together and remain indistinguishable from alleged injury caused by dumped imports:

> "the effects of other factors … confirmed the above direct causal link."[124]

235. Thus, in the absence of such separation and distinction of the different injurious effects, the EC would have no rational basis to conclude that the dumped imports were indeed *causing* the alleged injury. Accordingly, the EC acted contrary to Article 3.5 when it concluded, without more, that the alleged injury was caused by the dumped imports.

(b) Facts

236. Before presenting its arguments India briefly highlights some perplexing factual determinations by the EC contained in the causality determination.

237. The EC starts off by declaring in recital (50) that the alleged injury was actually caused by another factor: the declining and inadequate profitability is "basically the result of prices which had not been able to reflect the increases in the costs of raw cotton or to keep pace with inflation in prices of consumer goods."

238. In recital (53) the EC states that it does not consider relevant the references to producers not forming part of the Community industry; yet in recital (61) the EC includes such very reference.

239. In recital (54) the EC recalls the volume of dumped imports. It is clear that these figures are wrong, since they include the volume of a country that was not found dumping.

240. In recital (55) the EC recalls the market share increase of the Community industry. The EC also states in this recital that the Community industry's weighted average sales price remained "by and large stable". India is therefore asked to accept that an increase of sales prices with 3.1 per cent[125] is "by and large stable" while a decrease in profits with 2 per cent is "declining."[126]

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[123] Provisional determination, recital (103).

[124] Re-determination. Recital (69).

[125] Total sales value of Community industry in 1992 is ECU 428.6 million (Provisional Regulation at (83)) and sales volume, per the figures of the re-determination is 36,205 tonnes. *I.e.* the weighted average price in 1992 is 11.83 ECU/kg. These figures are in the I.P., respectively, ECU 446.6 million and 36,553 tonnes, *i.e.* 12.21 ECU/kg. The price rise is therefore 0.38 ECU/kg, or 3.1 per cent.

[126] Re-determination, recital (50).

241. In recital (56) the EC recalls that the low prices offered by the exporting producers have exercised downward pressure on prices on the Community market. The statement is based on a premise where non-dumping countries are taken into consideration.

242. In recital (57) the EC again states that: "average sales prices did not increase." As India pointed out, the fact is that the average sales prices went up with 3.1 per cent.[127] In this recital India is therefore again asked to accept that an increase of sales prices with 3.1 per cent means that these "sales prices did not increase" while a decrease in profits with 2 per cent is "declining."[128]

243. More recently, in its Regulation 696/2002 (the 're-confirmation'), the EC changed some of the facts on which it 'establishes' the causal link.

244. Under point 3.2 of that 're-confirmation' the effect from what previously were the dumped imports from three countries is replaced by the effect of the dumped imports from India. The alleged market share increase of the re-determination (15.3 per cent to 21.4 per cent) is replaced by 5.1 to 8.5 per cent. Under this point India takes issue with the fact that the Indian dumped imports are characterized to have increased in market share from 5.1 to 8.5 per cent. As shown earlier,[129] India considers that this calculation is erroneous.[130]

245. Under point 3.3 of the 're-confirmation' the EC "re-examines" other factors with a focus on imports from third countries. For this purpose the EC first recalls five countries with a market share above *de minimis*. The EC then summarizes the imports from *all* other countries. The EC then summarizes the development of Pakistani and Egyptian imports. *At no point* does the EC summarize together the imports from *all* third countries (with a market share over the *de minimis* level).[131]

246. Under point 3.4 of the re-confirmation the EC basically confirms its previous findings on the causal link except that in the re-confirmation the cause of the alleged injury is the Indian imports instead of the imports from Egypt, India, and Pakistan.

(c) Arguments

(i) Argument 1: The causality determination is incorrect

247. As noted earlier, the re-determination contains factual assertions, *e.g.* concerning the alleged dumping countries that are not true. To the extent that these assertions are repaired in the re-confirmation it is clear that this took place after the reasonable period of time. As regards the allegedly dumped imports from India alone, India takes issue with the calculation of the amount of dumped imports. Those amounts were overstated. This claim has been elaborated above.

248. In any event, India considers that the EC has not adequately proven at all that the increase in market share of dumped imports from India with 1.9 per cent (over a five year period)—and which

[127] Total sales value of Community industry in 1992 is ECU 428.6 million (Provisional Regulation at (83)) and sales volume, per the figures of the re-determination is 36,205 tonnes. *I.e.* the weighted average price in 1992 is 11.83 ECU/kg. These figures are in the I.P., respectively, ECU 446.6 million and 36,553 tonnes, *i.e.* 12.21 ECU/kg. The price rise is therefore 0.38 ECU/kg, or 3.1 per cent.

[128] Re-determination, recital (50).

[129] See s*upra* paragraph 100.

[130] As India has shown, the increase of the market share of dumped imports was from 2.7 to 4.6 per cent.

[131] If the EC would have shown such table then such imports would have increased from 37,965 tonnes in 1992 (19 per cent market share) to 48,110 tonnes in the I.P. (25.8 per cent market share). These figures can be calculated by adding the imports of the table with countries with more than 1 per cent market share with the imports from Egypt and Pakistan.

coincided with an increase in market share of the Community industry from 18.1 to 19.7 per cent (or from 22.4 to 25.1 per cent)[132]—were *the cause* of the profit reduction of the Community industry from 3.6 to 1.6 per cent (over a period of five years and which was, in fact, the alleged 'injury').

(ii) Argument 2: The EC disregarded the non-attribution language: neither did the EC examine all other factors which might have caused injury nor did the EC separately distinguish the injury caused by other factors

249. India considers that the EC has disregarded the non-attribution language contained in Article 3.5. The Appellate Body in *United States—Hot Rolled Steel* had occasion to provide its views in detail with respect to this provision.[133] The Appellate Body noted that:

> "This provision requires investigating authorities, as part of their causation analysis, first, to examine *all* "known factors", "other than dumped imports", which are causing injury to the domestic industry "at the same time" as dumped imports."[134] (Emphasis added by Appellate Body)

250. India is of the view that the factor identified by the EC authorities in recital (50) that "prices … had not been able … to keep pace with inflation in prices of consumer goods" has not been examined at all in section 5.3. Since this factor was singled out by the EC as one of the causes for the declining profitability, the EC cannot argue that this factor was not known. India considers therefore that this first aspect of the non-attribution language of Article 3.5 has been frustrated.

251. Second, the Appellate Body continued,

> " … investigating authorities must ensure that injuries which are caused to the domestic industry by known factors, other than dumped imports, are not "*attributed* to the dumped imports."[135] (Emphasis added by Appellate Body)

252. This second aspect was further explained in detail in subsequent sections of the Report.

253. In paragraph 223, the Appellate Body added that:

> " … If the injurious effects of the dumped imports are not appropriately separated and distinguished from the injurious effects of the other factors, the authorities will be unable to conclude that the injury they ascribe to dumped imports is actually caused by those imports, rather than by the other factors. Thus, in the absence of such separation and distinction of the different injurious effects, the investigating authorities would have no rational basis to conclude that the dumped imports are indeed causing the injury which, under the *Anti-Dumping Agreement*, justifies the imposition of anti-dumping duties."

254. In paragraph 228, the Appellate Body explained that:

> " … If the injurious effects of the dumped imports and the other known factors remain lumped together and indistinguishable, there is simply no means of knowing

[132] This depends on whether one takes the data of the provisional Regulation, recital (85) or those of the re-determination, recital (35).

[133] *United States—Anti-Dumping Measures on Certain Hot Rolled Steel Products from Japan*, Report of the Appellate Body of 24 July 2001, WT/DS184/AB/R.

[134] *Ibid.*, paragraph 222.

[135] *Ibid.*

> whether injury ascribed to dumped imports was, in reality, caused by other factors. Article 3.5, therefore, requires investigating authorities to undertake the process of assessing appropriately, and separating and distinguishing, the injurious effects of dumped imports from those of other known causal factors."

255. Clearly, therefore, there is the obligation to separate and distinguish the different injurious effects caused by other factors, from the effects of the dumped imports.

256. In India's view, the EC did not engage in such separation nor did it distinguish the different injurious effects. For example, as regards the increase in raw cotton prices, the EC merely confirmed the findings of the provisional Regulation.[136] That provisional Regulation, in recital (103) stated that "The Commission concluded that increases in raw material prices had caused injury." Nowhere in the provisional Regulation, nor elsewhere for that matter, are the injurious effects caused by this price increase separated and distinguished from the effects of the dumped imports.

257. By not engaging in such mandatory separation and distinguishing of effects of this other factor the EC therefore acted manifestly inconsistently with the non-attribution language of Article 3.5 as clarified by the Appellate Body.

2. Intermediate conclusions

258. India considers that it has presented a *prima facie* case showing that the EC has not respected the requirements of Article 3.5, as clarified by the Appellate Body. The EC has (1) not proven a causal link between the dumped imports and the alleged injury, (2) not examined all other factors which might have caused injury, and (3) not separately distinguished the injury caused by other factors. Moreover, the causality findings contain pertinent factual errors, some of which were only partially 'repaired' as an afterthought more than eight months after the deadline. Needless to say, India would be pleased to provide any further information or clarification which the Panel might need in reaching its findings.

F. THE EC DID NOT PAY PARTICULAR ATTENTION TO THE INTERESTS OF INDIA EVEN THOUGH THE MEASURES HAD BEEN SUBJECT TO DISPUTE SETTLEMENT. THE EC FAILED TO EXPLORE ANY *REMEDY*, CONSTRUCTIVE OR OTHERWISE

1. Claim 7: The EC acted consistently with its obligations under Article 15 of the Agreement on Implementation of Article VI of GATT 1994

2. Claim 8: The EC acted inconsistently with its obligations under Article 21.2 of the DSU

(a) Introduction and Facts

259. The Panel is fully aware of the facts of the original dispute. The EC failed to explore any constructive remedy, even though the desire for undertakings had been broached. As a result of the EC's complete and bare rejection of the Indian request for an undertaking, Indian exporters have, from 28 November 1997 to 14 August 2001 had to face illegal anti-dumping duties. They were prevented from 'benefiting from' any constructive remedy, such as for example a price undertaking.

260. As a result of these illegal duties (both on account of dumping as well as on account of injury) a number of Indian exporters have faced bankruptcy, the most glaring example of which is perhaps the company Omkar. While Omkar never dumped, as was finally admitted, it had to face a high anti-dumping duty. Other similar examples abound.

[136] Re-determination at recital (60).

261. Yet, despite the disastrous results of the original Regulation for the Indian companies, the EC refuses to take responsibility for its actions. Indian exporters respectfully requested that the EC compensate for the damage done.[137] Despite this logical request, the EC did nothing other than adopt 'emergency legislation', which although drafted in generic form, *de facto* appears to be specifically tailored to address the results of the *Bed Linen* dispute.[138] If this emergency legislation would not have been adopted (with *retro*-active effect!), two weeks before Regulation 1644/2001, importers could have qualified for a legitimate refund under EC legislation.

262. In other words, inadmissible duties were collected on Indian exports, which otherwise could all these years have legitimately gone to the Indian exporters by means of a price undertaking.

263. Apart from this first aspect, the EC, as we know, took no steps to terminate the proceeding. On the contrary, measures were kept alive, in a 'dormant' form. Indian exporters (once again) sought to explore a 'constructive remedy'[139] but no response was forthcoming from EC.

264. On the other hand, the first, immediate, EC action with a legal consequence was the suspension of the new results, even though the Panel had clearly held that:

> "[a] decision not to impose an anti-dumping duty, while clearly within the authority of a Member under Article 9.1 of the AD Agreement, is not a "remedy" of any type, constructive or otherwise".[140]

265. The second, less immediate event, was the action to initiate a review, this time with India as the sole target. Indeed, India's hope that non-initiation on its part of an Article 21.5 proceeding on 16 August 2001 might have the effect of de-escalating the dispute, has unfortunately proven to be a *fata morgana*. On the contrary, *diametrically* ***opposite*** to any offer of a remedy, constructive or otherwise, the EC initiated yet another anti-dumping investigation: *Bed Linen-3*. As a result of the speed with which that partial interim review has been conducted Indian exporters may soon, once again, have to face another ordeal of inadmissible anti-dumping measures on imports of Bed Linen from India to EU.

(b) Arguments

(i) First Argument: the EC acted contrary to Article 21.2 of the DSU

266. Article 21.2 of the DSU sets forth that:

> "Particular attention <u>should</u> be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement." (emphasis added)

267. Clearly, the text is not permissive. The word "should", rather than "may", clearly adds the mandatory element to the attention to be paid. There is no indication that there is discretion on part of the importing country authority in the sense that such attention would not have to be paid.[141]

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[137] India-Exhibit-RW-14, page 3.
[138] India-Exhibit-RW-16.
[139] India-Exhibit-RW-14, page 3.
[140] Original Panel report, paragraph 6.229, last sentence.
[141] *Cf. Canada–Aircraft AB*, Report of 2 August 1999, WT/DS70/AB/R at paragraph 187 *ff*. At Paragraph 187 the Appellate Body held:

268. *Paraphrasing* the relevant reasoning of the Appellate Body to the situation at hand: '*If Members that are requested, under Article 21.2 DSU, to pay particular attention to matters affecting the interests of developing country, and Members had no legal duty to pay such particular attention then this Article would be rendered meaningless*.'[142]

269. Thus, Article 21.2 contains a clear obligation once the other elements of the provision are fulfilled. This line of reasoning was also the view of the EC in *Korea–Dairy Products*.[143] In that proceeding the EC argued, as regards the meaning of 'should', that "*even assuming* that an obligation which is not accompanied by criteria is not mandatory"[144] (emphasis added) this would be different in the case there were express criteria. It will be noted that Article 21.2 *does* contain two express criteria that trigger the obligation; thus *even assuming that* 'should' alone is not always mandatory as such, the two additional express criteria leave no doubt.

270. That these two other criteria are fulfilled and are not disputed is beyond doubt: the matter affects the interests of India,[145] and has been subject to dispute settlement.[146]

"We note that Article 13.1 of the DSU provides that "A Member *should* respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate." (emphasis added) Although the word "should" is often used colloquially to imply an exhortation, or to state a preference, it is not always used in those ways. It can also be used "to express a duty [or] obligation".[120] The word "should" has, for instance, previously been interpreted by us as expressing a "duty" of panels in the context of Article 11 of the DSU.[121] Similarly, we are of the view that the word "should" in the third sentence of Article 13.1 is, in the context of the whole of Article 13, used in a normative, rather than a merely exhortative, sense. Members are, in other words, under a duty and an obligation to "respond promptly and fully" to requests made by panels for information under Article 13.1 of the DSU.

[120] *The Concise Oxford English Dictionary*, (Clarendon Press, 1995), p. 1283. See also *The Shorter Oxford English Dictionary*, (Clarendon Press, 1993), Vol. II, p. 2808, and *Black's Law Dictionary*, (West Publishing Co., 1990), p. 1379, which states that "should" "ordinarily impl[ies] duty or obligation; although usually no more than an obligation of propriety or expediency, or moral obligation, thereby distinguishing it from 'ought'."

[121] *European Communities – Hormones*, *supra*, footnote 64, para. 133."

[142] *Ibid.* Paraphrase based on first sentence of para. 188, where the Appellate Body stated that:

"If Members that were requested by a panel to provide information had no legal duty to "respond" by providing such information, that panel's undoubted legal "*right* to seek" information under the first sentence of Article 13.1 would be rendered meaningless. A Member party to a dispute could, at will, thwart the panel's fact-finding powers and take control itself of the information-gathering process that Articles 12 and 13 of the DSU place in the hands of the panel.[122] A Member could, in other words, prevent a panel from carrying out its task of finding the facts constituting the dispute before it and, inevitably, from going forward with the legal characterization of those facts. Article 12.7 of the DSU provides, in relevant part, that "…the report of a panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes." If a panel is prevented from ascertaining the real or relevant facts of a dispute, it will not be in a position to determine the applicability of the pertinent treaty provisions to those facts, and, therefore, it will be unable to make any principled findings and recommendations to the DSB."

[122] *United States – Shrimp*, *supra*, footnote 24, para. 106."

[143] *Korea–Definitive Safeguard Measure on Imports of Certain Dairy Products*, Report of the Appellate Body of 14 December 1999, WT/DS98/AB/R, paragraph 33.

[144] *Ibid.*, paragraph 34. The EC therefore also departs from the point of view that in fact *even without* express criteria the word 'should' contains an obligation.

[145] Original Panel report, paragraph 6.221, second sentence.

[146] India-Exhibit-RW-1.

271. Despite these criteria having been fulfilled, and accordingly the obligation having been triggered beyond doubt, the EC did not pay any particular attention to the Article. Nothing particular happened, except the suspension of measures, which, however, as already indicated by the original panel, is not a remedy of any type, constructive or otherwise. The EC would not wish to defy common sense by arguing that where suspension does *not* qualify as a 'remedy' (constructive or otherwise), it *does* qualify as 'particular attention'. Perplexing enough, and contrary to *any* interpretation of Article 21.2 DSU, Indian exporters are the target of a third *Bed linen* anti-dumping proceeding.

(ii) Second Argument: The EC acted contrary to Article 15 ADA

272. As pointed out, the Panel had previously held that:

> "[a] decision not to impose an anti-dumping duty, while clearly within the authority of a Member under Article 9.1 of the AD Agreement, is not a "remedy" of any type, constructive or otherwise".[147]

273. Despite this pertinent finding of the Panel, this decision not to impose is ***exactly*** what the EC did. The EC neither terminated the proceeding, as the outcome-decisive injury findings would have mandated, nor explored any remedy, constructive or otherwise.

274. India had in the past already explained the preference of exporters for an undertaking. The EC was reminded of this fact on 3 July 2001.[148]

275. Yet, once again, nothing was explored, despite the mandatory language of the text of Article 15: "***shall***". India once again regrets the inaction. India requests the Panel to find that the failure to pay heed to the mandatory language of the provision, and moreover to do ***exactly*** what the Panel found ***not*** to be a remedy, constitutes an inconsistency with Article 15.

3. Intermediate Conclusions

276. India considers that it has presented a *prima facie* case with respect to the question as to how the EC has acted inconsistently with Articles 15 ADA and 21.2 DSU. Accordingly, India requests that the Panel make such finding.

V. CONCLUSIONS

277. For the above reasons, India requests the Panel to find that:

> 1. By failing to withdraw the measures found to be inconsistent with the Anti-Dumping Agreement and to bring its measures into conformity with its obligations under the Anti-Dumping Agreement within the mutually agreed reasonable period of time, the EC has failed to comply with the DSB recommendations and rulings in this dispute; and
>
> 2. The re-determination, as amended, and the subsequent actions, as identified above, are inconsistent with the following provisions of the Anti-Dumping Agreement and the DSU:
>
> - Article 2.2.2(ii) of the ADA by not properly calculating a "weighted average" of amounts for SG&A and profits;

[147] Original Panel report, paragraph 6.229, last sentence.
[148] Exhibit-India-RW-14.

- Articles 3.1 and 3.3 of the ADA by cumulating Indian imports with those from a country for which no dumping was found;

- Article 5.7 of the ADA by not simultaneously considering the evidence of dumping and injury;

- Articles 3.1 and 3.2 of the ADA by not properly excluding the portion of non-dumped imports from the total volume of Indian imports;

- Articles 3.1 and 3.4 of the ADA by reciting factors without even collecting them and by failing to enter into an overall reconsideration and analysis of the information in light of the requirements of the Anti-Dumping Agreement;

- Article 3.5 of the ADA by incorrectly establishing a causal relationship between dumped imports and injury and by disregarding the non-attribution language;

- Article 15 of the ADA by not exploring any remedy, constructive or otherwise; and

- Article 21.2 of the DSU by failing to pay particular attention to this matter affecting India, and which already had formed the subject of dispute settlement.

ANNEX A-2

FIRST SUBMISSION OF THE EUROPEAN COMMUNITIES

Geneva, 29 July 2002

Summary of Contents Page

Table of Contents

I. INTRODUCTION AND SUMMARY

1. This first submission of the European Communities (the "EC") is filed in response to the submission of India of 15 July 2002. In Section II the EC raises a series of preliminary objections in accordance with paragraph 13 of the Working Procedures. In Section III the EC addresses the claims and arguments made by India.

2. The EC requests the Panel to make preliminary rulings to the effect that certain claims raised in India's submission are not within the Panel's jurisdiction, because they concern measures which were not "taken to comply" with the recommendations and rulings of the Dispute Settlement Body (the "DSB") in the original dispute, or because they concern findings which could have been raised by India during the original proceeding, or because they were not properly stated in the request for the establishment of the Panel.

3. To the extent that the Panel would consider that the claims raised in India's submission are within its jurisdiction, the EC submits that they are manifestly unfounded.

4. Article 2.2.2(ii) of the *Agreement on Implementation of the General Agreement on Tariffs and Trade 1994* (the "Anti-Dumping Agreement") does not prescribe the use of any specific averaging method. By using the sales value of the "other exporters or producers" as averaging factor, the EC authorities have exercised the discretion afforded by Article 2.2.2 (ii) in a reasonable manner. In contrast, the averaging method proposed by India would lead to a meaningless and unreasonable result. In any event, the violation alleged by India is inconsequential and does not give rise to nullification or impairment.

5. The EC authorities acted consistently with Article 3.3 of the *Anti-Dumping Agreement*. At the time when Regulation 1644/2001[1] (which is the only measure "taken to comply") was adopted, the EC authorities were entitled to treat imports from Pakistan as "dumped". In any event, as of the date of establishment of the Panel (which is the relevant date for assessing the consistency of the measures "taken to comply" with the covered agreements) the injury finding was based exclusively on the effects of the dumped imports from India.

6. Article 5.7 of the *Anti-Dumping Agreement* applies only with respect to the original investigation. It does not apply to subsequent reviews or to re-determinations made for the purpose of implementing the DSB's rulings and recommendations or of applying the legal interpretations made in adopted Appellate Body or panel reports.

7. The EC authorities found that all imports from non-sampled exporters (both co-operating and non-co-operating) were "dumped". Therefore, they were entitled to consider all such imports as "dumped" for the purposes of Article 3.2 of the *Anti-Dumping Agreement*. India's claim is illogical and untenable. It implies that the same imports may be simultaneously "dumped" and "non-dumped" under different provisions of the *Anti-Dumping Agreement*.

8. The EC carried out an overall reconsideration and analysis of the economic indicators pertaining to injury. In doing so, it properly evaluated these factors, for which it had already collected data in the original investigation, in accordance with the requirements of Article 3.1 and 3.4. It concluded that whilst the Community industry managed to increase production and to slightly increase its sales volume and market share by concentrating on sales of higher value niche products, it nevertheless suffered declining and inadequate profitability, which was basically the result of price

[1] Council Regulation (EC) No 1644/2001, of 7 August 2001 (OJ L 219/1, 14.8.2001) ("Regulation 1644/2001") (Exhibit India – RW – 18).

suppression. The injury indicators for cash flow, return on investments and employment also showed declining trends. The EC did not base its injury determination on erroneous or misrepresented facts.

9. The EC authorities made a proper determination that dumped imports were a genuine and substantial cause of injury, as required by Article 3.5 of the *Anti-Dumping Agreement*. They did examine all known causes of injury. The increase in the cost of raw cotton was not a separate cause of injury.

10. The requirement to explore "constructive remedies" provided for in Article 15 of the *Anti-Dumping Agreement* must be fulfilled before "applying" anti-dumping duties. Since the EC is not "applying" anti-dumping duties, it cannot be accused of having violated that obligation. Assuming *arguendo* that the EC authorities had been required to explore "constructive remedies", the suspension of the application of the anti-dumping duties would qualify as a "constructive remedy".

11. Article 21.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") is a non-mandatory provision. In any event, the EC authorities did pay "particular attention" to the interests of India.

II. REQUESTS FOR PRELIMINARY RULINGS

1. Introduction

12. The EC requests that the Panel make the following preliminary rulings in accordance with paragraph 13 of its Working Procedures:

(1) Regulations 160/2002[2] and 696/2002[3]are not measures "taken to comply" with the DSB's rulings and recommendations within the meaning of Article 21.5 of the *DSU* and, therefore, are not within the Panel's jurisdiction;

(2) the relevant date for assessing the consistency of the measures "taken to comply" with the covered agreements is the date of establishment of the Panel;

(3) certain claims raised by India in its first submission with respect to findings set out in the original measure which were not challenged by India before the original Panel, and which have not been modified by the measures at issue in this dispute, are not properly before this Panel; and

(4) the following claims raised by India in its first submission were not stated in its request for the establishment of the Panel, contrary to the requirement imposed by Article 6.2 of the *DSU*, and are, therefore, not within the Panel's terms of reference:

- the claim that the EC acted inconsistently with Article 4.1(i) of the *Anti-Dumping Agreement* by excluding from the "Community industry" a producer which had imported bed linen from Pakistan;

- the claim that the EC failed to respect the "reasonable period of time" agreed by the parties under Article 21.3 b) of the *DSU*.

[2] Council Regulation (EC) No 160/2002, of 28 January 2002 (OJ L 26/1, 30.1.2002) ("Regulation 160/2002") (Exhibit India – RW – 22).

[3] Council Regulation (EC) No 696/2002, of 22 April 2002 (OJ L 109/3, 25.4.2002) ("Regulation 696/2002") (Exhibit India – RW – 30).

2. Regulations 160/2002 and 696/2002 are not measures "taken to comply" within the meaning of Article 21.5 of the DSU

A. Summary of relevant facts

13. In the original panel proceeding India submitted no claims against the findings of dumping with respect to imports originating in Pakistan and Egypt reached by the EC authorities in Regulation 2398/97.[4] Nor, consequently, did the DSB make any rulings or recommendations with respect to such findings.

14. For that reason, when implementing the DSB's rulings and recommendations, the EC authorities did not re-examine the findings of dumping for Egypt and Pakistan. This was clearly explained in Regulation 1644/2001, which states that

> The findings on dumping with regard to imports originating in Egypt and Pakistan have not been revised. The relevant dumping margins are set out in recitals 29 to 31 of the definitive Regulation.[5]

15. Subsequently, nevertheless, the EC authorities decided, on their own motion, to determine whether imports originating in Pakistan and Egypt were dumped in the light of the legal interpretations made by the panel and the Appellate Body in *Bed Linen*. The results of that re-determination are set out in Regulation 160/2002.

16. The EC authorities concluded in Regulation 160/2002 that imports originating in Pakistan were not dumped.[6] It was decided, therefore, to terminate the anti-dumping proceeding with respect to those imports.[7]

17. As regards imports originating in Egypt, the EC authorities concluded that they lacked the necessary information to re-calculate the dumping margin in accordance with the legal interpretations made in *Bed Linen* and, therefore, to reach a finding on whether or not imports from Egypt were dumped. More specifically, Regulation 160/2002 states that

> There are no data available from the original investigation which would allow the determination of the amount for profit on the basis of any methodology provided for under Article 2(6) of the basic regulation. In these circumstances, a detailed reconsideration of the dumping margin for Egypt is not possible.[8]

18. In view of the above, it was decided to suspend the application of the anti-dumping duties on imports from Egypt.[9] It was further provided that the duties would expire unless an interested party requested a review within a certain time-limit.[10] Eventually, no such review was requested and the duties on imports originating in Egypt expired as of 28 February 2002.[11]

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[4] Council Regulation (EC) No 2398/1997, of 28 November 1997 (OJ L 133/1, 4.12.1997) ("Regulation 2398/97") (Exhibit India – 9).
[5] Regulation 1644/2001, recital 15.
[6] Regulation 160/2002, recital 13.
[7] Ibid., Article 2.
[8] Ibid., recital 14.
[9] Ibid., Article 1.1.
[10] Ibid., Article 1. 2.
[11] Notice of Expiry published on OJ C65/12, 14.3.2002 (Exhibit India – RW – 24).

19. Following the termination of the proceeding against Pakistan and the expiry of the duties on Egypt, the EC authorities re-assessed the finding of injury made in Regulation 2398/97, as amended by Regulation 1644/2001, in order to determine whether imports from India were, on their own, a cause of injury. The results of that re-assessment are set out in Regulation 696/2002.

20. The EC authorities concluded in Regulation 696/2002 that imports of India, when considered in isolation, were a cause of injury and, therefore, confirmed the imposition of definitive anti-dumping duties on those imports.[12] At the same time, nonetheless, the EC authorities confirmed also the suspension of the application of those anti-dumping duties.[13].

21. India has asserted that the EC authorities "quickly came up" with Regulation 696/2002 "in reaction to" India's request for consultations of 8 March 2002.[14] That is not true. Regulation 160/2002 already envisaged expressly that it could be necessary to re-assess the injury findings.[15] The reason why no such re-assessment was conducted in Regulation 160/2002 was because of the uncertainty at that moment as to whether the measures applied with regard to imports originating in India and/or Egypt would expire. Following the subsequent decision by the EC Commission to open a review of the measures applied to imports from India and the expiry of the measures on Pakistan and Egypt, the EC Commission conducted a re-assessment of the injury findings, the results of which were promptly disclosed to India.

B. Argument

22. Article 21.5 of the *DSU* provides in pertinent part that

> Where there is disagreement as to the existence or consistency with a covered agreement of measures *taken to comply* with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures …[16]

23. As clarified by the Appellate Body in *Canada – Aircraft (21.5)*,

> Proceedings under Article 21.5 do not concern just *any* measure of a Member of the WTO; rather, Article 21.5 proceedings are limited to those 'measures *taken to comply* with the recommendations and rulings' of the DSB. In our view, the phrase "measures taken to comply" refers to measures which have been, or which should be, adopted by a Member to bring about compliance with the recommendations and rulings of the DSB.[17]

24. Of all the measures cited in India's panel request, the only measure "taken to comply" with the DSB's recommendations and rulings is Regulation 1644/2001. Accordingly, that is the only measure which should be considered by the Panel when addressing India's claims.

25. Regulation 160/2002 is not a measure "taken to comply" with the DSB's recommendations and rulings in *Bed Linen*. As explained, Regulation 160/2002 sets out the results of the re-examination of the findings of dumping made in Regulation 2398/97 with regard to imports originating in Pakistan

[12] Regulation 696/2002, Article 1.
[13] Ibid.
[14] India's First Submission, para. 78.
[15] Regulation 160/2002, recitals 20 –21.
[16] Emphasis added.
[17] Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft – recourse by Brazil to Article 21.5 of the DSU* ("*Canada – Aircraft (21.5)"*), WT/DS/AB/RW, para. 36. (Emphasis added in the original).

and Egypt. The DSB made no recommendations or rulings with respect to such dumping findings, which were not challenged by India at any point during the original panel proceedings. Thus, the EC was under no obligation to re-examine the findings of dumping for Egypt and Pakistan. Therefore, Regulation 160/2002 cannot be considered as a measure "taken to comply" within the meaning of Article 21.5. It is a subsequent and distinct measure, which can be reviewed only by an ordinary panel established under Article 4.7 of the *DSU*.

26. For the same reason, Regulation 696/2002 is not a measure "taken to comply" with the DSB's rulings and recommendations in *Bed Linen*. The injury re-determination made in Regulation 696/2002 was rendered necessary by the earlier decision of the EC authorities to re-determine the findings of dumping for Pakistan and Egypt, which decision, as explained, was not itself a measure "taken to comply" with the DSB's recommendations and rulings in that dispute.

27. Since Regulations 160/2002 and 696/2002 are not measures "taken to comply" with the DSB's recommendations and rulings in *Bed Linen*, any claims involving the findings made by the EC authorities in those two regulations are beyond this Panel's jurisdiction. Those claims should have been brought by India before an ordinary panel established in accordance with Article 4.7 of the *DSU*.

3. The relevant date for assessing the consistency of the measures "taken to comply" is the date of establishment of the Panel

A. Summary of relevant facts

28. In accordance with Article 21.3 (b) of the DSU, on 26 April 2001 the EC and India agreed on a "reasonable period of time" for implementing the recommendations and rulings of the DSB of five months and two days, i.e. until 14 August 2002.[18]

29. Regulation 1644/2001 was adopted on 7 August 2001 and published in the EC's Official Journal on 14 August 2001. Regulation 160/2002 was adopted on 28 January 2002 and published on 30 January 2002. Finally, Regulation 696/2002 was adopted on 22 April 2002 and published on 25 April 2002.

30. This Panel was established on 22 May 2002 on the basis of a request made by India on 3 May 2002.

31. Thus, Regulation 1644/2001 was adopted and published before the end of the "reasonable period of time", while Regulations 160/2002 and 696/2002 were adopted and published after the end of the "reasonable period of time", but before this Panel was established.

B. Argument

32. At several points in its submission, India argues that, even if the alleged inconsistencies with the *Anti-Dumping Agreement* had been cured by Regulations 160/2002 and 696/2002, those regulations cannot provide a valid "justification" because they were adopted outside the "reasonable period of time".[19]

33. India's allegations reflect a basic misunderstanding of the scope of a panel's mandate under Article 21.5 of the *DSU*. India assumes erroneously that such mandate is limited to establish whether the measures "taken to comply" within the "reasonable period of time" are consistent with the covered agreements.

[18] WT/DS141/10 of 1 May 2001 (Exhibit India - RW - 2).
[19] See e.g. paras. 73, 82, 134 and 247 of India's First Submission.

34. As noted by the panel in *US – Shrimps (Article 21.5)*, "the DSU is silent as to the date on which the existence or consistency of the implementing measure must be assessed".[20] The same panel went on to find that

> … it should take into account all the relevant facts occurring until the date the matter was referred to it. By applying this approach, an Article 21.5 panel can reach a decision that favours a prompt settlement of the dispute. Indeed, it avoids situations where implementing measures allowing for compliance with the DSB recommendations and rulings would be disregarded simply because they occur after the end of the reasonable period of time. The Panel, while mindful of the obligation of the United States to bring its legislation into conformity by the end of the reasonable period of time, considers that it is consistent with the spirit of Article 3.3 of the DSU to take into account any relevant facts until the date on which the matter was referred to the Panel.[21]

35. The EC agrees with the views of the panel in *US – Shrimps (21.5)*.[22] As submitted above, the EC considers that Regulations 160/2002 and 696/2002 are not measures "taken to comply". However, should the Panel conclude that they are, the EC submits that the relevant date for assessing the consistency of the measures "taken to comply" with the covered agreements is the date of establishment of the panel, and not that of the end of the "reasonable period of time".

36. Of course, the EC is not suggesting that the implementing Member is under no obligation to implement the DSB's rulings and recommendations within the "reasonable period of time". That obligation, however, does not flow from Article 21.5, but instead from Article 21.3 of the *DSU*, which states in pertinent part that

> If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period to comply.

37. It is obvious, nevertheless, that a finding that a Member has violated Article 21.3 of the *DSU* by implementing late the DSB's recommendations and rulings would be necessarily declaratory, since there is nothing that such Member could do in order to correct that violation. In any event, as discussed below, in the present case India did not state in its panel request any claims based on Article 21.3 of the *DSU*.

4. Claims that could have been raised in the original dispute but were not

A. Summary of relevant facts

38. In its First Submission, India raises a number of claims against findings set out in the original measure which were not challenged by India before the original Panel and which have not been modified by the findings made in the measures at issue in this proceeding.

39. For example, in the original proceeding India's only claim under Article 3.5 was that the EC authorities had not established that injury had been caused "through the effects of dumping" because

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[20] Panel Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 by Malaysia* ("*United States – Shrimp (21.5)*"), WT/DS58/RW, para. 5.12.

[21] Ibid., para. 5.13.

[22] In *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 by Canada*, WT/DS18/RW, para. 7.10, the panel went even further by taking into account facts that occurred after the end of the establishment of the panel.

they had treated as "dumped imports" what India considered to be "non-dumped transactions".[23] That claim was dismissed by the Panel.[24]

40. Yet, India now complains that the causality determination is inconsistent with Article 3.5, *inter alia*, because the EC authorities failed to examine the effects of the increase in consumer prices.[25] and to separate the effects of the increase in the cost of raw cotton.[26]. The findings made by the EC authorities with respect to those factors have been confirmed without any modification in the re-determination at issue in this dispute. Thus, the claims now raised by India under Article 3.5 are claims which India could have raised during the original proceedings, but which India chose not to raise.

41. Similarly, in the original proceeding, India's only claim under Article 3.4 was that the EC authorities had failed to consider all the relevant injury factors.[27] Yet, now India contests the adequacy of the findings made by the EC authorities with respect to those Article 3.4 factors which were examined in the original measure. For example, India claims that the evaluation of factors such as sales[28], market share[29], price development[30], production[31], profitability[32] or employment[33] is inadequate, even though Regulation 1644/2001 limits itself to confirm the findings with respect to those factors made in Regulation 1069/1997.[34] Thus, once again, India is making claims under Article 3.4 which it could have raised in the original proceeding.

B. Argument

42. The EC submits that, to the extent that the re-determination at issue in this dispute does nothing but confirm the findings already set out in the measure at issue in the original proceeding, it cannot be considered that such re-determination constitutes a measure "taken to comply" within the meaning of Article 21.5 of the *DSU*. Therefore, any claims relating to those findings should be dismissed as not being properly before the Panel.

43. The EC is aware that in *Canada – Aircraft (21.5)*, the Appellate Body noted that[35]

> in carrying out its review under Article 21.5 of the DSU, a panel is not confined to examining the "measures taken to comply", from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings.

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[23] India's First Submission to the original Panel, paras. 4.217- 4.220, reproduced in Panel report, p. 221.

[24] Panel report, para. 6.142.

[25] India's First Submission, para. 250.

[26] Ibid., para. 256.

[27] India's First Submission to the original Panel, paras. 4.56-4.76, reproduced in Panel report, pp. 170-177.

[28] India's First Submission, paras. 166-171.

[29] Ibid.

[30] Ibid.

[31] Ibid., paras. 180-182.

[32] Ibid., paras. 172-1793

[33] Ibid., paras. 201-204.

[34] Commission Regulation (EC) No 1069/97, of 12 June 1997, imposing a provisional anti-dumping duty on imports of cotton-type bed linen originating In Egypt, India and Pakistan, (OJ 13.6.97 L 156/11) ("Regulation 1069/97" or "Provisional Regulation") (Exhibit India – 8), at recitals 31, 34 and 36.

[35] Appellate Body Report, *Canada – Aircraft (Article 21.5)*, para. 41

44. Nevertheless, the present case differs fundamentally from *Canada – Aircraft (21.5*). In that case, Canada objected to the claims raised by Brazil against a new and different measure on the grounds that no similar claims had been raised against the original measure. Had Canada's objection been upheld, Brazil would have been barred from making claims that could not have been raised in the original proceedings. In contrast, the issue before this Panel is whether India should be allowed to raise at this stage claims that it could have raised before the original panel.

45. Even if the Panel were to take the view that the claims at issue concern measures "taken to comply", the EC submits that by not raising those claims in a timely manner, India has acted inconsistently with the requirements of Article 13.10 of the *DSU*, which provides that

> … if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute.

46. In *US – FSC*, the Appellate Body noted that[36]

> Article 3.10 of the DSU commits Members of the WTO, if a dispute arises, to engage in dispute settlement procedures "in good faith in an effort to resolve the dispute". This is another specific manifestation of the principle of good faith which, we have pointed out, is at once a general principle of law and a principle of general international law. This pervasive principle requires both complaining and responding Members to comply with the requirements of the DSU (and related requirements in other covered agreements) in good faith. By good faith compliance, complaining Members accord to the responding Members the full measure of protection and opportunity to defend, contemplated by the letter and spirit of the procedural rules. The same principle of good faith requires that responding Members seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB or the Panel, so that corrections, if needed, can be made to resolve disputes. The procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes.

47. In the same way as the principle of good faith requires that the defendant raises its objections "seasonably and promptly", it requires also that the complaining party raises its claims in a timely manner.

48. The purpose of Article 21.5 is to provide an expeditious procedure to establish whether a Member has properly implemented the DSB's recommendations and rulings. Article 21.5 is not intended to provide a "second service" to complaining parties which, by negligence or calculation, have omitted to raise certain claims during the original proceeding.

49. By withholding certain claims which it could have raised before the original panel until these proceedings, India has prejudiced the procedural rights of the EC. In the first place, the deadlines are shorter in Article 21.5 proceedings, thus rendering more difficult the EC's defence. (The EC recalls that it has been granted only two weeks for replying to India's first submission, which India had had several months to prepare, and that a request for a one week extension was summarily rejected due to India's opposition). Second, and more important, were the Panel to uphold the claims at issue, the EC would not be entitled to a "reasonable period of time" for implementation.

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[36] Appellate Body Report, *United States – Tax Treatment for Foreign Sales Corporations*, ("*US – FSC*"), WT/DS108/AB/R, para. 166. [footnotes omitted]. See also Report of the Appellate Body in *Mexico Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States (Recourse to Article 21.5)*, WT/DS132/AB/R, para. 50.

50. In so far as India did not make claims with respect to a finding set out in the original measure, the EC authorities could assume legitimately that such finding was WTO consistent and need not be corrected. It would be manifestly unfair to expose the EC to the possibility of an immediate suspension of concessions under Article 22 of the *DSU* in response to a violation which the EC could not have anticipated when the implementing measures were taken and which it will be given no opportunity to correct.

5. Claims not stated in the panel request

A. Introduction

51. In the original proceeding, the Panel ruled that certain claims raised by India were not within its terms of reference because India had not even cited the relevant treaty Articles in the panel request, contrary to the requirement imposed by Article 6.2 of the *DSU*[37].

52. India has done the same again. As discussed below, in its first submission, India has asserted certain claims that are based on legal provisions which were not cited in the panel request. The EC requests the Panel to make a preliminary ruling to the effect that such claims are outside the scope of its terms of reference.

B. Article 4.1 (i)

53. India alleges that, by not taking into account for the purposes of the injury analysis evidence concerning a company which was excluded from the "Community industry" in the original investigation because it had imported the product under investigation from Pakistan, the EC authorities acted inconsistently with Article 3.1.[38]

54. Although India appears to allege exclusively a violation of Article 3.1, this claim involves necessarily a claim based on Article 4.1(i). The Panel cannot find a violation of Article 3.1 unless it determines first whether the exclusion of the company concerned from the "domestic industry" was consistent with Article 4.1 (i). Yet, that provision is nowhere stated in the Panel request.

C. Claims that the EC failed to respect the agreed "reasonable period of time"

55. As mentioned above, at several points in its submission, India alleges that the EC did not respect the deadline agreed under Article 21.3 b).[39]

56. This claim is not mentioned in the panel request. Furthermore, even in its first submission, India fails to identify these allegations as a separate claim and to cite the appropriate legal basis, which, as explained above, is Article 21.3 of the *DSU* and not Article 21.5.

[37] Panel report, paras. 6.12-6.17.
[38] India's First Submission, paras. 215-217.
[39] See e.g. paras. 73, 82, 134 and 247 of India's First Submission.

III. CLAIMS BROUGHT BY INDIA

A. CLAIMS UNDER THE ANTI-DUMPING AGREEMENT

1. Claim 1 : Article 2.2.2 (ii)

A. Claim

57. India alleges that the EC authorities acted inconsistently with Article 2.2.2 (ii) "by not properly calculating a weighted average of actual amounts for SGA & profits".[40]

58. More precisely, India claims that the EC authorities violated that provision by weighting the amounts for administrative, selling and general costs ("SGA") and profits according to the sales value of each of the "other exporters and producers". According to India, those amounts should have been averaged according to the sales volume of those exporters, measured by "units/sets".

B. Summary of relevant facts

59. In the re-determination of dumping for India contained in Regulation 1644/2001, the EC authorities resorted to constructed normal value for the five exporters included in the sample (Anglo-French, Bombay Dyeing, Madhu, Omkar and Prakash).

60. The amounts for SGA and profit included in the constructed normal value of one of the five exporters in the sample (Bombay Dyeing) were established in accordance with the *chapeau* of Article 2.2.2, while the amounts for SGA and profits for the other four exporters were calculated in accordance with the method laid down in Article 2.2.2 (ii).

61. For the purposes of applying Article 2.2.2 (ii), the EC authorities averaged the amounts for SGA and profits incurred and realised by Bombay Dyeing and by Standard Industries (a reserve company) on the basis of the net value of their domestic sales.

C. Argument

(a) Introduction

62. Article 2.2.2(ii) does not prescribe the use of any specific averaging factor. Therefore, the investigating authorities have discretion to use the averaging factor which they deem most appropriate.

63. In the case at hand, the EC authorities have exercised that discretion in a reasonable manner. The pertinence of using the value of the domestic sales made by the "other exporters or producers" for averaging the amounts for SGA and profits incurred and realised in respect of such sales is beyond question. Furthermore, the sales value is an objective and neutral criterion which, *a priori*, does not confer an advantage to any interested party. In contrast, the method proposed by India would lead to a meaningless result and is manifestly unreasonable.

64. Even assuming that Article 2.2.2 (ii) required to use the sales volume, India advances no reason to justify why the sales volume must be measured in "units/sets" rather than by weight or size. As shown below, had the EC authorities used the sales volume measured by weight, the dumping margins would be higher than those calculated by using the sales value. Thus, in any event, the

[40] Request for the Establishment of a Panel of 7 May 2002, WT/DS141/13/Rev.1.

violation alleged by India would be inconsequential and give rise to no nullification or impairment of benefits accrued to India under Article 2.2.2 (ii).

(b) India's claim has no basis on the text of Article 2.2.2 (ii)

65. It is manifest that, contrary to India's assertions[41], the text of Article 2.2.2 (ii) lends no support to its claim that the EC authorities were not permitted to average the amounts for SGA and profits according to sales value.

66. Article 2.2.2 (ii) states that, where the method set out in the *chapeau* of Article 2.2.2 cannot be applied, the amounts for SGA and for profits may be determined on the basis of

> the weighted average of the actual amounts incurred and realised by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin.

67. Thus, while Article 2.2.2(ii) provides for the calculation of a "weighted average", it does not prescribe the use of any specific averaging factor.

68. India's allegations that the EC method reduces the terms "weighted average" to redundancy[42] are groundless. It is beyond question that the EC method involves the calculation of a "weighted average" of the amounts for SGA and profits incurred and realised by other exporters and producers, as required by Article 2.2.2 (ii).

69. The EC agrees with India's obvious proposition that the weighted average must reflect the "relative importance" of the "other exporters or producers".[43] However, contrary to India's assumption, there is no reason why the "relative importance" of each exporter or producer should be measured necessarily in terms of sales volume, rather than of sales value.

(c) India's contextual arguments are without merit

70. Well aware that its interpretation finds no support in the text of Article 2.2.2 (ii), India puts forward a series of contrived "contextual" arguments[44]. All of them are without merit.

71. The provisions of the *Anti-dumping Agreement* invoked by India address different issues and serve different purposes. They cannot be relied upon in order to read into Article 2.2.2 (ii) an additional requirement which, quite simply, is not there.

72. In fact, if anything, Footnotes 2 and 5 and Article 6.10 suggest that, when the drafters of the *Anti-Dumping Agreement* intended that quantities be used, they said so expressly. *A contrario*, it may be inferred from those provisions that, when the *Anti-Dumping Agreement* remains silent, the investigating authorities must be accorded discretion to chose between sales volume and other pertinent criteria.

73. Footnotes 2 and 5 do not provide for the calculation of "weighted averages". Therefore, it is difficult to see how they could be relevant for the interpretation of those terms in Article 2.2.2 (ii). Furthermore, the purpose of the "5 per cent rule" in Footnote 2 and of the "20 per cent rule" in Footnote 5 is to establish whether the domestic price (i.e. the domestic sales value) provides a reliable

[41] India's First Submission, paras. 51-53.
[42] Ibid., paras. 53-54.
[43] Ibid., paras. 52-53.
[44] Ibid., paras. 55-60.

basis for calculating the normal value. In view of that, it would have been illogical to apply those thresholds to the sales value.

74. Article 6.10, which India itself describes as "indirect context"[45], is equally irrelevant. Article 6.10 is not concerned with the calculation of "weighted averages". It provides that the investigating authorities may resort to sampling where the determination of individual dumping margins for all the exporters is "impracticable". The "practicability" of a dumping determination is a function of the number of sales to be examined and not of their price: the examination of a sale does not become more cumbersome simply because it is made at a higher price. This explains why Article 6.10 refers to the "largest volume of the exports … which can reasonably be investigated", rather than to the "largest value of exports … which can be investigated".

75. The Judgement of the Court of First Instance ("CFI") of 17 July 1998 in the case T-118/96 cited by India[46] does not constitute "context" within the meaning of Article 31 of the *Vienna Convention*. Moreover, that judgement does not address the interpretation of Article 2.6 (a) of the EC Basic Regulation (the equivalent of Article 2.2.2 (ii)). In any event, the CFI's reasoning does not support, but rather contradicts, India's position. Contrary to India's assertions, the CFI did not rule that "volume should be the norm".[47] Rather, the CFI held that

> The decision to apply a figure of 10 per cent to the volume rather than the value of domestic sales falls within the broad discretion enjoyed by the institutions.[48]

76. In other words, the CFI was of the view that, in the absence of any specific provision in the EC Basic Anti-Dumping Regulation, the institutions had discretion to use either volume or value, which is also the position maintained by the EC in this case.

77. Nor is correct India's assertion that the CFI found "that the volume-context of the Regulation was sufficient to override any preference for a value-based determination".[49] After concluding that the EC institutions had broad discretion to use either volume or value, the CFI went on to note that

> Moreover, the institutions' decision does not exceed the limits of their discretion. It should be observed that the criteria they use in connection with the concept of the ordinary course of trade … and for assessing whether sales on the domestic market are representative …. apply also to the volume of sales of the like product.[50]

78. Thus, the CFI relied upon the "5 per cent rule" and the "20 per cent rule" exclusively for the purpose of confirming that, by choosing to use volume when applying the "10 per cent rule", the EC authorities remained within the limits of their margin of discretion. Furthermore, the CFI did not mention Article 2.6 (a) of the EC Basic Anti-Dumping Regulation among those provisions which provided relevant context for the interpretation of the "10 per cent rule".

[45] Ibid., para. 55.
[46] Ibid. para. 59.
[47] Ibid., footnote 51.
[48] Judgement of the CFI of 17 July 1998 in the case T - 118/96, at para. 76.
[49] India's First Submission, footnote 51.
[50] Judgement of the CFI of 17 July 1998 in the case T - 118/96, para. 79.

(d) The EC's interpretation does not contradict the positions expressed in the original proceeding

79. India appears to assume that the figures mentioned in the EC's statements to the original panel which it cites in its submission[51] are percentages of the sales volume. That assumption is incorrect. As the EC authorities have already explained to the Indian exporters[52], those figures are percentages of the sales value. They differ from the percentages used in the calculation of the reasonable amount for profit and SGA because they are percentages of all domestic sales, and not of the combined value of sales by Bombay Dyeing and Standard Industries.

(e) The EC has exercised reasonably the discretion afforded by Article 2.2.2 (ii)

80. The averaging method used in this case is the same generally applied by the EC authorities when resorting to Article 2.2.2 (ii). The EC authorities average the amounts for SGA and profits according to the sales value because that method is easier to apply and can be used in all the investigations. In contrast, if the averaging was made according to volume, it would be necessary to choose in each investigation one of the several possible criteria for measuring the sales volume of the product concerned. For example, in the case at hand it would have been necessary to decide whether to average the SGA and profits according to the number of "units/sets", as proposed now by India, or according to weight or size.

81. Moreover, the method applied by the EC is consistent with the methodologies applied by the EC authorities at previous steps of the dumping calculation in the *Bed Linen* investigation. Thus, in accordance with well established practice, the SGA expenses of each exporter were allocated among the different products manufactured by that exporter, and then among the different types of the product under consideration, on the basis of turnover, and not on the basis of quantity. Likewise, the SGA and profits incurred and realised by each exporter with respect to each product type were averaged according to value, rather than volume, in order to establish the SGA and profit margins for the product under investigation. India has at no point challenged the use of these methodologies.

82. Furthermore, the EC authorities generally use the same averaging factor whenever it is necessary to calculate a weighted average of data for different companies. For instance, when calculating the "all-others" dumping rate in accordance with Article 9.4 (i) of the *Anti-Dumping Agreement*, the EC authorities averaged the dumping margins of the exporters included in the examination according to their sales value, and not according to their sales volume. Similarly, to mention but another example, for the purposes of the injury determination, the EC authorities averaged the profit margins of the EC producers included in the sample according to their sales value. Again, India has not challenged the use of the sale value for these purposes.

83. Compared to the method proposed by India, the averaging method applied by the EC authorities gives a greater weight to the exporters with relatively higher unit prices for the product under consideration. However, higher unit prices for the product under consideration do not imply necessarily higher SGA or profit margins. They may reflect also a different product mix (and more specifically, a greater proportion of relatively higher priced product types) or higher production costs (other than SGA). Thus, the method applied by the EC authorities does not result necessarily in higher amounts for SGA and profits than India's proposed method.

84. Indeed, India does not seem to argue that the method used by the EC authorities is inherently biased against the exporters. Rather, the only basis for India's claim is that, had the EC authorities

[51] India's First Submission, paras. 61-64.

[52] EC Commission's reply to Texprocil comments on the disclosure document of 19 June 2001, p. 2 (Exhibit India – RW –17).

applied India's method in this specific case, the "reasonable" amount for SGA and profits would have been lower. However, the mere fact that, in the specific circumstances of this case, the method applied by the EC authorities yields a result which is less favourable to the exporters than India's proposed method is not sufficient to render the EC's method inconsistent *per se* with Article 2.2.2 (ii). In a different set of factual circumstances, the EC's method might well have been more favourable to the exporters than India's own method.

85. India's position would have unacceptable implications for the conduct of anti-dumping investigations. By India's logic, the investigating authorities would be prevented from adopting any generally applicable rules for the calculation of dumping margins. Instead, they would have to test all possible calculation methods at each step of the dumping determination, and then choose that method which is the most favourable to the exporter in the particular circumstances of each investigation. This would impose an unreasonable burden on the investigating authorities and, at the same time, be a source of unacceptable legal uncertainty and unpredictability for all the interested parties.

(f) The method proposed by India is unreasonable

86. Whilst the averaging method used by the EC authorities constitutes a reasonable exercise of the discretion afforded by Article 2.2.2 (ii), India's own method would lead to a meaningless result and is manifestly unreasonable

87. The EC recalls that the product under investigation (bed linen) includes bed sheets, duvet covers and pillow cases, packaged for sale either separately or in sets.[53] The "units/sets" used in India's calculation can be units of any of those products or of sets of those products. Thus, for example, a pillow case sold separately is accounted by India as one "unit", just like a sheet sold separately or a set consisting of a pillow case, a sheet and, sometimes, a duvet cover.

88. In other words, India's averaging method gives identical weight to all the product types covered by the investigation, regardless of their differences. For example, a pillow case sold separately is accorded the same weight as a double set comprising one sheet, one duvet covers and two pillow cases. As a result, the weight of each "other exporter or producer" included in the average will depend to a large extent on its product mix. For instance, an exporter which sells 100,000 pillow cases in India will be accorded the same weight as an exporter who sells 100,000 sets comprising, in addition to 100,000 (or 200,000) pillow cases, also 100,000 thousand sheets and 100,000 thousand duvet covers.

89. The above example evidences clearly that, to use India's own terms[54], India's averaging method fails to reflect the "relative importance" of each of the "other exporters or producers". Therefore, unlike the EC's method, India's method cannot be considered a reasonable exercise of the discretion afforded by Article 2.2.2 (ii).

(g) Averaging the SGA and profit according to volume measured by weight would result in higher dumping margins

90. Sales volume may be measured in a number of different ways. In the present case, for instance, it can be measured in weight (as the EC authorities did for the purposes of the injury determination), in size (square metres) or in pieces (of pillow cases, sheets, duvet covers, sets, etc).

91. India argues that Article 2.2.2 (ii) requires to average the SGA and profits on the basis of the sales volume of the "other exporters and producers" and does not permit the use of the sales value.

[53] Regulation 1069/97, recital 10.
[54] India's First Submission, para. 53.

But it has not advanced any single reason to justify why the sales volume must be measured in "units/sets" rather in kilos or in square metres.

92. The EC submits that, even assuming that, on the basis of India's arguments, Article 2.2.2(ii) had to be interpreted as requiring the use of the sales volume, nothing would prevent the EC authorities from using the sales volume measured by weight rather than by "units/sets".

93. For the sake of argument, the EC has calculated the weighted average amount for SGA and profit on the basis of the sales volume measured by weight. The relevant information was available from the questionnaire responses of the companies concerned. As shown by the table below, the amounts thus obtained are higher than those obtained by using the sales value.[55]

	Bombay Dyeing	Standard Industries	Total/average
Domestic turnover in Rs	134,154,064	13,276,083	147,430,147
Domestic sales in tones	465.00	43.39	508.39
Domestic sales in units/sets	627,764	179,775	807,539
SG&A plus profit/loss	22.48% (10.39%+12.09%)	-16.34% (19.15%-35.49%)	
Allowances for fair comparison	2.23%	0.37%	
Company's weight on turnover	91.0%	9.0%	SG&A+profit/loss: 18.99% Allowances: 2.06%
Company's weight on tones	91.5%	8.5%	SG&A+profit/loss: 19.17% Allowances: 2.07%
Company's weight on units/sets	77.7%	22.3%	SG&A+profit/loss: 13.84% Allowances: 1.82%

94. The above table evidences that, had the EC authorities used the sales volume measured by weight as averaging factor, the weighted average SGA and profit and, consequently, the constructed normal values and the dumping margins for the companies concerned would be higher than those calculated by using the sales value. Thus, even if the Panel were to conclude that Article 2.2.2 (ii) requires the use of sales volume, the violation alleged by India would not result in the nullification or impairment of the benefits accrued to India under that provision.

2. Claim 2: Articles 3.1 and 3.3

A. Claim

95. India alleges that the EC "acted inconsistent with Articles 3.1 and 3.3 of the ADA by cumulating Indian imports with those of a country for which no dumping was found". [56]

96 More specifically, India alleges that Regulation 1644/2001 is inconsistent with Articles 3.1 and 3.3 because the EC authorities cumulated imports originating in India with imports originating in Pakistan, which "were in fact not dumped, a fact which was revealed by publication of Regulation 160/2002."[57]

[55] The EC requests that the information set out in this table be treated as confidential pursuant to Article 17.7 of the *Anti-Dumping Agreement* and paragraph of the Panel's Working Procedures.

[56] Request for the Establishment of a Panel of 7 May 2002, WT/DS141/13/Rev.1.

[57] India's First Submission, para. 70.

B. Summary of relevant facts

97. The pertinent facts for the examination of this claim have already been summarised above in section II.3.A.

C. Argument

98. As submitted above, the only measure "taken to comply" with the DSB's recommendations and rulings is Regulation 1644/2001, which is, therefore, the only measure within the Panel's jurisdiction.

99. Regulation 1644/2001 confirmed the finding of dumping for Pakistan reached in Regulation 160/2002. Thus, at the time when Regulation 1644/2001 was adopted, the EC authorities were entitled to treat imports originating in Pakistan as "dumped" and, consequently, to cumulate them with imports from India in accordance with Article 3.3 of the *Anti-Dumping Agreement*.

100. India cannot rely on the finding of no-dumping reached in Regulation 160/2002 in order to claim that imports from Pakistan were "in fact"[58] non-dumped already when Regulation 1644/2001 was adopted. The finding of no-dumping contained in Regulation 1644/2001 was reached under EC law and does not prejudge the consistency with the *Anti-Dumping Agreement* of the finding of dumping made in Regulation 2938/97 and confirmed by Regulation 1644/2001. The WTO consistency of that finding can be examined and ruled upon only by a WTO panel. Yet, India did not challenge that finding before the original panel. Nor has India brought a claim against that finding before this Panel.

101. Should the Panel take the view that the other regulations cited in India's panel request are also measures "taken to comply" and, therefore, within its jurisdiction, the EC submits in the alternative that in Regulation 696/2002 the EC authorities established that imports of India, when taken in isolation, were a cause of injury. Therefore, as of the date of establishment of the Panel, the "measures taken to comply" were not based on the cumulation of imports from India with non-dumped imports from Pakistan.

3. Claim 3: Article 5.7

A. Claim

102. India alleges that

> The EC acted inconsistent with Article 5.7 of the ADA by not simultaneously considering the evidence of dumping and injury. In fact, by cumulating countries for injury purposes and by subsequently excluding a particular source on account of non-dumping, the EC engaged in sequencing that was entirely improper. [59]

103. More precisely, India claims that the EC authorities acted inconsistently with Article 5.7 by

(1) making the dumping re-determination for Pakistan after the adoption Regulation 1644/2001; and

(2) separating the dumping and injury findings in Regulations 160/2002 and 696/2002.

[58] Ibid.
[59] Request for the Establishment of a Panel of 7 May 2002, WT/DS141/13/Rev.1.

B. Summary of relevant facts

104 The relevant facts for the examination of this claim have been already summarised in section II.3.A of this submission.

C. Argument

105. At the outset, the EC recalls once again its position that Regulations 160/2002 and 696/2002 are not measures "taken to comply" with the DSB's recommendations and rulings and, therefore, are not within the Panel's jurisdiction. Accordingly, the arguments presented here below are submitted only in the event that the Panel were to rule that those regulations are measures "taken to comply".

106. India's claim reflects a basic misunderstanding with regard to the scope of the obligations imposed by Article 5.7. By its own words, Article 5.7 applies only with respect to the original investigation. It states that

> The evidence of both dumping and injury shall be considered simultaneously (a) in the decision whether or not to initiate an investigation, and, b) thereafter, during the course of the investigation, starting on a date not later that the earliest date on which in accordance with the provisions of this Agreement provisional measures may be applied.

107. Thus, Article 5.7 does not apply to subsequent reviews. This is confirmed by Articles 11.2, which envisages expressly that a review may be limited to dumping or to injury.[60] Further confirmation is provided by Article 11.4, which does not mention Article 5.7 among the procedural provisions that apply to reviews carried out under Article 11.[61]

108 The EC submits that, by the same token, Article 5.7 does not apply to the re-determination of dumping or injury findings for the purposes of implementing the DSB's recommendations and rulings (regardless of whether such re-determinations may be characterised as reviews under Article 11.2). Indeed, implementation re-determinations do not involve an "investigation", but merely a re-assessment of the evidence gathered during the course of the original investigation. Moreover, applying Article 5.7 to implementation re-determinations would have the absurd consequence of requiring the implementing Member to re-consider all the findings made during the investigation, regardless of whether those findings have any connection with the DSB's recommendations and rulings.

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[60] Article 11.2 provides in relevant part that

> Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both.

Further confirmation is provided by Article 11.3, which states that

> Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 *if that review has covered both dumping and injury*, or under this paragraph)… (emphasis added).

[61] Article 11.4 provides that

> The provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article …

109. Finally, and for the same reasons, the EC submits that Article 5.7 does not apply either where, as in the case at hand, a Member conducts voluntarily a re-determination of the dumping or injury findings in order to apply the legal interpretations made in a panel or Appellate Body report adopted by the DSB.

4. Claim 4: Articles 3.1 and 3.2

A. Claim

110. India claims that the EC "acted inconsistent with Articles 3.1 and 3.2 of the ADA, by not properly excluding the correct portion of non-dumped imports from the total volume of Indian exports".[62]

111. Specifically, India alleges that since Omkar and Prakash, two exporters which were found not to be dumping, accounted for 53 per cent of all the imports in the sample, the EC authorities should have considered that the same proportion of imports outside the sample was not dumped for the purposes of the injury analysis.

B. Summary of relevant facts

112. Given the large number of Indian producers and exporters concerned by the investigation, the EC authorities decided to limit their examination to a sample of exporters in accordance with Article 6.10 of the *Anti-Dumping Agreement*.

113. In the re-determination of dumping contained in Regulation 1644/2001, the EC authorities established the following dumping margins for the five exporters included in the sample.[63]

Anglo French Textile	9.8 %
Bombay Dyeing & Manufacturing	5.5 %
Madhu	3.0 %
Omkar	0.0 %
Prakash Cotton Mills	0.0 %

114. Co-operating exporters not included in the sample were attributed the average dumping margin of the sampled exporters, weighted on the basis of their export turnover to the EC. In accordance with Article 9.4 (i) of the *Anti-Dumping Agreement*, zero margins were disregarded. The dumping margin thus established for the non-sampled co-operating exporters was 5.7 per cent.[64] India has not challenged the method used to calculate that margin.

115. Co-operating exporters represented approximately 82 per cent of the total exports from India to the EC.[65] The dumping margin for the non co-operating exporters, was established on the basis of "facts available". More specifically, the EC authorities attributed to the non-cooperating exporters the highest dumping margin established for the exporters in the sample, i.e. 9.8 per cent.[66] India has not challenged the method applied to establish that dumping margin.

[62] Request for the Establishment of a Panel of 7 May 2002, WT/DS141/13/Rev.1.
[63] Regulation 1644/2001, recital 12.
[64] Ibid., recital 13.
[65] Regulation 1069/97, recital 16.
[66] Regulation 1644/2001, recital 14.

116. In the injury re-determinations made in Regulations 1644/2001 and 696/2002, the EC authorities assessed the volume and the effect of "dumped imports" both when exports by Omkar and Prakash were included in that notion and when they were excluded.[67] They concluded that the exclusion of Omkar and Prakash would not affect the outcome of the analysis.

117. The EC authorities treated all the imports from co-operating exporters not included in the sample and from non-co-operating exporters as "dumped imports" for the purposes of the injury analysis.

C. Argument

118. In the original proceeding, India claimed that non-dumped transactions should be excluded from the injury analysis.[68]

119 In response, the EC argued that dumping is determined for countries and, therefore, that it was entitled to consider all imports from a country found to be dumping as "dumped imports" for the purposes of Article 3.

120. The Panel rejected India's claim without, however, ruling on the EC's defence. The Panel considered the question of whether imports from an exporter found not to be dumping could be considered as "dumped imports" for the purposes of the injury analysis. But, as India had not contested the injury finding on this ground and there were no Indian producers in that situation, the Panel refrained from reaching any conclusions.[69]

121. The EC refers the Panel to the arguments made in the original proceedings and reiterates its position that it was entitled to consider all imports from India as "dumped imports" for the purposes of the injury analysis.[70]

122. However, should the Panel reach the conclusion that imports from an exporter which has been found not to be dumping must be excluded from the injury analysis, the EC submits that, in any event, all imports from co-operating exporters not included in the sample, as well as all imports from non-co-operating exporters were found to be "dumped" by the EC authorities, which, therefore, were entitled to treat them as "dumped imports" also for the purposes of Articles 3.1 and 3.2.

123. India has not challenged in these proceedings the finding that all imports outside the sample (both from co-operating and from not co-operating exporters) were "dumped". Therefore, it is illogical and contradictory for India to claim that some of those imports should be considered as "non-dumped" for the purposes of the injury determination.

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[67] Regulation 160/2002, recitals 22-24 and Regulation 696/2002, recitals 7-10 and 45-46

[68] Panel report, paras. 6.132-6-142.

[69] Ibid., para. 6.138

[70] In addition, the EC would like to point out that its interpretation is also warranted in view of the fact that a joint injury analysis is possible or even warranted when anti-dumping and anti-subsidy proceedings concerning the same country run in parallel. The salmon Panel has recognized that the injury analysis can be carried out jointly for both such proceedings (see paras 572 and 573 of the Panel Report on *United States - Imposition of Anti-Dumping Duties on Imports of Fresh Atlantic Salmon from Norway*, ADP/87, adopted on 27 April 1994). Indeed, since the starting point for such analysis is the volume and the prices of the imports concerned (and not the level of dumping or subsidization), it does not seem appropriate to distinguish at company level. If the EC's interpretation were not accepted, two different injury examinations would have to be carried out if a company is found to be dumping but not to be subsidized or *vice versa*. This makes injury examinations often unworkable and that cannot have been the intention of the drafters of the *Anti-Dumping Agreement*.

(a) Imports from cooperating exporters not included in the sample

124. Article 6.10 of the *Anti-Dumping Agreement* states that

> The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exporters which can reasonably be investigated.

125. Thus, Article 6.10 provides that, as a rule, the authorities must determine an individual dumping margin for each exporter. By way of exception, in the circumstances described in the second sentence of Article 6.10, the authorities may limit their examination to a sample of exporters and calculate individual dumping margins only for those exporters.[71].

126. It is implicit in Article 6.10 that, when the authorities limit their examination to a sample of exporters, they may calculate an "all-others" dumping margin for all the non-examined cooperating exporters on the basis of the margins determined for the companies included in the sample.

127. Indeed, as argued by India, the purpose of a sample is precisely "to provide an estimate relating to the whole".[72] However, India disregards that Article 6.10 allows the use of samples with the specific purpose of rendering practicable the determination of dumping margins for all the exporters under investigation, and not for the purpose of calculating the volume of dumped imports. Therefore, the data pertaining to a sample established in accordance with Article 6.10 must be used in order to calculate the dumping margin for "the whole", and not in order to establish what proportion of "the whole" is dumped.

128. The *Anti-Dumping Agreement* does not prescribe any specific rules for calculating the "all-others" dumping margin.[73]. Nevertheless, Article 9.4 of the *Anti-Dumping Agreement* places a maximum limit or ceiling on the level of the anti-dumping duty that may be applied to imports from non-examined exporters.[74]

129. Specifically, Article 9.4 provides as follows:

> When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed
>
> (i) the weighted average margin of dumping established with respect to the selected exporters or producers or,

[71] Panel Report, *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS189/R, para.6.90

[72] India's First submission, para. 104.

[73] Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ("*US- Hot Rolled Steel*"), WT/DS184/AB/R, para. 116.

[74] Ibid.

> (ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined,
>
> provided that the authorities shall disregard for the purposes of this paragraph any zero and *de minimis* margins and margins established under the circumstances referred to in paragraph 8 of Article 6. The authorities shall apply individual duties or normal values to imports from any exporter or producer not included in the examination which has provided the necessary information during the course of the investigation, as provided for in subparagraph 10.2 of Article 6.

130. Article 9.4 contains no suggestion to the effect that the "all-others" duty may be applied only to a certain proportion of imports from the non-examined exporters. It contemplates that the "all-others" duty will be applied to "imports from exporters or producers not included in the examination", without any restriction or qualification. The only exclusion from the "all-others" duty envisaged by Article 9.4 concerns the imports from non-examined exporters which have requested individual dumping margins in accordance with Article 6.10.2. *A contrario*, this confirms that all imports from the non-examined exporters may be subjected to the "all-others" duty.

131. The *Anti-Dumping Agreement* is premised on the basic notion that anti-dumping duties can be applied only to imports which are "dumped". This is reflected in Article 9.3, which provides that

> … the amount of the duty shall not exceed the margin of dumping as established under Article 2.

and in Article 11. 1, which stipulates that

> an anti-dumping duty shall remain in force only as along as and to the extent necessary to counteract dumping which is causing injury.

as well as in the system of refunds and reviews provided for in Articles 9.3.1 and 9.3.2 and in Articles 11.2 and 11.3, respectively.

132. Thus, if Article 9.4 allows the application of anti-dumping duties to all imports from all the exporters not included in the examination, it is because all such imports can be considered as "dumped", including for the purposes of Articles 3.1 and 3.2.

133. India does not dispute the application of the "all-others" duty to all imports from co-operating exporters not included in the sample. Nor does India contest the underlying determination of dumping made by the EC authorities with respect to all such imports. Yet, India pretends that some of those imports should not be considered as dumped for the purposes of the injury analysis. India's interpretation is contradictory and untenable. It implies that imports from the non-sampled exporters can be simultaneously "dumped" and "non-dumped" under the *Anti-Dumping Agreement*. That proposition is manifestly illogical. If imports from the non-sampled exporters are considered "dumped" for the purposes of applying anti-dumping duties, then it follows that they can be treated as such also for the purposes of the injury analysis.

134. India seeks to deny the relevance of Article 9.4 by arguing that Article 9 refers to the imposition and collection of anti-dumping duties, and "does not bear on the determination of injury – including the volume of dumped imports – under Article 3".[75] Yet, the EC would recall that the

[75] India's First Submission, para. 119.

original Panel held expressly that Article 9.2 was relevant context for the interpretation of the term "dumped imports" in Article 3.2.[76]

135. In similar vein, India argues that "the rules in [Article 9.4], including the obligation to disregard, are restricted for the purposes of this paragraph".[77] To begin with, however, the phrase "for the purposes of this paragraph" only applies with respect to the obligation to disregard certain margins, and not with respect to other "rules" provided for in Article 9.4. Moreover, that phrase serves simply to clarify that zero, *de minimis* and "best fact available" margins cannot be disregarded for the purposes of applying duties to the exporters in the sample for which those margins have been established.

136. The supposedly "absurd consequences" alleged by India do not result from the EC's position that the term "dumped imports" must be interpreted consistently throughout the Agreement, but rather from the specific rules for the calculation of the "all-others" rate contained in Article 9.4, and more specifically from the requirement to disregard zero and *de minimis* margins. It is well known, however, that the exclusion of those margins is the *quid-pro-quo* for the exclusion of the "best-facts-available" margins. The finely balanced compromise embodied in Article 9.4 may yield less than perfect results in extreme cases, such as the one described in India's example, but it has been accepted by all Members, including India.

137. Finally, the EC rejects India's unsupported allegation that the EC authorities applied "different standards, as to what a sample is supposed to mean, on the export and domestic side of an investigation".[78] The EC authorities used the dumping margins established for the companies in the sample in order to estimate the overall dumping margin for the companies outside the sample. The same kind of analysis was applied to the data pertaining to the sample of domestic producers. For example, the EC authorities used the profit data for the companies in the sample in order to estimate the level of profitability of the EC industry as a whole, rather than the proportion of sales of the EC industry that was made profitably, as would have been required by India's interpretation.

(b) Imports from non-co-operating exporters

138. As explained above, the EC authorities calculated the dumping margin for the non-co-operating exporters by resorting to "facts available". On that basis, the EC concluded that imports from non-co-operating exporters were dumped.

139. India has not challenged the dumping determination made by the EC authorities with respect to imports from non-co-operating exporters. In particular, India has not claimed that such determination is inconsistent with Article 6.8 and Annex II.

140. Since India does not contest the finding that imports from non-co-operating exporters were "dumped", it cannot challenge the treatment of such imports as "dumped imports" for the purposes of the injury analysis.

[76] Panel report, para. 6.137.
[77] India's First Submission, para. 119.
[78] Ibid., paras. 126-127.

5. Claim 5: Articles 3.1 and 3.4

A. Claim

141. India claims that

> The EC acted inconsistently with Articles 3.1 and 3.4 of the ADA by evaluating data without even collecting them, or even if the data were collected, a proper implementation of the Panel's findings required not only a mere recitation of injury factors but an overall reconsideration and analysis of the information in the light of the requirements of the Anti-Dumping Agreement.

B. Summary of relevant facts

142. It should be pointed out that the first limb of India's claim rests on the assumption that information relating to certain data was never collected. India tries to find support for its claim by relying on paragraph 6.167 of the original Panel report. This assumption is entirely incorrect.

143. First of all, India's statement that the Panel "factually established this absence of data collection as a substantive violation" of Article 3.4 is misleading.[79] In particular, the Panel merely found that in the absence of any indication on the face of the Provisional and Definitive Regulations, it could not simply assume that the data had been collected. Indeed, the Panel acknowledged that "**some of the data collected for other factors may have included data for the factors not mentioned**".

144. Secondly, during the Panel proceeding, the EC consistently indicated that the data constituting the basis for the evaluation of all injury factors was collected during the investigation.[80]

145. In its reply of 27 July 2001[81] to Texprocil's comments on the disclosure document of 19 June 2001, the EC Commission further explained how such data had been collected at the time of the original investigation.

146. Since the information concerning the injury factors mentioned in Article 3.4 had therefore been collected, it could be and was properly evaluated in accordance with the requirements of that provision.

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[79] India's First Submission, para 145.

Para 6.167 of the Panel Report provides:

> "It appears from this listing that data was not even collected for all the factors listed in Article 3.4, let alone evaluated by the EC investigating authorities. Surely a factor cannot be evaluated without the collection of relevant data. While some of the data collected for the factors that are mentioned in the Provisional Regulation by the EC authorities may have included data for the factors not mentioned, we cannot be expected to assume that this was the case without some indication to that effect in the determination. Nor is the relevance or lack thereof, as assessed by the EC authorities, of the factors not mentioned under the heading "Situation of the Community industry" at all apparent from the determination." (emphasis added). Thus, the Panel merely concludes that there is no indication in the determination that the EC authorities evaluated (the relevance of) all of the factors listed in Article 3.4.

[80] See EC submission of 27 March 2000, point D: reply to India claim no. 11 point 1; in particular para 249 to 255

[81] Exhibit India – RW –17.

C. Argument

147. India makes three arguments in support of its claim:

(1) That data which has not been collected cannot be evaluated;

(2) That if even data has been collected it has not been an adequate evaluation; and

(3) That factual errors have invalidated the redetermination.

The EC will rebut each of these arguments in turn.

(a) Data not collected cannot be evaluated

148. As already explained, the EC authorities did in fact collect the data in respect of the injury factors mentioned in Article 3.4[82] and was therefore able to evaluate that data in its redetermination. There are no 'clear-cut findings' of the original Panel to the contrary. Moreover, since the EC in its redetermination reassessed and evaluated this information it cannot be argued that the redetermination constitutes 'a mere restatement of the notice.'[83]

149. Neither did the Panel decide that the EC's infringement of Article 3.4 could not possibly be remedied by way of a redetermination consistent with the requirements of the *Anti-Dumping Agreement*. At paragraph 6.259 of the Panel report it is found that

> … Having found a violation of the substantive requirement to consider all the factors set forth in Article 3.4 in assessing the impact of imports, the question of whether the notice of either the preliminary or affirmative determination of injury is "sufficient" under Article 12.2 is immaterial. A notice may adequately explain the determination that was made, but if the determination was substantively inconsistent with the relevant legal obligations, the adequacy of the notice is meaningless. Further, in our view, it is meaningless to consider whether the notice of a decision that is substantive inconsistent with the requirements of the AD Agreement is, as a separate matter, insufficient under Article 12.2. A finding that the notice of an inconsistent action is adequate does not add anything to the finding of violation, the resolution of the dispute before us, or to the understanding of the obligations imposed by the AD Agreement. We therefore make no findings on claim 13.

150. The Panel merely found that it was unnecessary to make a finding regarding the procedural violation having already found that the substantive violation exists. Whilst the EC accepts that it is necessary to take account of the findings regarding the substantive violation, it rejects the suggestion that it was not possible to do so in this case. As stated above, India's arguments in this respect are based on the misplaced notion that the EC had not collected certain data in the first place. The EC will now demonstrate how misplaced India's allegations are with respect to the two examples they have given, namely inventories and capacity utilisation.[84]

[82] Ibid.
[83] India's First Submission, para 131.
[84] India's First Submission, para. 146.

(i) Inventories

151. India alleges that no data for inventories were obtained and that therefore no proper evaluation could be made. This is simply incorrect. The EC Commission's findings[85] on stocks were precisely made after examining the situation of stocks for the sampled Community producers. Even the Panel acknowledged that some of the data collected for other factors may have included data for the factors not mentioned[86], and this is exactly the case for data concerning stocks.

152. Inventories increase or decrease depending on the volume produced and the volume sold/ exported during a given period. Since data concerning production, sales volumes and exports were collected[87], the EC authorities did have data on stocks, as was clearly confirmed to Texprocil in the EC Commission's letter of 27 July 2001.[88] This information was also obtained from the accounts and verified on spot for sampled producers. The EC will address the question of whether it properly evaluated the relevance of this factor at paragraph 192 below.

153. As regards India's argument that stock levels should have been taken into account when establishing consumption[89], the EC points out that complete industry data was not available from all the Community producers. This is often the case in anti-dumping investigations and consumption is analysed in such circumstances on the basis of apparent consumption, without taking account of stocks. Finally, during the original investigation neither India nor any other interested party questioned this calculation.

(ii) Utilisation of capacity

154. India alleges that the EC authorities did not collect and properly evaluate data concerning capacity utilisation. India tries to argue that the EC confuses 'production capacity' and 'utilisation of capacity'. In order to analyse utilisation of capacity, however, it is clearly necessary to consider the level of production capacity. Under the heading 'capacity', the EC therefore considered both production capacity and capacity utilisation. In evaluating this factor the EC took into account information which was submitted in the complaint questionnaire replies and subsequently verified on spot. The investigation confirmed that reliable statistics on production machinery for the product concerned are extremely difficult to establish because the machinery can be bought, sold or used for different products with relative ease. As the same machinery could yield different production capacity depending on the nature of the product mix, it is difficult to draw any meaningful data. It should be noted that the product concerned consists of a large number and variety of products which differ in size, colour, construction and quality. The original complaint mentioned that "statistics about production machines in bed linen making up do not exist, being by far too specific."[90] This was never disputed by India or any other interested party.

155. Whilst the EC was able to establish that a number of producers were contracting out surplus productions and may therefore have been able to maintain a high rate of capacity utilisation, this data was not available for all sampled producers or the Community industry for the reasons explained above. Thus, the EC considered that in the absence of meaningful data for all companies in the sample, this factor did not have a bearing on the situation of the industry within the meaning in Article 3.4.

[85] Regulation 1644/2001, recital 29.

[86] Panel report, para. 6.167. It is recalled that the Panel merely found that it could not "be expected to assume that [such data had been collected] without some indication to that effect in the determination.".

[87] Regulation 1069/97, recitals 63, 81 and 82.

[88] Exhibit – India – RW – 17, page 4.

[89] India's First Submission, para. 147.

[90] See page 30 of the complaint (Exhibit-India-6).

156. The EC concludes that the two examples used by India to highlight the fact that no data was collected by the EC are totally unfounded.

(iii) Assessment of relevance

157. Finally, the EC submits that India's claims in relation to the assessment of relevance of the factors 'inventories' and 'capacity utilisation' are equally unfounded. India alleges that the EC just dismissed the factors concerning capacity and stocks as irrelevant and only then referred to the data collected. It argues that this amounts to a violation of Article 3.4 since facts pertaining to a certain factor must first be 'collected and brought on record' after which they can be evaluated. India seems to exclude the possibility that sometimes it may not be materially possible to bring on record data which simply does not exist or for which data only exists but not in any reliable or comparable form.

158. The EC would submit that in order to comply with Article 3.4 it is not necessary to adopt a checklist approach to the evaluation of (the relevance of) the factors cited therein. What is required is an evaluation of all the factors which may result in some of them not having a bearing on the situation of the domestic industry. Whether an administrative authority sets out the result before or after setting out the evaluation on which those results are based does not determine the adequacy of that evaluation. There was no '*a priori*' dismissal of the relevance of these factors. The key point is that each factor is considered and that the evaluation is objective. The EC submits that its evaluation of relevance met the required standards under Article 3.4.

(b) Alleged inadequate evaluation

(i) Preliminary remark

159. India argues that the EC failed to properly evaluate or offer any comment on a number of factors which it submits do not point towards injury. The EC will demonstrate that these submissions are incorrect and that its careful analysis of all the factors was consistent with the requirements of Article 3.4.

160. To dismiss out of hand, as India implies one should, any possibility of material injury being suffered simply because certain factors do not on the face of it show a clear negative development, would, on the contrary fall foul of Article 3.4 and the very obligation to examine objectively each factor mentioned in Article 3.4. In the context of Article 3.4, one Panel said:

> An evaluation of a factor implies putting data in context and assessing such data both in their internal evolution and vis-à-vis other factors examined.[91]

161. In any event, as explained above, India completely misrepresents the degree of evaluation and analysis performed by the EC in reaching its conclusions on injury.

162. The EC recalls that according to Article 17.6 (i) of the *Anti-Dumping Agreement*

> In its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned.

[91] Panel Report, *United States – Hot Rolled Steel*, para 7.232.

163. It should be noted that India argues several times that the EC's evaluation of injury is somehow not objective simply because it is based on or includes analysis of data collected for the sample. Since India did not contest the representativity of the sample, however, the EC fails to understand what violation of Article 3.4 or 3.1 is supposed to have occurred.

164. India suggests that the references in Regulation 1644/2001 to the Provisional regulation indicate a failure to reconsider the information. This is a purely formalistic argument which must be rejected along with the assertion that the redetermination is only a 'restatement'. The fact that the EC may have confirmed certain of its original findings is of no relevance to the question of whether the findings are consistent with a proper evaluation.

(ii) Sales

165. At paragraph 166 of its First Written Submission, India suggests that as information on sales by sampled producers is available in addition to information on sales by the Community industry, the sampled data should be 'set aside'. The EC fails to understand India's complaint in this respect, since it actually evaluated sales at the level of the Community industry.[92] India relies on the statement by the original Panel at paragraph 6.181 that

> It is not possible to have an objective evaluation of the evidence if some of the evidence is required to be ignored, even though it relates precisely to the issues to be resolved.

166. This statement by the original Panel does not support India's contention that sampled data should be set aside. The Panel's statement must be read in context –it did not suggest that any information pertaining to the sample must be ignored. It should be noted that the original Panel pointed out that

> In our view, it would be anomalous to conclude that because the EC chose to consider a sample of the domestic industry, it was required to close its eyes to and ignore other information available to it concerning the domestic industry it had defined.[93]

167. Thus, the Panel simply found that it the EC did not act inconsistently with Article 3.4 by taking into account information relating to the Community industry as a whole, including information relating to companies that were not included in the sample. Since this is precisely what the EC did here, it fails to understand what violation of Article 3.4 it is supposed to have committed. In any event, an increase in sales is not inconsistent with a finding of injurious price suppression.

(iii) Market share

168. Contrary to what India claims, there is no difference in figures regarding the market share of the Community industry. It is correct that it increased its market share by volume from 18.12 per cent in 1992 to 19.67 per cent in the IP, whereas it increased its market share by value from 22.4 per cent to 25.1 per cent during that period.[94] As explained in Regulation 1644/2001, market share is considered to have increased due to the focus on higher value niche products.[95]

[92] Regulation 1644/2001, recital 35; Regulation 1069/97, recitals 82 and 83.
[93] Panel Report, *EC-Bed Linen*, para 6.181.
[94] Whilst India refers to these latter figures being set out in recital 85 of the Provisional Regulation, that provision describes market share by value, not market share by volume.
[95] Regulation 1644/2001, recital 35. See also Regulation 1069/97, recital 84.

(iv) Prices

169. It is not disputed that, at the level of the Community industry, the increase in sales in value terms is greater than the increase in volume terms, and that consequently, average prices increased by 3.2 per cent. However, this analysis does not take account of the change in product mix by the Community industry, including the sampled producers, over the period of analysis concerned. This is quite obvious when the data for average prices are compared with data for the defined reference products, which decreased over roughly the same period.

170. The EC authorities collected and verified data on prices at the level of the sample for a constant product mix. Whilst the average prices per kilogram of the sampled producers increased by 3.2 per cent, the development in average prices for the defined reference products fell in index terms from 100 in 1993 to 99.2 in the IP[96]. Hence the EC examined both the overall increase in prices by both the Community industry and sampled producers and the decrease in average prices for the defined reference products sold by sampled producers and noted that the more positive overall development in prices compared to the defined reference products reflected the fact that the sampled producers had moved into niche markets and away from high volume mass markets.[97]

171. India argues that the explanation relating to higher value niche products is inconsistent with its determination in recital 97 of the Provisional Regulation that the market for bed linen is characterised by product substitutability and transparency. However, the fact that the market for bed linen is characterised by product substitutability does not necessarily undermine the finding that there are some high quality niche products. Indeed, it is quite common that a product, which consists of several types or ranges the highest and lowest of which may not be directly substitutable with one another, will nevertheless be sufficiently substitutable to be considered a like product. Furthermore, the EC notes that India has not disputed that there are some high quality niche products.

172. India further submits[98] that the reference to higher value niche products is contrary to the Appellate Body's finding in *Bed Linen* regarding the existence of one like product. In the context of zeroing, the Appellate Body criticised the EC for its failure to calculate overall margins of dumping for the product under investigation:

> Having defined the product as it did, the EC was bound to treat that *product* consistently thereafter in accordance with that definition. Thus it follows that, with respect to Article 2.4.2, the EC had to establish "the existence of margins of dumping" for the *product* –cotton-type bed linen –and not for various types of models of that product.[99]

173. The same criticism cannot be made here: the EC has evaluated overall sales, prices and market share data for the Community industry. It has also done so at the level of the sample for a number of defined reference products. The fact that the increase in overall prices and in market share was found to be explained by the shift in the product mix does not alter the fact that the EC evaluated these indicators at the level of the like product.

(v) Profits

174. India alleges that in regard to profits (and certain other factors), the EC has attributed absolute amounts from the sample to the total pool. However, recital 36 of Regulation 1644/2001 must be read

[96] Regulation 1069/97, recital 86.
[97] Regulation 1069/97, recital 87.
[98] India's First Submission, paras 170-171.
[99] Appellate Body Report, *EC-Bed Linen*, para 53.

together with recital 19(ii) of that Regulation, which makes it perfectly clear that data for trends concerning profitability were analysed at the level of the sample. Since India does not challenge the representativity of the sample it cannot argue that the EC is obliged to collect, verify and evaluate company specific data for the entire Community industry; to do so would completely ignore the fundamental purpose of sampling.

175. India goes on to suggest that any analysis of profits which did not include an evaluation of profits for the entire Community industry and not just sampled Community producers, fails to meet the requirements of objectivity in Article 3.1. Such an interpretation completely ignores the purpose of sampling which enables the authorities to base their conclusions on the data collected and verified for the members of the sample in certain circumstances, for instance where the domestic industry is particularly fragmented. In such situations, certain macro-economic information may also be available to the investigating authority and could therefore be taken into account at the level of the domestic industry too. However, information regarding profits, and other company specific data related to profitability which must be properly verified, can normally only be obtained at the level of the sample.

176. India also relies on paragraph 206 of the Appellate Body Report in *US- Hot Rolled Steel*:

> Accordingly, an examination of only certain parts of a domestic industry does not ensure a proper evaluation of the state of the domestic industry as a whole and does not therefore satisfy the requirements of "obectiv[ity]" in Article 3.1 of the Anti-Dumping Agreement.[100]

177. The EC points out that the Appellate Body was considering in that context whether an examination of the merchant industry to the exclusion of the captive industry would have satisfied the requirements of objectivity in Article 3.1. This is not analogous with the selection of a sample, the representativity of which is not contested. In any event, since the EC did not exclude from its consideration of injury the other Community producers forming part of the Community industry its analysis was not automatically biased. The fact that the EC was only able to collect and verify data concerning profitability for a representative number of sampled producers within the definition of the Community industry does not disclose any bias either; this is normal in cases where it is justified to base findings on a representative sample of the domestic industry. In the light of the above, and since India states that it takes no issue with the sample representing the total Community industry, the EC fails to understand what violation of the *Anti-Dumping Agreement* is alleged.

178. As regards the factual errors alluded to, the EC admits that a minor clerical error occurred in the disclosure document dated 19 June 2001.[101] Recital 83 of the Provisional Regulation provides

> Sales by the Community industry rose by 4.2 per cent from ECU 428.6 million in 1992 to ECU 446.6 million in the investigation period. Sales by the sampled producers also rose, from 280.6 million in 1992 to ECU 285.3 million (a rise of 1.7 per cent).

These figures are correct.

179. In the disclosure of 19 June 2001, however, the turnover for sampled producers is shown as ECU 276.9 million in 1992 and ECU 281.2 million in the IP. This figure is incorrect as it does not take account of the turnover of a small producer included in the definition of the Community industry.

[100] Appellate Body Report, *United States –Hot Rolled Steel*, para 206.
[101] Exhibit India – RW –17.

180. It is not disputed that the profits of sampled producers decreased by over 50 per cent from 3.6 per cent to 1.6 per cent. India states that this factor is not adequately evaluated since the EC "did nothing more than allege that the profit is below the minimum level of 5 per cent" without providing any proof for such a level of profit. The EC does however provide evidence in support of this level of profitability, since it was actually achieved by the sampled companies in the past, in a year in which dumped imports were 30 per cent lower than in the IP.[102] The fact that this level is derived from actual profit levels is important.

181. India seeks to rely on paragraph 6.100 of the Panel Report in *Bed Linen* to demonstrate that the fact that the profits of EC producers are lower in the IP than in an earlier year does not render those profit levels inadequate. If this analogy is at all applicable, however, it does not support India's contention. The 5 per cent profit level cannot be said to be arbitrarily chosen or subjective since it represents an amount based on actual profit data.

182. In any event India has not suggested any alternative supposedly more objective level of profitability which could be expected in the absence of unfair competition from dumped imports. Moreover, the low level of profitability was also found by the EC to be below levels achieved by importers.

183. India goes on to argue that the profits for sampled producers would have exceeded 20 per cent if one takes into account the level of investments made.[103] This is grossly inaccurate and based on a lack of understanding of established international accounting practices. It has been made quite clear that the figures for investment do not represent yearly amounts but rather the accumulated amounts.[104] In other words India implies that a proper evaluation of profits consists in adding the amount of investments accumulated over many fiscal years to the profit realised one single year. Moreover, India fails to recognise that according to established international accounting practices investments are considered part of the assets of a company and cannot simply be added to profits.

(vi) Output

184. The Community industry was found to have increased production by 8.7 per cent from 39370 tonnes in 1992 to 42781 tonnes in the IP. India argues that since output increased, this does not point towards injury and the EC cannot rely on the reasoning in recital 81 of the Provisional Regulation that those companies were the ones which were strong enough to survive the competition from dumped imports and which to a certain extent had benefited from the demise of other producers which had not survived.

185. India submits that this reasoning runs counter to the Panels findings as it "refers" to producers outside the domestic industry. The Panel criticised the EC for basing some of it conclusions regarding injury on the negative developments for producers outside the definition of the domestic industry. It did not prohibit all references to facts which merely put in context the information relating to the domestic industry.

186. Whilst there was an increase in production by the Community industry, which consisted of some relatively strong companies which had managed to survive in circumstances where others had not, the Community industry only managed to increase production (and to increase its sales volume and market share) by concentrating on more sales of higher value niche products. It nevertheless suffered declining and inadequate profitability, due *inter alia* to price suppression caused by dumped imports.

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[102] Regulation 1069/97, recital 89.
[103] India's First Submission, para. 178.
[104] See the table at page 8 of the fax from EC to Texprocil of 27 July 2002 (India Exhibit RW-17).

187. India seems to completely ignore other pertinent analysis relating to output. From 1994 to the IP the Community industry's output actually decreased by 1.6 per cent. Furthermore, it was noted that the increase in exports had also led to the overall increase in production.[105]

(vii) Productivity

188. The EC found that productivity had improved as a result of the decline in employment. The investigation showed that the gain in productivity occurred mainly in the period from 1992 to 1994 when most of the jobs were lost.

(viii) Return on investments

189. First, it has already been pointed out that the figures for investments in the table attached to the disclosure document of 19 June 2001[106] represent accumulated and not yearly amounts.[107] Whilst the return on investments remained positive throughout the injury analysis period, it decreased by over 50 per cent.[108]

(ix) Factors affecting domestic prices

190. India alleges that the contraction in demand and raw cotton prices have nothing to do with the imports from India. The EC found, however, that in fair market conditions, and in the absence of other factors preventing this, domestic producers should have been able to increase their prices and pass on to their customers the increase in the cost of the raw material.[109] Furthermore, despite the contraction in demand the Community industry should have been able to benefit from the gap left by factory closures; instead the growth of the Community industry was negative between 1994 and the IP.

(x) Margin of dumping

191. India alleges that the EC's evaluation in its redetermination was factually incorrect and inadequate. It bases its argument on the fact that two producers had zero dumping margins and one producer had a dumping margin of 3 per cent. Given that India has argued that the determination of injury should only be based on the effects of dumped imports by excluding Indian exports found not to have dumped, it seems somewhat surprising that India now contends that the zero margins of dumping should be taken into account. Based on the positive margins of dumping found, presumably India would not argue that these margins are not substantial or above *de minimis* levels. Even taking into account the margins of non-dumping producers, it can still be said that the margin of dumping is substantial and above *de minimis*.

(xi) Cash flow

192. As stated in recital 19 of Regulation 1644/2001, data for trends concerning cash flow was collected at the level of the sample. The EC found that as with profitability, cash flow had decreased by 28 per cent from 1992 to the IP. This is not disputed. Whilst India submits that the evaluation regarding cash flow is inadequate, this allegation is wholly unsupported.

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[105] Regulation 1069/97, recital 81.

[106] Exhibit –India- RW –5.

[107] This is clearly indicated in the table in page 8 of the EC's fax to Texprocil of 27 July 2001 (India exhibit RW-17).

[108] Regulation 1644/2001, recital 39.

[109] Regulation 1644/2001, recital 45. See also Regulation 1069/97, recital 88.

(xii) Inventories

193. As has been demonstrated, data was obtained in relation to inventories from questionnaire replies and company accounts (see paras 150 - 151 above). At recital 29 of Regulation 1644/2001 it was explained in detail that production (e.g. of printed patterns) often takes place in response to or in anticipation of orders placed by particular clients. Secondly, stock valuation often takes place at 31 December which is towards the end of a peak period for the bed linen sector. While some increase in stocks was observed in some companies, there was no suggestion that this was evidence of injury. An increase in stocks or decrease in stocks in this sector can thus indicate actual or anticipated orders rather than unsold production.[110] Consequently, the EC was entitled to conclude that stocks did not have a bearing on the state of the domestic industry.

(xiii) Employment

194. India claims that the decrease in employment[111] is more probably due to the increase in productivity from more efficient machines. However no evidence is provided in support of this claim: it is merely asserted that "the increased production from more efficient machines could have been the reason to the 300 lay-offs in the sector".[112] In any event, there is not an increase but rather a decrease in production during the periods in which employment for the Community industry decreased. The same trend was found at the level of the sampled producers, as is evident from the table annexed to the disclosure document of 19 June 2001.[113]

(xiv) Wages

195. It is accepted that wages increased over the injury investigation period[114], but this factor is not decisive as to the determination of injury and has to be viewed alongside all other factors.

(xv) Growth

196. The EC considered the growth of the domestic industry and evaluated this in context by comparison to the growth in dumped imports. Whether one compares the growth of the domestic industry to the growth of the low priced dumped imports from India alone or from dumped imports from all countries concerned, it is clear that growth on the part of the Community industry was far less significant in both absolute and relative terms.

197. The EC does not disregard the fact that sales volume overall has increased but it does note that growth was negative for a significant period of the injury analysis period, i.e. between 1994 and the IP and growth in market share was also very limited during that period. In analysing the trends over the whole of the injury investigation period an investigating authority cannot be expected to ignore clear negative trends during that period. In this context, the EC recalls the finding of the Appellate Body in Argentina – Footwear Safeguard

[110] Regulation 1644/2001, recital 29.

[111] Recital 91 of Regulation 1069/97 provides that direct employment in the Community industry decreased from "around 7000 jobs to 6900". The exact figures (7059 in 1992 to 6684 in the IP) correspond to the decrease of 5.3 per cent mentioned; see page 31 of provisional disclosure document of 2 June 1997 (Exhibit-India-23). The decrease in employment is mirrored at the level of the sample (a decrease of 5.9 per cent) as disclosed to Texprocil on 19 June 2001 (Exhibit-India –RW-5).

[112] India's First Submission, para 202.

[113] Exhibit –India –RW-5.

[114] Regulation 1644/2001, recital 33.

> … we do not dispute the view and ultimate conclusion that the competent authorities are required to consider the *trends* in imports over the period of investigation (rather than just comparing the end points) under Article 4.2 (a).[115]

198. Furthermore, whilst some factors may have showed a positive trend overall, this does not necessarily mean that there could have been no objective finding of injury. Indeed, in order to evaluate injury it is necessary to consider all the relevant economic indicators in context. Where there are both positive and negative trends, a balancing act must normally be performed, as one or several of these factors cannot necessarily give decisive guidance.

(xvi) Ability to raise capital

199. The EC evaluated the sampled producers' ability to raise capital and found that the level of credits increased by 3 per cent from 1992 to the IP. Whilst the level of credits raised decreased during the period considered and then increased during the IP, there was no indication that the Community industry had encountered difficulties raising capital. The fact that credits raised increased does not necessarily indicate that sampled producers were performing better. Indeed, whilst the level of credits remained fairly stable, the debt ratio was particularly high.

(c) Alleged factual errors

200. India alleges that there are a number of factual errors or factual misrepresentations in the EC's redetermination. By and large, these allegations have already been raised and dealt with under the second argument, so the EC shall limit its treatment of these claims and refer where appropriate to its earlier comments.

(i) Composition of the sample

201. India considers that the producer which was eliminated from the sample during the original investigation because it was found to have imported dumped imports from Pakistan should have been included in the sample in the redetermination since Pakistan was no longer found to be dumping. First, the EC submits that this amounts to a claim that the EC has violated Article 4.1(i), however since this claim was not stated in the Panel request it is outside the scope of the Panel's terms of reference.[116] Second, the original Panel and Appellate Body findings do not give rise to any obligation to alter the composition of the sample. Finally, this can hardly be described as a deliberate decision to ignore positive evidence, as suggested by India. Nor can it seriously be contended that even if the EC committed an error in not including the data again for this one excluded producer – *quod non*- that this would have amounted to a manifest error such as to render the entire evaluation biased or otherwise not objective.

(ii) Sales values

202. Whilst it is admitted that there was a minor clerical error in the table annexed to the disclosure document of 19 June 2001 in respect of sales values for the sampled companies, the redetermination correctly confirms that profit on turnover decreased from 3.6 per cent in 1992 to 1.6 per cent in the IP.[117]

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[115] Appellate Body report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, (*"Argentina – Footwear Safeguard"*) para. 129

[116] See paras 51-54 above.

[117] See paras 177-178 above.

(iii) Market share

203. There is no change in figures for market share of the Community industry in the redetermination; India has itself confused the figures for market share by value and market share by volume, as explained at para 187 above.

(iv) Attribution of sampled figures to Community industry

204. The EC has already explained that it was made clear in recital 19 of Regulation 1644/2001 that certain information was collected only at the level of the sampled producers. The fact that India points this provision out itself demonstrates that it was not misled by any of these figures, rather, it understood perfectly well that they related to sampled producers.

(v) Margin of dumping

205. In the event that the alleged factual errors or misrepresentations regarding Regulation 696/2002 are considered to be within the jurisdiction of the Panel, the EC submits that the margin of dumping was objectively examined for the same reasons set out at para 211 above. Similarly, the statement in recital 19 of that Regulation regarding undercutting and the level of dumping is based on the established findings for normal value and for dumping during the investigation period
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206. In the light of the above, the EC submits that it did not base itself on erroneous or misrepresented facts and did not act inconsistently with Article 3.1.

(d) Conclusion on Article 3.1 and 3.4

207. The EC submits that it did carry out an overall reconsideration an analysis of the economic indicators pertaining to injury. In doing so, it properly evaluated these factors in accordance with the requirements of Article 3.1 and 3.4. It concluded that whilst the Community industry managed to increase production and to slightly increase its sales volume and market share by concentrating on sales of higher value niche products, it nevertheless suffered declining and inadequate profitability, which was basically the result of price suppression. The injury indicators for cash flow, return on investments and employment also showed declining trends.

208. India fails to demonstrate that the EC did not have due regard to the relevant economic factors and concentrates in its criticism of the EC's analysis by referring to the fact that certain information was collected only at the level of the representative sample (a practice which is perfectly legitimate for the reasons given above), and it alleges a number of factual errors, which have been demonstrated to be either false or inconsequential.

6. Claim 6: Article 3.5

A. Claim

209. India alleges that "the EC acted inconsistent with Article 3.5 of the ADA, by incorrectly establishing a causal relationship between dumped imports and injury".[118]

[118] Request for the Establishment of a Panel of 7 May 2002, WT/DS141/13/Rev.1.

B. Facts

210. India "briefly highlights" what it describes as "some perplexing factual determinations by the EC".[119] The precise relevance of those determinations to the arguments made subsequently by India is nowhere explained. In any event, as shown below, India's criticisms are unjustified.

(a) Regulation 1644/2001

211. India suggests that in recital 50 of Regulation 1644/2001 the EC authorities would have acknowledged that the alleged injury was actually caused by other factors, namely the increase in the costs of raw cotton and in consumer prices.[120]

212. As will be shown below, the passage quoted by India has been taken out of context. Recital 50 is not part of the causation analysis. It belongs to the analysis of the situation of the EC, the purpose of which is to establish whether the EC industry has suffered injury, regardless of the causes.

213. India complains that in recital 61 the EC includes "references to producers not forming part of the Community industry".[121] The EC believes that this criticism is based upon a misreading of the findings of the original report. The original panel found that

> information concerning companies that are not within the domestic industry is irrelevant to the evaluation of the 'relevant economic factors and indices having a bearing on the state of the industry" required under Article 3.4.[122]

214. Thus, the original panel did not say that information concerning companies that are not within the domestic industry can never be relevant, but rather that such information is irrelevant for the purpose of assessing the sate of the domestic industry. Recital 61, however, is not concerned with the state of the domestic industry. The point made in recital 61 is that the impact of the decrease in consumption was felt notably by EC producers which were not part of the domestic industry, rather than by the domestic industry. The EC submits that such finding is perfectly relevant for the causation analysis.

215. India criticises that recital 54 considers as "dumped imports" the imports from Pakistan.[123]. This issue has already been addressed in the EC's reply to Claim 4.

216. India also criticises the price analysis made in recitals 55 and 57, and in particular that "an increase of sales prices with 3.1 per cent is 'by and large stable', while a decrease in profits with 2 per cent is 'declining'".[124]

217. The evolution of the prices of the domestic industry has been discussed in detail in the EC's response to Claim 5. At this point, the EC will limit itself to note that India's comparison is misleading. Indeed, India compares an increase in percentage points (for profits) to an increase in percentage (for sales). In percentage terms, profits fell by 56 per cent. The EC considers that, in view of that, it is no exaggeration to say that profits were "declining". Nor is it inaccurate to say that that, where prices vary by 3.1 per cent over five years, they are "by and large stable".

[119] India's First Submission, para. 236.
[120] India's First Submission, para. 237.
[121] Ibid., para. 237.
[122] Panel report, para. 6.182.
[123] India's First Submission, para. 239.
[124] Ibid., paras. 240 and 242. [Footnotes omitted]

(b) Regulation 696/2002

218. India contests that the market share held by dumped Indian imports increased from 5.1 per cent to 8.5 per cent.[125] This issue has already been addressed at length in the EC's rebuttal to Claim 4.

219. India contends that, for the purposes assessing the effects of the imports from other countries, the EC should have disregarded imports from countries with a market share *de minimis*, which India defines as less than 1 per cent.[126]

220. The EC is not aware of any provision in the *Anti-Dumping Agreement* that requires to disregard particular sources of imports on account of their volume for the purposes of Article 3.5. In particular, the EC considers that the rule on "negligible" imports contained in Article 5.8 does not apply in this context. In any event, even if it applied, imports from countries which individually accounted for less than 3 per cent of total imports accounted collectively for more than 7 per cent of total imports.

C. Argument

221. India puts forwards three different arguments in support of this claim[127]:

(1) that the EC "has not proven a causal link between the dumped imports and the alleged injury";

(2) that the EC "has not examined all the factors which might have caused injury"; and

(3) that the EC "has not separately distinguished the injury caused by other factors".

222. The EC will address and rebut in turn each of the above three arguments.

(a) India's first argument

223. India alleges two different grounds in support of its argument that the EC authorities have not proven the causal link between dumped imports and injury.

224. In the first place, India contends that the determination of causality is based on incorrect factual findings.[128] Specifically, India mentions the following findings:

(i) the EC treated imports from Pakistan as dumped imports; and

(ii) the EC overstated the amount of dumped imports from India.

225. The EC has already dealt with these two alleged errors in its rebuttal of Claims 2, 3 and 4.

226. Second, India argues, in no more words, that

> … the EC has not adequately proven at all that the increase in market share of dumped imports from India with 1.9 per cent (over a five year period) – and which coincided with an increase in market share of the Community industry from 18.1 to

[125] Ibid., para. 244.
[126] Ibid., para. 245.
[127] Ibid., para. 258.
[128] Ibid., para. 247.

> 19.7 per cent (or from 22.4 to 25.1 per cent)- were *the cause* of the profit reduction of the Community industry from 3.6 to 1.6 per cent (over a period of five years and which was, in fact, the alleged injury).[129]

227. As will be shown below, the above statement is, despite its brevity, replete with both legal and factual errors. In particular,

- Article 3.5 does not require that dumped imports be the sole cause of injury;
- injury can be found to exist even if dumped imports have not gained market share;
- the finding of injury reached by the EC authorities is not based upon the loss of market share by the domestic industry; and
- in any event, the increase in market share of the dumped imports was significant.

(i) Dumped imports do not have to be the sole cause of injury

228. The EC authorities were not required to prove that dumped imports were *the cause* of the injury suffered by the EC industry. The EC recalls that in *US – Wheat Gluten* the Appellate Body has clarified that

> the language in the first sentence of Article 4.2 (b) [of the *Agreement on Safeguards*] does not suggest that increased imports be the sole cause of injury, or that "other factors" causing injury must be excluded from the determination of serious injury. To the contrary, the language of Article 4.2 (b), as a whole, suggests that "causal link" between increased imports and serious injury may exist, even though other factors are also contributing, "at the same time", to the situation of the domestic industry.[130].

229. In the same case, the Appellate Body emphasised that the non-attribution language in the second sentence of Article 4.2 (b) of the *Agreement on Safeguards* means that the effects of increased imports must be examined in order to determine whether the effects of those imports establish a "genuine and substantial relationship of cause and effect"[131] between the increased imports and serious injury.

230. The wording of Article 3.5 of the *Anti-Dumping Agreement* is similar to that of Article 4.2 (b) of the *Agreement on Safeguards*. For that reason, as confirmed by the Appellate Body in *US - Hot Rolled Steel*, adopted panel and Appellate Body reports relating to the non-attribution language in the *Agreement on Safeguards* can provide guidance in interpreting the non-attribution language in Article 3.5 of the *Anti-Dumping Agreement.*[132]

231. In view of the above, the EC submits that, contrary to India's position, the relevant issue is not whether dumped imports were *the cause* of the injury suffered by the EC industry, but rather whether there was a "genuine and substantive relationship of cause and effect" between the two.

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[129] India's First Submission, para. 248.

[130] Appellate Body report, *United States – Definitive Safeguard Measure on Imports of Wheat Gluten from the European Communities* ("*US – Wheat Gluten*"), WT/DS166/AB/R, , para. 67. See also the Appellate Body report in *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen lamb meat from New Zealand and Australia* ("*US – Lamb*"), WT/DS177/AB/R, WT/DS178/AB/R, para. 166.

[131] Appellate Body Report, *US – Wheat Gluten*, para. 69; Appellate Body report, *US – Lamb*, para. 168.

[132] Report of the Appellate Body Report, *US – Hot Rolled Steel*, para. 230.

(ii) Injury can be found to exist even where dumped imports have not increased

232. India's argument suggests that if the increase in the market share held by the dumped imports is relatively small, those imports cannot be considered a cause of injury. That suggestion is incorrect.

233. Article 3.2 of the *Anti-Dumping Agreement* requires the investigating authorities to consider not only the volume of imports, but also the effect of the dumped imports on prices, including

> whether the effect of such imports is otherwise to depress prices to a significant degree or prevent increases, which otherwise would have occurred, to a significant degree.

234. Clearly, if the *Anti-Dumping Agreement* directs the investigating authorities to consider the existence of price depression and price suppression, it is because those two situations are considered as a relevant form of injury. Yet, the existence of price depression or price suppression is perfectly consistent with the lack of increase, or even the decrease, in the market share held by dumped imports.

235. Further evidence that an increase in the market share of the dumped imports (and a correlative decrease in the market share of the domestic industry) is not necessary in order to establish the existence of injury is provided by Article 3.4. The first sentence of that Article lists the market share as one of the relevant factors having a bearing on the state of the domestic industry. Nevertheless, the second sentence of Article 3.4 provides that neither one nor several of those factors (including the market share) can "necessarily give decisive guidance". India's argument effectively renders the market share of the domestic industry a "decisive" factor.

(iii) the injury finding was not based upon a decrease of the EC industry's market share

236. The finding of injury reached by the EC authorities was not based upon the loss of market share by the domestic industry, but mainly upon its declining profitability, which was the result of price suppression and not of a decrease in sales.[133]

237. Given the type of injury suffered by the EC industry, the contribution to that injury by the dumped imports cannot be measured by considering only the market share gained by those imports. Indeed, the prices of the dumped imports and their effects on the prices of the EC industry should also be considered. In any event, as explained below, dumped imports from India did increase significantly.

(iv) the market share of dumped imports increased significantly

238. The market share held by the dumped imports from India increased from 5.9 per cent to 9.9 per cent (5.1 per cent to 8.5 per cent, if imports from exporters found not to be dumping are excluded) between 1992 and the investigation period. As a result, dumped imports from India represented over 50 per cent of the EC industry's sales volume during the investigation period.[134]

239. Imports from India increased more than imports from any other source[135] in both absolute and relative terms. For example, imports from Pakistan increased by 1.5 percentage points.[136]

[133] Cf. Regulation 1644/2001, recitals 50 and 51.
[134] Ibid., 17.
[135] Ibid., recital 30.

240. Moreover, imports from India grew most in the period between 1994 and the investigation period (from 6.8 per cent to 9.9 per cent)[137], thus coinciding with the deterioration of the financial situation of the Community industry.[138]

(b) India's second argument

241. India alleges that the EC authorities cited the increase in consumer prices as one of the causes of injury but then failed to examine it as an "other factor" under Article 3.5.[139]

242. This argument misrepresents the findings made by the EC authorities. The EC authorities did indeed make the observation that the prices of the domestic industry did not keep pace with inflation in prices in consumer prices.[140] But they did not identify that fact as a cause of injury. The statement cited by India is not part of the causality analysis, but instead of the assessment of the state of the domestic industry. The fact that the domestic prices failed to keep pace with the inflation in prices for consumer goods was regarded as a further indication of price suppression and inadequate profitability. The causes of that price suppression and inadequate profitability were examined in a subsequent section of the determination (Section 5), where the EC authorities concluded that they were the consequence of the downward pressure on prices applied by dumped imports.[141]

(c) India's third argument

243. India states this argument as follows[142]:

> In India's view, the EC did not engage in such separation nor did it distinguish the injurious different effects. For example, as regards the increase in raw cotton prices, the EC merely confirmed the findings of the provisional Regulation. That provisional Regulation in recital (103) stated that "The Commission concluded that increases in raw materials had caused injury. Nowhere, in the provisional Regulation, nor elsewhere for that matter, are the injurious effects caused by this price increase separated and distinguished from the effects of the dumped imports.

244. The EC rejects India's broad and unsupported allegations to the effect that the EC authorities failed to separate and distinguish the effects of dumped imports from those of other, unspecified, causes of injury. The EC refers the Panel to the relevant sections of the Provisional Regulation and of Regulation 1644/2001 and, to the extent that it was considered a measure "taken to comply", of Regulation 696/2002, where the EC authorities set out in detail the results of its careful examination of all relevant "other factors".

245. Since India has presented arguments with respect to only one alleged "other factor" (the increase in the cost of raw cotton), the EC will limit itself to reply to those arguments.

246. Once again, India's arguments misrepresent the findings of the EC authorities through selective quotation. While the EC authorities stated that the increase in the cost of raw cotton "had

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[136] Ibid.
[137] Ibid, recital 5.
[138] Ibid., recital 26.
[139] India's First Submission, para. 249.
[140] Regulation 1644/2001, recital 51. See also Provisional Regulation, recital 86.
[141] Provisional Regulation, recitals 102 and 102, confirmed by Regulation 1644/2001, recital 60.
[142] India's First Submission, para. 256.

caused injury", the context makes it clear that the EC authorities did not consider that factor as a separate cause of injury.

247. The relevant findings are set out in recitals 102 and 103 of the Provisional Regulation, which state that

> The world raw cotton price, as measured by the Cotton Outlook A index (converted from US$ into ECUs) rose by 48 per cent between 1992 and the investigation period. Over the same period prices on the Community market of the product concerned by this proceeding were experiencing strong downward pressure because of price undercutting by the dumped imports. In this period the sampled producers were not able to achieve a satisfactory price development. As noted in recital (86) above, prices of the reference products fell on average in real terms.
>
> The Commission concluded that increases in raw materials prices had caused injury. However, the extent of such injury depends on the ability to pass on some or all of the increased cost. In this case, it was reasonable to assess that the dumped imports were the main reason why such pass-through did not occur.

248. Also of relevance is recital 45 of Regulation 1644/2001:

> The price of raw cotton, which can represent up to 15 per cent of the total cost of bed linen, increased significantly during the period considered. Normally, in fair market conditions, producers should have been able to pass on his cost increase to customers. The investigators has shown that the Community industry was not able to do so in this case.

249. The above passages evidence that the EC authorities considered that the increase in the cost of raw cotton "had caused injury" only because the EC industry was unable to reflect that increase in its prices. (In other words, because the Community industry had suffered "price suppression", as described in Article 3.2). The EC authorities found that, in turn, the reason why the EC industry could not pass on the cost increases was the downward pressure on prices exerted by the dumped imports. Thus, ultimately, the cause of the injury were the dumped imports, and not the increase in the cost of raw cotton. Since the increase in the cost of the raw cotton was not a separate cause of injury, its injurious effects cannot possibly be "separated/distinguished" from those of the dumped imports.

7. Claim 7: Article 15

A. Claim

250. India alleges that "the EC acted inconsistent with Article 15 of the ADA by failing to explore constructive remedies".[143]

B. Summary of relevant facts

251. In order to implement the DSB's rulings and recommendations, the EC authorities carried out a re-determination of the dumping findings made in Regulation 2398/97 with respect to imports of bed linen originating in India, as well as a re-determination of the injury findings reached in the same regulation. The results of those re-determinations are set out in Regulation 1644/2001.

[143] Request for the Establishment of a Panel of 7 May 2002, WT/DS141/13/Rev.1.

252. Although the EC authorities concluded in Regulation 1644/2001 that imports originating in India were dumped[144] and, together with the imports originating in Pakistan and Egypt, caused injury to the EC industry[145], they decided to "suspend the application" of anti-dumping duties on imports originating in India.[146]

253. The suspension stipulated in Regulation 1644/2001 has been confirmed by Regulation 696/2002.[147] Thus, currently the EC is applying no anti-dumping duties on imports of bed linen originating in India.

254. Regulation 1644/2001 further provided that the anti-dumping duties on imports originating in India would expire six months after its entry into force unless a review was initiated before that date.[148] Further to duly substantiated application made by the EC industry, the EC authorities opened a review on 13 February 2002.[149] That review is still ongoing. The EC authorities will decide whether or not to levy anti-dumping duties, or to accept an undertaking, once that review is completed. In the meantime, the application of the duties imposed pursuant to the original investigation will remain suspended.[150]

255. Contrary to what is suggested now by India[151], the Indian exporters proposed no "constructive remedies" to the EC authorities. Instead, following the disclosure by the EC authorities of the findings which provided the basis for Regulation 1644/2001, the Indian exporters requested the following.[152]

- the repeal of the anti-dumping measures with retroactive effect;
- the reimbursement of the duties paid;
- the reparation of the damages suffered; and
- a moratorium on the initiation of new investigations until 31 December 2004

256. The above actions would not have provided any relief to the domestic industry and, therefore, are not "constructive remedies" within the meaning of Article 15.

257. The EC also wishes to clarify that Regulation 1515/2001[153] is not, contrary to India's allegations, "emergency legislation".[154] The adoption of Regulation 1515/2001 was rendered necessary by the *Bed Linen* report, which was, and remains, the only adopted report concerning an anti-dumping or anti-subsidy measure of the EC. Nonetheless, Regulation 1515/2001 is a generally applicable regulation which was not "specifically tailored to address the results of the Bed Linen

[144] Regulation 1644/2001, recitals 8-14.
[145] Ibid., recitals 17-70.
[146] Ibid., Article 1.1
[147] Regulation 696/2002, Article 1.
[148] Regulation 1644/2001, Article 2.2.
[149] OJ C 39/17, 13.2.2002 (Exhibit India-RW-23).
[150] Regulation 1644/2001, Article 2.2.
[151] India's First Submission, para. 261.
[152] Texprocil's comments to the disclosure of 19 of June of 2001, pp. 17-18 (Exhibit IND – RW – 15).
[153] Council Regulation (EC) No 1515/2001, of 23 July 2001, on the measures that may be taken by the Community following a report adopted by the WTO Dispute Settlement Body concerning anti-dumping and anti-subsidy matters (OJ L 201/10, 26.7.2001) ("Regulation 1515/2001") (Exhibit India – RW – 16).
[154] India's First Submission, para. 261.

dispute".[155] Furthermore, contrary to India's assertions[156], Regulation 1515/2001 has no retroactive effect. Article 3 of Regulation 1515/2001 provides that

> Any measures adopted pursuant to this Regulation shall take effect from the date of their entry into force and shall not serve as basis for the reimbursement of the duties collected prior to that date, unless otherwise provided for.

258. Regulation 1515/2001 would have been retroactive if, as requested by the Indian exporters, it had provided for the adoption of implementing measures with effects from the day of introduction of the disputed measure.

C. Argument

(a) Introduction

259. The obligation to explore constructive remedies must be fulfilled before "applying" anti-dumping duties. The EC has suspended the "application" of anti-dumping duties on imports of bed linen from India. If and when the EC authorities decide to "apply" anti-dumping duties as a result of the ongoing review, they will explore first the possibilities of constructive remedies, and more specifically the possibility of a price undertaking with the Indian exporters. In the meantime, India's claim is premature and should be rejected by the Panel.

260. Furthermore, assuming *arguendo* that the EC authorities had been required to explore possibilities of constructive remedies, notwithstanding their decision to suspend the application of the duties, it is submitted in the alternative that such suspension would qualify as a "constructive remedy" for the purposes of Article 15.

(b) The EC is not "applying" anti-dumping duties

261 The second sentence of Article 15 provides that

> Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.

262. Thus, the obligation to explore constructive remedies must be fulfilled "before applying anti-dumping duties".[157] It follows that, as long as a developed country Member is not "applying" any anti-dumping duties, it has still the possibility to explore constructive remedies and, therefore, cannot be found to be in violation of Article 15.

263. Currently the EC is not "applying" any anti-dumping duties on imports of bed linen originating in India. Although those imports were found to be dumped and to cause injury, the EC authorities decided to "suspend the application" of duties. Moreover, such suspension will remain in place for as long as the EC authorities do not decide expressly otherwise.

264. Should the EC authorities decide at a later stage to "apply" duties on imports of bed linen from India, they will still be able to comply with the obligation imposed by Article 15.

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[155] Ibid., para. 261.
[156] Ibid.
[157] According to the original Panel, "the phrase 'before applying anti-dumping duties' in Article 15 means before the application of definitive measures" (para. 6.231).

265. More precisely, in the event that, as a result of the ongoing review, the EC authorities decided to "apply" duties on imports of bed linen from India, they would explore first the possibilities of constructive remedies, and in particular the possibilities of a price undertaking.

266. As long as no such decision to "apply" duties is taken by the EC authorities, India's claim that the EC authorities have acted inconsistently with Article 15 is premature and unfounded and should be rejected by this Panel.

(c) In the alternative, the suspension of the application of duties is a "constructive remedy"

267. If, notwithstanding the decision of the EC authorities to "suspend the application" of anti-dumping duties on imports of bed linen originating in India, the Panel were to conclude that the EC is "applying" those duties within the meaning of Article 15, the EC submits in the alternative that such suspension would have to be considered as a "constructive remedy" for the purposes of Article 15.

268. The EC recalls that the original Panel held that a price undertaking is a "constructive remedy".[158] In essence, a price undertaking amounts to the suspension of the application of duties subject to the condition that the exporters respect certain price conditions. The suspension decided by the EC in the case at hand is more advantageous for the exporters than a price undertaking, because it is unconditional. It is, therefore, "constructive" *a fortiori*.

269. India argues that the suspension decided by the EC authorities is not "a remedy of any type" and, therefore, cannot be a "constructive remedy".[159] This argument begs the question: if the suspension of duties is not a "remedy of any type" for the EC industry, why does India consider it necessary to complain against that measure?

270. In fact, this argument undermines India's own position. If the suspension is "no remedy of any type", it follows that, as argued by the EC in the first place, the EC authorities are under no obligation to explore "constructive remedies", because such obligation only arises before, and as an alternative to, applying the basic "remedy" envisaged by the *Anti-Dumping Agreement*: definitive duties. Put another way, if a Member decides to "apply" no "remedy" at all, what could be the point of requiring that Member to explore possibilities of applying "constructive remedies"?

271. India further argues that the suspension is "a pretext to continue the proceeding and circumvent the Panel's finding with respect to Article 15".[160] This allegation is unfounded, and indeed illogical.

272. In the first place, the EC authorities need no "pretext to continue the proceeding". They have established that imports of bed linen from India are dumped and cause injury to the EC industry. Therefore, they would be entitled to apply anti-dumping duties on such imports.

273. Second, as recalled by the original Panel, Article 15 imposes "no obligation to actually provide or accept any constructive remedy that may be identified and/or offered".[161]

274. Third, the suspension of duties decided by the EC authorities is far more favourable to the exporters than a price undertaking, the "constructive remedy" which India appears to have in mind.[162]

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[158] Panel report, para. 6.229.

[159] Request for the Establishment of a Panel, claim (h), WT/DS141/13/Rev.1, 8 May 2002. See also paras. 272-273 of India's First Submission.

[160] Ibid.

[161] Panel report, para. 6.233.

It is absurd to pretend that, in order to avoid "exploring the possibilities" of a price undertaking, which, as explained above amounts to a conditional suspension of the application of duties, the EC authorities would have decided to suspend it unconditionally.

275. Finally, as explained repeatedly, should the EC authorities decide to apply duties as a result of the pending review, they will explore first with the Indian exporters the possibilities of constructive remedies.

B. CLAIMS UNDER THE DSU

1. Claim 8: Article 21.2

A. Claim

276 India alleges that the EC has "failed to respect the stipulations of Article 21.2 of the DSU".[163]

B. Summary of relevant facts

277. The relevant facts for the examination of this claim have been summarised above in section II.7.B.

C. Argument

278. Article 21.2 provides that

> Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been the subject to dispute settlement.

279. As explained below, Article 21.2 of the *DSU* is a non-mandatory provision, which therefore imposes no binding obligations upon developed country Members, such as the EC. In any event, the EC authorities did pay "particular attention" to the interests of India.

(a) Article 21.2 is not a mandatory provision

280. Article 21.2 is worded in hortatory terms: it uses the word "should", rather than "shall". India has not identified any relevant contextual element which would suggest that "should" is used in Article 21.2 with the meaning of "shall", unlike in the case of the provision examined by the Appellate Body in *Canada – Aircraft.*[164]

281. Moreover, Article 21.2 is cast in exceedingly broad and vague terms. It fails to specify with a minimum degree of precision what action, if any, is expected from developed country Members. As noted by a recent panel report in connection with a similarly worded provision contained in the first sentence of Article 15 of the *Anti-Dumping Agreement*[165], "Members cannot be expected to comply with an obligation whose parameters are entirely undefined".[166]

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[162] India's First Submission, para. 274.

[163] Request for the Establishment of a Panel of 7 May 2002, WT/DS141/13/Rev.1.

[164] Appellate Body Report, *Canada – Measures affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, para. 187.

[165] The first sentence of Article 15 of the *Anti-Dumping Agreement* provides that

282. The EC recalls that the *Decision on Implementation- Related Issues and Concerns* adopted at the Ministerial Conference of Doha instructed the Committee on Trade and Development

> to identify those special and differential treatment provisions that are already mandatory in nature and those that are non-binding in character, to consider the legal and practical implications for developed and developing Members of converting special and differential treatment measures into mandatory provisions, to identify those that Members consider should be made mandatory, and to report to the General Council with clear recommendations for a decision by July 2002.[167]

283. By issuing that instruction, the Ministerial Conference recognised that some of the special and differential treatment provisions included in the *WTO Agreements* are non-mandatory. The EC submits that Article 21.2 of the *DSU* is one of such non-mandatory provisions.[168]

284. India itself has acknowledged as much in the proposal which it has submitted to the Committee on Trade and Development, where it has suggested that in Article 21.2 "the word 'should' be replaced by 'shall', so as to make this provision mandatory".[169]

285. The EC supports India's proposal. But, as the law stands now, Article 21.2 of the *DSU* imposes no obligation upon developed country Members which can be enforced by resorting to dispute settlement.

(b) Article 21.2 does not restrict the discretion of Members to select the implementing measures

286. Assuming *arguendo* that Article 21.2 imposed a binding obligation upon developed country Members, such obligation would relate to the procedural requirements of the implementation process set out in the other provisions of Article 21, and not to the content of any implementing measures adopted by those Members.

287. In other words, a developed country Member could not be found to violate Article 21.2 simply because it has chosen to take an implementing measure which, while being fully consistent with its substantive obligations under the *WTO Agreement*, is less favourable to the "interests" of a developing country Member than another measure suggested by that Member.

288. India has agreed with the above proposition outside the context of this proceeding. Thus, in the proposals which it has submitted to the Trade and Development Committee it has suggested that the phrase "matters affecting the interests of developing countries" should be clarified by providing that, where the dispute is brought by a developing country Member against a developed country Member,

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> It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement.

[166] Panel Report, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India*, WT/DS206/R, para. 7.110.

[167] WT/MIN (01)/17, at para. 12.1.

[168] The Notes by the Secretariat of 4 February 2002 on *Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions – Mandatory and Non-Mandatory Special and Differential Treatment Provisions* (WT/COMTD/W/77 Rev. 1/Add.1/Corr.1) and on *Non Mandatory Special and Differential treatment Provisions in WTO Agreements and Decisions (*WT/COMTD/W/77/Rev. 1/Add. 3) categorise Article 21.2 of the *DSU* as a non-mandatory provision.

[169] TN/CTD/W/6 of 17 June 2002.

> The defending developed country Member should be given no more than 15 months of RPT in any circumstance; existing 90 days time limit for 21.5 procedures should be observed strictly. In case of delay, it should entail an obligation to compensate for continuing trade losses to the developing country complainants.

289 The above suggests that India considers that any obligations imposed by Article 21.2 are procedural, rather than substantive.

(c) The EC authorities did pay particular attention to the interests of India

290. If, despite the above, the Panel were to conclude that Article 21.2 is a mandatory provision, the EC submits that, in any event, the facts of this case evidence that it did pay "particular attention" to the interests of India.

291. In the first place, the EC paid particular attention to India's interests by agreeing to an implementation period of only five months and two days, i.e. considerably less than the 15 months period, which India's proposal to the Trade and Development Committee considers sufficient to satisfy the obligation imposed by Article 21.2.[170]

292. The EC also paid particular attention to the interests of India by accepting the establishment of this Panel at the first meeting of the DSB in which India's request was put in the agenda, even though, in accordance with Article 6.1 of the *DSU*[171] and well established practice, it could have delayed the establishment of the panel until the following DSB meeting.

293. Finally, should the Panel take the view that Article 21.2 limits the discretion of the implementing Member to choose the content of the implementing measures, the EC submits in the further alternative that it paid "particular attention" to the interests of India by suspending the application of the anti-dumping duties, notwithstanding the findings that imports from India are dumped and cause injury to the EC industry.

IV. CONCLUSION

294. In light of the foregoing, the EC respectfully requests the Panel:

(1) to make the other preliminary rulings specified under Section II;

(2) to all the claims submitted by India for the reasons stated in Section III; and

(3) should the Panel conclude that the EC has violated Article 2.2.2 (ii) of the *Anti-Dumping Agreement*, to find that such violation has not nullified or impaired the benefits accrued to India under that provision

[170] Cf. Agreement between the EC and India under Article 21.3 (b) of the DSU, of 26 April 2001, WT/DS141/10 (Exhibit India-RW-2).

[171] Article 6.1 of the *DSU* provides as follows:

> If the complaining party so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, unless at that meeting the DSB decides by consensus not to establish a panel [footnotes omitted]

ANNEX B

Third Parties' Submissions

ANNEX B-1

THIRD PARTY SUBMISSION OF JAPAN

2 August 2002

1. The Government of Japan does not take any specific position on the issue of terms of reference of the Panel. Without prejudice to the position of Japan on that preliminary issue, Japan would like to express its own views as follows.

2. We generally agree with India's Claim 5, in that information related to factors listed in Article. 3.4 of the Anti-Dumping Agreement must be collected and adequately evaluated to determine injury of the domestic industry. Accordingly, we would like to request that the Panel carefully examine the consistency of the EC measure at issue with this Article.

3. We also agree with India's Claim 6. Article 3.5 of the Anti-Dumping Agreement requires that investigation authorities, as part of their causation analysis, examine *all* "known factors", "other than dumped imports", which are causing injury to the domestic industry "at the same time" as dumped imports. Investigation authorities also must ensure that injuries, which are caused to the domestic industry by known factors other than dumped imports, are not "*attributed* to the dumped imports." Accordingly, we would like to request that the Panel carefully examine the consistency of the EC measures at issue with this Article.

ANNEX B-2

THIRD PARTY SUBMISSION OF THE UNITED STATES

5 August 2002

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I. INTRODUCTION

1. The United States welcomes this opportunity to present its views to the Panel in this proceeding initiated by India to review the consistency with the covered agreements of a measure taken by the EC to comply with the rulings of the Dispute Settlement Body ("DSB") regarding the EC anti-dumping measure on bedlinens from India.

II. ARGUMENT

A. A MEMBER CAN TAKE MEASURES AFTER THE END OF THE REASONABLE PERIOD OF TIME TO COMPLY WITH THE RECOMMENDATIONS AND RULINGS OF THE DSB, AND SUCH MEASURES MAY FALL WITHIN THE MANDATE OF A PANEL UNDER ARTICLE 21.5 OF THE DSU

2. A Member's chance to comply with the recommendations and rulings of the DSB does not end with the reasonable period of time for compliance. Nothing in the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") prevents a Member from modifying a compliance measure taken during the reasonable period of time, replacing it with another measure, or even taking its compliance measure for the first time after the end of the reasonable period of time. Furthermore, any of these measures could be subject to review by a panel under Article 21.5 of the DSU.

3. The EC took its initial measure to comply, Regulation 1644/2001, within the reasonable period of time, and amended that measure in Regulation 696/2002, outside the reasonable period of time. The DSU clearly does not support India's position that the EC may not demonstrate its compliance based on Council Regulation 696/2002, because the measure was taken after the end of the reasonable period of time. India itself provides no legal support for this contention. Its most thorough explanation, appearing in paragraph 82 of its written submission, states simply that "[i]n any event Regulation 696/2002 took place outside the reasonable period of time and is therefore also for that reason a non-permissible justification".

4. India has pointed to no provision of the DSU in support of its position, and indeed its view is not consistent with the DSU. Nothing in the text of the DSU prohibits a Member from bringing a measure into compliance with its WTO obligations after the expiration of the reasonable period of time established under Article 21.3. To the contrary, several DSU provisions appear to presume the possibility of a Member's bringing its measure into compliance after the reasonable period of time has expired. For example, Article 21.6 of the DSU provides for continued surveillance by the DSB "until the issue is resolved", without regard as to whether that occurs before or after the end of the reasonable period. Article 22.8 requires the termination of suspension of concessions (which can only begin after the end of the reasonable period) when, *e.g.*, a Member removes the measure that was found to be inconsistent with a covered agreement.

5. It may be that India is, in essence, arguing that an obligation to comply with recommendations and rulings of the DSB before expiration of the reasonable period of time defines the bounds of the mandate of a panel proceeding under DSU Article 21.5. Once again, the text of the DSU belies this view. The ordinary meaning of Article 21.5 authorizes a panel to consider the "existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings [of the DSB]". The text does not limit the Panel's mandate to examining measures taken before the reasonable period of time expired, or in any other way place a time limit on taking such measures.

6. An examination of the context of Article 21.5 confirms that measures to comply with the recommendations and rulings might occur after the end of the reasonable period of time. Article 21.6 provides for continued surveillance by the DSB until a matter is resolved, without regard as to whether that occurs after the end of the reasonable period. Article 22.8 requires the termination of compensation or suspension of concessions (which can only begin after the end of the reasonable period) if a Member implements the recommendations and rulings.

7. We note that the EC states as a general principle that "the relevant date for assessing the consistency of the measures 'taken to comply' with the covered agreements is the date of establishment of the panel".[1] Regulation 696/2002 predates both the request for establishment and the establishment of the Panel, so there is no need in this proceeding to reach the issue of which is the proper benchmark.

B. ARTICLE 2.2.2(II) OF THE ADA IS SILENT WITH REGARD TO THE WEIGHING FACTOR USED TO CALCULATE SG&A PROFIT FIGURES

8. In its first written submission to this Panel, India claims that, contrary to Article 2.2.2(ii) of the *Agreement on Implementation of Article VI of GATT 1994* ("ADA"), the EC applied an improper weighting factor in calculating the weighted average of SG&A and profit figures used to adjust the constructed normal value. Specifically, India claims that the EC improperly overstated the dumping margin by using sales value as the weighting factor, rather than sales volume.

9. The United States disagrees with India's position on this question. Article 2.2.2(ii) specifies that a weighted average is to be utilized; however, it does not specify the manner in which the weighting is to be performed. Article 2.2.2(ii) is silent with respect to this question, providing no guidance, express or implied, as to whether the weighting should be done on the basis of sales value or sales volume.

10. The United States likewise disagrees with India's claim that the "context" of Article 2.2.2(ii) indicates that only a quantity-based weighted average is permissible. The fact that several distinct sections of the ADA refer to sales volume and quantity cannot be taken as evidence that Article 2.2.2(ii) requires a quantity-based weighted average. As noted above, Article 2.2.2(ii) is silent as to the type of weighting factor to be used. If anything, India's argument regarding "context" indicates that Members knew how to insert references to volume or quantity when they wanted to require a calculation to be performed on that basis. Thus, where they have omitted such a reference, it should be considered equally relevant. The Panel should conclude from the silence of Article 2.2.2(ii) that the Members intended the choice of weight-averaging factor to be discretionary.

11. The Panel should also be mindful of Article 17.6(ii) of the ADA, which provides that "[w]here the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations". In this case, Article 2.2.2(ii) merely dictates that the amounts in question should be weight-averaged; it does not prescribe that a value-based weighting factor must be used, nor does it prescribe that a volume-based weighting factor must be used. Because Article 2.2.2(ii) is silent in this respect, clearly either method would be a permissible interpretation of the ADA. Therefore, the United States submits that the Panel should not disturb the EC's reliance on a value-based weight-averaging in this instance.

C. ARTICLE 21.2 IS NOT MANDATORY

12. The United States concurs with the EC's conclusion that Article 21.2 is not mandatory. We would emphasize that, as used in the covered agreements, "should" is a hortatory term, and not a mandatory term.[2] Moreover, if the use of "should" were to create an obligation, it would have the

[1] EC first written submission, para. 35.

[2] The Appellate Body has on one occasion interpreted "should" as mandatory, but only in the context of a DSU provision concerning a panel's "right" to seek information from the parties to a dispute, and then only because it believed such an interpretation necessary to give meaning to this right. *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, para. 187. Even in this situation, the

same meaning as "shall". This would deprive all significance from the decision by the drafters of the covered agreements to use one term rather than the other, thus violating the principle that "words must not be read into the Agreement that are not there".[3]

D. INDIA'S ASSERTION THAT THE EC IMPROPERLY CUMULATED IMPORTS FROM INDIA WITH NON-DUMPED IMPORTS FROM PAKISTAN IS MISTAKEN

13. The United States notes that measures not "taken to comply with the recommendations and rulings" are not within the scope of Article 21.5 of the DSU. Thus, to the extent that the EC's re-examination of its application of anti-dumping duties to Pakistan in Regulation 160/2002 was independent of the measure it took to comply with the recommendations and rulings of the DSB, it is not subject to this Article 21.5 review.[4]

14. India appears to rely on the EC's independent examination of imports from Pakistan, which occurred after the measures taken to comply, to assert that the EC improperly cumulated imports from India with non-dumped imports from Pakistan.[5] However, the EC indicates it found in the original investigation that the imports from Pakistan were dumped, and India did not in the original Panel proceeding challenge that finding or the cumulation of imports from India with those from Pakistan. Under those circumstances, the EC did not act inconsistently with the ADA or the DSU by continuing to treat the imports from Pakistan as dumped for the purposes of making its redetermination with regard to imports from India.

15. Further, India's reliance on Article 5.7 of the ADA to show noncompliance by the EC is unavailing.[6] As the EC explains, Article 5.7, which addresses the simultaneous consideration of both dumping and injury, applies only to the initiation and the "course of the [original] investigation".[7] Neither Article 5.7 nor any other provision of the Agreement requires investigating authorities to revisit aspects of the determination that were upheld or were not subject to the dispute. For example, the DSB might recommend that a Member bring an anti-dumping measure into conformity with its obligations based on a finding that one discrete aspect of an injury determination, such as the evaluation of one relevant factor reflecting the condition of the domestic industry, was inconsistent with those obligations. Nothing in Article 5.7 or elsewhere in the Anti-Dumping Agreement would support a view that the Member in those circumstances had an obligation to perform the entire investigation anew, including reaching a new dumping determination.

E. THE COMPETENT AUTHORITIES' EVALUATION OF EACH OF THE FACTORS ENUMERATED IN ARTICLES 3.2 AND 3.4 OF THE ADA SHOULD BE DISCERNIBLE IN THEIR REPORT, BUT THERE NEED NOT BE A SPECIFIC FINDING ON EACH OF THOSE FACTORS

16. To a large extent, India and the EC disagree as to the facts underlying the EC's evaluation of a number of industry factors. The United States takes no view on the facts, but wishes to make several general observations about the EC's obligations under Article 3.4 of the ADA as it relates to

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Appellate Body recognized that "should" often indicates an exhortation and that any implied "obligation" is "usually no more than an obligation of propriety or expediency, or moral obligation." *Id.*, para. 187, note 120.

[3] *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002, para. 250.

[4] EC first written submission, paras. 15-16. The EC makes the same point with respect to imports from Egypt. EC first written submission, paras. 17-18. However, since we are limiting our discussion to certain arguments raised by India in this proceedings, we refer only to those imports from Pakistan.

[5] India 's first written submission, para. 71.

[6] India's first written submission, paras. 73-84.

[7] EC first written submission, paras.105-107.

the direction of the Panel in its original Report. In this respect, India cites, at paragraph 151 of its first written submission, to the initial observation of the Panel that "the text of Article 3.4 indicates that the listed factors are *a priori* 'relevant' factors 'having a bearing on the state of the industry,' and therefore must be *evaluated* in all cases".[8] The Panel's discussion that followed that comment, however, set the actual framework for what the Panel believes a Member's obligations are under Article 3.4, and, in particular what the EC was obligated to do to bring its measure into compliance.

17. In particular, the Panel recognized that, depending on facts and circumstances of the industry in question, a particular factor "either is or is not relevant to the determination of whether there is injury".[9] The Panel did not determine that every enumerated factor was relevant nor did it impose an obligation on the EC to *rely* on any particular factor. Rather, the Panel simply found that because the EC's determination did not even refer to certain of the Article 3.4 factors, there was nothing in the determination to indicate that the authorities considered them not to be relevant.[10]

18. Article 12.2 of the ADA requires only that the authorities set forth "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities." In light of Article 12.2, investigating authorities are not required in each case to make a specific finding on each enumerated factor in Articles 3.2 and 3.4, but, as the Panel here found, it should be discernible from the authorities' determination that they evaluated each of the enumerated factors.

F. ARTICLE 3.5 OF THE ADA DOES NOT LIMIT ANTI-DUMPING RELIEF TO SITUATIONS IN WHICH IMPORTS ARE INCREASING IN ABSOLUTE OR RELATIVE TERMS

19. India asserts that the EC acted inconsistently with Article 3.5 of the ADA by failing to establish a causal link between the imports and the injury to the industry, and by disregarding the non-attribution language.[11] As the EC has emphasized, Article 3.5 does not require that the dumped imports be the sole cause of injury, or that the dumped imports alone have caused the injury.[12]

20. To the extent India suggests that the absence of absolute or relative increases in the volume of subject imports defeats an affirmative determination, the United States agrees with the EC that the ADA does not require that there be an increase in import volume in order to find that the dumped imports caused material injury to the domestic industry.[13] As the EC notes, the Agreement recognizes that in some investigations, the causal effects of the dumped imports may be manifested through price effects, notwithstanding small or stable volumes of imports.[14] Further, in certain market conditions even declining import volumes can produce injurious effects.

III. CONCLUSION

21. The United States thanks the Panel for providing an opportunity to comment on the important interpretive issues at stake in this proceeding.

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[8] *European Communities–Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted 12 March 2001, para. 6.155 (emphasis added).

[9] *Id.*, para. 6.168.

[10] *Ibid*.

[11] India' s first written submission, paras. 230-257.

[12] EC first written submission, para.226.

[13] EC first written submission, paras. 231-234.

[14] Article 3.2 of the ADA.

ANNEX C

Second Submission by the Parties

ANNEX C-1

SECOND WRITTEN SUBMISSION OF INDIA

(12 August 2002)

TABLE OF CONTENTS

I. INTRODUCTION

1. India respectfully submits to the Panel its second written submission in rebuttal to the first written submission of the EC.

2. The EC requests four preliminary rulings. India will therefore commence this second written submission in Section II below by responding to the EC's requests for preliminary rulings. India will respectfully request the Panel to dismiss the four requests as unfounded. India will also point out that the third request contradicts the EC's own rebuttal arguments and expressly confirms India's Article 3.4 claim.

3. Another feature of the EC's first written submission is that it contains errors of fact as well as misleading arguments. Once revealed these errors well illustrate the unfoundedness of certain of the EC's defences. India will comment on these errors in Section III below in order to clarify these issues for the Panel.

4. The legal arguments of the EC, including those statements that misrepresent certain of India's arguments, are rebutted in Section IV below. India will discuss the legal issues in the following order:

- The relative size of companies with domestic sales (claim 1);
- The unwarranted cumulation and *ex-post* reparations (claims 2 and 3);
- The significant overstatement of dumped imports from India (claim 4);
- The absence of a re-evaluation of data that were not even collected (claim 5);
- The improper causal link and the absence of non-attribution (claim 6); and
- The EC's disregard for India's status as a developing country (claims 7 and 8).

5. Finally, India will summarize its conclusions (Section V).

II. THE EC'S REQUESTS FOR PRELIMINARY RULINGS

A. THE EC'S FIRST REQUEST

6. The EC argues that since "in the original panel proceeding India submitted no claims against the findings of dumping with respect to imports originating in Pakistan and Egypt reached by the EC authorities in Regulation 2398/97"[1], "Regulations 160/2002 and 696/2002 are not measures "taken to comply" with DSB's recommendations and rulings in Bed Linen"[2] and, therefore, "any claims involving the findings made by the EC authorities in those two regulations are beyond this Panel's jurisdiction."[3]

7. Such reasoning represents a misunderstanding of the terms of reference of a 21.5 panel. Although as a matter of principle it is true that the Appellate Body stated in *Canada – Civilian*

[1] EC First Written Submission (FWS), paragraph 13.
[2] EC FWS, paragraph 27.
[3] *Ibid.*

Aircraft 21.5 AB that "Article 21.5 proceedings are limited to those measures *taken to comply* with the recommendations and rulings"[4], (emphasis in original) a clear limitation on the procedure to determine what constitutes a "measure taken to comply" is contained not in this report, but in the following statement made by the Panel in *Australia–Salmon 21.5*:

> "We note that an Article 21.5 panel cannot leave it to the full discretion of the implementing Member to decide whether or not a measure is one "taken to comply". If one were to allow that, an implementing Member could simply avoid any scrutiny of certain measures by a compliance panel, even where such measures would be so clearly connected to the panel and Appellate Body reports concerned, both in time and in respect of the subject-matter, that any impartial observer would consider them to be measures "taken to comply"."[5]

8. It is obvious that the EC reasoning in its request for a preliminary ruling goes in a direction opposite to this finding in spite of the fact that Regulations 1644/2001, 160/2002 and 696/2002 are closely connected to the panel and Appellate Body reports concerned. To accept the request of the EC at this stage, before the Panel has undertaken any substantive consideration of the issue would amount to leaving it to the full discretion of the implementing Member to decide whether or not a measure is one "taken to comply".

9. India also recalls that in *Australia–Leather 21.5* the Panel rejected Australia's argument that the measure mentioned in the request for the establishment of a panel was not within the terms of reference of a panel since it was not part of the implementation of the DSB's ruling and recommendation:

> "For us to rule, as suggested by Australia, that we are precluded from considering the 1999 loan, would allow Australia to establish the scope of our terms of reference by choosing what measure or measures it will notify, or not notify, to the DSB in connection with its implementation of the DSB's ruling."[6]

10. For these reasons India submits that the Panel should dismiss the EC's first request for a preliminary ruling.

B. THE EC'S SECOND REQUEST

11. The EC argues that "the relevant date for assessing the consistency of the measures "taken to comply" is the date of establishment of the Panel. Therefore, it argues, India's claims that Regulation 1644/2001 could not be "cured" through subsequent regulations 160/2002 and 696/2002 should be dismissed.[7]

12. India does not see any conflict between its claim and the argument of the EC. India respectfully submits that it is possible to have as the relevant date for assessing the *overall* consistency of the measures "taken to comply" the date of establishment of the Panel while at the same time having the date of expiration of a reasonable period of time as a relevant date for assessing the consistency of measures "taken to comply" *within* the reasonable period of time.

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[4] *Canada – Civilian Aircraft 21.5 AB*, paragraph 36. Full references of frequently quoted reports are attached in table to this submission.

[5] *Australia – Salmon 21.5*, paragraph 7.10, subparagraph 22

[6] *Australia – Leather 21.5*, paragraph 6.4.

[7] EC FWS, paragraphs 28 ff.

13. The EC's argument once again reveals misunderstanding of terms of reference of a 21.5 panel as well as misinterprets provisions of Article 21 of the DSU.

14. As stated by the Panel in *Australia – Salmon 21.5* the terms of reference of a 21.5 panel are of 'dual nature':

> "Two benchmarks apply when defining our terms of reference. First, Article 21.5 of the DSU pursuant to which this Panel was established. Second, our specific terms of reference set out in document WT/DS18/15, a document that refers, in turn, to the matter and relevant provisions of the covered agreements referred to by Canada in its request for this Panel (document WT/DS18/14)."[8]

15. Respectively a 21.5 panel is entitled to examine the consistency of "measures taken to comply" not only from the point of view of their consistency with the DSB's rulings and recommendations, but also from the point of view of their overall consistency with covered agreements. The Appellate Body has addressed this 'dual consistency' issue in the following terms:

> "Accordingly, in carrying out its review under Article 21.5 of the DSU, a panel is not confined to examining the "measures taken to comply" from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings. Although these may have some relevance in proceedings under Article 21.5 of the DSU, Article 21.5 proceedings involve, in principle, not the original measure, but rather a new and different measure which was not before the original panel. … "[9]

16. Besides that, the 'dual compliance' should also be examined in light of timing. Logically, the first step that a 21.5 panel should make is to examine whether a Member has complied with an adverse recommendation of the DSB *within* the reasonable period of time. The fact that there is an obligation to comply within the "reasonable period of time" is not questioned by the EC.[10] However, contrary to its statement, this obligation does not flow from Article 21.3 of the DSU, but from the Article 21.1 of the DSU:

> "It is useful to recall the essential principle and rule that WTO Members are committed to "prompt compliance" with DSB recommendations and rulings[11] and that "prompt compliance" translates into "immediate" compliance.[12] When, however, such "immediate" compliance is "*impracticable*," then the Member bound to comply becomes entitled to "a reasonable period of time" within which to comply."[13] (Footnotes in original, emphasis in original)

17. The role of Article 21.3 is to substantiate this obligation of "prompt compliance" by determining a formal deadline to comply. Failure of a complying Member to respect this deadline gives right to initiate proceedings under Article 21.5. Otherwise such 21.5 proceeding would not even be initiated. If the deadline of 21.3 is meaningless, as the EC seems to suggest, *then when* can an applicant initiate action under Article 21.5? Could India as a matter of legal right request an establishment of panel before the expiration of a reasonable period of time?

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[8] *Australia – Salmon 21.5*, paragraph 7.10.
[9] *Canada – Aircraft 21.5 AB*, paragraphs 40–41.
[10] EC FWS, paragraph 36.
[11] Article 21.1 of the DSU.
[12] Article 21.3 of the DSU.
[13] *US – Hot Rolled Steel 21.3*, paragraph 25.

18. India also submits that this obligation under Article 21.1 is further served by the obligation contained in Article 21.2:

> " … where the DSU, immediately after stressing that "prompt compliance" with the recommendations and rulings of the DSB is essential for the WTO dispute settlement system, provides that: "Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement"."[14]

19. It is obvious that the "particular attention" to "the interests of developing country Members" as for the "prompt compliance" with the DSB's recommendations in its favour is best served by a strict interpretation of the binding nature of the obligation to comply.

20. Once the Panel has finished its analysis as to whether measures taken to comply *within* the reasonable period of time are consistent with covered agreements, it can also examine due to its 'dual' mandate the subsequent measures taken to comply which were taken, however, *outside* of the reasonable period of time:

> "The Panel takes the view that it should take into account all the relevant facts occurring until the date the matter was referred to it. By applying this approach, an Article 21.5 panel can reach a decision that favours a prompt settlement of the dispute. Indeed, it avoids situations where implementing measures allowing for compliance with the DSB recommendations and rulings would be disregarded simply because they occur after the end of the reasonable period of time. The Panel, while mindful of the obligation of the United States to bring its legislation into conformity by the end of the reasonable period of time, considers that it is consistent with the spirit of Article 3.3 of the DSU to take into account any relevant facts until the date on which the matter was referred to the Panel."[15] (Footnotes omitted)

21. Thus, the 'dual' terms of reference of a 21.5 panel allow for a finding by a 21.5 panel in a preliminary way of (in)consistency of measures taken to comply that were taken *within* the reasonable period of time and, at a later stage, for a final finding of whether the preliminary finding should be corrected due to subsequent developments. It may be the case that these two findings are identical or divergent. Naturally, in the latter case the decisive finding for the purpose of drafting recommendations to the DSB will be the one that takes into account the subsequent developments up to the date of the request for the establishment of the panel. Respectively, the finding of non-consistency of measures taken to comply *within* the reasonable period of time will be "necessarily declaratory" that, however, does not whatsoever diminish its value from the point of view of nullification and impairment.

22. As a side comment, India notes that the obligation of "prompt compliance" under Article 21.1 does nothing else, but to substantiate in terms of timing the general obligation contained in the DSU to comply with rulings and recommendation of the DSB. Therefore, the inconsistency of a measure with the covered agreements under Article 21.5 proceedings automatically results into a violation of Article 21.1. This makes it unnecessary for a complaining Member to raise violation of Article 21.1 as an independent claim.

23. For these reasons India respectfully submits that the Panel should dismiss as unfounded the EC's second request for preliminary ruling stating that subsequent Regulations 160/2002 and 696/2002 could cure inconsistencies contained in the measure "taken to comply" *within* the reasonable

[14] *Chile – Alcoholic Beverages* 21.3, paragraph 44.
[15] *US – Shrimp 21.5*, paragraph 5.13.

period of time, which is the Regulation 1644/2001. This is without prejudice to the right of the Panel to assess the overall consistency of the measures "taken to comply" up to the date of, and specified in, the request for the establishment of the Panel.[16]

C. THE EC'S THIRD REQUEST

24. The EC argues in its third request for a preliminary ruling that India's claims under Articles 3.5 and 3.4 could have been raised during the original proceeding but were not.[17]

25. First of all, as regards Article 3.5 and the non-attribution language, the assertions of the EC are not correct. India *had* originally made a claim regarding the EC's violations of the non-attribution language under Article 3.5 but the Panel determined that India had in that instance not met its burden of presenting a *prima facie* case (Panel report paragraph 6.144).[18] For that reason alone the EC's assertion is without basis since the claim was made.

26. India also recalls that the fact that the claim was dismissed in the original proceedings does not preclude a 21.5 panel from its examination within the Article 21.5 proceedings. In *US – Shrimp 21.5* the Appellate Body found that the measure which had been found WTO consistent in the original proceeding and remained therefore unchanged was not immune from scrutiny by a 21.5 panel.[19]

27. As regards Article 3.4 India first wishes to highlight some startling statements before addressing that request for a ruling. First, the EC expressly states that:

> " … India claims that the evaluation of factors such as sales, market share, price development, production, profitability or employment is inadequate, even though Regulation 1644/2001 limits itself to confirm the findings with respect to those factors made in Regulation 1069/1997."[20] (Footnotes omitted, underlining added)

28. This latter statement is not even incidental but repeated in the next paragraph where the EC immediately even draws the logical conclusion itself:

> "The EC submits that, to the extent that the re-determination at issue in this dispute does nothing but confirm the findings already set out in the measure at issue in the original proceeding, it cannot be considered that such re-determination constitutes a measure "taken to comply" within the meaning of Article 21.5 of the *DSU*." (Underlining added)[21]

29. India agrees and said as much in paragraph 157 of its first written submission where it stated that:

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[16] *E.g. US – Shrimp 21.5*, paragraph 5.13. See *supra* at paras. 0-0.
[17] EC FWS, paragraph 40, last sentence, and EC FWS, paragraph 41.
[18] Original Panel Report at paragraph 6.144:
"Finally, with respect to India's claim that the European Communities failed to properly consider "other factors" which might have been causing injury to the domestic industry, as required by Article 3.5 of the AD Agreement, we note that, with the exception of the argument concerning improper consideration of "dumped" imports, India has made no other arguments in support of this claim. Having rejected India's position in that regard, we consider that India has failed to present a *prima facie* case in this regard."
[19] *US – Shrimp 21.5 AB*, paragraph 91.
[20] EC FWS, paragraph 41.
[21] EC FWS, paragraph 42.

> "In the view of India the EC has in fact done nothing else other than to issue a new determination that, while professing to comply with the Panel's conclusions and findings, is essentially a restatement of its original determination. …"

30. The statements by EC are further proof that India's second argument under its claim 5 was correct:[22] the EC did simply not engage in an overall reconsideration and analysis even though the findings of the Panel and the Appellate Body warranted exactly that. The Panel will recall that the "EC-type" of "re-determination" can *indeed not* be considered as a measure "taken to comply" in light of the case law pronounced in *Mexico–HFCS 21.5* (Panel, confirmed by Appellate Body):[23]

> " … Part of the difficulty with SECOFI's redetermination in this case is that while SECOFI apparently undertook to respond to the specific criticisms set out in the original Panel's report, and has set out additional information relevant to the specific points made by the Panel in that report, there does not appear to have been an overall reconsideration and analysis of the information in light of the requirements of the AD Agreement, as clarified by the original Panel." (Emphasis added)

31. In the admitted absence of this overall reconsideration and analysis, the Panel is entitled to find that India's claim 5, argument 2, was correct and that, accordingly the EC did not comply with the findings of the original Panel and the relevant case law on such matter.

32. To the extent that the EC later in its first written submission argues, in response to India's second argument of claim 5, that it had engaged in a "careful analysis"[24], this contradicts the statement in paragraph 42 that the EC did "nothing but confirm" the original findings. Accordingly, the EC's third request for a preliminary ruling should be dismissed outright as a mere "litigation technique" for which the EC has appropriately quoted the Appellate Body in *US – FSC*. As the EC quoted the Appellate Body:

> " … The procedural rules of WTO dispute settlement are designed to promote, not development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes."[25]

33. The fact that the EC merely engages in "litigation techniques" becomes even clearer when the relevant case law is reviewed in more detail. In *Canada–Aircraft 21.5* the Appellate Body overruled the Panel's refusal to examine new arguments put forth by the complainant because that argument did not form part of the reasoning of the original panel:

> " … a panel is <u>not</u> confined to examining "the measures taken to comply" from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings."[26]

34. "Rather", the Appellate Body stated, "the Article 21.5 Panel was obliged to examine the revised TPC programme."[27] Otherwise, "the utility of the review envisaged under Article 21.5 of the DSU would be seriously undermined."[28]

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[22] India's FWS, paragraphs 157 ff.

[23] *Mexico–HFCS* Panel, at paragraph 6.37. In the present *Bed Linen* case the EC itself takes away any doubt by stating that it merely confirmed its original findings.

[24] EC FWS, paragraph 158.

[25] EC FWS paragraph 46, last sentence.

[26] *Canada – Aircraft AB 21.5* paragraph 41.

[27] *Canada – Aircraft AB 21.5* paragraph 42.

[28] *Canada – Aircraft AB 21.5* paragraph 41.

35. In *US – Shrimps 21.5*, where the scope of panel review under Article 21.5 was again an issue, the Appellate Body reiterated its above-cited ruling from *Canada–Aircraft 21.5*. The Appellate Body quoted with approval the Panel's observation that a 21.5 Panel:

> "is fully entitled to address all the claims … whether or not these claims, arguments and the facts supporting them were made before the Original Panel and in the Appellate Body proceedings … ".[29]

36. The Appellate Body also approved the Panel's examination of whether the (US) compliance measure would amount to a 'disguised restriction on international trade' under GATT Article XX, *chapeau*, an issue which was not examined by the original Panel/Appellate Body.

37. In the context of the EC's third request one may therefore say that the only limitation on a 21.5 Panel is that it cannot go beyond the claims raised by the complainant in its request for establishment of 21.5 Panel.[30]

38. In light of the above, India respectfully submits that the EC's third request for a preliminary ruling should be dismissed as unfounded. To the extent that the EC is admitting the correctness of India's second argument of its fifth claim (no overall reconsideration and analysis) India trusts that the Panel takes note of the EC's express admission of its violation of Article 3.4.

39. As regards the EC's point raising of claims in a timely manner,[31] India fails to see the problem of the EC. The claims and the measure were duly identified before the Panel. Claims and measures together form the matter, which forms the basis for the terms of reference for a Panel.[32]

D. THE EC'S FOURTH REQUEST

40. The EC claims that India is raising claims outside the terms of reference.

41. This is an attempt of the EC to deliberately misrepresent the nature of India's claims and arguments.

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[29] *US – Shrimp AB 21.5* footnote 46. See also paragraphs 101 and 102 of that same report.
[30] *Ibid.* paragraphs 87 and 88.
[31] EC FWS paragraph 47.
[32] *Cf. Guatemala–Cement AB*, paragraph 72:
" … Article 7 of the DSU itself does not shed any further light on the meaning of the term "matter". However, when that provision is read together with Article 6.2 of the DSU, the precise meaning of the term "matter" becomes clear. Article 6.2 specifies the requirements under which a complaining Member may refer a "matter" to the DSB: in order to establish a panel to hear its complaint, a Member must make, in writing, a "request for the establishment of a panel" (a "panel request"). In addition to being the document which enables the DSB to establish a panel, the panel request is also usually identified in the panel's terms of reference as the document setting out "the matter referred to the DSB". Thus, "the matter referred to the DSB" for the purposes of Article 7 of the DSU and Article 17.4 of the Anti-Dumping Agreement must be the "matter" identified in the request for the establishment of a panel under Article 6.2 of the DSU. That provision requires the complaining Member, in a panel request, to "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." (Emphasis added) The "matter referred to the DSB", therefore, consists of two elements: the specific measures at issue and the legal basis of the complaint (or the claims)." (Emphasis added by Appellate Body)

42. As regards the first Article referred to by the EC, Article 4(1)(i), it is clear that India has nowhere made a claim under that provision. India trusts that it is clear to the Panel that it is not making such a separate *claim*.

43. While even the EC cannot create claims that are not there, it still tries to create one. The EC states that Article 3.1 "involves necessarily a claim based on Article 4(1)(i)".[33]

44. This statement from the EC is a less than candid characterization of India's claim 5 with respect to Articles 3.1 and 3.4. India had explained, as an *argument* in support of its *claim* (that the EC's injury finding was inconsistent with Articles 3.1 and 3.4), that factual evidence on the record had been disregarded.[34] The deliberate disregard of evidence of one EC producer who *had* been verified was one such example to illustrate the fact that no overall reconsideration and analysis had, nor could have, taken place. India made no separate claim under Article 4(1)(i)—even though it could have done so given the pertinent violation.

45. Indeed, for the difference between claims and arguments India needs only to recall one example from the original Panel report. In the original *Bed Linen* Report the Panel found (a second) violation of Article 3.4 since the EC had for its injury determination included EC producers that did not even form part of the domestic industry. India had at that time raised no separate *claim* under Article 4 (definition of domestic industry) but had focused on the violations of Article 3 alone. Nowhere did the Panel find, or did the EC argue, that in order to find fault with Article 3 there should first be a separate claim of a violation of Article 4. The EC did not appeal that finding of the Panel.

46. In the current situation India restricted claim 5 to Articles 3.1 and 3.4—even though the EC's actions undoubtedly would also violate Article 4(1)(i) separately.

47. Nowhere has India requested or suggested the Panel to go beyond the claims raised in the request for the panel. The sweeping statement that "India has done the same again"[35] is baseless and should be dismissed as such.

48. Finally, the EC mentions that India should have mentioned Article 21.3 of the DSU rather than Article 21.5. Probably fully aware of the surreal nature of this preliminary request the EC does not spend more than three curt sentences on this issue.[36]

49. Article 21.3(b) deals with the reasonable period of time in a situation where parties mutually agree on that period. An Article 21.5 proceeding in itself is all about *compliance* within that reasonable period of time. If the complaining party would consider that compliance within the RPT did exist then it would not have initiated an Article 21.5 proceeding.

50. India did therefore not mention Article 21.3(b) in its request for the Panel as a separate *claim*. In no other Article 21.5 proceeding has an applicant ever mentioned the inconsistency of Article 21.3 as a separate claim.[37]

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[33] EC FWS, paragraph 54.

[34] Doubtless, the EC is fully aware of the distinction between *claims* and *arguments* such as for example explained in *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Appellate Body Report, WT/DS27/AB/R, 9 September 1997, paragraphs 141-145 or *Korea – Dairy Products AB* at paragraph 123. The EC's attempt to confuse the two concepts may therefore be characterized as a simple litigation technique for which, as noted above, the EC has already quoted the relevant views of the Appellate Body in *FSC*.

[35] EC FWS paragraph 52, first sentence.

[36] See also the discussion at para. 0 *supra*.

[37] *See: Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, Recourse by New Zealand to Article 21.5 of the DSU, Request for the Establishment of a Panel, WTO

51. For these reasons India respectfully submits that also the EC's fourth request should be dismissed.

E. INTERMEDIATE CONCLUSION

52. India has explained above why the EC's requests for preliminary rulings are unfounded. As India has shown, the EC has with its requests merely engaged in "litigation techniques" in order to deviate attention from the real violations that were committed by the EC.

53. For the above reasons, India respectfully submits that the Panel dismiss all of the EC's requests for preliminary rulings.

III. ERRORS OF FACT

A. GENERAL

54. As mentioned above, there are a number of incorrect and/or misleading statements in the EC first written submission. India will comment on and correct the statements that it considers most relevant and important for a proper understanding of the case.

B. THE UNEXPLAINED SIZES OF BOMBAY DYEING *VERSUS* STANDARD INDUSTRIES

55. The EC's 'defence' in paragraph 79 of its first written submission as regards the original relative size of Bombay Dyeing and Standard Industries—as quoted by India in its first written submission in paragraphs 61 through 63—is limited to a mere reference back to the EC's earlier contention that these quantities were *already* based on sales *value* rather than sales *volume*.

Document WT/DS113/23, 6 December 2001; *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, Recourse by the United States to Article 21.5 of the DSU, Request for the Establishment of a Panel, WTO Document WT/DS103/23, 6 December 2001; *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, Recourse by New Zealand to Article 21.5 of the DSU, Request for the Establishment of a Panel, WTO Document WT/DS113/16, 19 February 2001; *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, Recourse by the United States to Article 21.5 of the DSU, Request for the Establishment of a Panel, WTO Document WT/DS103/16, 19 February 2001; *Brazi l– Export Financing Programme for Aircraft*, Second Recourse by Canada to Article 21.5 of the DSU, WTO Document WT/DS46/26, 22 January 2001; *United States–Tax Treatment for 'Foreign Sales Corporations'*, Recourse to Article 21.5 of the DSU by the European Communities, Request for the Establishment of a Panel, WTO Document WT/DS108/16, 8 December 2000; *Brazil – Export Financing Programme for Aircraft*, Recourse by Canada to Article 21.5 of the DSU, WTO Document WT/DS46/13, 26 November 1999; *Canada – Measures Affecting the Export of Civilian Aircraft*, Recourse by Brazil to Article 21.5 of the DSU, WTO Document WT/DS70/9, 23 November 1999; *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, Recourse by Korea to Article 21.5 of the DSU, WTO Document WT/DS99/12, 25 October 2000; *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, Recourse by the United States to Article 21.5 of the DSU, WTO Document WT/DS132/6, 13 October 2000; *United States – Import Prohibition Of Certain Shrimp And Shrimp Products*, Recourse by Malaysia to Article 21.5 of the DSU, WTO Document WT/DS58/17, 13 October 2000; *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather*, Recourse by the United States to Article 21.5 of the DSU, WTO Document WT/DS126/8, 4 October 1999; *Australia – Measures Affecting Importation of Salmon*, Request by Canada for Determination of Consistency of Implementation Measures, WTO Document WT/DS18/14, 3 August 1999; *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Recourse by Ecuador to Article 21.5 of the DSU, WTO Document WT/DS27/41, 18 December 1998; *European Communities – Regime for the Importation*, Sale and Distribution of Bananas, Request for the Establishment of a Panel by the European Communities, WTO Document WT/DS27/40, 15 December 1998.

56. More specifically, the EC explains that the percentages as quoted by India ("almost 80 per cent of the domestic market"; "80 per cent of its domestic market"; and "80 per cent of the market … than one with only 14 per cent") were already value-based percentages of *all* domestic sales.

57. The EC offers no proof for its assertion but merely states that it had *already* explained this earlier on page 2 of India-Exhibit-RW-17. In that exhibit the EC had asserted that Bombay Dyeing held 80 and Standard Industries 14 per cent of the domestic market, respectively. The current explanation in the EC's first written submission remains therefore no more than a repeated assertion not sustained by evidence. Indeed, the repetition of the explanation raises more questions than answers while it would have been for the EC to produce the contrary *evidence*.

58. Let us accept for a moment that there were indeed a few more companies with domestic sales for the missing 6 per cent in addition to 80 per cent for Bombay Dyeing and 14 per cent for Standard Industries. We suppose therefore that originally the total pool was 100 for domestic sales. Let us assume now that this total pool of 100 domestic sales is reduced to 94 for the total of Bombay Dyeing (80) and Standard Industries (14) only.

59. Then it is arithmetically <u>*not*</u> possible that as a percentage of that pool of 94 the amount for Bombay Dyeing would allegedly be 91 per cent while the other amount for Standard Industries would allegedly be 9 per cent! The respective sizes 80 per cent (out of 100) and 14 per cent (out of 100) are logically—as relative sizes vis-à-vis *each other*—85 per cent (80 out of 94) *versus* 15 per cent (14 out of 94), respectively.[38] These relative sizes are never 91 *versus* 9.

60. Indeed, with the volume figures now being revealed as 77.7 per cent *versus* 22.3 per cent India can only suspect that in its declarations before the original Panel, the EC had tried to understate the actual relative size of Standard Industries by mentioning a volume of 14 instead of 22 per cent. By contrast, the 77.7 per cent size of Bombay Dyeing based on volume is more than remarkably in line with the repeated declarations of "almost 80 per cent" and "80 per cent". This again shows that the EC originally did use a different means (volume) of measuring the respective size of the companies on the domestic market (rather than now value).

C. THE EC'S 'CONFUSION' BETWEEN A DUMPING *MARGIN* AND A DUMPING *DUTY*

61. A general feature of the first written submission of the EC is the confusion it seeks to create between a dumping *duty* and a dumping *margin* and the way of determining both.

62. As India had pointed out in its first written submission, Article 9, by its very title, regulates the imposition and collection of anti-dumping *duties*. It does not address the question of how non-dumped exports of a sample should be treated in the context of an injury or dumping determination.

63. Yet, by repeatedly intermingling the concepts of *duty* and *margin* the EC eventually comes to argue that since the weighted average *duty* should exclude three sets of margins (zero, *de minimis*, and facts available), the determination of the weighted average dumping *margin* must follow those same specific and restricted rules.

64. Having done that first, the EC ultimately comes to argue that this weighted average *margin* cannot represent imports that are simultaneously dumped and non-dumped.[39] Hence, by first interjecting that "exclusion concept" for *duty* purposes into the concept of a weighted average

[38] More precisely: [(80 ./.. 94) * 100] = 85%; [(14 ./.. 94) * 100] = 15%.
[39] EC FWS paragraph 132.

dumping *margin*, and subsequently taking this *margin* to override the concept of a sample, the EC eventually comes to defeat the very purpose of a sample.

65. In fact, if that argument of the EC is followed to its consequences then that means that this case must immediately be terminated because of negative dumping for the entire country on a weighted average basis.[40]

66. Coming back to India's point: once it is acknowledged, following the guidance of the Appellate Body[41], that the purpose of a *duty* determination under Article 9 ("Imposition and Collection of Anti-Dumping *Duties*) is restricted to just that, it is perfectly clear that the EC has violated both Articles 3.1 and 3.2 by deliberately disregarding positive evidence on the record, based on sample data, as regards the real volume of dumped and non-dumped imports.

D. THE MISQUALIFICATION OF THE "ALL OTHERS" RATE

67. The EC's references as regards the calculation of its "all others" rate[42] are unfortunate since they mix the concepts of "residual duty", the "weighted average duty", and the US concept of an "all others" rate. In order to clarify this confusion for the Panel, India briefly wishes to correct the statements of the EC.

68. Basically, the anti-dumping duty applied to non co-operating companies is, under EC law frequently referred to as the "residual duty". For example Regulation 1644/2001 states at recital (14) that, in view of the high level of co-operation:

> " … it is considered appropriate to set the dumping margin for non cooperating companies in India at the level of the highest dumping margin established for a company in the sample."

69. Under EC law this residual duty is the duty applied to "all others", *i.e.* everyone who did not co-operate. This duty is typically set at the same level as the highest dumping margin in case of a high co-operation (such as in *Bed Linen*) and a higher (punitive) level in case of a low cooperation.

70. Under US law, the "all others" rate is also the rate that is applied to the non-co-operating producers, but there it is calculated as a weighted average of the co-operating companies.[43] This concept of what is the "all others" duty is therefore different in US and EC law.

71. In EC law, in order to qualify for the weighted average rate, one has to be cooperating but not sampled; it cannot be obtained through non-cooperation.[44] This is therefore called the "weighted average duty for co-operating non-sampled producers."

72. Thus, in simple terms, under EC law the "all others" rate is the highest, while under US law this is generally[45] a weighted average.

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[40] See paragraph 0 *infra.*

[41] Appellate Body *Bed Linen* report, footnote 30.

[42] EC FWS paragraphs 82, 126, 130, 132, 135.

[43] To be more precise it should be noted that in US law a company which has been designated by DOC as a "mandatory" respondent must participate or face the application of adverse facts available; in such situation it cannot elect the "all-others" rate by non-co-operation. A second caveat is that in a non-market economy case in the US, the "all others" rate is based on adverse facts available. This is because in such cases, the DOC presumes that all companies in the country are under government control, such that failure to respond to the questionnaire is deemed to be non-co-operation.

[44] Except in the case of "newcomers".

[45] But see the above caveats.

73. The difference is important to clarify since in paragraphs 82, 126, 128, 130, 132, 135 of its submission the EC refers to the "all others" rate when in fact it means to refer to the "weighted average duty for cooperating non-sampled producers."

IV. RESPONSE TO THE LEGAL ARGUMENTS OF THE EC

A. GENERAL

74. India will now proceed to refute in detail the arguments that the EC has made in its first written submission.

B. THE RELATIVE SIZE OF COMPANIES WITH DOMESTIC SALES (CLAIM 1)

1. Introduction

75. The EC seeks to misrepresent India's claim by resorting to strong language: "the method proposed by India would lead to a meaningless result and is manifestly unreasonable".[46] The EC then proclaims that its own method is "beyond question"[47] and that even if the EC were proven wrong then it "would be inconsequential and give rise to no nullification or impairment of benefits accrued to India".[48]

76. Upon scrutiny these statements are not convincing.

77. First of all, the method proposed by India is not meaningless but merely flows from the EC's earlier position. Since that earlier position would have led to one more company not being found dumping it is clear that what India proposes is neither meaningless nor manifestly unreasonable.

78. Indeed, India's view makes perfect sense: while the EC's value-method results in the company with the highest prices on the domestic market also weighing the most heavily in the establishment of the weighted average normal value, India's method is neutral as regards the price element of the companies on the domestic market. It is not biased towards a more heavy weight of companies with higher prices. Probably for this reason Article 6.10—on the mirror side—also includes no price element, since it is designed to be neutral as regards in- or exclusion of companies with the highest or lowest export prices.

79. Second, the assertion that even if the EC is wrong, no benefit is nullified finds no basis in the DSU. This is similar to the argument of Guatemala or Argentina, which tried to raise a final defence of "harmless error";[49] the Panels in *Cement-II* and *Floor Tiles* have clarified that "[q]uite the contrary is true."[50] The Panels explained that Article 3.8 of the DSU provides that there is a presumption that benefits are nullified or impaired where a provision of the Agreement has been violated.

80. To rebut this presumption, one has to show that there was no change in the competitive relationships, rather than that there was or there would have been no effect due to a violation. As the Appellate Body has stated in *EC – Bananas* quoting the *US – Superfund* panel:

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[46] EC FWS, paragraph 63, last sentence.
[47] *Ibid.*
[48] EC FWS, paragraph 64.
[49] *Argentina – Floor Tiles*, paragraph 6.102. *See also*, *Guatemala – Cement-II*.
[50] *Ibid.*, paragraph 6.104.

> "A change in the competitive relationship contrary to [Article III:2, first sentence] must consequently be regarded *ipso facto* as a nullification or impairment of benefits accruing under the General Agreement. A demonstration that a measure inconsistent with Article III:2, first sentence, has no or insignificant effects would therefore in the view of the Panel not be a sufficient demonstration that the benefits accruing under that provision had not been nullified or impaired even if such a rebuttal were in principle permitted."[51] (emphasis added)

81. India submits that the EC argument[52] fails to take this finding of the Appellate Body into account.

82. Further, rather than—as the EC suggests—imposing an "unreasonable burden on the investigating authorities"[53] by using all possible calculation methods at each step of the dumping determination, this appears to be exactly what the EC did in this case. When faced with the dilemma of admitting that 70 per cent per cent of the exports of the sample were not dumped, rather than 53 per cent, the decision to shift from the original relative size 80-14 (later characterized as 77-22) to a new proportion (91-9) was quickly made.

2. Facts

83. India has already illustrated above, in paras. 0-0, that the factual shift in position as regards the relative size of the companies is mathematically beyond doubt. While the EC seeks to shore up support by a simple reference to an earlier statement on the same matter, that 'justification' remains without evidence.

3. Arguments

84. The EC was simply reluctant to follow its own fact-sheets to their logical conclusion. That reluctance to implement the findings of the Panel and the Appellate Body also surfaced in the EC's re-determination where it resorted to defiant language (penultimate and last sentence of recital (74) of Regulation 1644/2001).

85. The EC first argues on the text of Article 2.2.2(ii).[54] It states that by choosing any method to average under Article 2.2.2(ii) it has not acted inconsistently with that provision.

86. However, it is not for India—nor for the EC—to interpret the provision in light of the Appellate Body's interpretation already on record: an interpretation should not be such so as to "substantially empt[y] the phrase "weighted average" of meaning."[55]

87. As pointed out by India, by coming up with a new weighing method, the relative importance of Standard Industries has become less than $1/10^{th}$ of the mean. This happened because companies with higher prices obtained more relative weight in the mean.

88. The EC subsequently seeks to characterize India's contextual argument as "contrived".[56] Yet, it is clear that India's argument is in accordance with the Vienna Convention which, apart from the

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[51] Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, 9 September 1997, paragraph 252.
[52] EC FWS, paragraph 94.
[53] EC FWS, paragraph 85.
[54] EC FWS, paragraph 65 *ff*.
[55] India FWS, paragraph 53.
[56] EC FWS, paragraph 70 *ff*.

ordinary meaning of the terms, also attaches significance to those terms in their context and in the light of its object and purpose.

89. The EC argues that the provisions invoked by India address different issues and serve different purposes.[57] The US follows the same line of reasoning.[58] It is however not clear that the type of questions to be solved here are so different. All provisions cited by India address the question of measuring the relative size of sales, be it domestic sales in proportion to export quantity (footnote 2), domestic sales at a loss in proportion to total domestic sales (footnote 5), or the relative size of a company's export quantity in proportion to the total size of export quantity (Article 6.10). This is perfectly logical because prices are the core of the investigation and therefore are not 'neutral.'

90. The EC subsequently submits that its own case law does not constitute context.[59] India has already pointed out that the principle of good faith as enshrined in the Vienna Convention ensures that such case law can serve as relevant context.[60] The EC subsequently argues that its own CFI judgement contradicts India's position. India however fails to see the contradiction: does it mean that the investigating authorities are permitted one day to weigh on value and the next day on volume? Clearly this would not be the discretion the Court had in mind. Rather it seems conceivable that the Court gave the institutions one choice. Having made that choice, it must be applied consistently.

91. The EC then refers to its own previous position.[61] India has already addressed this issue separately.[62]

92. The EC then states that it has reasonably exercised the discretion granted to it under the provision.[63] The question however is not that of judgment calls as to the reasonability of the discretion exercised. Rather, the question is whether a provision was "properly applied", as India asserts it was not. As the Panel noted in its original report:

> " … the use of actual data itself ensures that subjective judgments about the reasonability of the results do not affect the calculation of constructed normal value. We consider that no purpose would be served by testing the results obtained under the chapeau and subparagraphs (i) and (ii) against some arbitrary or subjective standard of reasonability."[64]

93. The EC rather seems to imply that if the interpretation proposed by the EC is "reasonable", then that is actually what Article 2.2.2(ii) means. This approach to interpretation of legal acts seems

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[57] EC FWS, paragraph 73.
[58] US Third party submission paragraph 10.
[59] EC FWS, paragraph 75.
[60] Compare Lennard who states that:
"Issues of estoppel and acquiescence are not strictly issues of 'interpretation' and … may derive from the obligation to *perform* treaties in good faith, or else from generally accepted domestic law principles as a source of international law." (Emphasis in original, footnotes omitted).
Lennard, Michael (2002) *Navigating by the Stars: Interpreting the WTO Agreements*, JIEL 17-89 at 77.
[61] EC FWS paragraph 79.
[62] Section 0 *supra*.
[63] EC FWS, paragraphs 63 and III.A.1.C.e., paragraphs 80 *ff*. In paragraph 63 the EC states:
"Article 2.2.2(ii) *does not prescribe* the use of any specific averaging factor. Therefore, the investigating authorities have discretion to use the averaging factor which they deem most appropriate. In the case at hand, the EC authorities have exercised that discretion in *a reasonable* manner…" (Emphasis added)
[64] Original Panel Report paragraph 6.99.

similar to the so-called *Chevron* doctrine extensively applied in US administrative law[65] and reflected to a certain extent in Article 17.6(ii)ADA.[66] In this regard, India submits that this doctrine is inappropriate if applied at the international level in the way proposed by the EC.

94. 'Reasonability' is not listed among the tools that could be used to interpret an international treaty in accordance with Articles 31 and 32 of the VCLT. Only after the options provided for in these Articles are exhausted can an interpreter turn to clarification of the ambiguous provisions from the point of view of what should be reasonable in such case:

> "As the Appellate Body has repeatedly stated, panels are to consider the interpretation of the WTO Agreements, including the AD Agreement, in accordance with the principles set out in the *Vienna Convention on the Law of Treaties* (*Vienna Convention*). Thus, we look to the ordinary meaning of the provision in question, in its context, and in light of its object and purpose. Finally, we may consider the preparatory work (the negotiating history) of the provision, should this be necessary or appropriate in light of the conclusions we reach based on the text of the provision. We then evaluate whether the United States' interpretation is one that is "permissible" in light of the customary rules of interpretation of international law."[67]

95. The EC does not follow this order of interpretation, probably *assuming* that interpretation in accordance with the VCLT will produce several 'permissible' or 'reasonable' interpretations. However, as the Appellate Body has stated, merely to assume something is not enough in such case. Well reasoned argument should prove that the application of the VCLT gives rise to at least two 'permissible' interpretations:

> "This second sentence of Article 17.6(ii) *presupposes* that application of the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention* could give rise to, at least, two interpretations of some provisions of the *Anti-Dumping Agreement*, which, under that Convention, would both be "*permissible* interpretations". In that event, a measure is deemed to be in conformity with the *Anti-Dumping Agreement* "if it rests upon one of those permissible interpretations."
>
> It follows that, under Article 17.6(ii) of the *Anti-Dumping Agreement*, panels are obliged to determine whether a measure rests upon an interpretation of the relevant provisions of the *Anti-Dumping Agreement* which is *permissible under the rules of treaty interpretation* in Articles 31 and 32 of the *Vienna Convention*. In other words, a permissible interpretation is one which is found to be appropriate *after* application of the pertinent rules of the *Vienna Convention*."[68] (Footnotes omitted, emphasis original)

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[65] Croley, Steven P., and John H. Jackson. "WTO Dispute Settlement Procedures, Standard of Review, and Deference to National Governments." *American Journal of International Law* 90 (1996): 193-213: "Courts applying the Chevron doctrine face two sequential questions, often referred to as "step one" and "step two" of Chevron. First: Has Congress "directly spoken to the precise question at issue," or is the statute interpreted by the agency "silent or ambiguous"? … If the court concludes … that [it is], then the reviewing court proceeds to a second question – step 2: Is the agency's interpretation of the statute a "reasonable" or "permissible" one?"

[66] The negotiating history of Article 17.6(ii) of the ADA shows that its wording is actually derived from the *Chevron* doctrine. Croley, Steven P., and John H. Jackson, *id.*, at 146 ff.

[67] Panel Report, *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R, 1 February 2001, paragraph 6.4.

[68] Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-rolled Steel Products from Japan*, WT/DS184/AB/R, 24 July 2001, paragraphs 59-60.

96. In India's view however a well-reasoned argument cannot prove that the alleged silence of the text of the Article leads to the discretion of Article 17.6(ii).[69] The question of more than one permissible interpretation, *i.e.* the question of a choice, does not arise. At the risk of repetition: the stipulations of the Appellate Body, and the context of the Article do not allow value-based weighing. Notably the volume-criterion on the side of the export sales of exporters may not permit a different criterion on the domestic sales side of the exporters.

97. The EC then provides an example as to the fact that SGA and profit regularly follow a turnover allocation.[70] India is aware of this point but considers it irrelevant for answering the question. The issue in question is the relative size of domestic sales of various companies in the mean in a weighing exercise.

98. The EC then refers to the calculation of the "all others" rate.[71] India has already pointed out that the EC has unfortunately confused the concept of "all others" with that of the weighted average duty for co-operating producers (paras. 0-0).

99. The EC then seeks to draw India's argument away from the facts of the case by stating that the method applied by the EC authorities does not result necessarily in higher amounts for SGA and profits than India's proposed method.[72] This is beside the point: the EC had already established a relative proportion and then decided to depart from it when the outcome would have resulted in lower dumping margins.

100. The EC continues its line of arguing by stating that in a different set of factual circumstances, the EC's method might well have been more favourable to the exporters than India's own method.[73] India does not contest this. However, this is beside the point since provisions have to be applied properly.

101. The EC then refers to unacceptable implications and an unreasonable burden.[74] Yet, since the EC appears determined to use calculation methods resulting in the highest margin it seems reasonable to ask that some consistency in method be followed in order to maintain legal predictability. To choose, invariably, the method that always results in the highest possible dumping margin may be a consistency in goal but is not a consistency in method.

102. Indeed, even if the Panel were to accept that the text is "silent"—*quod non*—and that the above considerations put forward by India do not mandate the authority to use a neutral volume method, the question first becomes whether the discretion granted to the Member is absolute. India submits that that is *not* the case if there are specific criteria that limit such discretion.[75] The ADA, as clarified by the Appellate Body, created such limitations. One of these criteria has already been put

[69] Similar to the EC, this appears also the suggestion of the US Third Party Submission at paragraph 11.

[70] EC FWS paragraph 81 *ff.*

[71] EC FWS paragraph 82.

[72] EC FWS paragraph 83 *ff.*

[73] EC FWS paragraph 84 *ff.*

[74] EC FWS paragraph 85.

[75] *Cf.* Case of the S.S. "Lotus" (France v. Turkey), PCIJ Series A, No. 10 (1927). At paragraph 18 the PCIJ held that:

"International law governs relations between independent states. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed".

A fortiori, once restrictions on the discretion exist, they must be heeded.

forward and was the finding of the Appellate Body that the text should have a meaning. Another important point to recall is that the text of the first sentence of Article 15 applies in a case against a developing country member. That sentence mandates that "special regard must be given." (Emphasis added). Clearly this also imposes a norm that limits the discretion granted to a Member. The EC would agree that a calculation method that results in a lower margin is one such form of complying with the first sentence under Article 15.

103. The EC then suggests that the proposal by India is unreasonable and would involve new choices as to the several possible criteria for measuring the sales volume of the product concerned.[76] This suggestion is however not correct; India's methodology only stems from taking the EC's original position to its conclusion and from applying the Article as it should be.

104. The EC seeks to explain that India's method is manifestly unreasonable and leads to a meaningless result.[77] Nothing is less true. India's method would have led to three exporters not being found dumping. Objectively such result is relevant since it would have reflected the absence of dumping of more than two-thirds of India's exports. (Even though under the EC's extravagant "logic" of treating a sample this would probably still have implied that the EC found that virtually all of India's exports were dumped). In this connection the EC draws attention to pillows and duvets. Fact of the matter remains that it was the EC who had originally defined the relative volume as 80-14.

105. Contrary to the EC's assertion,[78] India's method is reasonable. India's method is *a priori* neutral as regards the influence of companies with the highest or lowest prices and merely takes the facts to their conclusion.

106. Finally the EC refers to a newly discovered calculation method by which it could have found even more dumping.[79] Undoubtedly more methods might exist when one re-studies the facts. This however does no justice to the original facts as originally declared. India had seven calendar days to study and comment on the weighing method by the EC.[80] It immediately identified the illegality of the result-oriented value based weighing method.

C. THE UNWARRANTED CUMULATION AND THE *EX-POST* REPARATIONS (CLAIMS 2 AND 3)

1. Unwarranted cumulation: Claim 2 regarding Articles 3.1 and 3.3

107. The EC argues that only Regulation 1644/2001 is within the Panel's jurisdiction and that it revised the dumping determination for Pakistan only after August 2001. For that reason, it says, it was entitled to cumulate Indian imports with those of Pakistan in Regulation 1644/2001.[81]

108. As India mentioned in its first written submission in paragraph 73: such reasoning in itself is proof that the EC did not respect the deadline of 14 August 2001. The EC was required to prepare a legally correct *measure* within the deadline. The EC should have understood that a correct injury assessment against India—which originally involved cumulation—could not have been made without a double-check as to the dumped imports of other countries. The measure against India was closely

[76] EC FWS paragraph 86 *ff.*
[77] EC FWS paragraph 86 *ff.*
[78] EC FWS paragraph 89.
[79] EC FWS paragraph 91-93. The EC found a new method to calculate volume in kgs.
[80] India FWS paragraphs 12-13.
[81] In this connection India assumes that the EC reference in paragraph 99 of the EC's FWS that "Regulation 1644/2001 confirmed the finding of dumping for Pakistan reached in Regulation 160/2002." is a misprint since Regulation 1644/2001 predates 160/2002. India assumes that the EC probably meant to refer to Regulation 2398/97 when it said 160/2002.

intertwined with those of other countries and a re-determination of that measure would have involved an entire re-examination of the pertinent facts. One could even argue that Regulation 2938/97 as such (against the three countries) was the *measure* to be brought in conformity.

109. The fact that the injury attributed to the Indian imports was repaired in April 2002 proves that a correct measure for India should from the outset have involved a correct dumping and injury finding for Pakistan and Egypt in August 2001.

110. In case the Panel finds that the EC was permitted to calculate the dumping margin for part of the re-determination (*i.e.* for the Pakistani imports) at a later stage, then the fact remains a measure against India was in force from 28 January 2002 to 25 April 2002 whereby injury was based on imports from a country that did not dump. This is contrary to the text of Article 3.3 which permits cumulation only of dumped imports. As pointed out earlier, this violates both Articles 3.3 and 3.1. The issue is material since on 13 February 2002 (within that illegal injury period as far as Articles 3.3 and 3.1 are concerned) the EC initiated its "partial interim review" against India. Accordingly, the EC initiated its interim review based on an illegal measure.

111. In fact, the EC's argumentation that India's argument on cumulation is invalid appears rather cynical and unprincipled given the similar type violation of which the EC has recently accused the US.[82]

112. Further, to the extent that Regulation 160/2002 repaired the dumping findings of Regulation 1644/2001 it is clear that the EC did not respect the synchronicity requirement enshrined in Article 5.7 (which India will address separately below).

113. To the extent that Regulation 696/2002 subsequently repaired both Regulations 1644/2001 and 160/2002 it is clear that the EC again did not respect the synchronicity requirement enshrined in Article 5.7 (which India will address separately below).

2. *Ex-Post* reparations: claim 3 regarding Article 5.7

114. The EC starts off by recalling that Regulations 160/2002 and 696/2002 are outside the jurisdiction of the Panel. In the EC's view these are not measures taken to comply. India has already clarified that it had identified these measures in its Request for the Panel and should therefore be permitted to bring claims with respect to them. The Regulations are closely intertwined and they seek to repair the re-determination for India.

115. The EC subsequently argues that Article 5.7 does not operate in the context of reviews or re-determinations following the implementation of a Panel report. For this purpose the EC provides certain arguments, most of which hinge on the application of Article 11 that deals with reviews.

116. One may separately contest whether the purported implementation of a Panel and Appellate Body report qualify as a form of "review" in the sense of Article 11. However, let us assume for the sake of argument that this is the case.[83]

117. The EC first states that a review may address only dumping or only injury and that *therefore* these determinations can be made separately. While the first part of the statement is true, the second

[82] *United States–Sunset Reviews of Anti-Dumping and Countervailing Duties on Certain Steel Products from France and Germany*, Request for consultations by the EC of 30 July 2002, WT/DS262/1, 3rd and 6th matter raised in that request.

[83] If it is determined that a re-determination is tantamount to a new investigation then Article 5.7 applies without any question.

part is not. The point is that *once both* dumping and injury are under review, the findings on them should not be separated: neither by doing part of the dumping aspects in August 2001 and the rest in January 2002, nor by doing dumping aspects in January 2002 and injury aspects in April 2002. Under such logic the EC could even have waited with injury reparations until the year 2003 or later.

118. The EC points to perceived "absurd consequence" of requiring re-consideration of all the findings.[84] This misrepresents the argument of India and tries to deflect attention from its own actions. As noted, in the previous paragraph, it is in theory possible that a given measure would only have problems on account of injury while dumping would have been correctly determined. In *such* a case there would not be the need to reconsider dumping once more. *But*, given the fact that in this *Bed Linen* case there was a need to carefully re-consider and re-analyse *both* dumping and injury on an overall basis, given various findings of the Panel and Appellate Body reports, it would be pointless to do this in three episodes as the EC did this time. Exactly to curtail such excesses and continued harassment, Article 5.7 contains the requirement of synchronicity.

119. Further, the EC puts up the view that since Article 5.7 is not mentioned in Article 11, it finds no application. In this connection India only needs to recall the recent Panel Report concerning *Certain Corrosion Resistant Carbon Steel Flat Products from Germany.*[85] In that case it was *the EC* which took the view that the *de minimis* standard contained in Article 11 of the ASCM should also apply in review proceedings even though Article 21 does not expressly repeat that *de minimis* standard.[86] The Panel in that case agreed with the EC.[87] While that Panel recognized that the text of the *de minimis* provision did not mandate its application in a review, it found that the terms of the provision were unequivocal.[88]

120. That Panel took into account that the provision in question was couched in mandatory and strong language, conveying that the drafters had in mind a particular outcome to protect exporters and to prevent trade harassment. Eventually the panel concluded, *inter alia*, that finding otherwise would compromise the disciplinary framework that the drafters sought to create throughout the Agreement.[89]

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[84] EC FWS paragraph 108.

[85] *US – German Steel*. One may also compare the recent EC's request for consultations in the case WT/DS262/1, *op. cit.*, where the EC repeats this argument.

[86] *Ibid.*, for example, paragraph 5.41 last sentence:
"The EC submits that, for the reasons stated above, this threshold is not appropriate, and that since 0.53 per cent is below the 1 per cent *de minimis* level which should apply in sunset reviews, the US was in breach of Article 21.3 in continuing the measure" (emphasis in original)
and paragraph 5.112:
"… a systematic and good faith interpretation of Article 21.3 with Articles 21.1, 22.1, 22.7 and 11.9 of the *SCM Agreement*, would suggest clearly that the *de minimis* rule of 1 per cent should be applied also in sunset reviews."
Or, as the EC stated in paragraph 5.417:
" … the US is proposing again a formalistic interpretation of the terms of Article 21.3 and in complete isolation of its object, purpose and context."

[87] *Ibid.*, paragraphs 8.56-8.81.

[88] *Ibid.* paragraph 8.59.

[89] *Ibid.* paragraph 8.59:
" … we recognise, at the outset, that nothing in the text of the provision provides for its de minimis standard to be implied in Article 21.3. What is clear from this language, however, is that a de minimis subsidy cannot be countervailed, and that, upon a finding of a de minimis subsidy, the Agreement mandates but one outcome. Investigating authorities must not only terminate the investigation, but they must do so immediately. The terms of the provision are unequivocal. Such mandatory ("shall") and strong ("immediate") language would suggest that the drafters had an important consideration in mind in drafting this provision, reflected in the precise choice of words. In particular, the mandatory nature and strong language of the provision convey, in our view, that the drafters sought a particular

121. India respectfully submits that the EC admit that similar logic applies to Article 5.7 of the Anti-Dumping Agreement. In light of this history of continued amendments India has the fearful premonition that the next amendment will be the imposition of excessive punitive duties as a result of the EC's "partial interim review".

122. Moreover, India submits that while interpreting Article 5.7, as for its applicability to the re-determination of dumping or injury findings for the purposes of implementing the DSB's recommendations and rulings, it is important to take into account as part of context Article 21.2 of the DSU. It goes without saying that the obligation contained in this Article to pay particular attention to *prompt* compliance with the DSB recommendations in favour of a developing country is, *inter alia*, served by an interpretation of Article 5.7 according to which the re-determination of dumping and injury are necessarily simultaneous.

123. For these reasons India requests the Panel to uphold its claim on Article 5.7. The provision also contains mandatory language, and the drafters would have had in mind a particular outcome. It forms part of a disciplinary framework contained in the Anti-Dumping Agreement and *does* have a meaning, which is, *inter alia*, to protect exporters from harassment.

D. THE SIGNIFICANT OVERSTATEMENT OF DUMPED IMPORTS FROM INDIA (CLAIM 4)

124. Central to the EC's defence that 'to the extent a sample does not show dumping it is not relevant for the injury analysis' is the rule contained in Article 9.4. As is known, that rule addresses the determination of the maximum *duty* that can be imposed on co-operating non-sampled producers. Yet, the EC not only continues to invoke Article 9.4—directly or indirectly—but also continues to assimilate the different concepts of *duty* and *margin* when in truth those are distinct or at most only partially overlap. For this purpose India has already dismantled that confusion in paragraphs 0-0 *supra.*

125. The confusion of the concepts of the "all others" (*i.e.* residual) duty with the "weighted average duty for co-operating non-sampled producers" has also been pointed out.[90]

126. Further, India had in its first written submission already pointed to the irrelevance of Article 9 (imposition and collection of duties) for the question under consideration. For that purpose India had already recalled the guidance of the Appellate Body that the rules on the imposition and collection of duties do not bear on the issue of the establishment of the existence of dumping margins.[91]

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outcome, to protect exporters under investigation and prevent trade harassment through continuation of an investigation of a de minimis subsidy."

And 8.79:

"In sum, we consider that the rationale for the de minimis standard set out in Article 11.9 is clearly that CVDs are to be used to counter injurious subsidisation, and the threshold set out in this provision demarcates the level below which subsidisation is deemed to be so small as to be non-injurious for purposes of the imposition of CVDs. Having found this to be the case, and having established that one of the objects and purposes of the SCM Agreement is to regulate the imposition of CVDs and to create a disciplinary framework therefor, we are of the view that the de minimis standard must be applicable to sunset reviews as it is to investigations. Finding otherwise would compromise the very object and purpose of the SCM Agreement and the disciplinary framework that the drafters sought to create through the Agreement."

[90] Section 0 *supra.*
[91] India's first written submission paragraph 120. Appellate Body in *Bed Linen* footnote 30.

127. The EC itself is also forced to admit in its paragraph 128 that the Appellate Body stated that the only thing that Article 9.4 does is to place a limit on the level of the anti-dumping *duty* that may be applied to imports from non-examined exporters.[92]

128. If the EC would indeed *follow* that logic then it is clear that Article 9 is irrelevant for the calculation of a dumping margin. Yet, the EC does not follow that logic. It only continues to invoke Article 9 but also continues to disregard the specific admonition in paragraph 4 of Article 9 ("for the purpose of this paragraph"); that paragraph underlines its own restricted purpose. The EC's statement that rule in paragraph 4 only applies with regard to the obligation to disregard but not with respect to the other rules makes no sense.

129. The EC goes on and contradicts its own re-determination by presenting the argument that imports from a country cannot simultaneously be both dumped and non-dumped for the purposes of the ADA. That assertion contradicts, *inter alia*, the EC's own finding that 53% of the sample was not dumped while 46 per cent was dumped. Common sense dictates that part of the imports of a country can be dumped and the remainder non-dumped. This is also the view of the important non-attribution language contained in Article 3.5. Article 3.5 mentions as an example of one such possible other factor the volume and prices of imports not sold at dumping prices and mandates that these "must" not be attributed to the dumped imports.

130. Yet, let us, for the sake of argument, take the "logic" of the EC (*that there can be only one weighted average dumping margin for the country*) to its logical consequence. Then it becomes clear that on a weighted average basis India was not dumping:

	CIF value	Dumping Result	*Margin*	*Duty (per Art 9.4) (%)*
Bombay Dyeing / Nowrosjee Wadia	100,924,637.03	5,612,587.09	5.56%	5.5
Madhu	183,063,049.40	5,630,527.42	3.08%	3.0
Omkar	212,877,521.30	-829,312.23	-0.39%	
Anglo-French	126,464,036.70	12,458,213.32	9.85%	9.8
Prakash	314,529,134.10	-36,949,733.62	-11.75%	
Total	937,858,378.53	-14,077,718.02		
Weighted Average			-1.50%	5.7
"All Others"				9.8

(Source: India-Exhibits-RW-6, -7, -8, -9)

131. If *this* EC argument is therefore to be followed, then the EC should have concluded that the *whole* of India was not dumping (the weighted average *margin* was *minus* one point five!).[93] *India had not even gone that far* since, according to the original Panel Report, dumping is normally a determination made with reference to a product from a particular *producer/exporter*[94]—and not with reference to a country. India only made the point that a *sample* should be considered what it is supposed to mean: "a relatively small part or quantity intended to show what the whole is like; a

[92] The EC quotes the Appellate Body in *Hot Rolled Steel* paragraph 116.
[93] This is even before any correction in the dumping margin of Madhu.
[94] Original *Bed Linen* panel report, paragraph 6.136.

specimen." By disregarding this pertinent fact, the violations with Articles 3.1 and 3.2 have been specified in detail in India's First Written Submission.[95]

132. For the record India hereby respectfully submits that if *the particular* line of reasoning from the EC is accepted, and therefore leads to the calculation that the entire product of the country is not dumped on a weighted average basis, the violation with Articles 3.1 and 3.2 also exists. In such case, the *entire* imports from the country should not have been considered dumped for the injury analysis. In such situation, the case should have been *immediately* terminated because of no dumping.

133. Finally, in its first written submission, the EC's assertions about its treatment of the sample on the domestic industry side and on the exporters side are incomprehensible. India's view was straightforward: if a domestic sample is taken to represent the domestic industry on the one hand, then the exporters' sample should also represent the exporting producers on the other hand.

E. THE ABSENCE OF AN AUTHENTIC RE-EVALUATION OF DATA THAT WERE NOT EVEN COLLECTED (CLAIM 5)

1. Arguments

134. India recalls that it had presented two arguments with respect to its claim under Articles 3.1 and 3.4. First, India had pointed out that data that were not collected cannot suddenly be evaluated. Second, even if data had been collected—*quod non*—there should have been an overall reconsideration and analysis: the evaluation should be adequate and not merely a gloss that pays lip service to the findings of the Panel and contradicts facts on the record.

2. Data which were not collected cannot be evaluated

135. As India had pointed out in its first written submission, the Panel had originally found a substantive violation of Article 3.4.

136. For this purpose India had highlighted two examples that were illustrative of the fact that data had not been collected.

137. It may be that the EC considers that it has responded to the two examples. Upon inspection its answers are unimpressive. The EC's justification that it had collected data on stocks is limited to a reference back to an earlier explanation.

138. The EC states that stock information was obtained from accounts and then verified on spot but offers no evidence to support its statement. In any event, such statement is too simplistic and calls for clarification. Accounts only reflect stock data at a company level. Exactly for such purpose the questionnaires for *exporters* invariably contain separate detailed questions and tables on stock data for the product concerned. The issue is material since data on stocks form an important means in EC anti-dumping practice through which sales and production data are double-checked.

139. Yet, the questionnaires for EC *producers* contained no such questions on stock data.

140. The Panel and the EC will recall that India has two years ago *already* made available in Exhibit-53 of its original First Written Submission the copies of all non-confidential questionnaire

[95] India recalls its example provided in its first written submission which showed that the logic of the EC would lead to nearly all the imports from a country being found dumped, even if there was only one exporter in the sample found dumping. (Paragraph 123 India FWS). The EC has not even attempted a refutation other than stating that its method is perhaps less than perfect. (Paragraph 135 EC FWS).

replies of the Community Industry. No information on stock or capacity utilization (to restrict us to these two examples) was ever collected. Sections II and III of those questionnaires dealt with sales. Sections IV and V dealt with production. The only 'collection' that ever took place was that in section VI producers were *permitted*, on less than half a page, to "please *describe* the effects" (*"Bitte beschreiben Sie die Auswirkungen"* (page 726 of Annex 53)) of the imports on nine factors: market share, sales, prices, production, capacity utilization, stocks, employment, profitability, ability to invest, etc. *If needed*, they could continue on another paper (*"Utilisez, si necessaire, une autre feuille de papier"* (page 791 of Annex 53)). None of these seventeen producers ever provided hard data on stock or capacity utilization (nor on any of those other factors).[96] This pertinent absence of facts may well have formed part of the Panel's finding that it appeared that data were not even collected.

141. By contrast, the Bed Linen questionnaire for *exporters* did contain such detailed questions for the product concerned.[97]

142. Another step in the false reasoning in paragraph 152 is that the EC admits that the error of establishing consumption is not only a feature of the Bed Linen case but also of other proceedings. While it is possible that other proceedings suffer from the same deficiency that does not justify the mistake here.

143. The EC then points out[98] that it should have been the task of third parties to ensure that the investigating authority correctly satisfies its job obligations. Such a statement is bizarre. Article 3.1 ADA imposes the obligation on the authorities to objectively examine the situation based on positive evidence, regardless of whether third parties remind them.

144. India has in its first written submission already had occasion to the fallacies in the reasoning on capacity in the re-determination. The EC's defence now becomes absurd:

> "Thus, the EC considered that in the absence of meaningful data for all companies in the sample, this factor did not have a bearing on the situation of the industry within the meaning in Article 3.4."[99]

145. In other words: *Because these data were absent they were not relevant.* What if the producers had had huge profits and had chosen not to disclose them? Probably the EC would have considered them not relevant as well. Yet, it is exactly the task of the authority to collect these data and evaluate them.

146. In short, by allowing domestic producers to decide what data to provide, and by accepting that only that is relevant, the injury determination becomes a meaningless self-fulfilling prophecy. Data was simply not collected for a large number of factors, a fact which India already pointed out in its original first written submission to the Panel more than two years ago.

147. Finally, India had in its first written submission pointed that the sequence in which the evaluation was conducted was entirely improper. It amounted to an *a priori* dismissal of factors. For this purpose India already recalled that the original Panel Report had also quoted *Korea – Dairy*

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[96] Compare pages 726, 736, 756, 763, 764, 772, 791, 806, 813, 829, 842, 851, 871, 923 and 950 of Annex 53. Certain companies did not even answer Section VI (the QR that starts on p. 929 ends on p. 942 without section VI. In these pages, nearly all these companies limited their information on the factors to a few sentences or paragraphs. None of them gave any concrete information on stocks or capacity utilization.

[97] India Exhibit-63, page 1108. For capacity and capacity utilization of the product concerned: page 1107.

[98] EC FWS paragraph 153 last sentence.

[99] EC FWS paragraph 154 last sentence.

Safeguards that had made clear that facts pertaining to a certain factor must *first* be collected and *then* brought on record, *after* which they can be evaluated. Only this may form a basis for a proper injury determination.[100]

148. The EC concludes its section 157 with one correct observation that:

> "The key point is that each factor is considered and that the evaluation is objective"

149. To sum it up: *that* is exactly what *never* happened in *Bed Linen*. The logical impossibility of that had already been pointed out in the original Panel report: without collection of the necessary evidence it was impossible to even engage in a proper and objective evaluation.

3. Even if data had been collected—*quod non*—there should have been an overall reconsideration and analysis

150. The EC starts off with the preliminary remark that "its careful analysis of all the factors was consistent with the requirements of Article 3.4". India needs only to refer back to the opening paragraphs of the EC first written submission where it states that Regulation 1644/2001 limits itself to "nothing but confirm" the original findings.[101] The EC itself was already forced to admit that to that extent "it cannot be considered that such re-determination constitutes a measure "taken to comply"."[102]

151. India already had occasion to note that these observations of the EC were in line with paragraph 157 of India's first written submission.

152. For that purpose India had in its first written submission identified a number of elements, as well as the relevant case law of *Mexico – HFCS 21.5*, that would have mandated an *overall reconsideration and analysis.*

153. Other than that, the EC's first written submission, for the most part, does not directly address the arguments of India. Instead, the EC has largely done no more than summarize its re-determination and contend in a *pro forma* manner that it satisfies the requirements of the AD Agreement.

154. For example, in paragraph 159 the EC quotes the Panel in *US – Hot Rolled Steel*. The EC misrepresents India's arguments by stating that India implied that injury could not be suffered if certain factors would not show injury. By contrast, and apart from *Mexico – HFCS 21*.5 as already quoted by India in its first written submission, India recalls that the Panel in *Thailand – H-Beams* also made abundantly clear that there should be an overall analysis containing an adequate evaluation:

> "While we do not consider that positive trends in a number of factors during the IP would necessarily preclude the investigating authorities from making an affirmative determination of injury, we are of the view that such positive movements in a number of factors would require a compelling explanation of why and how, in light of such apparent positive trends, the domestic industry was, or remained, injured within the meaning of the Agreement. In particular, such a situation would require a thorough and persuasive explanation as to whether and how such positive movements were outweighed by any other factors and indices which might be moving in a negative direction during the IP."[103]

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[100] These steps in the investigation should not be confused since they are separate and distinct.
[101] EC FWS, paragraph 41.
[102] EC FWS, paragraph 42.
[103] *Thailand–H-Beams*, Panel, paragraph 7.249.

155. India does not consider that the *Bed Linen* re-determination meets this standard *at all*. For this purpose it has already provided its views in its first written submission.[104]

156. India denies the EC's false suggestion that it would have suggested that data on the sample are not relevant.[105] Of course these data are relevant, provided that they are interpreted properly.

157. India does not dispute that the EC's re-determination provides a recitation of data concerning the Article 3.4 factors. However, such recitation alone is insufficient to satisfy EC's obligation under Article 3. The Panel Report[106], consistent with the findings of other panels[107], indicated that the ADA requires an analysis of the pertinent information, not merely a reference to it.

158. The EC accuses India of making a "formalistic argument" that a mere reference back is nothing more than a restatement of a previous finding.[108] Yet, it would have been up to the EC to explain what the difference is between their approach and a simple restatement. An overall reconsideration and analysis cannot simply be assumed by references back to earlier findings. This is witnessed, to name but one example, in the context of market share: while the EC merely states that the previous findings are confirmed, an overall reconsideration and analysis should have led to the inclusion of the verified sampled EC producer who was importing the product from Pakistan. This should at least have led to a change in the market share data.

159. For the sake of brevity India will not re-enter again the entire discussion on each of the factors. Basically India disagrees with all the EC has stated unless it explicitly agrees. However, for certain points India wishes to make additional observations.

Sales, Market Share, Prices

160. As for sales volume and market share India had pointed out that under any measure of the percentage, or any of the EC data, both went *up*. The EC has not explained why this increasing trend was not probative for the state of the industry. The continued reference to the sale of *niche* products is irrelevant since *it was the EC* itself who defined the 'like product'.

161. If the EC would have wished to investigate and/or protect the producers of a certain type or model (say the high value merchandise) of that *'like product'*, then the EC would have been free to define the *'like product'* as such and initiate a proceeding against such *'like product'*.

162. Following the EC's 'logic' this would always give rise to injury for sales volume and market share: *in a case where sales volume and market share go down, then this is a sign of injury of the like product; if by contrast sales volume and market share go up, then this is due to a special product mix which overrides the criterion of like product*. Such reasoning is fallacious.

163. The same observation goes for the average prices: *if average prices would have gone down, then the EC would have taken this as a sign of injury for the like product; yet now that average prices went up, the supposed reason is the existence of shift in the product mix which overrides the criterion of like product.* Again, such reasoning is fallacious.

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[104] India FWS, paragraphs 157-213.

[105] EC FWS paragraph 162.

[106] For example at 6.162 the Panel held that authorities "must explain their conclusion as to the lack of relevance or significance of such factors." Yet, to name but one example, the EC never mentioned why the 8.7 per cent increase in output was not probative for the state of the industry. It merely mentioned that this increase in output "explains" the increased productivity. Re-determination at recital (31).

[107] E.g. *Thailand – H-Beams.*

[108] EC FWS paragraph 163.

164. Accordingly, for these three important factors the EC's evaluation makes no sense: Heads the EC wins, tails India loses. In India's view such evaluation focusing on a shift in the product mix does not fulfil any standard of an objective examination.

Profits

165. The EC still does not reveal the profits of the Community industry; rather it states that it was only able to collect profit data for a "number of" (all?) sampled producers.[109] This still does not explain how total sales, output, employment, wages, figures could all be obtained at the industry level, while profit data could not. It could be that, following the EC's logic, because producers chose not to give these figures, the EC found these not relevant.[110]

166. As regards the admitted clerical error in turnover India can no longer understand the EC's findings on profits. The fact remains that with different turnovers the EC now came to exactly the same percentage of profits. This is incomprehensible.

167. As regards the level of profit India further fails to see why a year outside the IIP would be relevant. First of all one may wonder where the information came from if it is outside the IIP. Second, one may wonder about the perceived relevance of 1991. Why not 1980. Or 1880.

168. India still has reservations as to the EC's explanation regarding investments. The explanation is restricted to a mere reference back to one title in a table of India-RW-17. When returning to the original source, the tables attached to India-RW-3, the EC had provided a comparative profit and loss table for five years. In that table there was for each year of the IIP the production, turnover, wages paid, as well the investments. While the production, turnover, and wages are all yearly figures, the investments should now be considered accumulated figures, according to the EC.

Output

169. The EC does not offer any compelling explanation as to why the increase in output was not probative for the state of injury. It only states that this increase in output was due to the concentration on higher value niche products. India already pointed to the fallacy in such reasoning: if the output had reduced the EC would have considered this as a sign of injury for the *Bed Linen* industry. Now that it goes up, it is also a sign of injury because of the alleged change in product mix. India considers such reasoning fallacious and, again, recalls that the 'like product' definition under Article 2.6 applies "throughout" the ADA, and not only when the factor points towards injury.

170. The EC then states that the declining profits override the increase in output. This however does not meet the requirements of *Thailand–H-Beams* which made clear that issues such as this require:

> " … a <u>compelling</u> explanation of why and how, in light of such apparent positive trends, the domestic industry was, or remained, injured within the meaning of the Agreement." [111] (underlining added)

[109] EC FWS paragraph 176.
[110] EC FWS paragraph 154, last sentence.
[111] *Thailand – H-Beams*, Panel, paragraph 7.249.

Productivity

171. India had already explained in its first written submission how the EC's increased productivity could not result of the reduction in jobs, but rather was a result of more efficient machinery.[112] The EC merely refers to its earlier inverted 'logic': because workers were laid off, the remaining workers decided to start work harder, in order to become more productive.

Factors affecting prices

172. The injurious effects of the increase in raw material prices should have been separately established. India refers in this regard also to its discussion of causation and the non-attribution language, *infra* in section 0.

Margin of dumping

173. The EC takes the position that for the consideration of margins of dumping only the positive margins count. It again relies on the specific rule for duty purposes that zero margins can be disregarded. This disregards that the word "dumping margin" also has to be capable of covering the absence of dumping in case dumping is not there. Probably the EC would also argue that the dumping margins for Pakistan were substantial, since in its view the zeros should be disregarded.

Cash flow

174. The EC spent two curt sentences on the evaluation of cash flow. India had pointed to the inadequacy of that evaluation. The EC does further not dispute the factual error.

Inventories

175. India has already pointed to the absence of data collection for inventories, as well as to the fallacies in the analysis.

Employment

176. India refers to its earlier comments.

Wages

177. The EC fails to explain why this was not decisive.

178. *Growth*

179. The EC considers that the growth in market share was "very limited". Yet, market share is a relative figure. Does the EC expect this to grow every year and up to what level?

180. As for the alleged trends the EC remains selective in when to look at trends and when not. Fact is that the injury investigation period was originally determined at 1992 to the I.P. Moreover, it is not a requirement that "there could have been" a finding of injury. Injury must be "determined" based on an objective examination of positive evidence.

[112] India FWS, paragraph 201.

Ability to raise capital

181. Again this factor does not point towards injury.

4. Factual errors

182. India had in its first written submission highlighted a number of factual errors. The answers of the EC are not convincing. For the sake of brevity India will be short.

183. As regard the deliberate disregard of verified information of one producer, the EC has requested a preliminary ruling. India has already pointed out that that request misrepresents the nature of India's argument. As noted, there was no separate claim under Article 4.1(i) but this does not prevent India from making an argument in which this Article is mentioned.[113]

184. The EC then mentions that there were no findings that would have mandated any change in the composition of the sample. Yet, according to the second paragraph of recital (54) of the provisional Regulation that producer *was* in the original sample and *was* verified. Its information was only excluded after the authorities determined that it was importing from a dumped source. Now that Regulation 160/2002 revealed that this source was in fact not dumping, the verified information of that producer could no longer be disregarded. Yet by deliberately disregarding such positive evidence as verified, the requirements of an objective examination were violated. Moreover, the fact that such verified information is disregarded also witnesses that no overall reconsideration and analysis ever took place.

185. The EC then states that there was no deliberate decision to disregard. Yet, the error remains and positive evidence has been ignored. The EC's characterization as 'harmless error' finds no basis in the DSU. Moreover, nobody knows whether the mistake was harmless or not, exactly because it is unknown how the injury determination would have looked had this producer been included.

186. As regards the change in sales data the EC admits its error. This in itself was not the sole point. The question was how data sheets with a different turnover than before could still show the same profit margin (from 3.6 to 1.6). With different turnovers the EC came to exactly the same percentage of profits. This remains beyond India's understanding.

187. As regards the change in market share India thanks the EC for its explanation on the measurement shift from value to volume.

188. Concerning the attribution of sample amounts to the Community industry the EC merely states that India was not misled by the figures. That is however beside the point. The point is that the errors are abundant and will mislead any reader without extensive and detailed background knowledge on the case.

189. Finally, concerning the level of the dumping margins the EC continues to defeat common sense. The EC again relies on the specific rule for duty purposes that zero margins can be disregarded. As noted, this disregards that the word "dumping margin" also has to be capable of covering the absence of dumping in case dumping is not there.

[113] See the discussion in paragraphs 0-0 *supra.*

F. THE IMPROPER CAUSAL LINK AND THE ABSENCE OF NON-ATTRIBUTION (CLAIM 6)

1. General

190. India recalls that it had presented two arguments for its claim under Article 3.5. As a first argument India had argued that the EC had not proven the causal link. As a second argument India had argued that the EC had disregarded the non-attribution language by neither (a) examining all other factors which might have caused injury, nor (b) distinguishing the injury caused by other factors.

2. The Causal Link

191. As regards the error in including Pakistani imports as well as the error that overstated the volume of dumped imports, India refers to its earlier arguments, *supra*.

192. As regards the four other arguments of the EC,[114] India wishes to present its views as follows.

193. The EC first states that it was not required for the investigating authority to prove that dumped imports were *the sole cause* of material injury.[115] In support the EC quotes the Appellate Body Report in *US – Wheat Gluten* and refers to the Appellate Body Report in *US – Lamb*. The EC then concludes, based on the findings in *US – Hot Rolled Steel* concerning the non-attribution language, that the findings in *Wheat Gluten* and *Lamb* with respect to causation also apply *mutatis mutandis* in the context of the Anti-Dumping Agreement.

194. For this latter purpose the EC, *inter alia*, suggests that the wording of Article 3.5 is similar to that of Article 4.2(b) of the Agreement on Safeguards.

195. Let us first compare the two texts and then recall the findings of the Appellate Body.

196. Article 3.5 of the ADA states that:

> "It must be demonstrated that the dumped imports are, through the effects of dumping, … causing injury within the meaning of this Agreement." (emphasis added)

197. Article 4.2(b) of the ASG states that:

> "The determination referred to in subparagraph (a) shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof."

198. Clearly, these texts are not identical.[116] This is a first reason why India considers that it is not necessarily true that the standard of causation as pronounced in *Wheat Gluten AB* and *Lamb AB* must directly be transplanted to the Anti-Dumping Agreement.

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[114] EC FWS paragraph 226 *ff*.
[115] EC FWS paragraph 226, first bullet point.
[116] Compare also *US–Line Pipe AB* which, in paragraph 214, quoted approvingly *US–Hot Rolled Steel AB*:
"[a]lthough the text of the *Agreement on Safeguards* on causation is by no means identical to that of the *Anti-Dumping Agreement*, there are considerable similarities between the two Agreements as regards the non-attribution language."

199. More importantly, India said something *different* than what the EC is implying it said. India is *not* proposing that in the context of the ADA the standard of causation as per the Panel in *Wheat Gluten* should be applied.

200. In the case of *Wheat Gluten*, the *Panel* had expressly found that the increased imports had to be sufficient:

> " … *in and of themselves*, to cause injury which achieves the threshold of "serious" as defined in the Agreement."[117] (emphasis added)

201. The Panel in *Wheat Gluten* concluded that "Article 4.2(a) and (b) SA require that increased imports *per se* are causing serious injury."[118]

202 On appeal, the Appellate Body stated that:

> " … the need to distinguish between the effects caused by increased imports and the effects caused by other factors does *not* necessarily imply, as the Panel said, that increased imports *on their own* must be capable of causing serious injury, nor that injury caused by other factors must be *excluded* from the determination of serious injury." (emphasis in original)[119]

203. India has *nowhere* gone as far as arguing that the dumped imports must *on their own* be capable of causing material injury, although it considers that good arguments exist to support this logic in the ADA context. However, in this case this is a bridge that need not be crossed. India has merely stated, that in this case it:

> "considers that the EC has not adequately proven at all that the … dumped imports from India were … *the cause* of the profit reduction of the Community industry …".[120] (emphasis in original)

204. India had therefore, in its first argument of its sixth claim, remained extremely close to the text of the first sentence of Article 3.5 which states that:

> "It must be demonstrated that *the dumped imports are*, through the effects of dumping, … *causing injury* within the meaning of this Agreement." (emphasis added)

205. Accordingly, India does not consider that it has contradicted the Appellate Body Report in *Wheat Gluten* or that it has set forth a wrong standard of causation in the context of the Anti-Dumping Agreement.

206. India's view fits with the non-attribution language, as interpreted in *US – Hot Rolled Steel AB*, since that language ensures that the effects of dumped imports must be distinguished from the injury caused by dumped imports. Through such non-attribution the investigating authorities ensure that injury caused by factors other than dumped imports is not attributed to dumped imports. Accordingly the determination finally rests on a genuine and substantial relationship of cause and effect between dumped imports and material injury.

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[117] *Wheat Gluten* Panel, paragraph 8.138.
[118] *Ibid.*, paragraph 8.143.
[119] Appellate Body *Wheat Gluten* paragraph 70, last sentence.
[120] India FWS, paragraph 248.

207. The Appellate Body in *US – Hot Rolled Steel* would appear to have ruled clearly that the dumped imports should *cause* the injury. In its Report the Appellate Body stated that if the non-attribution language is not heeded then:$

> " … the authorities would have no rational basis to conclude that the dumped imports are indeed causing the injury which, under the *Anti-Dumping Agreement*, justifies the imposition of anti-dumping duties."[121](underlining and emphasis added)

208. Therefore, investigating authorities should ensure that the dumped imports are indeed causing the injury, as required by the Anti-Dumping Agreement. Besides that, the causation analysis is as important as never before due to the Appellate Body statement in *US – Line Pipe* that under Article 5.1 of the ASG (which is textually similar to Article 11.1 of the ADA) "safeguard measures may be applied only to the extent that they address serious injury attributed to increased imports".[122]

209. India respectfully submits that it has presented a correct view on the question of causation in the context of the Anti-Dumping Agreement.

210. The second argument of the EC[123] misrepresents the views of India. India had stated that the EC had not *demonstrated* that the tiny increase in imports had *caused* the injury.[124] This argument is now changed by the EC into that India had stated that "if the increase in the market share held by the dumped imports is relatively small, those imports cannot be considered a cause of injury."[125] Since the EC is therefore addressing something that India has *not even* stated it seems rather pointless to react to it.

211. The third argument of the EC mentions that the injury finding was not based on a loss in market share.[126] Of course India has never suggested this since the market share of the Community industry went *up*. Indeed, since this market share went up it would have been not more than prudent to provide, as one Panel put it:

> " … a compelling explanation of why and how, in light of such apparent positive trends, the domestic industry was, or remained, injured within the meaning of the Agreement."[127]

212. Finally the EC refers to the alleged increase in market share of dumped imports from India.[128] While India has already pointed out that the EC's calculation of "dumped imports" was wrong, the EC once more misrepresents the dumped imports from India. It states that the market share of "dumped imports" represented over 50 per cent of the EC industry's sales volume. Even following the EC's "logic" on calculating dumped imports (with dumped imports from India taken as 8.5 per cent (rather than 4.6 per cent)), this is still *less* than 50% of the 19.7% market share (in volume terms) as explained in recital (35) of Regulation 1644/2001. The argument of the EC is therefore based on a wrong presentation of facts.

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[121] *US – Hot Rolled Steel AB*, paragraph 253.
[122] *US – Line Pipe AB*, paragraph 260.
[123] EC FWS, paragraphs 240-241.
[124] *Ibid.*
[125] EC FWS paragraph 231.
[126] EC FWS paragraph 235.
[127] *Thailand – H-Beams*, Panel, paragraph 7.249.
[128] EC FWS paragraph 237.

3. The Non-Attribution Language

213. As a first aspect, India fails to understand the EC's rebuttal concerning the non-examination of all other factors that might have caused injury. India had provided one example of such other factor, which was the inflation in prices of consumer goods.[129] While identified, this factor had not even been examined as a possible other factor. The EC states that this was regarded as a sign of injury, not a possible *cause*.[130] Yet, since price suppression and inadequate profits were singled out as the main indication of injury, the inflation could well have been a cause of that alleged injury. This should have been examined separately.

214. As a second aspect, India had mentioned that the EC had failed to engage in ensuring that injury caused by other factors should not be attributed to the dumped imports. For this purpose India had quoted the apposite paragraphs from the Appellate Body in *US – Hot Rolled Steel*.[131]

215. As India mentioned, there is the obligation to separate and distinguish the different injurious effects caused by other factors, from the effects of the dumped imports.[132]

216. And, in India's view, the EC did not engage in such separation nor did it distinguish the different injurious effects. This observation from India was pertinent since the EC in recital (103) of the provisional Regulation had stated that:

> "The Commission concluded that increases in raw material prices had caused injury."

217. Again, in the re-determination the EC stated at recital (50) that:

> "… the declining and inadequate profitability … is basically the result of prices which had not been able to reflect the increases in the costs of raw cotton."

218. Yet, nowhere in the provisional Regulation, nor elsewhere for that matter, were the injurious effects caused by the price increase in the costs of cotton separated and distinguished from the effects of the dumped imports.

219. Accordingly, India submitted that by not engaging in such mandatory separation and distinguishing of effects of this other factor the EC acted inconsistently with the non-attribution language of Article 3.5 as clarified by the Appellate Body.

220. In rebuttal the EC merely concludes that:

> "Since the increase in the cost of the raw cotton was not a separate cause of injury, its injurious effects cannot possibly be "separated/distinguished" from those of the dumped imports."[133]

221. Yet this explanation is not in line with the obligations as expressed by the Appellate Body as regards the non-attribution of injury and the mandatory separation of injurious effects.[134] Once the

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[129] India FWS, paragraph 250.
[130] EC FWS, paragraph 241.
[131] India FWS, paragraphs 249, 251, 253, 254, quoting the Appellate Body in *US – Hot Rolled Steel* paragraphs 222, 223, and 228.
[132] India FWS, paragraph 255.
[133] EC FWS, paragraph 248.
[134] *US – Hot Rolled Steel AB* paragraph 228. Moreover, the Appellate Body in *Line Pipe*, in the context of the ASG, at paragraph 217, did not leave any doubt:

EC determined that the increase in raw material prices caused injury,[135] such cause *had* to be separated from the alleged injury caused by dumped imports. While the Appellate Body recognized that:

> " … it may not be easy, as a practical matter, to separate and distinguish the injurious effects of different causal factors"[136]

it immediately added that:

> " … although this process may not be easy, this is precisely what is envisaged by the non-attribution language."[137]

222. Accordingly, India respectfully submits that, the EC, by failing to do *precisely that*, acted inconsistently with Article 3.5.

G. THE EC'S DISREGARD FOR INDIA'S STATUS AS A DEVELOPING COUNTRY (CLAIMS 7 AND 8)

1. India's claim 7 regarding Article 15

223. First of all, India recalls that the core of the problem here is that the EC did, once again, nothing to help Indian exporters in a constructive fashion. The imposition of duties was merely suspended with the sole goal of (soon) seeking to impose duties higher than ever. As the Panel had already clearly stated in its original report: suspension of measures is not a "remedy" of any type, constructive or otherwise.

224. The EC does not try to deny these facts but tries to argue that its failure to respect Article 15 results from one word in the Article, which is the word 'applying'. That shift in attention does not solve the problem which is that the EC did exactly that what it was not supposed to have done.

225. Nevertheless, India wishes to briefly address that EC argument since it does not agree with it. One needs only to compare the word 'apply' with the word 'action'. Each of these words has to be capable of covering an activity in case something is done. However, this does not detract from the fact that both can also include the meaning of an 'inactivity' or a 'decision not to act.'

226. Similarly, the suspension of an imposition of duties can in itself also qualify as a form of application. This is for example recognised in Article 7, addressing the question of provisional measures. Article 7.1, and the rest of that Article, uses variations of the word 'apply', rather than 'impose'. In Article 7.2, the "withholding of appraisement" is a recognised form of a provisional measure, even though no duty is imposed.

227. The Appellate Body followed a similar line of reasoning in *Line Pipe*:

> " … Article 9.1 is concerned with the application of a safeguard measure on a *product*. And we note, too, that a duty, such as the supplemental duty imposed by

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" … the competent authorities must establish explicitly, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports. This explanation must be clear and unambiguous. It must not merely imply or suggest an explanation. It must be a straightforward explanation in express terms."

[135] Provisional Regulation recital (103).

[136] *US – Hot Rolled Steel AB* paragraph 228.

[137] *Ibid.*

> the line pipe measure, does not need actually to be enforced and collected to be "applied" to a product. In our view, duties are "applied against a *product*" when a Member imposes conditions under which that product can enter that Member's market—including when that Member establishes, as the United States did here, a duty to be imposed on over-quota imports. Thus, in our view, duties are "applied" irrespective of whether they result in making imports more expensive, in discouraging imports because they become more expensive, or in preventing imports altogether."[138] (Underlining added)

228. In similar vein, the suspension of imposition of duties equally qualifies as an application of measures. The measures are dormant, but they apply. If they would not apply then there would be no need to suspend their imposition. This suspension is conditional upon the partial review not being concluded.[139] There is therefore a very clear timing condition within imports have to take place—a condition which moreover will soon run out and after which no more imports can take place.

229. Having dismantled the semantic confusion that the EC has sought to create, India wishes to return to the root of the problem. India recalls that the obligation to explore rests on the EC, not on India. Thus, while the EC recognises that India had provided various alternatives as possible constructive remedies, the only reaction from the EC (now, after one year) is that all of India's suggestions do in the EC's view not qualify as constructive remedies. One may only wonder how more often an initiative has to come from India while the onus to explore rests on the EC?

230. The EC also hastens to explain that Regulation 1515/2001 was neither emergency legislation nor retroactive. Yet, one only needs to read Article 4 of that Regulation: even though the Regulation entered into force on 27 July 2001, "it applies to reports adopted after 1 January 2001 by the DSB." Since the Bed Linen reports were adopted by the DSB on 12 March 2001, Regulation 1515/2001 applied to it, even though that Regulation entered into force four months later. This also addresses the question of being specifically tailored: there is only one set of Reports affected by that retroactivity—the Bed Linen Reports of 12 March 2001. The issue is material since the legitimate refunds under EC law could have served as some sort of remedy, even though for many bankrupt companies it is already too late.

231. Finally, the EC tries to rebut the Panel's finding that non-imposition of measures is not a remedy of any type. The EC argues that suspension is a remedy, directly contrary to what the Panel had held. It is therefore not for India to refute such assertions. The Panel had already enunciated itself on this issue in paragraph 6.228 of its original Report. The EC did not appeal these findings. Hence it is inappropriate for it to do so now.

2. India's claim 8 regarding Article 21.2 DSU

232. The EC states that Article 21.2 is not mandatory, despite relevant case law of the Appellate Body on the question of 'should'. India has already identified that case law. India has also quoted and paraphrased the relevant sections in its first written submission.

233. The EC then wrongly states that India has not identified any *specific element* render the word 'should' mandatory beyond doubt. Yet, India had identified *two* express criteria that were fulfilled and triggered the obligation beyond doubt. In return to that identification of two express criteria the EC has not attempted a refutation.

234. The EC hides behind formalistic arguments.

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[138] *US–Line Pipe AB*, paragraph 129.
[139] Re-determination Article 2 paragraph 2.

235. The EC first mentions that the Article is vague. Yet that does not render the obligation inoperative. If provisions would have *no* meaning then there is no purpose for such provisions. If such view is upheld then that also implies that Articles 4(10) and 24 (first sentence) of the DSU are meaningless. If this is so they might as well be deleted. Yet, an interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs to redundancy or inutility.[140]

236. Indeed:

> "A treaty interpreter is not entitled to assume that … usage [of words] was merely inadvertent on the part of the Members who negotiated and wrote the Agreement."[141]

237. To confirm its reasoning India recalls that in the arbitral award in *Chile–Alcoholic Beverages,* it is said that:

> "because Article 21.2 is in the DSU, it is not simply to be disregarded."

238. The award goes on to say that:

> "Article 21.2, whatever else it may signify, usefully enjoins, *inter alia*, an arbitrator functioning under Article 21.3(c) to be generally mindful of the great difficulties that a developing country Member may, in a particular case, face…"[142] (underlining added)

239. India also recalls that in *all* arbitrations under Article 21.3(c) of the DSU Article 21.2 has been enforced when requested so by the developing countries.[143]

240. Moreover, in *India–Quantitative Restrictions* the Panel anticipating the difficulties of India to comply with an adverse decision stated the following:

> "The foregoing factors take an added importance in light of the principle of special and differential treatment. This principle should be highlighted, given that Article 21.2 of the DSU requires that "Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement."[144] (Underlining added)

241. India also wishes to remind the EC that on at least one occasion the EC has *itself* stated that 'should' in Article 21.2 of the DSU means 'must':

> "The European Communities argues that though in accordance with Article 21.2 of the DSU, when assessing the "reasonable period of time" the arbitrator must take into account the "interests" of Argentina as a developing country, this does not mean that the arbitrator must take into account "circumstances" which are "qualitatively

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[140] *Ut res magis valeat quam pereat.* This is clear-cut and undisputed case law, ever since paragraph 23 of *US – Gasoline AB.*

[141] *EC – Hormones AB* paragraph 164. Other examples abound. *E.g. Argentina – Footwear AB* paragraph 88, *Korea – Dairy Products AB* paragraph 80-81, *Japan–Alcoholic Beverages AB* page 12, *Canada – Milk AB* paragraph 135, *US – Underwear* page 15.

[142] *Chile–Alcoholic Beverages* 21.3, paragraph 45. (also quoted by Arbitrator in *Argentina–Bovine Hides* 21.3, paragraph 51).

[143] *Indonesia–Autos* 21.3, *Chile–Alcoholic Beverages* 21.3, *Argentina–Bovine Hides* 21.3.

[144] *India–Quantitative Restrictions*, Panel Report, paragraph 7.6.

different" from those that would be relevant for a developed country."[145] (Underlining added)

242. The EC refers to another Panel report which dealt with Article 15. India has however already addressed the question of Article 15 in its claim 7. In any event the facts and history of this case are entirely different. *Bed Linen* has a history of violations, including that of Article 15. The EC should have exercised much more caution rather than to initiate yet another review.

243. Now that the EC has brought up Article 15 in the context of Article 21.2 DSU, India wishes to briefly elaborate on this. India has already explained how Article 15 has been violated by the EC in the re-determination, by doing exactly the opposite of what the Panel held. The EC's repetition of its inconsistency—after the Panel already found fault with the EC's actions—brings with it also a violation with Article 21.2. India considers that the compelling logic of the Appellate Body enunciated in *Line Pipe*[146] also applies in the relation between Articles 21.2 of the DSU and Article 15 of the ADA: a Member cannot be considered to have paid particular attention unless, as a first step, it has heeded the essential interests of developing country Members under Article 15. The violation of Article 15 therefore brings with it the inconsistency with Article 21.2 DSU. India considers this one more reason that Article 21.2 has been violated.

244. The EC then refers to the negotiating of possible future legislation. This however is no 'context' foreseen in Article 31.2 of the Vienna Convention. That argument should therefore be dismissed as such. Moreover it is common knowledge that statements in negotiations may not always reflect the exact legal position of an Article in question; it could form part of an overall negotiating strategy.

245. The EC suggests that the obligations under Article 21.2 of the DSU are procedural rather than substantive. India disagrees that the Article sets forth a preference of form over content. In any event, the EC did just nothing that would qualify as an action under Article 21.2. On the contrary, the initiation of yet another Bed Linen review suggests that the EC did rather the *exact* opposite of paying particular attention to the interests of India.

246. Finally the EC states that it did pay particular attention. The examples that are mentioned however do not qualify as such. The implementation period depended on the mutual agreement and not on the fact that India is a developing country; moreover, the EC did not respect that period. The EC then asserts that it accepted India's request for a Panel the first time it was put on the agenda; however, this is not correct since the request had *de facto* been made once before.[147]

247. As a last resort the EC mentions that it took account of India's interests by suspending the imposition of the measures. As we know now that later action seems not to have been taken in good faith: in retrospect it appears no more than temporary lip service to enable the initiation of yet another *Bed Linen* proceeding and soon to impose duties higher than ever.

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[145] *Argentina–Bovine Hides* 21.3, paragraph 33.

[146] *US – Line Pipe AB*, at paragraphs 118-119 where the AB upheld the Panel's findings on the inconsistency with Article 8, that had quoted the AB report on *US – Wheat Gluten*. In *US – Wheat Gluten AB* it was held at paragraph 146 that:

> "In view of [the] explicit link between Articles 8.1 and 12.3 of the *Agreement on Safeguards*, a Member cannot, in our view, "endeavour to maintain" an adequate balance of concessions unless it has, as a first step, provided an adequate opportunity for prior consultations on a proposed measure."

[147] India's first written submission paragraph 24.

248. Indeed, as for Article 21.2 DSU, the parameters are *not* completely undefined. *Particular attention should* be paid, yet the EC did entirely nothing. At least *something* discernible should have been done that should have shown the extra attention.

249. Similar to with the word *action*, *particular attention* can under circumstances also encompass the decision not to act. A published decision *not* to initiate *Bed Linen-3* could have qualified as such.

250. Indeed, and finally, even if parameters are not defined then that does not mean that *nothing* should be done. For example, it is an unwritten and basic rule in traffic that drivers in cars should pay particular attention to the situation of pedestrians. While parameters in those circumstances are also not expressly defined then this does not mean that drivers can simply ignore pedestrians. They are under the obligation to exercise additional *caution*, even though that can take several forms depending on the situation.

251. Yet, we all know that the contrary happened: *Bed Linen-3* was initiated.

V. CONCLUSION

252. For the above reasons, India maintains the conclusions set out in its first written submission.

List of Regularly Quoted Panel and Appellate Body Reports and Arbitration Awards

Argentina – Bovine Heads 21.3	*Argentina – Measures on the Exports of Bovine Hides and the Import of Finished Leather, Arbitration under Article 21.3(c) of the DSU, WT/DS155/10 of 31 August 2001*
Argentina – Floor Tiles	*Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy, WT/DS189/R of 28 September 2001*
Australia – Leather 21.5	*Australia – Subsidies Provided to Producers and Exporters of Automotive Leather, Recourse to Article 21.5 of the DSU by the United States, WT/DS126/RW of 21 January 2000*
Australia – Salmon 21.5	*Australia – Measures Affecting Importation of Salmon, Recourse to Article 21.5 by Canada, WT/DS18/RW of 18 February 2000*
Canada – Civilian Aircraft 21.5 AB	*Canada – Measures Affecting the Export of Civilian Aircraft, recourse to Article 21.5, Report of the Appellate Body, WT/DS70/AB/RW of 21 July 2000*
Chile – Alcohol 21.3	*Chile – Taxes on Alcoholic Beverages, Arbitration under Article 21.3(c) of the DSU, WT/DS87/15 and WT/DS110/14 of 23 May2000*
EC – Bed Linen	*European Communities – Anti-Dumping Duties On Imports Of Cotton-Type Bed Linen From India, WT/DS141/R of 30 October 2000*
EC – Bed Linen AB	*European Communities – Anti-Dumping Duties On Imports Of Cotton-Type Bed Linen From India, Report of the Appellate Body, WT/DS141/AB/R of 1 March 2001*
EC – Hormones AB	*EC Measures concerning Meat and Meat Products (Hormones), Report of the Appellate Body, WT/DS26/AB/R and WT/DS48/AB/R of 16 January 1998*
Guatemala – Cement-II	*Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico (Cement-II), WT/DS156/R of 24 October 2000*
India – Quantitative Restrictions	*India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, WT/DS90/R of 6 April 1999*
Indonesia – Autos 21.3	*Indonesia – Certain Measures Affecting the Automobile Industry, Arbitration under Article 21.3(c) of the DSU, WT/DS54/15, WT/DS55/14, WT/DS54/14, WT/DS59/13 and WT/DS64/12 of 7 December 1998*
Korea – Dairy Products AB	*Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products, Report of the Appellate Body, WT/DS98/AB/R of 14 December 1999*
Mexico – HFCS 21.5	*Mexico – Anti-Dumping Investigation Of High Fructose Corn Syrup (HFCS) From The United States, recourse to Article 21.5, WT/DS132/RW of 22 June 2001*
Thailand – H-Beams	*Thailand – Anti-Dumping Duties On Angles, Shapes And Sections Of Iron Or Non-Alloy Steel And H-Beams From Poland, WT/DS122/R of 28 September 2000*
US – Gasoline AB	*United States – Standards for Reformulated and Conventional Gasoline, Report of the Appellate Body, WT/DS2/AB/R of 29 April 1996*
US – German Stee	*United States – Countervailing Duties on Certain Corrosion Resistant Carbon Steel Flat Products from Germany, WT/DS213/R of 3 July 2002*
US – Hot Rolled Steel AB	*United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, Report of the Appellate Body, WT/DS184/AB/R of 24 July 2001*
US – Hot Rolled Steel 21.3	*United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, Arbitration nder Article 21.3(c) of the DSU, WT/DS184/13 of 19 February 2002*
US – Lamb AB	*United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia, Report of the Appellate Body, WT/DS178/AB/R and WT/DS178/AB/R of 1 May 2001*

US – Line Pipe AB	*United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea, Report of the Appellate Body, WT/DS202/AB/R of 15 February 2002*
US – Shrimp 21.5	*United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia, WT/DS58/RW of 15 June 2001*
US – Shrimp 21.5 AB	*United States – Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, Recourse to Article 21.5 by Malaysia, WT/DS58/AB/RW of 22 October 2001*
US – Wheat Gluten AB	*United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, Report of the Appellate Body, WT/DS166/AB/R of 22 December 2000*

ANNEX C-2

SECOND SUBMISSION OF THE EUROPEAN COMMUNITIES

12 August 2002

I. INTRODUCTION

1. This Second Submission of the European Communities (the « EC ») addresses the arguments made by Japan and the United States in their Third Party Submissions filed on 5 August 2002. The EC notes in this respect that Japan's submission is limited to India's claims 5 and 6, whereas the United States has commented on the significance of measures taken after the expiry of the "reasonable period of time" and India's claims 1, 2, 3, 5, 6 and 8. The EC will address each of these in turn.

II. ARGUMENT

A. Measures taken after the expiry of the « reasonable period of time »

2. The EC agrees with the arguments made by the United States at paragraphs 2 to 4 of its submission to the effect that a Member can still take «measures to comply » after the end of the «reasonable period of time».[1]

3. Nevertheless, the EC understands India's position to be not that a Member cannot take « measures to comply » after the end of the «reasonable period of time» but, rather, that the mandate of this Panel is limited to establishing whether the measures taken within the «reasonable period of time» are consistent with the covered agreements. As explained by the EC, Article 21.5 of the *DSU* does not provide for such limitation of the Panel's mandate.[2] The EC notes that the Unites States agrees with that view.[3]

4. The EC has argued that the relevant date for assessing the consistency of the measures taken to comply is that of the date of establishment of the panel because that appears to have been the date taken into account by the panel in *US – Shrimps (21.5)*.[4] However, as observed by the United States, the Panel need not decide whether the relevant date is the date of the panel request, that of the establishment of the panel, or a later date (as decided by the Panel in *Australia – Salmon (21.5)*[5]), because, in any event, all the measures at issue in this case were taken before the date of the panel request.

B. Article 2.2.2(ii) of the Anti-dumping Agreement (India's claim 1)

5. The EC notes that the United States shares its view that Article 2.2.2(ii) of the *Anti-Dumping Agreement* does not prescribe the use of any specific averaging factor according to which weighted average SGA and profit must be calculated.[6] The United States likewise disagrees with India's claim

[1] US Third Party Submission, paras. 2-4.
[2] EC First Submission, paras. 32-37.
[3] US Third Party Submission, paras. 5-6.
[4] EC First Submission, para. 35.
[5] See EC First Submission, footnote 22.
[6] US Third Party Submission, paras. 9 and 10.

that it can be inferred from references to sales volume or quantity elsewhere in the *Anti-Dumping Agreement* that Article 2.2.2(ii) implies that SGA and profit must be calculated on the basis of sales volume.

6. The EC agrees with the United States' conclusion that weighting could therefore be done on the basis of either sales value or sales volume, both being, in principle, "permissible interpretations" within the meaning of Article 17.6(ii) of the *Anti-Dumping Agreement*. Nevertheless, the EC has shown that the specific method proposed by India in this case (averaging by volume measured in terms of "sets/units") leads to a meaningless result. In other words, India's method does not allow a "proper establishment of the facts" within the meaning of Article 17.6 (i). For that reason, it cannot be considered a "permissible interpretation".

7. Finally, even if Article 2.2.2(ii) required the weighted average to be calculated on the basis of volume, India has not justified why sales volume should be measured in units/sets rather than by weight or size.[7] As the EC has highlighted, a weighting by sales volume measured by weight would have resulted in higher dumping margins than those calculated using sales value[8], thus giving rise to no nullification or impairment of benefits to India under Article 2.2.2(ii).

C. Article 3.3 of the Anti-Dumping Agreement (India's claim 2)

8. The EC notes that the United States concurs with the view that Regulation 160/2002 is not subject to this Article 21.5 proceeding because it is independent from the measures taken by the EC to comply with the recommendations and rulings of the DSB.[9]

9. The United States also agrees with the EC's position that the EC authorities were entitled to continue to treat imports from Pakistan as dumped for the purposes of the re-determination of injury made in Regulation 1644/2001.[10]

D. Article 5.7 of the Anti-Dumping Agreement (India's claim 3)

10. The EC endorses the arguments made by the United States at paragraph 15 of its submission to the effect that Article 5.7 applies only with respect to the original investigation.

E. Articles 3.2 and 3.4 of the Anti-Dumping Agreement (India's claim 5)

11. The EC agrees with Japan that information related to factors listed in Article 3.4 must be collected and evaluated to determine injury. The EC complied fully with this obligation in its re-determination following the DSB recommendations and rulings. The EC endorses the United States' view that whilst each of the factors enumerated in Article 3.4 must be evaluated, the question of whether or not a factor is relevant to the determination of injury will depend on the facts and circumstances of the industry in question.[11]

12. The EC notes the United States view that, in the light of Article 12.2, investigating authorities are not required to make a specific finding on each enumerated factor in Article 3.2 and 3.4, provided that it is discernible from their determination that they evaluated each of those factors. In any event, the EC submits that the fact that it evaluated each factor is not only discernible from Regulation

[7] EC First Submission, paras. 86-89.
[8] EC First Submission, para. 64 and paras. 90-94.
[9] US Third Party Submission, para. 13.
[10] Ibid., para. 14.
[11] US Third Party Submission, para 17. See also *EC-Bed linen*, report of the Panel, para. 6.168.

1644/2001, but that its re-determination actually sets out specific findings in relation to each of those factors.

F. Article 3.5 of the Anti-dumping Agreement (India's claim 6)

13. The EC agrees with Japan that Article 3.5 of the *Anti-dumping Agreement* requires that investigating authorities examine any known factors other than dumped imports which are causing injury at the same time as dumped imports, and that injuries caused by these other factors must not be attributed to the dumped imports. The EC submits that it did carefully examine such other known factors and did not attribute injury caused by them to the dumped imports. The United States agrees with the EC that Article 3.5 does not require that the dumped imports are the sole cause of injury.[12] As the EC has made clear, the relevant issue is not whether the dumped imports were *the cause* of injury suffered by the EC industry, but rather whether there was a genuine and substantial relationship of cause and effect.

14. The EC notes that the United States also agrees with the EC that injury can be found to exist even where dumped imports have not increased.[13] In any event, the EC established in the present case that market share held by dumped imports from India had increased significantly over the injury analysis period.[14]

C. Article 21.2 of the DSU (India's claim 8)

15. The EC notes that the United States agrees with the EC's position that Article 21.2 of the *DSU* is a non-mandatory provision[15] and that Japan has not expressed any views to the contrary. The EC endorses the argument made by the United States at paragraph 12 and footnote 2 of its submission.

16. The EC recalls that, in any event, the facts of this case evidence that the EC authorities did pay particular attention to the interests of India.[16]

[12] US Third Party Submission, para. 19; EC First Submission, paras. 227-230.
[13] US Third Party Submission, para. 20.
[14] EC First Submission, paras. 237-239.
[15] US Third Party Submission, para. 12.
[16] EC First Submission, paras. 289-292.

ANNEX D

ORAL STATEMENTS

ANNEX D-1

ORAL STATEMENT OF THE REPUBLIC OF KOREA

11 September 2002

1. Korea welcomes this opportunity to present its views with respect to the proceeding initiated by India to examine the consistency with the covered agreements of the measure taken by the European Communities to comply with the rulings of the DSB concerning the EC anti-dumping duties on imports of cotton-type bed linen from India. Korea will confine its statements to a couple of issues raised in the submissions of India and the EC.

A. THE EC FAILED TO CONDUCT THE RE-DETERMINATION WITHIN ITS OBLIGATIONS UNDER ARTICLE 2.2.2(II) OF THE AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF GATT 1994

2. Article 2.2.2 (ii) mandates selling and general costs (SGA) and profits to be determined on the basis of the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation. The crucial point in this provision is the method for calculating the weighted average of the actual amounts.

3. In the present case, the EC resorted to sales value as the averaging factor for SGA and profits, whereas India argued that actual amounts should be averaged according to the sales volume of the exporters. Korea is of the view that the approach by the EC, which used the sales value in lieu of sales quantity or volume as the weight-averaging factor, resulted in distorting the relative importance of the exporters concerned.

4. Article 2.2.2 (ii) does not prescribe the use of any specific averaging factor in the method for determining the weighted average. The EC claims that lack of reference to any specific averaging factor in Art. 2.2.2 (ii) provides the investigating authorities with discretion as to the choice of the averaging factor. To make its case further, the EC compared Art. 2.2.2 (ii) with Footnotes 2 and 5 and Article 6.10 in its first submission para 72 and argues that by being silent on the averaging factor in Art. 2.2.2 (ii), the drafters of the AD Agreement "accorded the investigating authorities discretion between sales volume and other pertinent criteria".

5. Korea believes the EC's comparison is misplaced. In the AD Agreement, there are four provisions in total which contain reference to the concept "weighted average" – Articles 2.2.1, 2.2.2 (ii), 2.4.2 (ii), and finally 9.4 (i). There is one thing in common to these 4 provisions, that is, they all do not prescribe any specific averaging factor. If any of these provisions prescribed a specific averaging factor, then one could safely presume that it is the intention of the drafters that under the other provisions, the investigating authorities enjoy full discretion in the choice of averaging factor. On the contrary, that is not the case and from the fact that the drafters of the AD Agreement remain silent on choice of the averaging factor in all these 4 provisions, it is inferred that the investigating authorities may choose an averaging factor of their choice, but the choice is not immune from scrutiny.

6. What is important is that, as the Appellate Body in the EC Bed Linen case pointed out in its report, weighted averaging should take into account in an appropriate manner the relative importance of different exporters. Korea is of the view that the EC's averaging factor based on the sales value of each producer does not meet this standard because the method is biased towards overemphasizing the

relative importance of a company with higher SGA and profits – in this case, Bombay Dyeing - as SGA and profits and sales value are price-related indexes.

7. To illustrate this point, let us assume there are two companies: one with higher SGA and profits and the other with lower SGA and profits. In the majority of cases, the sales price of the company with higher SGA and profits would be higher than that of the company with lower SGA and profits because sales value is positively correlated with SGA and profits. Hence, if the sales value is used as an averaging factor in calculating the weighted average of SGA and profits, then the weighted average will converge into the company with higher SGA and profits.

8. Therefore, the sales value method leads to a higher weighted average SGA and profits, and consequently a higher constructed normal value, artificially inflating the dumping margins. In the original investigation, the EC chose to zero negative price differences to inflate the dumping margins, which was found by the Panel to constitute a violation of Article 2.4. Korea believes that the EC, by employing the sales value method which entails artificially higher weighted average SGA and profits, once again tried to distort the calculation of constructed and normal value.

9. In its first submission, the EC states that it employs the sales value method when calculating all other dumping rates under Article 9.4(i) of the ADA. Korea does not see any problem in the EC's averaging method based on value for the calculation of the weighted average under Article 9.4(i) because the dumping margin in Article 9.4 is not related with the averaging factor of sales value, i.e. it is independent from the sales value. The selling price of the company with the higher dumping margin can be lower than that of the company with a lower dumping margin because these two variables are not correlated. Therefore, the value-based averaging method employed with regard to the Article 9.4(i) will not produce any distortion in the end. A contrario, the averaging method based on value with respect to the Article 2.2.2 (ii) would lead to distortion and thus inflate the dumping margin, as SGA and profits on the one hand and sales value on the other are positively correlated.

10. In its first submission, the EC states that averaging the SGA and profits according to volume based on weight instead of the unit would result in higher dumping margins and that the EC's averaging method is in fact more favourable to India. With this in mind, the EC requested the Panel to find that the EC's violation has not nullified or impaired the benefits accrued to India, even though the Panel concluded that the EC has violated Article 2.2.2(ii) of the ADA.

11. Korea is of the view that the averaging method suggested by the EC in which the volume would be measured in terms of weight is not relevant. The averaging method should reflect the actual method of transactions and practice. Bed linen end-products are in general sold in different units and they're rarely, if ever, sold by weight or in bulk, as suggested by the EC.

12. Summing up, for the reasons stated above, Korea believes that the EC misinterpreted and misapplied the averaging method with regard to Article 2.2.2 (ii) and artificially inflated the dumping margin. Therefore, Korea is of the view that the EC's measures are not consistent with the recommendations and rulings of DSB and impairs and nullifies the benefits accruing to India.

B. THE EC ACTED INCONSISTENTLY WITH ARTICLE 3.1 AND 3.4 BECAUSE IT FAILS TO COLLECT SUFFICIENT DATA PRIOR TO EVALUATION IN ITS RE-DETERMINATION.

13. In order to comply with the recommendations and rulings of the DSB, the EC reassessed and evaluated all of the relevant injury factors enumerated in Article 3.4 of the AD Agreement (Regulation 1644/2001 recital (4)). However, the EC stated that it did not collect additional information for re-determination, and findings are based on information collected during 1996 – 1997 (recital 73). In its re-determination, taking into account this problem, the EC suspended the imposition of its anti-dumping duty for exports from India (recitals 72-78).

14. As for data collection, the original Panel found that necessary data was not even collected for all the factors listed in Article 3.4 of the AD Agreement. The Panel thus concluded that the EC did not conduct an objective evaluation of all relevant economic factors and failed to act consistently with its obligations under Article 3.4 of the Agreement.

15. In this respect, Korea believes that the EC's re-determination without collecting additional information does not meet the recommendations or rulings of the DSB. Article 3.1 states that injury determination shall be based on positive evidence and objective examination of the injury factors mentioned on Article 3.4, and the EC's re-determination does not meet this requirement. In order to fully carry out implementation, the EC should have collected additional information for re-determination.

ANNEX D-2

ORAL STATEMENT OF THE UNITED STATES AT THE THIRD-PARTY SESSION

11 September 2002

1. Thank you, Mr. Chairman, and members of the Panel. It is a pleasure to appear before you today to present the views of the United States in this proceeding. The purpose of this oral statement is to highlight certain aspects of the issues addressed in our written submission, and to comment on some issues in India's submission.

I. THE PROVISIONS OF ANTI-DUMPING AGREEMENT ARTICLE 5.7 DO NOT APPLY TO IMPLEMENTATION MEASURES

2. As the United States explained in its third party submission, the text of Article 5.7 of the Anti-Dumping Agreement specifies that the obligation applies in two circumstances – in the decision whether or not to initiate an investigation of dumping and injury and during the course of that investigation. The absence of reference to other circumstances, such as a proceeding to bring a measure into compliance with adverse DSB recommendations and rulings, indicates that Article 5.7 does not apply in those other circumstances.

3. In support of its view to the contrary, India cites to the Panel Report in *Certain Corrosion Resistant Carbon Steel Flat Products from Germany*.[1] In that dispute, the panel, with one member dissenting, concluded that the *de minimis* requirements of Article 11.9 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), which explicitly reference only the investigation stage, also apply in a five-year review under Article 21.3 of the SCM Agreement.

4. The United States believes the conclusions of the *Corrosion Resistant* panel are based upon erroneous findings on issues of law and related legal interpretations, and has appealed the *Corrosion Resistant* panel's findings on the pertinent issue to the Appellate Body. In this respect, the United States notes that the report of the panel in the *Corrosion Resistant* dispute is at odds with the report of the panel in the *Korea DRAMs* dispute.[2] As the panel in *Korea DRAMs* concluded in reference to the fact that Article 5 of the Anti-Dumping Agreement is entitled *Initiation and Subsequent Investigation*, "the term 'investigation' means the investigative phase leading up to the final determination of the investigating authority".[3]

5. The United States' view of the correct law is and has been consistent in the current Article 21.5 proceeding, in the *Korea DRAMs* dispute and in the *Corrosion Resistant* dispute. In all three cases, the fact that the text of an article (here Article 5.7 of the Anti-Dumping Agreement) explicitly delineates the circumstances to which it is applies, but contains no reference to certain other circumstances (here the circumstances occurring after the initiation and initial investigations) must mean something. The ordinary meaning of the absence of such a reference is simply that there is no

[1] WT/DS213/R (Circulated 3 July 2002).

[2] *United States - Anti-Dumping Duty On Dynamic Random Access Memory Semiconductors (DRAMs) Of One Megabit Or Above From Korea* ("*Korea DRAMs*"), WT/DS99/R, Report of the Panel adopted 19 March 1999, para. 6.40.

[3] *Korea DRAMs*, para. 6.48, n. 494.

requirement to apply the Article 5.7 simultaneity requirements to measures taken to comply with DSB recommendations and rulings.

6. In any event, the policy reasons articulated by the two-panelist majority in the *Corrosion Resistant* case simply are not present in the current case. In the *Corrosion Resistant* dispute, the panel was interpreting two provisions addressing the minimum requirements that investigating authorities must follow when they initially conduct an original investigation and a sunset review. In contrast, the instant case involves the question of what types of actions may be taken to correct an anti-dumping determination that has already been the subject of a complete investigation, if a Member chooses to reconsider that determination in order to bring the measure into compliance with the DSB recommendations and rulings.

7. India appears to recognize that Article 5.7 does not impose a blanket requirement for simultaneous consideration of dumping and injury in all proceedings. It admits that Article 5.7 would permit a Member, upon implementing a DSB recommendation or ruling addressing only dumping or only injury, to reconsider only the dumping findings or only the injury findings.[4] India fails to explain how Article 5.7 can be read *not* to require a simultaneous consideration of dumping and injury in response to *some* DSB recommendations and rulings, yet to require reconsideration in response to certain other DSB recommendations and rulings.

8. If a Member chooses to implement DSB recommendations and rulings by reconsidering a dumping determination, neither the Anti-Dumping Agreement nor the DSU requires investigating authorities to include in their reconsideration findings that were not found to be inconsistent with the covered agreements. Furthermore, requiring investigating authorities to go beyond the scope of the DSB recommendations and rulings in the context of implementation could also create inconsistencies with Article 6.9 of the Anti-Dumping Agreement, which requires authorities to inform all interested parties of the essential facts under consideration in sufficient time for the parties to defend their interests.

9. Finally, we note that India's argument would require an investigating authority to reconsider every aspect of a determination when it implements DSB recommendations and rulings that are applicable only to certain aspects of that determination. If that were the rule, it would greatly expand the time necessary to comply with recommendations and rulings regarding anti-dumping and countervailing measure determinations, contrary to one of the central objectives of the DSU, as described in Article 21.1, which is to secure prompt compliance with the recommendations and rulings of the DSB.

II. COMPARISON OF ANTI-DUMPING AGREEMENT AND SAFEGUARDS AGREEMENT

10. As India notes, the texts of Article 3.5 of the Anti-Dumping Agreement and Article 4.2(b) of the Safeguards Agreement are not identical.[5] The United States agrees with India that the standard of causation applicable in disputes arising under the Safeguards Agreement should not be transposed to disputes arising under the Anti-Dumping Agreement.

11. Likewise, the Panel should reject India's efforts to transpose the *Line Pipe* Appellate Body finding concerning Article 5.1 of the Safeguards Agreement onto its interpretation of Article 11.1 of the Anti-Dumping Agreement.[6] The texts of the two provisions are not, as India asserts, similar.

[4] India's Second Written Submission at para. 118.
[5] India's Second Written Submission at paras. 196-197.
[6] India's Second Written Submission t para. 208.

Article 5.1 of the Safeguards Agreement addresses the nature of the measure that the Member takes in the first instance "to remedy serious injury and to facilitate adjustment". Article 11.1 of the Anti-Dumping Agreement addresses the "duration and review" of anti-dumping duties that have already been issued. Furthermore, in an anti-dumping duty action, unlike the measure contemplated under Article 5.1 of the Safeguards Agreement, the Member does not have to choose among a quota, a tariff-rate quota, and a tariff in taking action.

III. WEIGHT AVERAGING

12. With respect to India's claim that the EC improperly used sales value as the basis for weight averaging sales, general and administrative expenses ("SG&A") as well as profit, the Anti-Dumping Agreement does not specify whether sales value or sales volume must or may be the weighing factor. Article 2.2.2(ii) of the Anti-Dumping Agreement is silent as to the type of weighting factor to be used. As both sales value and sales volume represent permissible bases for weight-averaging these figures, the Member conducting an investigation of dumping retains the discretion to choose between them. If the Panel were to require use of a particular method, it would add to the obligations to which the WTO Members have agreed, in direct contravention of Article 3.2 of the DSU.

13. India suggests that Article 17.6 of the Anti-Dumping Agreement may have been improperly applied by failing to first interpret Article 2.2.2(ii) of the Anti-Dumping Agreement in accordance with the customary rules of interpretation of public international law. India's argument, however, is premised on its assertion that Article 2.2, footnote 2, Article 2.2.1 and Article 6 of the Anti-Dumping Agreement somehow provide relevant context for the interpretation of Article 2.2.2(ii). These Articles, however, are wholly unrelated to the averaging of SG&A and profit. To the extent that the Panel finds it relevant that these provisions specifically refer to volume as the basis for evaluating a requirement, the fact that Article 2.2.2(ii) of the Anti-Dumping Agreement does not refer to volume should be considered equally relevant.

IV. CONCLUSION

14. This concludes my presentation. Thank you again for this opportunity to express our views.

ANNEX D-3

ORAL STATEMENT OF THE EUROPEAN COMMUNITIES

10 September 2002

TABLE OF CONTENTS

I. INTRODUCTION

1. On behalf of our delegation, I would like to thank the Panel for this opportunity to submit orally the views of the European Communities (the "EC") in this dispute.

2. In our Oral Statement of this morning we will provide a comprehensive response to India's Second Submission. I will begin by addressing India's reply to the EC's preliminary objections. I will then turn to India's arguments with respect to claims 1 to 4 and 6 to 8. My colleague, Ms. Meany, will address India's arguments in connection with claim 5.

II. PRELIMINARY OBJECTIONS

A. FIRST REQUEST: MEASURES "TAKEN TO COMPLY"

3. The EC has requested the Panel to find that Regulations 160/2002 and 696/2002 are not "measures taken to comply" within the meaning of Article 21.5 of the *DSU*.

4. India objects to that request by arguing that those two regulations are "closely connected to the panel and Appellate Body reports concerned".[1] Yet, India does not explain how the measures are "connected", or why such "connection" should be relevant.

5. The EC submits that not all the measures that are somehow "connected" to the measure in dispute in the original panel proceedings qualify as measures "taken to comply". By India's standard, once a measure has been found to be WTO inconsistent, any subsequent measure that amends formally the legal instrument containing the original measure would have to be considered as a measure "taken to comply", even if it bears no relationship whatsoever with the rulings and recommendations made in the original dispute. That interpretation of Article 21.5 cannot be correct.

6. India further argues that, upholding the EC's request, would amount "to leaving it to the full discretion of the implementing member to decide whether or not a measure is one "taken to comply".[2] This is a mischaracterization of the EC's position. The EC has never argued that it is for the implementing Member to self-judge what constitutes a measure "taken to comply". Clearly, it is for the Panel to decide whether or not a measure qualifies as a measure "taken to comply".

7. In this regard, the precedents cited by India are inapposite. In *Australia – Salmon*, Australia argued that a measure had not been "taken to comply" because it aggravated the inconsistency.[3] In *Australia – Leather*, Australia argued that the measure was not "taken to comply" because it had not been notified as such to the DSB.[4] In the case at hand, the EC is arguing nothing of the sort.

8. The EC's request is based on the fact that the anti-dumping duties on imports from Egypt and Pakistan were not a measure in dispute before the original Panel. India did not submit any claims with respect to those measures. Nor, consequently, did the DSB make any recommendations or rulings with respect to those measures.

9. The re-determination of the dumping findings for Egypt and Pakistan made in Regulation 160/2002 was conducted by the EC authorities on their own initiative, and not because they were required to do so in order to comply with the DSB's recommendations and rulings. For that reason, such re-determination cannot be considered as a measure "taken to comply". Had the EC authorities not adopted Regulation 160/2002, India could not have requested an Article 21.5 panel to complain about the absence of implementing measures with respect to Egypt and Pakistan.

10. In turn, the re-determination of injury contained in Regulation 696/2002 was rendered necessary by the adoption of Regulation 160/2002. For that reason, it cannot be considered as a measure "taken to comply" either.

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[1] India's Second Submission, para. 8.

[2] Ibid.

[3] *Australia – Measures affecting the Importation of Salmon – Recourse to Article 21.5 by Canada*, WT/DS18/RW, para. 7.10, subpara. 23.

[4] *Australia – Subsidies provided to Producers and Exporters of Automotive Leather - Recourse to Article 21.5 of the DSU by the United States*, WT/DS126/RW, para. 6.4.

11. The EC notes that India has nowhere addressed these arguments

B. SECOND REQUEST: DATE FOR ASSESSING THE CONSISTENCY OF THE MEASURES "TAKEN TO COMPLY" WITH THE COVERED AGREEMENTS

12. The EC has requested the Panel to make a ruling to the effect that the relevant date for assessing the consistency of the measures "taken to comply" with the covered agreements is the date of establishment of the Panel.

13. India agrees with that request[5]. Nevertheless, it argues that, in addition, the Panel should assess the consistency of the measures "taken to comply" also as of the date of expiry of the "reasonable period of time".[6]

14. India's request is not within the Panel's terms of reference. The obligation to comply within the "reasonable period of time" does not arise from Article 21.5, but from Article 21.3 of the *DSU*. Yet, India has not cited Article 21.3 in its panel request.

15. In any event, the ruling requested by India would serve no useful purpose and would complicate unnecessarily the Panel's task. If the Panel found that the EC did not comply as of end of the "reasonable period of time", but did so as of the date of establishment of the panel, there would be nothing else that the EC could do in order to remedy that temporary lack of compliance. Therefore, should the Panel consider that India's request is within its terms of reference, the EC would invite the Panel to exercise judicial economy.

16. India has suggested that the obligation to comply within the reasonable period of time flows from Article 21.1 of the *DSU*.[7] The EC disagrees. Article 21.1 states an objective, which informs the interpretation of the other provisions of Article 21. But it does not impose, as such, any legal obligations. In any event, India's panel request does not cite Article 21.1 either.

17. India suggests that a Member cannot initiate proceedings under Article 21.5 until the end of the "reasonable period of time".[8] Although the issue is not relevant in this dispute, the EC must state its disagreement. If a Member takes a "measure to comply" before the end of the "reasonable period of time", that measure can be challenged immediately under Article 21.5. It is only in the absence of any measures "taken to comply" that the complaining Member will be required to wait until the end of the "reasonable period of time" before requesting a panel under Article 21.5.

18. India further argues that "the inconsistency of a measure with the covered agreements under Article 21.5 proceedings automatically results in a violation of Article 21.1".[9] While this is correct, the opposite is not necessarily true. A measure may be consistent with the covered agreements, and yet violate Article 21.3 because it was taken after the "reasonable period of time". Thus, it is incorrect to say that it is "unnecessary for a complaining Member to raise the violation of Article 21.1 as an independent claim".[10]

[5] India's Second Submission, para. 12.
[6] Ibid.
[7] Ibid., para. 16.
[8] Ibid., para. 17.
[9] Ibid., para. 22.
[10] Ibid., para. 22.

19. While it may be true that no Member has ever invoked a violation of Article 21.3 in Article 21.5 proceedings[11], this does not prove that it is unnecessary to state that claim separately. Rather, it seems more likely that no Member has ever bothered to invoke a violation of Article 21.3 because a ruling that the implementing Member has complied late would be declaratory and devoid of practical consequences.

20. India also argues that, in light of Article 21.2 of the *DSU*, when the complaining Member is a developing country, panels should make a "strict interpretation of the binding nature of the obligation to comply".[12] This argument is misguided. The EC does not dispute the binding nature of the obligation to comply within the "reasonable period of time". The EC has never suggested that such obligation is "meaningless".[13] To repeat, the point made by the EC is simply that a finding that a Member has violated Article 21.3 by complying late would be merely declaratory, because there is nothing else that such Member could do in order to remedy such violation.

C. THIRD REQUEST: CLAIMS THAT COULD HAVE BEEN RAISED IN THE ORIGINAL DISPUTE BUT WERE NOT

21. The EC has requested the Panel to rule that certain claims under Articles 3.4 and 3.5 which India could have raised, but did not raise, in the original dispute with respect to findings that have remained unmodified in the measure at issue are not properly before it. Those findings do not constitute, properly speaking, measures "taken to comply". Furthermore, by withholding those claims, India has acted inconsistently with Article 3.10 of the *DSU*, which requires that the complaining party raises its claims in a timely manner. As a result, India has prejudiced the procedural rights of the EC.

22. India argues that the claims under Article 3.5 which it has raised in these proceedings were within the terms of reference of the original Panel.[14] The EC would agree that the panel request was drafted in such broad terms that it could have encompassed any conceivable claim under Article 3.5. It remains, nevertheless, that India never argued in the original proceedings that the EC had acted inconsistently with Article 3.5 by failing to examine the inflation in the prices of consumer goods as a cause of injury, or by failing to separate the effects of the increase in the cost of raw cotton from those of the dumped imports. Thus, when adopting the implementing measures at issue, the EC authorities could assume legitimately that the WTO consistency of their analysis of those two factors was not being called into question and, therefore, that there was no need to revise that analysis.

23. As regards Article 3.4, the EC has noted that in Regulation 1644/2001 the authorities confirmed the findings made in the original measure with respect to some of the injury factors listed in that article (namely, sales, market share, price development, production, profitability and employment). Indeed, since those findings were not challenged by India in the original proceedings, there was no reason to revise them. For example, India did not contest in the original dispute the findings with respect to the level of profits made by the EC industry. Those findings have, therefore, been confirmed in Regulation 1644/2001. Yet, India claims now, for the first time, that such findings are inadequate.[15] The EC submits that India should not be allowed to raise that claim at this late stage.

[11] Ibid., para. 50.
[12] Ibid., para. 19.
[13] Ibid., para. 17.
[14] India's Second Submission, para. 25.
[15] Ibid., paras. 172-179.

24. To say that the EC authorities have confirmed the findings which they made with respect to some injury factors, which were not contested in the original proceedings, does not amount to an admission that the EC authorities have not made an overall reconsideration and analysis of all the injury factors.[16] The EC did make such an overall reconsideration and analysis by taking into account both the undisputed findings with respect to certain injury factors and the findings with respect to certain other factors which the original Panel found had not been properly evaluated in the original measure. India's persistent refusal to acknowledge the obvious difference between the factual findings made with respect to each individual injury factor and the overall consideration and analysis of all injury factors is becoming tiresome by now.

25. Predictably, India cites the report of the Appellate Body in *Canada – Aircraft (21.5)*.[17] However, as explained, that report does not address the situation at issue in this case. Unlike Canada, the EC is not arguing that the complaining party is not entitled to make any claims which it did not make before the original panel. As correctly concluded by the Appellate Body in that case, the measures "taken to comply" will generally be new, different measures, which may therefore give rise to new claims. Instead, the EC's position is that India should not be allowed to raise at this stage those claims which it could have raised before the original Panel, but which it chose not to raise.

26. Finally, the EC notes that India fails to address the EC's argument that, by withholding the claims at issue, India has prejudiced the procedural rights of the EC.[18] By way of response, India limits itself to argue that the claims at issue were properly stated in the request for the establishment of this Panel.[19] This does not answer the points made by the EC. First, that deadlines are shorter in Article 21.5 proceedings. And second, and more importantly, that, if a violation is found, the EC will have "no reasonable period of time" to comply. As a result, the EC will be exposed to an immediate suspension of concessions under Article 22 of the *DSU* in response to a violation which India had never invoked before and which, therefore, the EC could legitimately assume did not exist at the time when the implementing measures were adopted.

D. FOURTH REQUEST: CLAIMS NOT STATED IN THE PANEL REQUEST

27. The EC has requested the Panel to make a ruling to the effect that India's claims under Article 4.1(i) of the *Anti-Dumping Agreement* and Article 21.3 of the *DSU* were not stated in the request for the establishment of the Panel and, therefore, are not properly before the Panel.

28. The EC notes India's explanation that it is not submitting a claim under Article 4.1(i).[20] However, such claim is implicit in India's claim under Articles 3.1 and 3.4 to the effect that the data for the company concerned should have been evaluated. Indeed, India's claim is logically dependent on a previous finding that the company in question, which was excluded by the EC authorities from the "domestic industry", should nevertheless have been included therein.[21] Yet, clearly, whether or not that company was properly excluded from the "domestic industry" is not something which can be decided by the Panel under Article 3. It involves necessarily a finding under Article 4.1(i).

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[16] Ibid., paras. 29-32.
[17] India's Second Submission, para. 33.
[18] EC's First Submission, paras. 49-50.
[19] India's Second Submission, para. 39.
[20] Ibid., para. 42.
[21] See India's First Submission, at para. 216:

> … since India was not dumping, the re-investigation of dumping should have included the verified information of that sampled producer. *There was no legal justification to continue to exclude (or disregard) information on the record pertaining to that producer. Article 4.1(i) could not be invoked…* [emphasis added].

29. This claim is fundamentally different from the claim under Article 3 decided by the original Panel to which India refers in its Second Submission.[22] Before the original Panel, India claimed that data for EC producers which had not been included in the "domestic industry" could not be used in assessing the state of the "domestic industry". The EC never disputed that those producers were not part of the "domestic industry". In contrast, the issue raised by India now is whether the fact of disregarding data for a company which was not included, but which, according to India, should have been included in the "domestic industry", amounts to a violation of Article 3. The EC submits that the Panel cannot decide that issue without deciding first whether the decision of the EC authorities to exclude that company from the "domestic industry" was consistent with Article 4.1(i).

30. As regards Article 21.3 of the *DSU*, India's position is that it was not required to make a separate claim under that provision.[23] We have already addressed this argument in connection with the second preliminary request.

III. CLAIMS

A. CLAIM 1: ARTICLE 2.2.2 (II)

31. India alleges that Article 2.2.2 (ii) requires the amounts for SGA and profits to be averaged according to the volume sold by the "other producers or exporters" and does not allow the sales value to be used for that purpose.

32. India's interpretation finds no support in the text of Article 2.2.2 (ii). Well aware of this, India has advanced a series of contextual arguments. The EC has shown that they are all without merit.[24]

33. The EC considers that Article 2.2.2 (ii) does not prescribe any specific averaging method. The EC is not suggesting that the investigating authorities enjoy unrestricted discretion to select an averaging factor. The method chosen by the investigating authorities must allow a "proper establishment of the facts".[25] A method which precludes a "proper establishment of the facts" cannot be considered a "permissible" interpretation of Article 2.2.2 (ii) within the meaning of Article 17.6 (ii).

34. The EC has shown that the method applied in *Bed Linen* does allow a "proper establishment of the facts". It is pertinent. And it is neutral. It does not result necessarily in higher amounts for SGA and profits than India's proposed method. Under a different set of factual circumstances, the EC's method might well have been more favourable to the exporters than India's own method. India has acknowledged this expressly.[26]

35. Unlike the EC's method, India's method does not allow a "proper establishment of the facts" and, hence, it is not a "permissible" interpretation of Article 2.2.2 (ii). As explained, India's method gives the same weight to a pillow case as to a double set comprising one sheet, one duvet cover and two pillow cases.[27] Thus, in the words of the Appellate Body[28], India's method fails to "reflect the relative importance" of each of the "other exporters or producers".

[22] India's Second Submission, para. 45.
[23] India's Second Submission, paras. 49-50.
[24] EC's First Submission, paras. 71-74.
[25] Cf. Article 17.6 (i) of the Anti-Dumping Agreement.
[26] India's Second Submission, para. 100.
[27] EC's First Submission, paras. 86-88.

36. India asserts that its method is "reasonable" because it would have led to "one more company not being found dumping".[29] However, the reasonableness of a legal interpretation is not a function of whether it is more favourable to the exporters. The EC is not aware of any provision of the *WTO Agreement*, or of any principle of treaty interpretation, which would require it to choose always that interpretation which, in the specific circumstances of each investigation, happens to be the most favourable for each exporter concerned.

37. India has suggested that, in view of the first sentence of Article 15, the EC authorities should have chosen the method which results in the lowest dumping margin.[30] This amounts in effect to a new claim under Article 15 which was not stated in India's request for the establishment of this Panel and is, therefore, outside the Panel's terms of reference.[31] The EC is hereby requesting the Panel to make a ruling to that effect. In any event, as recalled by the panel in *India – Steel Plates*, the first sentence of Article 15 is not a mandatory provision.[32] Moreover, as noted by the same panel, the first sentence of Article 15 only requires to give special regard "when considering the application of anti-dumping measures". That phrase refers to the final decision to impose measures, and not to the choices of methodology during the investigation.[33]

38. India makes much of the alleged lack of consistency in the EC authorities' practice.[34] However, whether or not the EC authorities acted consistently is not a pertinent consideration for the interpretation of Article 2.2.2 (ii). The interpretation of that provision must be valid for all Members, and not just for the EC. In any event, the EC rejects categorically India's accusations:

- first, the method applied in the *Bed Linen* investigation is the same generally applied by the EC authorities in all the anti-dumping investigations where it has become necessary to resort to Article 2.2.2 (ii).[35] India has not disputed this;

- second, the method applied by the EC authorities is consistent with the methodologies applied at previous steps of the dumping calculation in the *Bed Linen* investigation. It is also consistent with the methods applied to calculate other weighted averages, such as the "all others" rate or the profit margin of the domestic industry.[36] Again, India does not dispute this[37]; and

- third, there is no inconsistency between the method applied in this case and the Judgement of the EC Court of First Instance in the case 118/96 cited by India, which addresses a different issue.[38]

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[28] Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* , WT/DS141/AB/R, para. 74.

[29] India' Second Submission, para. 77. See also para. 104.

[30] Ibid., para. 102.

[31] See India's Request for the Establishment of a Panel of 7 May 2002, WT/DS141/13/Rev.1, at letter (h), where India stated its claim under Article 15 as follows:

> The EC acted inconsistently with Article 15 of the ADA by failing to explore constructive remedies. The recently initiated partial interim review shows that the suspension of the measures was not a remedy of any type but a pretext to continue the proceeding and circumvent the Panel's finding with respect to Article 15;

[32] Panel Report, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India*, WT/DS206/R, para. 7.110.

[33] Ibid., para. 7.111.

[34] See e.g. India's Second Submission, at paras. 90, 101, 103 and 104.

[35] EC's First Submission, para. 81.

[36] EC's First Submission, para. 82.

[37] India's Second Submission, paras. 97 and 98.

[38] EC's First Submission, paras. 75-78.

39. In fact, India's allegations of inconsistency rest on little else than a series of incidental statements made by the EC to the original Panel to the effect that the sales of the company Bombay Dyeing were "representative" because they accounted for almost 80 per cent of the domestic market. That is indeed a very scant basis for alleging a violation of Article 2.2.2 (ii). The statements in question were made in response to India's argument that data for one exporter could not be sufficiently representative to calculate the reasonable amount for SGA and profits in accordance with Article 2.2.2 (ii). They have no direct bearing on the question of whether the amounts for SGA and profits should be averaged according to volume or value, an issue which did not arise in the original investigation. The statements made by the EC would have been equally pertinent, regardless of whether they referred to percentages of sales value or of sales volume, because both magnitudes may be relevant to measure the "representativeness" of an exporter. In any event, as explained, they referred to value, and not to volume.

40. The apparent discrepancy alleged by India in its Second Submission[39] results from the fact that the company Standard Industries reported in its Questionnaire response an amount for its domestic sales which was different from the amount that it had previously reported for the purposes of the selection of the sample in September 1996. The market shares cited by the EC in the statements to the original Panel were based on the sales value reported by the Indian producers for the purposes of the selection of the sample, except in the case of the two sampled companies with sales in India (Anglo French and Bombay Dyeing), for which the amounts reported in their Questionnaire responses and verified on-spot were used instead. On the other hand, the amounts used for the purposes of calculating the weighted average SGA and profits were the sales value established for Bombay Dyeing during the investigation and the sales value reported by Standard Industries in its Questionnaire response. (It is recalled that since Standard Industries served only as a reserve company, its response was neither examined nor verified during the original investigation). While Standard Industries reported for the purposes of the sampling that its domestic sales amounted to [***], its Questionnaire response showed that they amounted to only [***].[40] These data are well known to India (see Exhibit India – RW – 17 and Annexes 16, 17 and 18 of India's First Submission to the original Panel). Nevertheless, and in order to dispel any remaining misunderstanding, the EC is providing as an annex to this Oral Statement a table showing the amounts used to calculate the market shares cited by the EC in the statements to the original Panel and the amounts used in order to calculate the weighted average SGA and profit.[41]

41. Even assuming that Article 2.2.2 (ii) required to use the sales volume, India has advanced no reason in its First Submission to justify why the sales volume should be measured in "units/sets" rather than by weight or size. Significantly, India's Second Submission remains silent on this issue. As demonstrated in our First Submission[42], had the EC authorities used the sales volume measured by weight, the dumping margins would be higher. Thus, in any event the violation alleged by India would be inconsequential and give rise to no nullification or impairment of the benefits accrued to India under Article 2.2.2 (ii). The EC recalls that it has made a conditional request to the Panel to make an express finding to that effect.[43] The EC hereby reiterates that request.

[39] India's Second Submission, paras. 57-60.

[40] The EC requests that the data in square brackets be treated as confidential pursuant to Article 17.7 of the *Anti-Dumping Agreement* and paragraph 3 of the Panel's Working Procedures.

[41] Exhibit EC-1. The EC requests that the information set out in this Annex be treated as confidential pursuant to Article 17.7 of the *Anti-Dumping Agreement* and paragraph 3 of the Panel's Working Procedures.

[42] EC's First Submission, paras. 90-94.

[43] Ibid., para. 293.

42. India does not contest that the EC authorities would be entitled to average according to weight. Nor does India dispute that such method would lead to a higher dumping margin. Nonetheless, India contends that the EC has failed to rebut the presumption of nullification or impairment laid down in Article 3.8 of the *DSU* because it has not shown that "there was no change in the competitive relationship".[44]

43. Obviously, India has misunderstood the EC's argument. Unlike the United States in the *Superfund* case, to which India refers[45], the EC is not arguing that the averaging method which it applied in *Bed Linen* has had no actual effects on the volume of imports. (Indeed, since the EC is applying no duties, this fact would be impossible to ascertain). Rather, the point made by the EC is that, by applying a method which results in a lower dumping margin, and consequently in a lower duty, than another method which, by India's own admission, is consistent with Article 2.2.2 (ii), the EC is effectively improving the competitive opportunities of the Indian imports. Indeed, India would surely agree that the competitive opportunities of the Indian imports would be impaired if the EC were to increase the duty rates above the current level following a recalculation of the reasonable amounts for SGA and profits based on the use of weight as the averaging factor.

B. CLAIM 2: ARTICLES 3.1 AND 3.3

44. India has alleged that the EC authorities should not have cumulated imports from Pakistan and India because imports from Pakistan were not dumped.

45. The EC's position is well known to the Panel. The anti-dumping duties applied to imports originating in Pakistan were not a measure in dispute before the original Panel. India made no claims against the dumping determination for Pakistan. And, consequently, the DSB made no rulings or recommendations with respect to that determination. This has two implications: first, that the EC authorities were not required to re-determine the dumping margin for Pakistan as part of the measures "taken to comply"; and, second, that the EC authorities were entitled to continue to treat imports from Pakistan as "dumped" for the purposes of the injury determination made in Regulation 1644/2001.

46. Regulation 1644/2001 is the only measure "taken to comply". Accordingly, whether or not Regulations 160/2002 and 696/2002 are consistent with Articles 3.1 and 3.3 is not an issue before the Panel. In any event, assuming that those regulations were also measures "taken to comply", their consistency would have to be assessed as of the date of establishment of this Panel. Yet, India does not dispute that, as of that date, the measures in dispute were based on the injurious effects of the imports from India alone.

47. India's complaint is thus effectively circumscribed to the allegation that the measures were inconsistent with Articles 3.3 and 3.1 between the date of entry into force of Regulation 160/2002 and the date of entry into force of Regulation 696/2002, i.e. between 28 January 2002 and 25 April 2002.[46] The EC submits that this issue is not within the Panel's mandate, which is to assess the consistency of the measures "taken to comply" as of the date of its establishment. Furthermore, even if it were, the ruling requested by India would serve no useful purpose, because the EC could not remedy a violation which had already ceased when the Panel was requested. Accordingly, the EC would invite the Panel to exercise judicial economy.

[44] India's Second Submission, para. 80.
[45] Ibid.
[46] India's Second Submission, para. 110.

48. India alleges that the issue is "material" because the ongoing review of the measures in dispute was initiated during that period.[47] However, the EC would recall that India has withdrawn its claims with respect to the initiation of that review.[48] Moreover, it is plain that the initiation of that review is not within the terms of reference of the Panel. First, because the initiation of a review is not one of the three types of measures mentioned in Article 17.4 of the *Anti-Dumping Agreement*.[49] And second, because, in any event, the initiation of the review was not a measure "taken to comply" within the meaning of Article 21.5 of the *DSU*.

49. In connection with this claim, India has accused the EC of acting in a "cynical and unprincipled"[50] manner because, according to India, the EC would have raised similar claims in another case against the United States (still at the consultations stage). The EC takes offence at the use of such language, which is even more unacceptable given that India's accusations are false. In the case mentioned by India, the EC has expressed the concern that the United States should not have cumulated imports from the EC with imports from other sources because imports from the EC were negligible or competed in different ways. There is no contradiction between those claims and the position taken by the EC in this case.

C. CLAIM 3 : -ARTICLE 5.7

50. By its own terms Article 5.7 applies only to original investigations. It does not apply to subsequent reviews under Article 11. Nor does it apply to subsequent re-determinations made in order to comply with the DSB's recommendations and rulings or, as in the case at hand, in order to adapt a measure which has not been the subject of dispute settlement to the legal interpretations developed in an adopted report.

51. India now appears to concede that the scope of a review or of a re-determination may be limited to injury or to dumping.[51] Yet, it goes on to argue that, "once both dumping and injury are under review"[52], they should be considered simultaneously.

52. Even if India's argument were correct as a matter of law, it would still be wrong as a matter of fact. It is not true that in the case at hand "both dumping and injury were under review". The scope of the redetermination made in Regulation 160/2002 was limited from the outset to the dumping determinations for Egypt and Pakistan. Therefore, the issue of whether both dumping and injury should have been examined simultaneously did not even arise.

53. India is effectively arguing that, under Article 5.7, the EC was not entitled to limit the scope of the re-determination contained in Regulation 160/2002 to dumping. Yet, Article 5.7 is a procedural provision concerned exclusively with the timing of the examination of dumping and injury. It does not provide for a substantive obligation to examine both dumping and injury. The source of that obligation, if any, must be found elsewhere in the *Anti-Dumping Agreement*.

[47] Ibid.,
[48] Ibid., para. 35.
[49] Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R ("*Guatemala – Cement I*"). Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R ("*US - 1916 Act*"), para. 73.
[50] India's Second Submission, para. 111.
[51] India's Second Submission, paras. 117 and 118.
[52] Ibid., para. 117.

D. CLAIM 4: ARTICLES 3.1 AND 3.2

54. India accuses the EC of confusing the notions of *margin* and *duty*.[53] The EC authorities made no such confusion. They determined first the margins of dumping for both the co-operative and the non-co-operative exporters that were not included in the sample.[54] Only as a subsequent step, and on the basis of those margin determinations, did the EC authorities impose duties on imports from those exporters.

55. India has at no point contested the methods followed by the EC authorities in order to calculate the margins of dumping for the non-sampled exporters (both co-operative and non-co-operative). In particular, India has not claimed that those methods are inconsistent with Articles 2, 6.10 or 6.8 or with any other relevant provision governing the determination of dumping.

56. The findings of dumping reached by the EC authorities concerned all the imports from the non-sampled exporters, and not just a certain proportion of them. Therefore, the EC authorities were entitled to treat all such imports as "dumped". The term "dumped imports" has the same meaning throughout the *Anti-Dumping Agreement*. Since India has not disputed the finding that all the imports from the non-sampled exporters were "dumped", it is precluded from claiming that only some of them should be treated as "dumped" for the purposes of the injury analysis.

57. While India insists that Article 9.4 is concerned exclusively with the imposition of duties, it does not explain how the dumping margin of the non-sampled exporters should have been calculated. Surely, India's position cannot be that the investigating authorities enjoy complete discretion to establish the dumping margin of those exporters. Or that no dumping margin needs to be calculated for them.

58. The EC submits that it is more logical to consider that, although the *Anti-Dumping Agreement* does not prescribe any specific method for calculating the dumping margin of the non-sampled exporters, and therefore leaves some discretion to the investigating authorities, the ceiling set out in Article 9.4 operates also, indirectly, as a limit on the method used for calculating the dumping margin of those exporters.

59. Indeed, while the provisions of Article 9 are concerned with the imposition of duties, it is obvious that there is a logical link between the level of the dumping margin and that of the dumping duty. In fact, that link is stated expressly in Article 9.3. That article and the other provisions of the *Anti-Dumping Agreement* discussed in the EC's First Submission reflect the basic notion that duties can be applied only to "dumped" imports. Therefore, if Article 9.4 allows the application of duties to all the imports from the non sampled exporters, something which India does not dispute, it is because all such imports can be considered as "dumped", including for the purposes of the injury analysis.

60. India attributes to the EC the position that "there can be only one weighted average dumping margin for the country".[55] The EC has never taken that position. Thus, India's arguments in paragraphs 130 to 132 of its Second Submission are pointless.

61. India also makes much of what it describes as the EC's "misqualification of the 'all others' rate.[56]" The EC fails to see what point, if any, India is trying make. The EC attaches no particular relevance to the use of the term "all others" rate. The EC has referred to the duty rate established in

[53] India's Second Submission, paras. 61-66
[54] Regulation 1644/2001, recitals 12 and 13.
[55] India's Second Submission, para. 130.
[56] India's Second Submission, paras. 67-73.

accordance with Article 9.4 as the "all others" rate simply because that was the terminology used by the Appellate Body in *United States – Hot Rolled Steel*.[57] The EC has clearly explained that the duty applied to non-cooperative exporters not included in the sample was calculated on the basis of "facts available", and not of the formula set out in Article 9.4.[58] Thus, the confusion alleged by India does not arise.

E. CLAIM 5: ARTICLE 3.4

62. I shall address each of India's arguments under Article 3.4, namely, (1) that data not collected cannot have been evaluated; (2) that even if the data were collected they were not adequately evaluated; and (3) that certain factual errors have allegedly invalidated the redetermination.

1. Data not collected cannot be evaluated

63. In its First Submission, India claimed that the Panel had "factually established the absence of data collection as a substantive violation" of Article 3.4.[59] Even though watered down, in its Second Submission, India still insists on arguing that the original Panel "found" that it appeared that data had not been collected.[60] The original Panel did not find, as a matter of fact or of law, that data had not been collected. It merely found that there was no indication in the determination that the EC authorities had evaluated the relevance or significance of all of the factors listed in Article 3.4. India conveniently ignores the fact that the original Panel acknowledged that some of the data collected for other factors may have included data for the factors mentioned; in the absence of any indication to that effect in the determination, however, it could not assume that that was the case. In other words, the information might well have been collected but this was not sufficiently clear from the determination. The original Panel's remarks have thus been taken out of context and exaggerated, and India's continued reliance on those remarks merely exposes the weakness of its assertion that certain information was never collected.

64. India then casts wild and unsubstantiated aspersions about the EC's attitude to data collection, by suggesting that if the EC producers choose not to disclose certain data, then the EC would simply consider that factor not relevant.[61] The EC strongly objects to this accusation, both in general and in regard to the present case. What is striking here is that India completely ignores the fact (or even the possibility) that it may sometimes be impossible to establish meaningful data and it fails to respond to the EC's explanations regarding the difficulties encountered in collecting specific data e.g. on capacity utilisation, in an industry such as bed linen, where machinery is used for so many different qualities and types of product, including products outside the definition of the like product.

65. We shall consider again the two examples given by India, capacity utilisation and stocks. Since these are both factors which were not considered relevant to the state of the Community industry, and since India alleges that there is some connection between the decision not to consider

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[57] Appellate Body Report, *United States – Anti- Dumping Measures on certain Hot Rolled Steel Products from Japan*, WT/DS184/AB/R , ("*US – Hot Rolled Steel*"), para. 115

> We observe, first, that Article 9.4 applies only in cases where investigating authorities have used "sampling", that is, where investigating authorities have in accordance with Article 6.10 of the Anti-Dumping Agreement, limited their investigation to a select group of exporters or producers. In such cases, the investigating authorities may determine an anti-dumping rate to be applied to those exporters and producers who were not included in the investigated sample. *The rate so established is referred to as the "all others" rate.* [emphasis added].

[58] EC's First Submission, para. 115.
[59] India's First Submission, para. 145.
[60] India's Second Submission, para.140.
[61] India's Second Submission, para. 145.

these relevant and the collection of information, it may be helpful here to explain not only how information was collected but also how relevance (or the lack of it) was assessed.

Stocks

66. Inventories increase or decrease depending on the volume produced and the volume sold/ exported during a given period. Since data concerning production, sales volumes and exports were collected[62], the EC authorities did have data on stocks, as was clearly confirmed to Texprocil in the EC Commission's letter of 27 July 2001.[63] Information concerning stocks was further verified on spot for sampled producers. India ignores the fact that information on stocks could be derived from other data, and stresses that the information requested on stocks in the exporter's questionnaire was much more detailed and that this level of detail would be necessary also for properly establishing the relevance or significance of stocks for the purposes of determining injury. But requesting information on stocks from exporters serves an entirely different purpose. Information on stocks may be relevant in calculating normal value for the IP for an individual exporter. It might not play a role, however, if that particular company only produces to order. In assessing the relevance or significance of stocks for the sampled Community industry, it is first necessary to have meaningful, reliable data across the entire sample of producers and over a number of years, not just for the investigation period. But this is difficult to establish where certain companies are found to produce to order, others may also sub-contract to meet orders and others still may maintain stocks to better serve their clients.

67. India has also argued that the EC should not have had regard to the accounts since they only reflect data at the company level and not at the level of the product concerned. However, stock movements could be estimated on the basis of turnover and in this respect it should be noted that bed linen activity represented up to 70 per cent (and 46 per cent on average) of the sampled Community producers' activity.[64] However, what is important here is that it became plain upon the on spot verifications that an increase in stocks may not necessarily indicate unsold production but might be due to increased orders.

68. At recital 29 of Regulation 1644/2001 it was explained in detail that production often takes place in response to or in anticipation of orders placed by particular clients. Secondly, stock valuation often takes place at 31 December which is towards the end of a peak period for the bed linen sector; this can also lead to apparent large variations in stocks from one year to the next. While some increase in stocks was observed in some companies, there was no suggestion that this was evidence of injury. As explained, an increase in stocks or decrease in stocks in this sector can thus indicate actual or anticipated orders rather than unsold production.[65] Consequently, on the basis of information obtained and verified on spot, the EC was entitled to conclude that stocks did not have a bearing on the state of the domestic industry.

Capacity utilization

69. It had been stated in the complaint that statistics on production capacity did not exist for the bed linen industry as it is far too specific.[66] This alleged difficulty in establishing data on production capacity and capacity utilisation for bed linen, was confirmed during the on-the-spot verification visits made at the premises of the sampled Community producers. As capacity utilisation cannot be calculated without reference to production capacity, this necessarily means that reliable data on

[62] Regulation 1069/97, recitals 63, 81 and 82.
[63] Exhibit – India – RW – 17, page 4.
[64] Exhibit India-RW –17, page 5.
[65] Regulation 1644/2001, recital 29.
[66] India-Exhibit 6, page 30.

capacity utilisation was equally unattainable. The EC would like to draw the Panel's attention to the fact that certain Indian producers made similar comments.[67] For instance, one company stated that "*there are no rated capacities for the machineries for producing the product concerned.* [Nor is there] *any other technical ways or means to compute the installed capacity*." Another company likewise said that the stitching machine had no rated capacity. Other companies said that since they produced to order the question of determining capacity utilization did not arise.

70. The EC found that many Community businesses bought and/or sold machinery with relative ease, making capacity production/utilisation somewhat of a moving target. More importantly, even the same machinery can yield completely different production capacities depending on the product mix, especially since the product concerned consists of a large number and variety of products which differ in size, colour, construction and quality. This made it extremely difficult for the EC to draw meaningful, comparable data. Whilst the investigation did show that some producers had contracted out surplus production, which might indicate a higher rate of capacity utilisation towards the end of the period considered , the data available could not be considered as a basis for drawing any conclusions as to the state of the Community industry For instance, a company working at full capacity and subcontracting a product mix comprising a majority of smaller products, such as pillowcases, may not necessarily find that work as profitable as if it had used less capacity to produce a higher value product. In other words, a decrease or increase in capacity utilisation is unlikely to have the same meaning in terms of injury for different companies or even for the same company in different years. The EC therefore rightly concluded that capacity utilisation was not a factor which could be considered relevant for determining the state of the Community bed linen industry.

2. Adequate evaluation of Article 3.4 factors

71. Before turning to look in more detail at the evaluation of certain factors performed by the EC authorities, a few preliminary observations should be made.

An overall reconsideration does not prevent any confirmation of previous findings

72. First, contrary to what India alleges in its Second Submission, the EC did not contradict itself by stating that there had been an overall reconsideration and analysis even though certain previous findings were confirmed. As has already been explained, India takes out of context[68] the EC's reference to the 'confirmation' of original findings. The fact that the EC did not, upon reconsideration of the matter, find it necessary to amend certain of its previous findings, whilst it did revise other findings, in no way supports the allegation that there has been no overall reconsideration.[69]

Use of the sample

73. Second, we note that India does not contest the relevance of the sample for determining injury[70]. Apart from the fact that India has not previously stated that it contested the representativity of the sample, we have already noted that the claim in relation to one producer excluded from the

[67] Exhibit EC-2. The EC requests that the information set out in this Annex be treated as confidential pursuant to Article 17.7 of the *Anti-Dumping Agreement* and paragraph 3 of the Panel's Working Procedures.
[68] India's Second Submission, para. 150.
[69] See also EC First Submission, para. 163.
[70] India's Second Submission, para.156.

sample is not properly before the Panel since no claim has been brought under Article 4.1 regarding the proper definition of the Community industry.[71]

74. So, whilst India purports not to contest either the representativity or the relevance of the sample, it still contests reliance on sampled data alone for certain injury factors. However, one must ask what is the point of allowing the use of a sample at all if one cannot rely on the data collected for that sample? Now, some basic information may be available at the level of the entire Community industry; this is generally information which is collected globally and readily available or ascertainable. (This normally includes information on production, sales, market share, employment and growth.) Such data are often derived from statistics kept by National Federations based on an aggregation of figures supplied by their members. This information is then cross-checked with the data submitted directly from all the companies included in the definition of the Community industry in their questionnaire replies.

75. Information which is of a much more company specific nature on the other hand, such as information on prices, profitability, cash flow etc., is unlikely to be readily available and may be much more difficult to collect and verify at the level of the entire Community industry. This is especially so where the industry is fragmented and comprises a large number of individual companies. In cases where it has been deemed necessary to have recourse to a representative sample of producers, it is common in the EC's practice to collect and verify such detailed company specific information only at the level of the sample.

Assessment of relevance

76. The assessment of the relevance of certain factors (stocks and capacity utilisation) has already been addressed in oral and written argument; we refer the Panel to our previous comments.

Evaluation of injury factors

77. The EC notes that India acknowledges that injury can be suffered even if certain factors do not show injury[72], but it contends that the EC failed to explain why certain positive trends were not probative for the state of the Community industry. Since the EC has explained in detail in its First Submission how each of the factors mentioned in Article 3.4 was evaluated, it will therefore concentrate in its oral submissions on addressing those factors which India has alleged should have been probative for the state of the industry.

Sales, Market share, prices

78. The figures on sales, market share and price developments are set out in recitals 82 to 88 of Regulation 1069/97 and recital 35 of Regulation 1644/2001. (Again, the fact that these earlier findings are confirmed cannot be taken to mean that there was no overall reconsideration and analysis as India has alleged.) In short, sales for the Community industry increased more in terms of value (4.2 per cent)[73] than in terms of volume (only 1 per cent).[74] Similarly, sales by sampled producers actually decreased by 1.5 per cent in terms of volume[75], whereas they rose in terms of value by 1.7 per

[71] As the EC pointed out at para. 200 of its First Submission, the inclusion of that one sampled producer would have been of negligible effect in any event.
[72] India's Second Submission, para. 154.
[73] Regulation 1069/97, recital 83.
[74] Regulation 1644/2001, recital 35.
[75] Regulation 1069/97, recital 82.

cent[76]. Average prices per kilogram therefore increased over the period. The investigation established that for the sampled producers, the increase in prices was due to a shift towards higher value niche products. This was confirmed in the redetermination.[77]

79. India rejects out of hand the EC's explanations regarding the shift towards niche products as far as prices are concerned. It seems to argue that since the like product includes the niche products, there can be no distinction between the two, implying that only average prices should be relevant. It submits that otherwise there would always be injury since there would be injury if prices decrease and if they increase this would just be put down to a supposed shift in the product mix. This suggestion is absurd- there is no conspiracy theory! Interestingly, India does not seem to dispute the actual existence of the shift in sales and production by the sampled producers towards higher value niche products. Nor is it disputed that average prices actually decreased for the defined reference products in the sample. Therefore, the EC found that average prices had increased, but on closer inspection it found that this was due to the shift in product mix. Had average prices decreased overall, it may have been equally necessary to consider whether changes in the product mix could have been responsible. The EC does not conclude that whenever average prices increase this will not be treated as a positive development; it merely argues that it was perfectly entitled to look beyond the development in average prices and take account of the fact that the increases were largely the result of a shift in production and sales to higher value niche products.

80. As far as market share, sales (and output) are concerned, India again argues that the shift towards niche products should not be taken into account. The EC maintains that rather than simply taking into account the bottom line in developments in market share, sales and output, it can and should look to the context in which those developments take place. Here again, it may take into account the fact that sales, production and market share have increased for higher value niche products.

81. On the one hand, India seems to suggest then that the EC should have merely calculated average prices, set out the figures for sales and market shares and looked no further if this showed a positive trend. On the other hand, India states that an analysis of pertinent information is required and not merely a reference to it.[78] We could not agree more.

Output

82. With regard to output, India argues that the EC failed to mention why the 8.7 per cent increase in output was not probative for the state of the Community industry. Apart from the fact that no one factor can be taken to be decisive, India fails to respond to any of the EC's explanations in its First Submission as to how information on output was analysed. For instance, whilst there was an overall increase of 8.7 per cent (between 1992 and the IP), this was not an "increasing trend" as India says but output actually decreased between 1994 and the IP. The EC recalls that in *Argentina – Footwear Safeguard*, the Appellate Body found that investigating authorities are required to consider the trends over the period of the investigation and not just the end to end points.[79]

83. It was further noted by the EC that the increase in exports had also led to the overall increase in output and that the Community industry had to a certain extent benefited from the demise of other

[76] Regulation 1069/97, recital 83.
[77] Regulation 1644/2001, recital 35.
[78] India's Second Submission, para. 157.
[79] Appellate Body Report, *Argentina –Safeguard Measures on Imports of Footwear*, WT/DS/121/AB/R ("*Argentina –Footwear Safeguard*") para.129.

producers which had not survived the competition from dumped imports.[80] It cannot be argued therefore that the EC merely recited the fact that output had increased without actually analysing this factor. Nor is India correct in stating that the EC only argued that the increase in production was due to the concentration on higher value niche products – that was merely one aspect of the EC's analysis, in addition to the elements already mentioned.

84. The EC does not simply assert that "the declining profits override the increase in output". Rather, the EC analysed the increase in output in context, noting *inter alia*, the recent decrease in output, and further noted that despite the overall increase in production, the Community producers had still suffered declining and inadequate profitability, which one would not normally expect to be the case.

Productivity and Employment

85. The overall increase in production and the overall decrease in employment clearly resulted in increased productivity. India regards this a positive development caused by the increase in production (which it alleges was due to improved machinery which in turn led to a decrease in jobs), whereas the EC argues that there is no direct link between the increase in investments and the decrease in employment – the positive trend in productivity cannot be seen as significant since it was partly caused by the reduction in employment. The patterns of production and employment can be seen in Exhibit India–RW- 5. There was no increase but rather a decrease in production during the period for which employment decreased. It was also explained that the overall increase in production was partly due to the Community industry's increased sales of niche products; this coupled with the restructuring which took place made improvements in productivity possible. In the absence of this improvement in productivity, financial losses would have been higher.

Wages

86. Average wages per employee increased during the period considered. The EC explained that this increase was partly in line with the increase in consumer prices in the EC during the same period. Whilst the EC accepts that this is not necessarily an indication of injury, it does not agree that this factor alone can be seen as decisive, as India suggests.

Growth

87. The EC notes that India does not actually dispute the fact that growth of the domestic industry was limited compared with the growth of low priced dumped imports from India alone or from all countries concerned. In that regard, it is clear that growth in the domestic industry was far less significant in both absolute and relative terms: sales increased by 1 per cent (or 348 tonnes) between 1992 and the IP and market share increased by 1.6 percentage points in that period.

88. India then claims that the EC was selective in looking at trends over the years. Where, however, there is a clear negative trend for a significant period of the analysis period, (in this case a decline in sales volume of 3 per cent (or 1173 tonnes) between 1994 and the IP) it should not be ignored. It was also noted that this decline in sales volume occurred even though domestic producers should have been able to benefit from the gap left by factory closures.[81] India also objected to the EC's statement that growth in market share was very limited between 1994 and the IP, arguing that market share cannot be expected to grow each year. The EC does not necessarily expect market share to grow each year but it observes that at the same time as the negative trends for sales, growth in

[80] EC First Submission, paras. 183 –186.
[81] Regulation 1644/2001, recital 44.

market share was more limited, i.e. that growth was negative (sales volume) or limited (market share) during the latter period of the injury analysis period. Again, the EC recalls that in *Argentina – Footwear Safeguard*, the Appellate Body found that investigating authorities are required to consider the trends over the period of the investigation and not just the end to end points.[82]

Profits

89. It is not disputed by India that profits of the sampled domestic producers fell from 3.6 per cent to 1.6 per cent during the period considered. This is a decline of 54 per cent (even though India would have us believe that a decline of 2 percentage points is somehow equivalent to 2 per cent, that is of course nonsense).

90. The EC found that a reasonable level of profitability for this industry was 5 per cent. This figure was not plucked from the air. It was based on actual profit levels achieved by the Community producers in a year in which there was no evidence of dumping and when the imports concerned where 30 per cent lower than in the IP. This figure cannot be said to be subjective or arbitrarily chosen since it was based on actual profit data. It was also found that the low level of profitability achieved during the investigation period was below levels achieved by importers of the like product.

91. India still questions why data was only available for profits at the level of the sample and not the entire Community industry. It has, however, already been explained that where it is necessary to have recourse to a sample, complex company specific data such as profitability data can only be examined at the level of the sample. However, as noted, there has been no question as to the representativity of the sample.

Cash flow

92. As stated in recital 19 of Regulation 1644/2001, data for trends concerning cash flow was collected at the level of the sample. The EC found that as with profitability, cash flow had decreased, by 28 per cent from 1992 to the IP. This is not disputed. Whilst India has submitted that the evaluation regarding cash flow is inadequate, this allegation is wholly unsupported.

Return on investments

93. India implies that since the EC did not expressly state in the table in its letter of 19 June 2001[83]that the figures for investments represented accumulated accounts, that the express mention of this in the letter of 27 July 2001[84] is somehow not to be trusted. However, since the figures in those tables are identical there can be no doubt that the figures represent accumulated and not yearly amounts for investments. Whilst the return on investments remained positive throughout the injury analysis period, it decreased by over 50 per cent.[85]

Margin of dumping

94. The EC has submitted under claim 4 that it is entitled to treat all imports from India as dumped for injury purposes. However, if the determination of injury should be based on the effects of dumped imports as India argues, the EC maintains that non-dumped imports are not relevant in

[82] Appellate Body Report, *Argentina –Footwear Safeguard*, para 129.
[83] Exhibit India-RW-4, table in Annex.
[84] Exhibit India-RW-17, table on page 8.
[85] Regulation 1644/2001, recital 39.

assessing significance of the margin of dumping established for injury purposes. In any event, the EC would still submit that the margin of dumping is substantial and above *de minimis*.

Factors affecting prices

95. The EC found that in fair market conditions, domestic producers should have been able to pass on the increase in prices of raw cotton material to their customers. In so far as India argues that the injurious effects of the increase in raw material prices should have been separately established, this is dealt with in the context of its claim under Article 3.5.

96. It should be noted that the EC also observed that prices had not kept pace with inflation in prices of consumer goods.[86]

3. Alleged factual errors

97. For the most part, the factual errors alleged by India have either already been addressed, or it has been accepted that there was no 'error' as such.

Dumping margin

98. The argument in relation to dumping margins has been dealt with under claim 4.[87]

Sample

99. The allegation concerning the exclusion of a producer from the Community industry is not properly before the Panel for the reasons already given.[88] We would merely add that, in any event, the exclusion of that producer does not affect the representativity of the sample. As regards the factors for which data for the whole Community industry have been used, the exclusion of that producer was of negligible consequence since it represented less than 1 per cent of the Community industry.

100. As far as the alleged misrepresentation is concerned regarding references to the sample, the EC notes that India does not contest that it was in any way misled by which figures related to the sample and which related to the Community industry. We therefore fail to see the relevance of this allegation.

Market share

101. The alleged discrepancy regarding the figures for market share has been clarified and accepted.[89]

Profits

102. India states that it fails to understand how data sheets with different turnover figures could show the same profit margin.[90] However, the EC has already clarified that there was a minor clerical error in the sales turnover figures for sampled producers in disclosure document of 19 June 2001.

[86] Regulation 1644/2001, recital 50; Regulation 1069/97, recital 86.
[87] See paras. 54-61 above.
[88] See paras. 27-30 above.
[89] India's Second Submission, para. 187.
[90] India's Second Submission, para. 186.

This did not affect the profitability figures. If anything, the fact this error crept into the EC's disclosure upon re-determination, though regrettable, only goes to demonstrate that a thorough overall reconsideration and analysis was performed. Had the EC merely blindly confirmed its previous findings, as India claims, such a clerical error would not have arisen.

103. Let us not forget the substance here. India tried various arguments in its First Submission, to demonstrate the inadequacy or inaccuracy of the EC's findings on profits. However by the stage of its second Submission, India simply tries to hide behind a smokescreen alleging inconsequential factual errors. The fact is that India cannot really dispute that profitability levels decreased by over 50 per cent between 1992 and the IP. This decrease and the reference to adequate levels of profitability are based on hard evidence, since these were actually achieved by the sampled companies.

4. Conclusion

104. In conclusion, the EC did not blindly confirm previous findings; it did conduct an overall reconsideration and analysis and it did not err in finding that some information and findings set out in the original investigation were confirmed. It did not act blindly in pursuit of some form of "self-fulfilling prophecy", as India suggests.[91] Instead it looked closely and carefully at the situation of the Community industry and found *inter alia* that:

- Profitability decreased by 54 per cent over the period considered;
- Profits for the sampled producers were below those for importers of the product concerned;
- Undercutting by dumped imports from India ranged between 13.8 and 40.7 per cent;
- Cash flow declined by 28 per cent; returns on investment also showed declining trends;
- Employment decreased by 5.3 per cent;
- Production decreased between 1994 and the IP;
- Average prices of the defined reference product for sampled producers decreased;
- Although sales value of the Community industry as a whole increased, sales volume increased by less (and even decreased for the sampled producers); average prices therefore increased -this was due to a shift towards higher value niche products;
- Average price increases were not sufficient to pass on fully to customers the substantial increase in the cost of raw cotton due to the downward pressure exerted by low priced dumped imports, which declined by up to 18 per cent;
- Market share increased by 1.6 percentage points, however sales volumes fell by 3 per cent between 1994 and the IP; this is despite the fact that there were several factory closures in the Community and the surviving producers of the Community industry ought to have benefited from this gap in the market;
- Growth of the Community industry was limited compared to the growth in imports from India – imports increased by 56 per cent in volume and gained 4 percentage points in market share[92];

105. Although certain factors appeared positive at first sight, these had to be analysed in context. Thus, as the EC found at recital 50 of Regulation 1644/2001, while the Community industry managed to increase production and to slightly increase its sales volume and market share by concentrating on more sales of higher value niche products, it nevertheless suffered declining and inadequate profitability, which is basically the result of prices which had not been able to reflect the increases in

[91] India's Second Submission, para.

[92] Even if imports from exporters found not to have dumped are excluded, the increase in dumped imports from India remains significant at 55 per cent and market share increased by 3.4 percentage points (from 5.1 to 8.5 per cent). See Regulation 696/2002, recital 23.

the costs of raw cotton or to keep pace with inflation in prices of consumer goods. Declining trends were also found for cash flow, return on investments and employment.

106. On this basis, and in particular because of the declining and inadequate profitability (which is not disputed) and the price suppression suffered as a result of the marked increase in low priced dumped imports, the EC was able to find, in all objectivity, that the Community industry had suffered material injury within the meaning in Article 3.4 of the *Anti-Dumping Agreement*.

F. CLAIM 6: ARTICLE 3.5

107. The EC notes that India concedes, after some quibbling, that the EC authorities were not required to establish that dumped imports were *the cause* of the injury suffered by the domestic industry, but rather that there was a genuine and substantial relationship of cause to effect.[93] That relationship does not exclude the existence of other causes of injury.

108. India also recognises that injury may be found to exist even where the increase in the market share held by dumped imports is relatively small.[94] Once that premise is accepted, however, it becomes obvious that the five-line argument made by India at paragraph 248 of its First Submission, even if it were factually correct (*quod non*), would not be sufficient to establish a *prima facie* violation of Article 3.5.

109. India argued in its First Submission that the EC authorities identified the inflation in the prices of consumer goods as a cause of injury which, therefore, should have been examined under Article 3.5. The EC has explained that the inflation in the prices of consumer goods was not considered a cause of injury, but rather a further indication of price suppression and inadequate profitability. Yet, in its Second Submission, India persists by arguing that "since price suppression and inadequate profits were singled out as the main indication of injury, the inflation could well have been a cause of that alleged injury".[95]

110. The EC fails to see the logic of this proposition. Unlike raw cotton, consumer goods are not inputs for the manufacture of bed linen. Consequently, an increase in the prices of consumer goods does not affect the profitability of the bed linen industry and, therefore, cannot be a cause of injury. To repeat, the fact that the prices of bed linen (a consumer good) do not increase in line with the prices of other consumer goods is a "symptom" of injury because it suggests that, unlike the producers of other consumer goods, the manufacturers of bed linen are not able to pass on their cost increases. But it is not, of itself, a cause of injury.

111. India's last argument under this heading is that the EC authorities attributed to the dumped imports from India the injury caused by other factors, and in particular by the increase in the prices of raw cotton.

112. At the outset, the EC would recall that the burden of proof is borne by India. Accordingly, it is for India to prove that there were other known causes of injury and that the EC authorities failed to separate their effects, and not for the EC to prove the opposite. In order to meet its burden of proof, it is not enough for India to continue to quote once again the same well-known passages from the relevant Appellate Body reports and to assert, like a mantra, that the EC authorities failed to "separate/distinguish", etc.

[93] India's Second Submission, paras. 193-209.
[94] Ibid., para. 210.
[95] Ibid., para. 213.

113. The EC notes that India does not dispute that the prices of raw cotton increased substantially. Nor does India contest that the EC producers of bed linen were unable to reflect those increases in their prices. Further, India has not alleged, let alone proved, that the EC producers were prevented from rising their prices due to factors other than the dumped imports from India. In view of that, the EC submits that India has failed to establish even a *prima facie* violation of Article 3.5.

114. As explained in our First Submission, the EC authorities found that the increase in the cost of raw cotton was a cause of injury only because the EC producers were unable to reflect that increase in its prices. In turn, the reason why the EC industry could not pass on the cost increases was the downward pressure on prices exerted by the dumped imports. Thus, ultimately, the cause of injury were the dumped imports, and not the increase in the cost of raw cotton. In a passage of *US – Hot Rolled Steel* repeatedly cited by India[96] the Appellate Body noted that it is necessary "to separate and distinguish the injurious effects of *different* causal factors".[97] The increase in the cost of raw cotton is not a *different* causal factor, because it cannot have any injurious effects on its own. Therefore, its effects need not, and indeed cannot possibly be separated from those of the dumped imports.

G. CLAIM 7: ARTICLE 15

115. The obligation to explore "constructive remedies" provided for in Article 15 must be fulfilled before "applying" anti-dumping duties. The EC has suspended the "application" of anti-dumping duties on imports of bed linen from India. If and when the EC authorities decide to "apply" anti-dumping duties as a result of the ongoing review, they will explore first the possibilities of constructive remedies, and more specifically the possibility of a price undertaking. In the meantime, India's claim is premature and should be rejected by the Panel.

116. India contends that "the suspension of an imposition of duties can in itself also qualify as a form of application".[98] India argues that Article 7 refers to the "application" of provisional measures and includes among those measures the "withholding of appraisement", even though that measure does not involve the "imposition" of duties.[99] That is, of course, correct. But it lends no support to India's interpretation of Article 15. To begin with, Article 15 refers to the "application" of anti-dumping duties, and not of other anti-dumping measures. And, in any event, the EC is not "applying" any anti-dumping measures of any kind, including those envisaged in Article 7.

117. India's reliance[100] upon the report of the Appellate Body in *US – Line Pipe*[101] is likewise misguided. In that case, the United States argued that the safeguard measure at issue did not "apply" to developing countries accounting for less than three per cent of imports because imports below 9,000 tons were exempted and the US authorities "expected" that any country exceeding that limit would, in practice, account for more than three per cent of total imports. In other words, the US contention that the safeguard measure did not "apply" to certain countries was based on the mere "expectation" that, *de facto*, imports from those countries would not reach the level that triggered the application of the safeguard measure. The Appellate Body correctly rejected the US argument.

118. Unlike the United States in *US - Line Pipe*, the EC is not arguing that it "expects" that, in practice, no duties will be "applied" to imports from India. The "application" of anti-dumping duties

[96] India's Second Submission, para. 221.
[97] Appellate Body Report, *US – Hot Rolled Steel*, para. 228. [Emphasis added].
[98] India's Second Submission, para. 226.
[99] Ibid.
[100] India's Second Submission, para. 227.
[101] Appellate Body Report, *United States – Definitive Safeguard measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R ("*United States – Pipe Line*"), paras.130-132.

to imports of cotton bed linen originating in India is suspended as a matter of law, and not merely as a matter of fact. This legal situation will remain unchanged as long as the Council of the European Union does not adopt another regulation repealing formally the decision to suspend the application of the duties.

119. The EC has submitted in the alternative that, assuming *arguendo* that the EC authorities had been required to explore possibilities of constructive remedies, notwithstanding their decision to suspend the application of the duties, such suspension would qualify as a "constructive remedy" for the purposes of Article 15.

120. In response, India limits itself to argue that the suspension of duties would not be a "remedy".[102] India cannot have it both ways. It is manifestly contradictory to argue, on the one hand, that the EC is "applying" duties, because, although suspended, they continue to affect imports potentially[103] and, at the same time, that such suspension constitutes no "remedy" for the EC industry.

121. India also argues that the "imposition of duties was merely suspended with the sole goal of (soon) seeking to impose duties …".[104] India further asserts that the EC does not deny these facts.[105] That is false. The EC has thoroughly refuted this absurd accusation in its First Submission.[106] It has shown that India's allegation is not only unfounded, but indeed plainly illogical. The EC authorities did not need to suspend the application of duties in order to open a review. They found that imports from India are dumped and cause injury. Therefore, they were entitled, and continue to be entitled, to apply anti-dumping duties on those imports pending the duration of the review.

H. CLAIM 8: ARTICLE 21.2 OF THE DSU

122. As explained in our First Submission, the EC considers that Article 21.2 of the *DSU* is a non-mandatory provision.[107] In any event, the EC authorities did pay "particular attention" to the interests of India.[108]

123. Article 21.2 is worded in hortatory terms: it uses the term "should", rather than "shall". Generally, the word "should" implies no more than a moral obligation.[109] True, as noted by the Appellate Body, the term "should" may, in certain contexts, have the meaning of "shall".[110] In the case of Article 21.2, however, the context indicates otherwise. The terms of Article 21.2 are exceedingly broad. They lack the minimum degree of precision which is indispensable to any binding obligation. As rightly put by a recent panel report, "Members cannot be expected to comply with an obligation whose parameters are entirely undefined".[111]

124. To say that Article 21.2 is not mandatory is not the same as saying that it is "inoperative[112]", "meaningless"[113] or "redundant".[114] Public international law provides many examples of non-binding

[102] India's Second Submission, para. 231.
[103] Ibid., para. 228.
[104] Ibid., para 224. See also, para. 247.
[105] Ibid., para. 224
[106] EC's First Submission, paras. 270-274.
[107] Ibid., paras. 279-284.
[108] Ibid., paras. 289-292.
[109] Appellate Body Report, *Canada – Measures affecting the Export of Civil Aircraft*, WT/DS70/AB/R, footnote 120.
[110] Ibid., para. 187.
[111] Panel Report, *United States – Anti-dumping and Countervailing measures on Steel Plate from India*, WT/DS206/R, para. 7.110.
[112] India's Second Submission, para. 235.

instruments of unquestionable relevance. The *WTO Agreement* itself contains numerous provisions drafted in hortatory terms, including some of the provisions on special and differential treatment for developing country Members. Indeed, as explained in our First Submission[115], the *Decision on Implementation* adopted at the Doha Conference instructs the Committee on Trade and Development to identify those non-mandatory provisions and to consider whether they should be rendered mandatory. We note that India has not addressed this argument.

125. As recalled by India[116], in some arbitrations under Article 21.3 (c) of the *DSU* the arbitrators have followed the exhortation contained in Article 21.2 to pay particular attention to the interests of developing country Members when exercising the margin of discretion which is inherent in the determination of a "reasonable" period of time. Contrary to what is suggested by India, this does not imply that Article 21.2 imposes a mandatory obligation upon developed country Members.

126. Even if Article 21.2 imposed a mandatory obligation, any such obligation would relate to the procedural requirements of the implementation process set out in the other provisions of Article 21, and not to the content of the implementing measures. India appears to endorse this view in the proposal which it has submitted to the Trade and Development Committee.[117] Yet, in its Second Submission, it takes the opposite view. Thus, India argues now that, in view of Article 21.2, the EC was required to refrain from opening the ongoing review of the measures[118] or, even further, to publish a decision "not to initiate Bed Linen – 3".[119]

127. On India's interpretation, a developed country Member which violates the *WTO Agreement* would be subject to stricter substantive obligations when adopting an implementing measure than those that would apply to a Member which has acted consistently with the *WTO Agreement*. In other words, a developed country Member which has infringed the *WTO Agreement* would be penalised for that reason. That interpretation is at odds with the objectives of the WTO dispute settlement mechanism. The *DSU* is not a punitive mechanism. It does not provide for the imposition of penalties to those Members who violate the *WTO Agreement*. Rather, the objective of the *DSU* is to secure the withdrawal of the measures that are found to be inconsistent with the *WTO Agreement.*[120]

128. India also argues that the alleged violation of Article 15 would entail an automatic violation of Article 21.2.[121] The EC disagrees. Even if Article 21.2 imposed an obligation, and even if the EC had infringed Article 15, it remains that the EC could have paid "particular attention" to the interests of India in other, different ways. Indeed, as explained in our First Submission, the facts of this case evidence that the EC did pay "particular attention" to the interests of India in at least two other ways.

129. In the first place, the EC paid particular attention to India's interests by agreeing to an implementation period of only five months and two days. Contrary to India's allegations[122], the existence of an agreement between the parties does not detract from this. To be clear, the EC would not have agreed to such accelerated implementation, had India not been a developing country Member.

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[113] Ibid.
[114] Ibid.
[115] EC's First Submission, paras. 281-282.
[116] India's Second Submission, paras. 237-239.
[117] See EC's First Submission, paras. 287-288.
[118] India's Second Submission, paras. 242 and 251.
[119] Ibid., para. 249.
[120] Cf. Article 3.7 of the DSU
[121] India's Second Submission, para. 243.
[122] Ibid., para. 246.

130. The EC also paid particular attention to the interests of India by accepting the establishment of this Panel at the first meeting of the DSB in which India's request was put in the agenda. India argues now that, *de facto*, the same request had been made once before.[123] That is incorrect. India's previous request was withdrawn because it was premature. (It had been submitted before the expiry of the 60 days period mentioned in Article 4.7 of the *DSU* without the agreement of the EC). Moreover, the measures and the claims mentioned in the two requests were not the same.

131. Finally, should the Panel take the view that Article 21.2 limits the discretion of the implementing Member to choose the content of the implementing measures, the EC has submitted in the further alternative that it paid "particular attention" to the interests of India by suspending the application of the anti-dumping duties, notwithstanding the findings that imports from India are dumped and cause injury to the EC industry.

132. In response, India contends that the suspension was not decided in good faith, because "in retrospect it appears no more than temporary lip service to enable the initiation of yet another Bed Linen proceeding".[124] We have already refuted this absurd accusation. To repeat, the suspension was not required in order to initiate the current review. The EC authorities were, and continue to be, entitled to apply duties pending the duration of the review. It is deeply ironical that the EC should be accused now of bad faith for suspending the application of the duties.

This concludes our oral statement. Thanks for your attention.

[123] Ibid., para. 246.
[124] Ibid., para. 247.

ANNEX D-4

CLOSING STATEMENT OF THE EUROPEAN COMMUNITIES

11 September 2002

Mr. Chairman, Members of the Panel,

1. First of all, allow me to express our appreciation for your efforts and those of the Secretariat. Like the original dispute, this is a complex one. It raises important and novel issues, both under the *Anti-Dumping Agreement* and under the *DSU*.

2. The discussions during this hearing have helped to clarify the positions of the parties. We are concerned, however, about India's change of position on some issues. India is not simply adding new arguments. In some cases, it is raising entirely new claims, which are not within the Panel's terms of reference. In fact, some of those claims even contradict the claims submitted previously by India in its Panel request.

3. In this statement I do not intend to address all the claims of issue in the request. We will limit ourselves to restate briefly our position with respect to two issues where we believe that this may be particularly useful in view of the positions expressed by India during this hearing.

4. First, we would like to come back to India's claim 4. As explained, the EC authorities calculated a dumping margin for the non-sampled exporters who co-operated in the investigation on the basis of the margins established for the sampled exporters. They calculated another dumping margin, on the basis of "facts available", for the non-cooperative non-sampled exporters.

5. India has not submitted any claims with respect to the methods followed by the EC authorities in order to calculate the dumping margin of the non-sampled exporters. Yet, India indicated yesterday that it contests those methods. India suggested that those methods would breach Articles 2, 3 and 6.10 of the *Anti-Dumping Agreement*.

6. India's reference to Article 3 is difficult to understand, because it is obvious that Article 3 contains no provision dealing with the calculation of the margin of dumping.

7. Articles 2 and 6.10 are relevant for the determination of dumping, but were not cited in the request for establishment of this Panel. They are, therefore, outside the terms of reference of the Panel.

8. In any event, India has not explained why the EC's method is contrary to Articles 2 and 6.10. The EC considers that neither Article 2 nor Article 6.10 nor indeed any other provision of the *Anti-Dumping Agreement* prescribes any specific method for calculating the dumping margin of the non-sampled exporters. Of course, this is not saying that the investigating authorities enjoy unrestricted discretion to establish that margin. Logically, the upper limit for the duty rates set out in Article 9.4 limits also the level of the dumping margin.

9. India has suggested that the dumping margin should be calculated by averaging the margins of the sampled exporters, without excluding zero or *de minimis* margin.

10. It should be noted, first of all, that this contradicts the claim raised by India in this Panel request. The result of applying India's method would be that either all imports from the non-sampled exporters are dumped or that all such imports are non-dumped. Yet India claims that the data of the sample should be used to establish what proportion of imports from the non-sampled exporters is dumped. In any event, the EC considers that there is no provision in the Agreement that requires investigating authorities to use India's method. And indeed India has pointed to no such provision.

11. Furthermore, India's method leads to an absurd result. In accordance with Article 9.4, the importing Member could apply duties at a higher rate than the dumping margin established by following India's formula. Further, in accordance with Article 9.4, the importing Member could apply duties to imports from the non-sampled exporters, even when the dumping margin of those exporters is zero or *de minimis*.

12. The EC submits that an interpretation which leads to these absurd results cannot be correct. The second issue we would like to address is the relevance of the increase in the cost of raw cotton under Article 3.5.

13. At the outset, we would recall that Article 3.2 of the *Anti-Dumping Agreement* recognises expressly that price suspension is a relevant form of injury.

14. India has not contested that the prices for raw cotton increased substantially, not just in the EC but worldwide. Nor does India dispute that the EC producers were not able to pass on fully such increase. In sum, it is undisputed that the EC industry suffered injury in the form of price suppression.

15. As the Chairman rightly pointed out yesterday, price suppression may be caused by a variety of factors. Indeed, it may be caused by any factor which has an impact on the prices of the domestic industry. However, under Article 3.5 the authorities are not required to examine all conceivable causes of injury, but just the "known" factors. The EC authorities did examine all known "other factors", including all the factors included by India during the investigation, such as the evolution of consumption, the impact of non-dumped imports and the competition from other EC producers. They concluded, nevertheless, that while some of those factors may have contributed to the injury, there was a substantial and genuine causal relationship between the dumped imports and the injury suffered by the domestic industry.

16. At any rate, it is important to note that India is not arguing that the price suppression was caused by factors other than the dumped imports. In other words, India is not arguing that the EC producers were prevented from rising their prices in order to respect the increased cost of raw cotton by factors other than the dumped imports. Instead, India is arguing that the EC should have distinguished the effects of the dumped imports from those of the increase in the cost of raw cotton. As explained, this argument is illogical. The increase in the cost of raw cotton is not a cause of injury *per se*. It caused injury only because the EC producers were prevented from passing on that increase. Therefore, the injury caused by the increase in the cost of raw cotton cannot be separated from that caused by the dumped imports.

17. Before concluding this statement, we would like inform the Panel and India that the EC wished to request confidential treatment also for Exhibit EC-1 and the turnover data derived from the exhibit which is mentioned in the Oral Statement. We will include this request in the final version of our Oral Statement.

Thanks for your attention.

ANNEX D-5

ORAL STATEMENT OF INDIA

10-11 September 2002

Mr Chairman, Members of the Panel,

1. On behalf of my delegation, in the dispute EC-Bed Linen: recourse to Article 21.5 of the DSU by India I thank you for the opportunity to address you today. India has made two submissions to the Panel. I am sure you have carefully studied them. Therefore, we will be brief in our remarks.

2. We will endeavour to assist the Panel by highlighting what we consider to be the most important points.

3. Let me put the present dispute in its context. India would like to recall that the matter before this Panel is whether the EC has correctly implemented the recommendations and rulings of the DSB in the original dispute—*within* the reasonable period of time as mutually agreed between India and the EC.

4. The answer is a clear No.

5. The DSB recommendation gave EC the choice ***either*** to revoke the measure ***or*** to modify it correctly. The EC has done ***neither***. There has simply not been even an actual *intention* to comply.

6. More specifically, whilst the application of the re-determination adopted pursuant to the DSB ruling is currently suspended, the *reason* for doing that was, as an EC official speaking to the Bureau of National Affairs, on conditions of anonymity, put it:

> "We have made a strong statement by suspending the duty. The EU has *distanced* itself in *the greatest possible way* from the Appellate Body ruling."[1] (emphasis added)

[1] Unworkable WTO Ruling Spurs EU to suspend Bed-Linen Dumping Duties, BNA (Bureau of National Affairs) WTO Reporter, 15 August 2001.

7. In other words, while the EC *claims* to have changed the measure, it simultaneously and expressly *recognized* and publicly *declared* that it could *not* apply the measure in the modified form. As a result the EC chose to suspend the duties rather than to comply with an adverse DSB recommendation.

8. Accordingly, the so-called 're-determination' was nothing else than payment of lip-service to the DSB. At the same time it gave an opportunity to the EC to "distance" itself from rulings with which it disagreed.

9. So where is the compliance when there is not even an *intention* to comply? There is None.

10. Lack of an actual *intention* to comply is the first, basic, reason as to why India considers that there is no compliance.

11. This does not detract from the fundamental violations that were committed in the process of paying the lip-service. The so-called 'measures to comply' taken by the EC in the form of the re-determination and its subsequent amendments have introduced a *series* of inconsistencies with the ADA and the DSU. This re-determination and its amendments will soon, upon conclusion of the ongoing "partial interim review", result in further imposition of anti-dumping measures.

12. Indeed, if one steps back from the details and examines *what* the EC has done, the question of compliance needs to be put in perspective. Does the DSB ruling simply prohibit dumping margin calculations as well as findings of injury and causality that were **formulated** in the EC's *Official Journal* in a certain way? Can that illegal measure simply be **re-formulated**—or **restated**—so that its effects are the same but are no longer prohibited? Is the WTO about form over substance? The answers to these questions, India submits, are obvious. The rest of this statement will be devoted to explaining how one reaches the same answers when looking at the detail.

13. For this purpose, with your permission, I would now like to request my colleague, Mr K.K. Jalan, Joint Secretary, Ministry of Textiles, Government of India, to take the floor.

Mr Chairman, Members of the Panel,

On behalf of the Indian delegation, I want to thank you for the opportunity to appear before you today.

I. A "REASONABLE PERIOD OF TIME" IS A *FINITE* RATHER THAN *INFINITE* CONCEPT (INDIA'S CLAIMS 2 AND 3)

14. On 14 August 2001 the EC declared that it fully complied with the DSB ruling in the *Bed Linen* case.[2] The press release specifically emphasized that "implementation was achieved within the reasonable period of time granted by the WTO." The rationale for this emphasis was, in the EC's own words, the *obligation* to implement the DSB's rulings and recommendations within the "reasonable period of time".[3]

15. At the same time the EC has recently requested the Panel to consider the date of establishment of the panel as the relevant date for assessing the consistency of the measures "taken to

[2] European Union complies fully with WTO ruling in India Bed Linen case and suspends anti-dumping measures against India, IP/01/1207, 14 August 2001.

[3] EC First Written Submission (FWS) para. 36.

comply".[4] Thus in the present case the EC strives to prove that on *22 May 2002* it fulfilled its obligation to comply before *14 August 2001*. Mr Chairman, surely 22 May 2002 does not come before 14 August 2001.

16. India agrees that it is the right of the Panel to assess the overall consistency of the measures "taken to comply" up to the date of, and specified in, the request for the establishment of the Panel.[5] Indeed, this logic is fully consistent with India's claims that the EC violated its obligation to comply *within* the reasonable period of time. With this request as well as with its first request for a preliminary ruling, the EC implicitly admits that it has no substantial arguments against India's claims 2 and 3. In doing so, it actually concedes that it failed to respect the requirement of Articles 3.1 and 3.3 to cumulate dumped imports only with dumped imports (India's claim 2) as well as with the obligation of synchronicity, contained in Article 5.7 (India's claim 3), to consider the evidence of both dumping and injury *simultaneously*.

17. India notes that the EC by turning to formalistic arguments concerning terms of reference of the panel and the scope of application of Articles 3.1, 3.3, and 5.7 implicitly accepts that *substantially* it is wrong. As India pointed out this is witnessed, respectively, by the EC's recent request for consultations in a different dispute settlement proceeding[6], and by a recent Panel Report where it was the EC which took the view that certain important procedural standards do apply in the context of review proceedings.[7] India, while disagreeing with these formal objections of the EC, notes the substantial position of the EC in these other proceedings.

18. Therefore, in respect of its claims under Articles 3.1, 3.3 and 5.7 India notes that the EC and India are in fact in agreement as regards the substance of the violations pointed out in India's claims 2 and 3.

II. A MERE GLOSS ON THE ORIGINAL FINDING IS *NOT* WHAT IT TAKES (INDIA'S CLAIM 5)

19. The EC's re-determination is constructed around the word "appears" used by the Panel in the context of concluding that data collection for the injury factors listed in Article 3.4 had not even taken place, let alone evaluated by them.[8]

20. The Panel would have noted that the EC repeatedly has failed to quote the *conclusion* of the Panel that "based on the *foregoing*" it found that the EC had not engaged in an evaluation of all relevant economic factors.[9] As India had pointed out in its First Written Submission: the word "foregoing" not only includes the reference in paragraph 6.167 that "it appears that data was not even collected" but also includes the Panel's dismissal in paragraph 6.168 of the EC's recurring argument "that data were evaluated but not discussed". As the Panel noted: that latter view was *simply not tenable*. Why should it be tenable now?

[4] EC FWS, para.35.
[5] E.g. US – Shrimp 21.5, paragraph 5.13.
[6] United States – Sunset Reviews of Anti-Dumping and Countervailing Duties on Certain Steel Products from France and Germany. Request for consultations by the EC of 30 July 2002, WT/DS262/1, 3rd and 6th matter raised in that request.
[7] Certain Corrosion Resistant Carbon Steel Flat Products from Germany, WT/DS213/R of 3 July 2002.
[8] Original Panel Report, para. 6.167.
[9] Original Panel Report, para. 6.169.

21. Accordingly, in particular, the measure taken by the EC "to comply" completely disregarded the essential requirement to *first* collect the previously missing data and *subsequently* engage in an overall reconsideration and analysis.

22. The EC never went out to collect the missing data. Indeed, as India pointed out, there is simply no evidence whatsoever that the EC *ever* collected data on stock or capacity utilization of the Community industry.[10] As pointed out, the data obtained from the accounts reflect stock data at a company level. Exactly for such purposes the questionnaires for *exporters* invariably contain separate detailed questions and tables on stock data for the product concerned. The issue is material: data on stocks form an important means in EC anti-dumping practice through which sales and production data are double-checked.

23. The 'defence' of the EC that *because these data were absent they were irrelevant* is untenable. It violates basic obligations of an investigating authority. By allowing domestic producers to decide what data to provide and by accepting that only such data are relevant, the injury determination becomes a meaningless self-fulfilling prophecy.

24. Furthermore, the EC seems to believe that there is no need to have an *overall* analysis and reconsideration of the data collected. In its written submission the EC states that Regulation 1644/2001 limits itself to "nothing but confirm" the original findings. This statement reflects exactly India's concern pertaining to the EC's compliance in the present case, *i.e.*: the EC disregarded relevant case law such as the Panel and Appellate Body in *Mexico-HFCS 21.5* that mandated precisely such overall reconsideration and analysis.

25. India would not like to repeat its detailed arguments in this connection but simply would wish to stress that an overall reconsideration and analysis should have taken place, if data had indeed been collected. In this regard the EC's contention that India is making a "formalistic argument" by pointing out that a mere reference back is nothing more than a restatement of a previous finding, is incorrect.[11]

26. Yet, it was up to the EC to explain what the difference is between its approach and a simple restatement. An overall reconsideration and analysis cannot simply be assumed by mere references back to earlier findings whilst, simultaneously, some of the other earlier findings are simply deleted. This is witnessed, to name but one example, in the context of market share: while the EC curtly states that the previous findings are confirmed, an overall reconsideration and analysis should, for example, have led to the inclusion of the verified sampled EC producer who was importing the product from Pakistan. This should at least have led to a change in the market share data.

27. India has in its written submission identified other pertinent factual errors such as the change in turnover of the sampled producers which nevertheless, and surprisingly, led to exactly the same profit margin. The significant overstatement of the dumped imports from India as well as the disregard of the level of the dumping margins are other examples of facts that were ignored.

28. India also wishes to point out that the First Written Submission of the EC has not directly addressed the arguments of India. Instead the EC has done no more than summarize its re-determination and contend in a *pro forma* manner that its re-determination satisfied the requirements of the ADA.

[10] These two factors are only examples, since it appears that data were never collected for as many as eight or nine factors.

[11] EC FWS para. 163.

III. A "SAMPLE" MEANS WHAT IT NORMALLY MEANS RATHER THAN WHAT IT NEVER MEANS (INDIA'S CLAIM 4)

29. The EC's view "to comply" with the DSB ruling as regards the re-determination of injury meant, first, to take a sample of Indian imports. It then determines within the sample the relationship in *relative* terms between dumped and non-dumped imports. Finally, it deducts from the total volume of Indian imports the *absolute* amount of non-dumped imports *from the sample*.

30. The Panel will recall that India has already provided a hypothetical example in its First Written Submission to illustrate how untenable the EC's position is.

31. Answering India's legitimate concerns about the reasons not to deduct the amount of non-dumped imports corresponding to its *relative* share within the sample, the EC invariably relies upon Article 9.4. India has already pointed out the irrelevance of that Article for the question under consideration.

32. This irrelevance follows from the title of this article 9 ("imposition and collection of duties") as well as from the clear-cut findings of the Appellate Body in this regard.[12] As India has pointed out, the EC deliberately assimilates the different concepts of duty and margin when in truth those issues are distinct. That deliberate confusion ultimately led the EC to interject the 'exclusion concept' that applies for dumping *duties* into the concept of dumping *margins*.

33. On the other hand, India's view on the ordinary meaning of the term "sample" ("a relatively small part or quantity intended to show what the whole is like; a specimen") does not necessitate any additional comments.

34. Equally contradictory is the EC's argument that there can be only one weighted average dumping margin for the country. If that logic is taken to its consequence, it becomes clear that on a weighted average basis India was never dumping and that the termination of the proceeding is way overdue.

35. Indeed, since the EC apparently is of the opinion that there is only one weighted average dumping margin for a country India may now legitimately pose two interlocutory questions:

(1) Why did the EC not terminate the proceeding on 14 August 2001, when it was apparent to the EC that there was no dumping from India on a weighted average basis?

(2) Why did the EC engage once again in the "zeroing" of the negative dumping amounts of entire producers when the Appellate Body had already noted that Article 9 did not have bearing on the determination of dumping margins?

36. India looks forward to the answers of the EC as long as these answers do not involve another repetition of a reference back to Article 9, which is irrelevant in this context.

IV. VOLUME OR VALUE (INDIA'S CLAIM 1)

37. The EC submits that by choosing value-based averaging factor in order to determine the relative importance of Indian exporters under Article 2.2.2(ii) it has not acted inconsistently with that

[12] Appellate Body Report, European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India ("EC – Bed Linen"), WT/DS141/AB/R, adopted 12 March 2001, footnote 30.

provision. The EC believes that it could have chosen *any* method to average, provided it acted reasonably in its application. Such reasoning is constructed around the assumption that Article 2.2.2(ii) is silent on the issue discussed.

38. India cannot accept this argument. Article 2.2.2(ii), if properly interpreted on the basis of the *Vienna Convention* and in light of the statements of the Appellate Body, does not give rise to any doubts as for its preference for volume-based averaging as the only averaging factor possible. As India had occasion to note: volume is, *inter alia*, price-neutral and in harmony with the volume-based averaging on the export side of a sample. It flows naturally from the text and context of the Article, if applied properly. In doing so, India has given a meaning to all aspects of Article 2.2.2(ii), as required by the *Vienna Convention* and to the principle of effective treaty interpretation.

39. Even assuming, for the sake of argument, that Article 2.2.2(ii) provides for discretion in terms of the selection of an averaging factor, this discretion does not mean that an investigating Member can depart from its own previous definition of the relative size being 80-14, especially given the status of India as a developing country.

40. The EC states:

> "By India's logic, the investigating authorities … would have to test all possible calculation methods at each step of the dumping determination, and then choose that method which is the most favourable to the exporter in the particular circumstances of each investigation. This would impose an unreasonable burden on the investigating authorities and, at the same time, be a source of unacceptable legal uncertainty and unpredictability for all the interested parties."[13]

41. This statement misinterprets India's reasoning. The statement of the EC is abstract while the circumstances of this case are very concrete. India recalls that it was the EC who had originally defined an averaging factor by which it had come to the ratio of 80-14. Such a ratio can be reached only on the basis of volume. Hence India's objection is that the EC is not being consistent in its practice by shifting to the ratio 91-9. India does not request the EC to be favourable to the exporters nor to the importers but wish the EC to be unbiased and objective, more so given India's status as a Developing Country. An unbiased and objective authority acting in good faith cannot shift positions as regards important aspects of a proceeding, displaying various views as and when deemed fit.

42. As the Appellate Body stated in the *US – Shrimp*:

> "One application of [the principle of good faith], the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right "impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably." An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting."[14] (footnotes omitted)

43. The Appellate Body went on to clarify the meaning of the word "reasonable":

[13] EC FWS, para. 85.

[14] Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products ("US – Shrimp"), WT/DS58/AB/R, adopted 6 November 1998, para. 158.

> " … Exercise of the right in such a manner as to prejudice the interests of the other contracting party arising out of the treaty is unreasonable and is considered as inconsistent with the bona fide execution of the treaty obligation, and a breach of the treaty. … "[15]

44. India also recalls in this connection that it follows from the EC's own reasoning in paragraphs 13-14 of its First Written Submission that for the purpose of implementation of the DSB ruling it could not have done what it had not been asked to do.[16] The question arises then, why did the EC change the averaging factor (from 80-14 to 91-9) in its calculations under the Article 2.2.2(ii)? India suspects that the obvious answer has to deal with the intention of the EC to circumvent the DSB ruling and thus to preserve the restrictions on Indian imports. Maintaining dumping margins as high as possible demonstrates a consistency in goal but not a consistency in method—as required by Article 2.2.2(ii) and its interpretation by the Appellate Body.

V. CAUSAL LINK AND NON-ATTRIBUTION (INDIA'S CLAIM 6)

45. We now come to the question of causal link and non-attribution.

46. Not only the injury finding, but also the determination of the alleged cause of the alleged injury is—as it has always been—of concern to India. The so-called measures taken by the EC to comply neither prove the existence of a causal link between dumped imports and serious injury, nor do they ensure that the injurious effects of factors other than dumping such as increase in costs of raw materials and inflation are not "attributed" to dumped imports.

47. The defence of the EC in this regard is missing the point: it distorts India's claim in respect of Article 3.5 and is based on a wrong presentation of facts.

48. Contrary to the EC's view, India has *nowhere* gone as far as arguing that the dumped imports must *on their own* be capable of causing material injury. In line with Article 3.5 of the ADA India believes that it must simply be demonstrated that the dumped imports are causing injury. And nothing else. Until now the EC has failed to comply with this requirement. In fact, and astonishing enough, currently less volume of imports are dumped while the alleged injury as a result of dumped imports is more.

49. As regards the non-attribution language India fails to understand why inflation while identified by the EC as a factor has not been analysed separately as a cause of the alleged injury nor has its injurious effect been segregated from the alleged injury caused by dumped imports. The same is true about the increase in prices of raw materials.

50. India recalls that the EC in recital (103) of the Provisional Regulation had stated that:

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[15] ID., footnote 156 (aquoting B. Cheng, General Principles of Law as applied by International Courts and Tribunals (Stevens and Sons, Ltd., 1953), Chapter 4, in particular, p.125).

[16] EC FWS, paras. 13-14:

> "In the original panel proceeding India submitted no claims against the findings of dumping with respect to imports originating in Pakistan and Egypt reached by the EC authorities in Regulation 2398/97.
>
> Nor, consequently, did the DSB make any rulings or recommendations with respect to such findings. For that reason, when implementing the DSB's rulings and recommendations, the EC authorities did not re-examine the findings of dumping for Egypt and Pakistan."

> "The Commission concluded that increases in raw material prices had caused injury."

51. Again, in the re-determination (Regulation 1644/2001) the EC states at recital (50) that:

> "… the declining and inadequate profitability … is basically the result of prices which had not been able to reflect the increases in the costs of raw cotton."

52. Yet, nowhere in the provisional Regulation, nor elsewhere for that matter, were the injurious effects caused by the price increase in the costs of cotton separated and distinguished from the effects of the dumped imports.

53. On the contrary, the EC in its rebuttal merely concludes that:

> "Since the increase in the cost of the raw cotton was not a separate cause of injury, its injurious effects cannot possibly be "separated/distinguished" from those of the dumped imports."[17]

54. Yet this explanation directly contradicts the obligations as expressed by the Appellate Body as regards the non-attribution of injury and the mandatory separation of injurious effects.[18] Once the EC determined that the increase in raw material prices caused injury[19], such cause *had* to be separated from the alleged injury caused by dumped imports. As the Appellate Body noted:

> " … although this process may not be easy, this is *precisely* what is envisaged by the non-attribution language.[20] (Emphasis added)

VI. SHOULD A DRIVER ACCELERATE? (INDIA'S CLAIMS 7 AND 8)

55. It seems to India that there is not much to add on its claims under Article 15 ADA and 21.2 DSU. The EC has hardly reacted to India's claims in a meaningful fashion. To the extent that the EC has replied, it has not addressed the substance of India's claim, but has rather (1) resorted to formalistic arguments about the 'application' of duties and (2) the fact that Article 21.2 DSU is couched in 'should' rather than 'shall'. India has already shown those arguments to be irrelevant and wishes to step back from the *form* to the *substance* of the obligation, if one agrees that WTO is substance over form.

56. To illustrate: What should a driver in a big car do when he sees a pedestrian cross the street? Should he accelerate? What should that driver do when he notes that it is not just any pedestrian crossing that street but the *same* one that he hit before due to his previous reckless driving? Should he this time accelerate even faster in order to test whether his new car is capable of reaching 100 km per hour in 5 seconds so as to pass the crossover before the pedestrian? Should the driver take that risk? Or should he this time be a little more cautious so as not to cause any additional damage to the

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[17] EC FWS, paragraph 248.

[18] US – Hot-Rolled Steel AB paragraph 228. Moreover, the Appellate Body in Line Pipe, in the context of the ASG, at paragraph 217, did not leave any doubt:

> "… the competent authorities must establish explicitly, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports. This explanation must eb clear and unambiguous. It must not merely imply or suggest an explanation. It must be a straight forward explanation in express terms."

[19] Provisional Regulation recital (103).

[20] US – Hot Rolled Steel AB paragraph 228.

pedestrian? These questions, while appearing to be rhetorical, do reflect the realities in this present dispute.

57. What should a very developed country do when it is obliged by the WTO to bring its inconsistent anti-dumping measures against the imports from a developing country into conformity with the WTO Agreement? Should it just try to introduce a new anti-dumping measure as fast as possible and with the risk of causing even greater harm than before? Or should it try to pay *special attention* to the interests of the developing country in the process of due compliance before it decides to introduce a new, if any, anti-dumping measure? Due to the mandatory language of Article 15 of the ADA and Article 21.2 of the DSU the answers again are obvious.

58. India recalls in this regard that the EC is well aware of the enormous difficulties caused to the Indian textile industry by its previous measure. In March 2002 the *Bed Linen* case was cited by the NGO Oxfam as the *clearest example yet* of the devastating impact of anti-dumping duties on exports from the developing countries.[21] The EC has read the report as it follows from the fact that it issued public comments in this respect. This stated awareness, however, had no effect.

59. In particular, the EC seems to believe that it complied with the ruling of the DSB to give due regard to the developing country status of India through suspension of anti-dumping duties. In this connection the EC conveniently forgets that the real, and expressly declared, reason was that the suspension was to:

> "distance itself in the greatest possible way from the Appellate Body ruling."[22]

60. India submits once again that suspension of duties with the sole aim of seeking to re-impose them cannot qualify as a "remedy" of any type, constructive or otherwise.

61. Indeed, as the Panel has already clearly stated in its original report suspension of measures is not a remedy of any type. Yet the EC did exactly that.

62. Moreover, India recalls that the suspension of imposition of duties equally qualifies as an application of measures. The measures are dormant, but they apply. If they would not apply then there would be no need to suspend their imposition. This suspension is conditional upon the conclusion of the partial review.[23] There is therefore a very clear timing condition on imports that take place—a condition which moreover will soon run out and after which no more imports can take place. A virtual time bomb is ticking and the mere threat of its likely explosion has already caused irreparable damage.

63. Besides that, the EC again has failed to study the possibility of constructive remedies. India recalls that the obligation to explore rests on the EC, not on India. As pointed out, the EC has done just the exact opposite of what the Panel found: it suspended the measures even though the Panel had explicitly held that such is not a remedy, constructive nor otherwise.

64. The EC's repetition of its inconsistency with Article 15 of the ADA—after the Panel already found fault with the EC's actions—brings with it also a violation with Article 21.2 of the DSU. India

[21] As is known, companies which ever dumped (such as Omkar) went bankrupt due to the illegal measures. Companies such as Anglo-French which suffered WTO-inconsistent duties had to lay off thousands of workers due to the illegal duties.

[22] Unworkable WTO Ruling Spurs EU to Suspend Bed-Linen Dumping Duties, BNA WTO Reporter, 15 August 2001.

[23] Re-determination Article 2 paragraph 2.

considers that the compelling logic of the Appellate Body enunciated in *Line Pipe*[24] also applies in the relation between Articles 21.2 of the DSU and Article 15 of the ADA: a Member cannot be considered to have paid particular attention unless, as a first step, it has heeded the essential interests of developing country Members under Article 15. From the repeated violation of Article 15 flows inherently the inconsistency with Article 21.2 DSU.

65. Besides that, in general the EC has done just *nothing* that could qualify as an action under Article 21.2. On the contrary, the initiation of yet another Bed Linen review suggests that the EC has done just the ***exact*** opposite of paying particular attention to the interests of India.

VII. GOOD FAITH IN THE CONTEXT OF ARTICLE 21.5 PROCEEDINGS

66. As the Appellate Body stated in the *Japan–Alcoholic Beverages II*:

> "adopted panel reports … create legitimate expectations among WTO Members".[25]

67. India submits that the first and immediate legitimate expectation generated by an adopted panel report is that the party found to be in violation of the WTO Agreements would comply with an adverse decision in *good faith*.

68. India has already pointed out in its Second Written Submission that the third EC request for a preliminary ruling is nothing more than a litigation technique.
As has been pointed out by two respected authors in the field, the legal stance of the EC in its third preliminary request—and of which it accuses India—is the opposite of what it actually has done earlier in another case:

> "The situation will probably not happen often but did seem to occur in the recent case 'United States–Tax Treatment for Foreign Sales Corporations'. In the original proceedings, the plaintiff European Communities did not lodge a complaint about GATT Article III (national treatment). Then in the Article 21.5 proceeding, the European Communities raised that point with regard to a limitation on foreign content in the new US tax measure, which was a similar limitation to what existed in the original tax measure. The panel found a violation with respect to GATT Article III and the Appellate Body affirmed."[26] (footnotes omitted)

70. As can be seen, these authors have shown that the EC's own *actions* in that different proceeding significantly contradict the EC's *reasoning* relating to its third preliminary request.

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[24] US – Line Pipe AB, at paras. 118-119 where the AB upheld the Panel's findings on the inconsistency with Article 8, that had quoted the AB report on US – Wheat Gluten. In US – Wheat Gluten AB it was held at para. 146 that:

> "In view of [the] explicit link between Articles 8.1 and 12.3 of the Agreement on Safeguards, a Member cannot, in our view, "endeavour to maintain" an adequate balance of concessions unless it has, as a first step, provide an adequate opportunity for prior consultations on a proposed measure."

[25] Appellate Body Report, Japan – Taxes on Alcoholic Beverages ("Japan – Alcoholic Beverages II"), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97, at 14.

[26] Kearns, J.E. and Charnowitz, S. "Adjucating Compliance in the WTO: A Review of DSU Article 21.5", 5:2 JIEL (2002) 331-352 at 348 in Chapter III.B.2.b "New claims and arguments that could have been raised in the original dispute but were not".

71. The EC's unfortunate interpretation of straightforward facts is not unique. Similar examples abound, as witnessed by the EC's own arguments. *For example*, the EC:

(1) confuses the concepts of an anti-dumping *duty* and a dumping *margin*;

(2) attaches a bizarre meaning to the word "sample";

(3) suddenly changes its mind as regards the choice of the averaging factor;

(4) creates an evaluation of factors based on data which were not even collected, leave alone brought on record, before the original Panel; and, besides that,

(5) directly, and repeatedly, disregards what the Panel stated in respect of the constructive remedies.

One may also recall that:

(6) whilst the EC argues that Article 5 does not apply in the context of a review, it recently argued exactly the opposite in another dispute settlement proceeding. The same goes for Articles 3.1 and 3.3.

72. India recalls that today's proceedings are not original proceedings before an ordinary Panel. Today the parties are before a 21.5 Panel. Therefore, those parties are *ex definitione* unequal. India has prevailed in the original proceedings and it is now for the EC to demonstrate its adherence to the rule-oriented multilateral trading system.

Mr Chairman, Members of the Panel

73. We regret if we have used some harsh words during our oral presentation today. However, this only reflects the anguish of India, especially the Indian Bed Linen exporters and hundreds of thousands of workers connected with the industry, who have faced the unending consequences of a prolonged investigation since 1994.

74. As already mentioned, even the initiation of proceedings affects the exports. Thus the *Bed linen* exports have been affected from 1994 onwards. Moreover, this item is under quantitative restrictions. Since 1997, Indian exporters have had to face four sets of anti-dumping determinations and there is no relief in sight, despite measures being termed "inconsistent" by the DSB.

75. Mr Chairman, Members of the Panel, India looks forward to justice being done not only in form but also in substance, so as to strengthen the faith of Developing Country Members such as India, in the multilateral rule-based trading system.

Thank you for your attention.

ANNEX D-6

CLOSING STATEMENT OF INDIA

10-11 September 2002

Mr. Chairman, Members of the Panel,

1. Thank you for listening to us so carefully these two days and for your stimulating questions. We would like to make a number of concluding remarks to highlight a number of key issues arising out of the debate.

I. FRUSTRATING YET ILLUMINATING QUESTIONS AND ANSWERS

3. One frustrating—yet illuminating—feature of our debate has been the extent to which the EC has responded to the questions of the Panel and the questions of India.

4. The Panel asked whether the EC, after the original Panel Report, went out and collected the information on factors for which it appeared that data was not collected. The EC simply answered that it did not.

5. India asked why the EC did not re-determine its dumping and injury findings simultaneously vis-à-vis Egypt and Pakistan. The EC argued that these were not related to the DSB ruling. Yet, when asked why then the EC did not re-determine other Regulations imposing anti-dumping measures vis-à-vis third countries (not related to the DSB ruling) the EC considered this not necessary. Despite

this divergence in approach, the EC continues to deny that the re-determination for Egypt and Pakistan are closely connected with the findings of the DSB on all counts that India mentioned. The EC seeks to deny the close connection of Regulation 696/2002 even though it specifically and only deals with the causality of dumped imports from India.

6. India asked why the reasoning of the EC in *Certain Corrosion Resistant Carbon Steel Flat Products from Germany* does not apply in the context of this proceeding. The EC's reply was that the *de minimis* rule contained in Article 11 of the ASCM contained an important substantive safeguard, but that Article 5.7 of the ADA is about procedure. When asked why a substantive provision does apply in a review and a procedural safeguard does not the EC does not know. On the basis of this logic of self-selection by the EC, important procedural safeguards are reduced to inutility.

7. In this connection of Article 5.7 India also observes that the US in its oral statement has not taken into account point that India made in paragraph 117 of its SWS. The point was that once both dumping and injury are under review the synchronicity requirement should be respected.

8. India asked the reason for the difference in approach relating to fact finding (questionnaires) with respect to exporters and domestic producers. The EC answers that since the goals are so different the means could be different. Yet, the EC still has to explain why the goals are so different, for example, as regards stocks and capacity utilization. India has already pointed to the importance of these factors for double-checking certain other information such as sales and production figures.

9. India asked why sample data were taken differently in the context of exporters as compared to sample data in the context of domestic producers. The EC explained that it did not consider the data of domestic producers in a different fashion. Yet, that is not borne out by the facts. The result of the sample was attributed to the "Community Industry" yet the result of the Indian exporters was not attributed to the Indian exports.

II. PROCEDURAL

First Request

10. In respect to the first request of the EC for a preliminary ruling India would like to recall that the first and foremost factor that the Panel should take into account is the fact that all three measures taken by the EC to comply—Regulation 1644/2001, Regulation 160/2002 and Regulation 696/2002—are mentioned in the request of India for the establishment of the Panel.

11. In its panel report in *Australia – Leather 21.5* the Panel has stated that

> "in general it is the complaining Member in WTO dispute settlement which establishes the scope of the measures before the Panel … For us to rule that we are precluded from considering [a certain measure] would allow [the defendant] to establish the scope of terms of reference… In the absence of any compelling reason to do so, we decline to conclude that a measure specifically identified in the request for establishment is not within our terms of reference".[1] (underlining added)

12. What is the "compelling reason" for the Panel in the present case to exclude Regulations 160/2002 and 696/2002 from the scope of terms of reference?

[1] WTO Panel Report, Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the Dispute Settlement Understanding by the United States, WT/DS126/RW, adopted 11 February 2000, paras. 6.4-6.5.

13 The EC believes that it is the fact that

> "the re-determination of the dumping findings for Egypt and Pakistan … was conducted by the EC authorities on their initiative, and not because they were required to do so in order to comply with the DSB's recommendations and rulings… In turn the re-determination of injury contained in Regulation 696/2002 was rendered necessary by the adoption of Regulation 160/2002".[2]

14. Apart from that, the EC failed to explain why it was necessary to lump together imports from India, Pakistan and Egypt in the original proceeding, while it became unnecessary and impossible in August 2001 at the moment of issuing the re-determination.

15. India notes, however, that at the same time, the EC recognised during the oral hearings that there is a close connection between the three Regulations as is obvious from the fact that they amend the same original Regulation, are devoted to the same category of products, adopted by the same body within the relatively short period of time. In other words, there is a clear-cut connection between the original measure and three regulations under consideration today as well as obvious interdependence between the three regulations as such.

16. If one looks objectively now at these statements of the EC—even assuming for the purpose of argument that Regulations 160/2002 and 696/2002 are not directly related to the Dispute Settlement Body ruling (*quod non*)—it is easy to notice that they counterbalance each other. In these circumstances is there a compelling reason to deprive India of possibility to get a verdict on the measures specified by it in the request for the establishment of the Panel? The answer is No.

Second Request

17. As a preliminary matter India would like to notice that the first written submission of the EC creates confusion as for the date for assessing the consistency of the measures "taken to comply". While in the title of its request the EC states that the relevant date is the date of the establishment of the panel, later on[3] it agrees with the Panel in *US – Shrimps 21.5* which stated that the relevant date is "the date on which the matter was referred to the Panel".[4] Contrary to what the EC claims now, in the latter case the EC argued that the date on which the matter was referred to the Panel is the date of the request for the establishment of the panel.[5] India concurs with this interpretation of the EC. In any case India submits that the issue is non-material since all the inconsistent measures in this case were taken by the EC prior to both—the date of the request for the establishment of the panel forming the basis of the terms of reference (7 May 2002) as well as the date of establishment of the panel (22 May 2002).

18. What is, however, material is the issue whether the EC has complied within the reasonable period of time. India notes that nowhere in its statements and written submissions does the EC question the fact that it has NOT complied within the reasonable period of time. Rather, it states that India's request is not within the Panel's terms of reference.[6]

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[2] Oral Statement of the EC, para. 9.

[3] EC FWS, paras. 34-35.

[4] Panel Report, United States - Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 by Malaysia ("United States – Shrimp (21.5)"), WT/DS58/RW, para. 5.13.

[5] Ibid., para. 4.34, especially footnote 126.

[6] Oral Statement of the EC, para. 14.

19. The panel has surely noted that the EC's request is contradictory. First, the EC itself recognises that India "is correct" in stating that "the inconsistency of a measure with the covered agreements under Article 21.5 proceedings automatically results in a violation of Article 21.1".[7] Thus, the EC recognises that at least for the purpose of this case the panel can legitimately deal with India's claim that it has not complied within the reasonable period of time.

20. Second, the EC's argument *a contrario* in the same paragraph misses the point since India has never argued the opposite neither at the concrete level in the present proceedings, nor in abstract for the future. The EC suggests that there may be situations that the mentioning of Article 21.1 in the request for the establishment of the panel will indeed be necessary. India's immediate reaction to that is: So What? In the current dispute and in the situations India has had in mind in its SWS the violation of Article 21.1 follows directly from the violations of the covered agreements.

21. The EC well aware of the weakness of its argument invents the following theory. According to it, the fact that no Member has ever invoked a violation of Article 21.3 in Article 21.5 proceedings witnesses not the fact that it is unnecessary to state that claim separately, but the fact that "no Member has ever bothered to invoke a violation of the finding of such violation of Article 21.3 because a ruling that the implementing Member has complied late would be declaratory and devoid of practical consequences".[8] India submits that apart from lack of the textual support in the DSU as for the criteria to distinguish between declaratory and devoid of practical consequences rulings of the DSB and other rulings of the DSB, the argument of the EC misrepresents the everyday practice of this Organisation.

22. Irrespective of the number of the article of the DSU from which the obligation to comply within the reasonable period of time flows, the failure to mention it is easily explained by the fact that the DSB finds violation of this obligation without its specific identification in the request for the establishment of the panel. To name but few examples, India recalls that in the *Australia – Salmon 21.5* the panel found that Australia failed to comply with the DSB recommendation within the reasonable period[9] without the need for Canada to specifically indicate this claim in the request for the establishment of the panel.[10] In the same way in the *Brazil – Aircraft 21.5* Canada's request for the establishment of the panel did not contain any specific basis for its claim that Brazil has not complied within the required 90 days.[11] This, however, has not precluded the panel and subsequently the Appellate Body from coming to a conclusion that "Brazil has failed to … withdraw the prohibited export subsidies … within 90 days".[12] Finally, in the *US – FSC 21.5* the EC in its request for establishment of a panel requested a panel to find that "that the US has failed to comply with the DSB recommendations … by 1 November 2000".[13] In view of the fact that this request for establishment of the panel failed to specify "the appropriate legal basis", how can the EC insist that this claim was outside the panel's terms of reference? Does the EC suggest that the *US – FSC* case should be re-litigated?

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[7] Ibid., para. 18.

[8] Ibid., para. 18.

[9] Panel Report, Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 by Canada, WT/DS18/RW, para. 8.1(i).

[10] Australia - Measures Affecting Importation of Salmon, Request by Canada for Determination of Consistency of Implementation Measures, WTO Document WT/DS18/14, 3 August 1999.

[11] Brazil – Export Financing Programme for Aircraft, Recourse by Canada to Article 21.5 of the DSU, WTO Document WT/DS46/13, 26 November 1999.

[12] Appellate Body Report, Brazil – Export Financing Programme for Aircraft - Recourse by Canada to Article 21.5 of the DSU, WTO Document WT/DS46/AB/R, adopted 20 August 1999, para. 82.

[13] United States–Tax Treatment for 'Foreign Sales Corporations', Recourse to Article 21.5 of the DSU by the European Communities, Request for the Establishment of a Panel, WTO Document WT/DS108/16, 8 December 2000.

India recalls in this concern that in its request for establishment of the panel[14] India requested the Panel to find that:

(a) By failing to withdraw the measures found to be inconsistent with the Anti-Dumping Agreement and to bring its measures into conformity with its obligations under the Anti-Dumping Agreement, the EC has failed to comply with the DSB recommendations and rulings in this dispute; and

(b) The re-determination, as amended, and the subsequent actions as identified above are inconsistent with the above provisions of the Anti-Dumping Agreement and the DSU.

India submits that this request together with detailed claims constitute sufficient basis for the panel to find a violation by the EC of its obligation to comply within the reasonable period of time irrespective of the fact that the specific provision of the DSU is not mentioned.

Third Request

24. There is not much that India could add to its arguments against the EC's third request for preliminary ruling. India recalls once again that contrary to its position today it was the EC in the *US – FSC 21.5* case which argued that claims that could have been raised in the original dispute but were not, may certainly be raised during the 21.5 proceedings. The panel and Appellate Body in *US – FSC 21.5* endorsed this approach. India fails to see how the situation of non-compliance of the US in that case is different from the EC's non-compliance in the present case.

25. The panel surely noted yesterday the oral comment of the EC that the precedent created by the *US – FSC 21.5* case is irrelevant for the purposes of the current discussion since in this case the measure under consideration was "new" while in the present proceedings the measure under consideration is an "old amended" one. The statement is remarkable since it demonstrates the absolute ignorance as for the following finding of the Appellate Body:

> "… a measure which has been "taken to comply with the recommendations and rulings" of the DSB will *not* be the same measure as the measure which was the subject of the original dispute, so that, in principle, there would be two separate and distinct measures: the original measure which *gave rise* to the recommendations and rulings of the DSB, and the "measures taken to comply" which are – or should be – adopted to *implement* those recommendations and rulings. In these Article 21.5 proceedings, the measure at issue is a new measure …"[15]

26. Thus, the EC argument of irrelevance of the *US – FSC 21.5* should be dismissed. Equally irrelevant is the EC's argument that "by withholding the claims at issue, India has prejudiced the procedural rights of the EC". India notes in this regard, first, that the fact that the procedural rights of the US will be affected by the new claims brought by the EC did not prevent the panel and Appellate Body in the *US – FSC 21.5* to put aside this argument of the EC. Secondly, India submits that it is the EC through non-compliance with the DSB ruling which imposed upon itself considerably tighter schedule of 21.5 proceedings.

[14] European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India (WT/DS141) - Recourse to Article 21.5 of the DSU by India, Request for the Establishment of a Panel, WT/DS141/13/Rev.1, 8 May 2002.

[15] Appellate Body Report, Brazil – Export Financing Programme for Aircraft - Recourse by Canada to Article 21.5 of the DSU, WTO Document WT/DS46/AB/R, adopted 20 August 1999, para. 36.

Fourth Request

27. India has already explained that it does not request the Panel to make findings in respect of EC's violations of Article 4.1(i) of the ADA and Article 21.3 of the DSU.

Due Process

28. India also wishes to recall one issue of due process. During the meeting with the Panel on 10 September 2002, the EC submitted excerpts of confidential questionnaire responses of Indian producers to underscore certain of arguments. India has already pointed out how the Exhibit shows the due compliance of Indian producers with its detailed questionnaire whilst EC producers were not even asked such questions.

29. Faced with this sudden submission of confidential information, and in order to re-establish the level playing field, India has already asked the EC to submit the same information for EC producers.

30. The EC did not want to do that.

31. In light of the unwillingness of the EC to submit such information at the simple request of India, the Panel could, on the basis of its powers under Article 13 DSU, request to hand this information in immediately (and not after so many weeks) so that a level playing field can be established. India emphasizes in this context that the EC has started the process of relying on confidential information submitted by interested parties in the administrative proceeding.

III. A "SAMPLE" MEANS WHAT IT ALWAYS MEANS RATHER THAN WHAT IT NEVER MEANS (INDIA'S CLAIM 4)

32. Ever since its First Written Submission India has made a clear-cut claim on what is a "sample". The answer, India submits, is simple: a sample is intended to show what the whole is like, a specimen. By not recognizing that a sample is what it always is the EC has come to a significant overstatement of the dumped imports from India. Accordingly it has neither based itself on positive evidence nor engaged in an objective examination.

33. In the present case, where the non-dumped imports in the sample drawn by the EC was 53 per cent the EC comes to the conclusion that non-dumped imports in case of the whole is 14.4 per cent.

34. Basically, the EC is asking the Panel to accept that a sample for injury purposes only serves as a basis to show what the whole is like as far as dumped imports are concerned. According to the EC's logic, the sample becomes irrelevant insofar as it shows no dumping. Yet, India has already shown that when there is only one company that dumps the EC will find that the entire country is dumping. Or, as illustrated by the example of India: The EC's approach leads to situations where even though 95 per cent of the sample is not dumped, then still 95 per cent of the total exports will be considered dumped.[16]

[16] India's FWS paragraph 123: "Suppose that this time the total export volume was 100,000. Suppose that the investigating authority would resort to sampling. Suppose that that sample consists of 5 producers. Suppose that these five producers have a total export volume of 5,000 tonnes. Suppose that there are four producers in that sample who are not dumping. Suppose that these four producers represent 95 per cent of the exports in that sample. Suppose therefore that these four producers represent 4,750 tons out of that sample and that therefore 4,750 tons out of 5,000 tons are not dumped. *Then it is the EC's position that for the purpose of injury, it should consider 95,250*

35. It is well-known that the EC, on its own accord, selected a sample of exporters, in order to investigate Indian exports.[17] That sample was a specimen to see what the rest was like. It was intended to provide statistical estimates relating to the whole. If the EC had considered that a sample would not represent Indian exports it could have investigated all exporters.

36. As noted, the *evidence* that was available is that (slightly over) 53 per cent of the sample was not dumped, while (slightly over) 46 per cent was dumped. This was the positive evidence of the sample pool that should have formed the basis for the examination. There is no *evidence* with respect to the dumping or non-dumping of the remainder of the exports which was not sampled.

37. Hence, by deducting an absolute amount calculated from a sample *representing a total amount of exports*, the EC has neither based itself on positive evidence nor engaged in an objective examination. *Instead*, however, the EC 'concluded' that, *based on the evidence that 53 per cent of the sample was not dumped*, a mere 14 per cent of the total [(2,612/18,428)*100] was not dumped!

38. India considers that such conclusion is not objective, since it involves an inappropriate mix of a relative amount with an absolute total. Following the EC's "logic" India could equally argue that if dumping was only found for 47 per cent of the sample, only 12 per cent [(2,276/18,428)*100] of the total imports was dumped. Neither of such methods would draw "objective" conclusions based on "positive evidence".

39. The correct approach would have been that for the remainder (or *total*) of exports an *objective examination* should therefore take place: based on the positive evidence of the sample, the authorities should have objectively examined how the rest (total) of the exports looked like.

40. The EC's method runs therefore directly contrary to Article 3.1, as interpreted by the Appellate Body, which mandates such objective examination based on positive evidence. This inconsistency with Article 3.1 also results in a direct inconsistency with Article 3.2: the failure to correctly establish the "volume of the dumped imports" leads automatically to the impossibility to correctly "consider whether there has been a significant increase in dumped imports".

41. The EC continues to side-track this straightforward claim by entering into arguments concerning Articles 6 and 9. The EC argues that India did not make a claim with respect to the weighted average dumping margin. That is correct. India only requested that a sample should be taken to represent the imports from a country.

42. More specifically, the EC argues that imports cannot be simultaneously dumped and non-dumped. In essence, the EC is therefore making the point that there can be only one overall margin for the country as a whole, be it dumped or non-dumped. India has responded that if *that* line of reasoning is followed, the proceeding should have been terminated long ago since there was no dumping for the country as a whole. It was minus one point five. The EC argues that India cannot say that since according to the EC the duty for the country as a whole was five point seven. Yet, that duty was arrived at by zeroing the dumping margin of two large producers in the sample. As India had occasion to point out: the exclusion (zeroing) concept in Article 9 does not bear on the determination of a dumping margins. Yet the EC continues to refer to that Article. Thus, in reaction to this EC view: while zeroing had been clearly prohibited on a product level, by the Panel and the

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tons as dumped! Or in other words: even though 95 per cent of the sample (representing the total exports) is not-dumped, then still 95 per cent of the total exports will be considered dumped."

[17] Original Panel Report, paragraph 2.5.

Appellate Body, the EC continues to zero this time even more than ever: it zeroed on the producer level!

43. Finally, the EC continues to assert that the sample on the side of the domestic industry was applied in the same way as on the export side. For this purpose the EC gave the example of profits. Yet, surely, for profits the EC did not "zero" the losses that were made by some of its domestic producers. It made an average of profits and losses. Objectively, the same should have been done on the export side when determining the existence of dumping or not dumping.

IV. COLLECTION OF DATA AND OVERALL RECONSIDERATION (CLAIM 5)

44. As regards its fifth claim, India can today be short. It may be worthwhile to recall three basic points.

45. First, the EC has expressly admitted that no new collection of data took place. Obviously, collection of such absent information cannot even take place. Inconsistency of the measure with Article 3.4 was ruled by the Panel and the EC did not take this issue to the Appellate Body. Had the data been with the EC, it would have taken this finding of the Panel to the Appellate Body. India has also shown how the EC purportedly "collected" data on the 15 factors with respect to the domestic producers.

46. Second, the EC has already admitted that the market share of the domestic producers did not change although it should have changed if an overall reconsideration and analysis had indeed taken place. Other factual mistakes, resulting from the absence of such overall reconsideration and analysis, abound.

47. And third, India has already identified in its second written submission the enormous problem that this case has on account of "like product". The EC argues when it comes to sales prices that such price increase should not be considered for the "like product". Instead, the EC wishes that the average price increase should be put in perspective in light of the shift towards "niche products". This in itself signifies an enormous problem of 'like product'. As Article 2.6 of the ADA mandates:

> "Throughout the Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration" (underlining added)

48. There is simply no discretion of suddenly identifying niche products at a certain stage of the proceeding (the re-determination stage) for the purpose of a very specific aspect of the re-determination (the question of sales value increase in the context of injury). For this purpose India has also recalled during today's discussions the pertinent observations of the Appellate Body.[18]

V. CAUSAL LINK AND NON-ATTRIBUTION (INDIA'S CLAIM 6)

49. The EC continues to argue that increase in raw material cost was not a separate cause in injury, to be distinguished from the effect of dumped imports from India.

50. India already had occasion to point out that these statements of the EC contradict their own recitals (103) of the original Provisional Regulation and (50) of the re-determination. In recital (103) the EC had concluded that increases in raw material prices had caused injury. Again, in recital (50) of

[18] The findings in Recital (53) of the original Report. As it did before, the EC again acknowledged that it was itself who defined the "like product".

the re-determination, the EC stated that the declining profitability resulted from prices not being able to reflect the increases in the costs of raw cotton.

51. Basically the EC in its rebuttal stated that the injurious effects of the increase in the costs of raw cotton could not be separated from the effects of the dumped imports. The EC does not contest that in principle the injury caused by other factors should not be attributed to the dumped imports.

52. In its Oral Statement (112) the EC also declined that these were separated causes of injury. It even attributed further burdens on India which not even exist in Article 3.5.

53. Is "increase of raw material prices" a different issue from "dumped imports"? While this straightforward question appears rhetorical, it is a genuine issue in this dispute. The same goes for inflation. India trusts that the Panel agrees that factors such as inflation and increase in raw material prices are indeed different from dumped imports.

54. In its Oral Statement the EC reiterated that the inadequate profitability was "basically the result of prices which had not been able to reflect the increases in the costs of raw cotton or to keep pace with inflation in prices of consumer goods." What does this have to do with dumped imports?

55. This is not the only problem. There is a further contradiction.

56. While this alone signifies an elementary problem on account of "like product", the contradiction is that when it comes to discussing raw material price increases the EC does not engage in distinguishing between niche products and other products.

57. In short, the EC therefore wants to have it three ways: (1) for the average price increase the "like product" definition should be set aside; (2) for the increase in raw material prices there is only one "like product" and (3) the EC also wishes us to accept that increase in raw material prices is a same factor as the imports from India. The fact that in the original proceeding the EC also wanted a different "like product" when it came to zeroing of certain models has already been ruled to be incorrect by the Appellate Body.

VI. ARTICLE 2.2.2(II)

58. As Korea had occasion to point out today, the weighing on the basis of value has an intrinsic tilt-effect towards the finding of higher dumping margins. By contrast, a volume-based weighing is neutral and accords proportionate weight to the relative size of companies. India's detailed arguments have been set forth in its written submissions. The Appellate Body already rendered clear findings regarding Article 2.2.2(ii) but scrutiny of the so-called re-determination shows that the requirement of weighted average has not been properly respected. India has already shown that if the EC's original position had been taken to its consequence would lead to one more producer not being found dumping.

VII. SHOULD A DRIVER ACCELERATE? (INDIA'S CLAIMS 7 AND 8)

59. As regards the DSB finding pertaining to Article 15, the EC's view that suspension of a measure is a constructive remedy cannot be taken as correct. The Panel has clearly ruled that suspension of a measure is not a constructive remedy. In this regard India also recalls the *intentions* of the EC. As already pointed out in India's opening statement, the suspension was only conducted in order to distance itself from the DSB rulings in the greatest possible way. The further intention is also clear from the subsequent actions in relation with the suspension of Regulation 1644/2001.

60. The suspension was followed by a partial interim review which is being pursued at top speed to reach a predetermined conclusion. The EC is perhaps targeting India for taking the matter to DSB. That is why the measure is terminated against two countries previously forming part of the measure while it is put into partial review mode for India. Perhaps it is the EC's way to distance itself from the DSB ruling. India is of the view that there is no compliance at all. Obviously in such a situation there cannot be any compliance as there is no intention to comply from the beginning. In such a situation there cannot be any consideration for the developing country status of India.

61. The EC has not refuted the allegation that it is driving at top-speed and aiming for a new record. It merely repeats its earlier contradictory assertion that whilst the suspension should already be considered as a constructive remedy, it will explore a constructive remedy before its new car hits the target.

62. Mr Chairman, Members of the Panel,

63. As a concluding observation India submits that if this re-determination and its reparations of an important DSB ruling is allowed to pass, India's faith in the multilateral trading system will be severely shaken. For the time being India simply notes that the EC's action were no more than lip service. As India pointed out: the WTO should be substance over form. India trusts that the Panel agrees with this latter view.

Thank you for your attention.

ANNEX E

QUESTIONS AND ANSWERS

ANNEX E-1

INDIA'S ANSWERS TO THE PANEL'S QUESTIONS

23 September 2002

To India:

India is pleased to answer the questions of the Panel. India will first recall the questions of the Panel in *italics* after which it will present its answers in regular font.

1. A. India argues that regulations 160/2002 and 696/2002 were measures taken to comply, but since they were adopted after the August deadline, they were taken after the expiry of the reasonable period of time. Does India therefore consider that the Panel must ignore these regulations in its analysis? Or does India consider that the Panel should somehow fault the EC for taking these measures after the expiry of the period of the reasonable period of time? Or does India consider that the Panel should do both?

Reply

India would not wish to instruct the Panel what it should or should not do. Basically, India only considers that the Panel has standard terms of reference where its task is described:

> "To examine, in the light of the relevant provisions of the covered agreements cited by India in document WT/DS141/13/Rev.1, the matter referred by India to the DSB in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."[1]

India recalls that Regulations 1644/2001, 160/2002 and 696/2002 all constitute "the matter referred by India to the DSB" in the document WT/DS141/13/Rev.1. In this regard India cannot imagine to suggest that "the Panel must ignore [Regulations 160/2002 and 696/2002] in its analysis". Indeed, nowhere in its written submissions and oral statements has India suggested something similar. India expects that the Panel will comply with Article 11 of the DSU and objectively assess the matter before it.

In this connection, India notes that the analysis that the Panel is required to undertake pursuant to WT/DS141/13/Rev.1 is of a dual nature. India requested the Panel to find both that:

> "(a) By failing to withdraw the measures found to be inconsistent with the Anti-Dumping Agreement and to bring its measures into conformity with its obligations under the Anti-Dumping Agreement, the EC has failed to comply with the DSB recommendations and rulings in this dispute; and
>
> (b) The re-determination, as amended, and the subsequent actions as identified above are inconsistent with the above provisions of the Anti-Dumping Agreement and the DSU."

[1] *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India– Recourse by India to Article 21.5 of the DSU*, Constitution of the Panel established, Note by the Secretariat, WTO document WT/DS141/14 of 2 July 2002.

It is indispensable to examine Regulations 1644/2001, 160/2002 and 696/2002 under both claims. Since the claims are different, their analysis will also be different. Thus, under the claim that the EC has not complied within the reasonable period of time the relevant fact is that Regulations 160/2002 and 696/2002 were taken after the expiration of the reasonable period of time and therefore *ex definitione* are not capable of remedying inconsistencies contained in Regulation 1644/2001. Under the second claim the relevant fact is the substantive inconsistency of the Regulations 160/2002 and 696/2002 *per se* (as well as of Regulation 1644/2001) with the covered agreements.

Furthermore, nowhere in its written submissions and oral statements has India suggested that the EC should be faulted for "taking … measures [to comply] after the expiry of the period of the reasonable period of time". India requests the Panel to find that the EC has failed to comply with the DSB ruling *within* the reasonable period of time irrespective of what the EC has or has not done after the expiry of the reasonable period of time. The fact that the EC has undertaken measures, albeit unsuccessful, in order to repair inconsistencies of Regulation 1644/2001 with *inter alia* Articles 5.7, 3.1, 3.4 and 3.5 of the ADA proves that Regulation 1644/2001 *per se* fails to satisfy the requirements of those provisions. The fault of the EC under claim (a) is, therefore, that it failed to comply within the reasonable period of time, but not that it has done something afterwards.

Summing up, India's answer to questions one and three is No. As for the second question India submits that the EC should be faulted not for taking measures after the expiration of reasonable period of time, but rather for failure to take them within the reasonable period of time.

1.B. If the Panel were to conclude that regulation 1644/2001 is the only measure taken to comply, is there any basis for the Panel to consider regulation 696/2002 in this proceeding?

Reply
India recalls once again the following finding of the panel in *Australia–Salmon (21.5):*

> "Two benchmarks apply when defining our terms of reference. First, Article 21.5 of the DSU pursuant to which this Panel was established. Second, our specific terms of reference set out in document WT/DS18/15, a document that refers, in turn, to the matter and relevant provisions of the covered agreements referred to by Canada in its request for this Panel (document WT/DS18/14)."[2]

On the basis of this logic if the Panel in the present case finds that Regulation 1644/2001 is the only measure taken to comply, it will effectively state that regulations 160/2002 and 696/2002 are outside of its terms of reference pursuant to Article 21.5. That in turn means that the Panel would have to "amend" its terms of reference as set out in WT/DS141/13/Rev.1 in order exclude regulations 160/2002 and 696/2002 that were explicitly mentioned in WT/DS141/13/Rev.1. India does not see how these terms of reference could be amended. However, if the terms of reference are somehow amended, then India would not see any basis for the Panel to consider Regulation 696/2002 in this proceeding.

2. We recall that India raised a claim under Article 3.5 of the ADA during the original panel's proceedings. However, India made no arguments concerning the adequacy or lack thereof of the EC's analysis of "other factors" causing injury and non-attribution. In the original report, at para 6.144, the Panel concluded "we consider that India has failed to present a prima facie case in this regard". On what basis do you consider that it is appropriate for an Article 21.5 panel to rule on

[2]Panel Report, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada* ("*Australia – Salmon (Article 21.5 – Canada)*"), WT/DS18/RW, adopted 20 March 2000, para. 7.10.

a claim that could have been addressed in the original proceedings, but regarding which no arguments were made, and no ruling was made? Please explain in detail, in particular with respect to the assertion that there was no reason for the EC to reconsider this aspect of its original determination, since there was no finding of violation in this respect.

Reply

India is pleased to answer this question "in detail".

First of all, India notes that it is not for India to tell the Panel what is appropriate for it do and what is not. The Panel has standard terms of reference that describe its task:

> "To examine, in the light of the relevant provisions of the covered agreements cited by India in document WT/DS141/13/Rev.1, the matter referred by India to the DSB in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."[3]

India recalls that its claim under Article 3.5 is part of "the matter referred by India to the DSB" in the document WT/DS141/13/Rev.1. Taking into account the fact that Article 21.5 does not limit the terms of reference of a 21.5 Panel, India submits that there is no legal basis for such Panel to exclude from its terms of reference "a claim that could have been addressed in the original proceedings, but regarding which no arguments were made, and no ruling was made". India recalls the finding of the Panel in *Australia–Salmon (21.5)*:

> "The reference to "disagreement as to the … consistency with a covered agreement" of certain measures, implies that an Article 21.5 compliance Panel can potentially examine the consistency of a measure taken to comply with a DSB recommendation or ruling in the light of any provision of any of the covered agreements. Article 21.5 is not limited to consistency of certain measures with the DSB recommendations and rulings adopted as a result of the original dispute; nor to consistency with those covered agreements or specific provisions thereof that fell within the mandate of the original Panel; nor to consistency with specific WTO provisions under which the original Panel found violations. If the intention behind this provision of the DSU had been to limit the mandate of Article 21.5 compliance Panels in any of these ways, the text would have specified such limitation. The text, however, refers generally to "consistency with a covered agreement"."[4] (underlining in the original)

In this regard, India expects that the Panel will comply with Article 11 of the DSU and objectively assess the matter before it.

As regards the assertion that there was no reason for the EC to reconsider certain aspects of its original determination, since there was no finding of violation in that regard, India would like to make the following comments.

First, it is not correct to state that since the DSB ruling was silent on the issue, there is no reason for a complying Member to reconsider this aspect of original determination. The duty to comply in good

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[3] *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India– Recourse by India to Article 21.5 of the DSU*, Constitution of the Panel established, Note by the Secretariat, WTO document WT/DS141/14 of 2 July 2002.

[4] Panel Report, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada* ("*Australia – Salmon (Article 21.5 – Canada)*"), WT/DS18/RW, adopted 20 March 2000, para. 7.10, subpara. 9.

faith with the WTO Agreement cannot be presumed to exist only in case when there is a respective DSB ruling. The Panel in *Australia-Salmon (21.5)* has closed the door to any doubts in this regard:

> "We recall that even assuming that no finding of discrimination under Articles 2.3 or 5.5 was made in the original dispute – a matter contested by Canada -- the fact that no such claim may have been dealt with in the original dispute does not prevent an Article 21.5 compliance panel from doing so. Nowhere in the DSU can we trace the requirement referred to by Australia that Article 21.5 compliance panels can only reconsider WTO provisions dealt with by the original panel in case of a "change in circumstances". If, indeed, no "change in circumstances" occurred, as a matter of substance, one could expect that a compliance panel would simply confirm the finding made by the original panel. This issue is, however, a matter of substantive compliance with WTO rules, not one of terms of reference."[5]

Second, India recalls once again that the task of the complying Member under the ADA is to undertake an overall reconsideration of the measure in light of the DSB ruling, not just remedy some of the inconsistencies found:

> " … Part of the difficulty with SECOFI's redetermination in this case is that while SECOFI apparently undertook to respond to the specific criticisms set out in the original Panel's report, and has set out additional information relevant to the specific points made by the Panel in that report, there does not appear to have been an **overall reconsideration and analysis** of the information in light of the requirements of the AD Agreement, as clarified by the original Panel."[6] (Emphasis added)

Third, India recalls that in *Canada–Aircraft (21.5*), the Panel declined to examine one of the Brazil's argument on the ground that this argument "did not form part" of the reasoning of the original panel and was "not relevant to the present dispute, which concerns the issue of whether or not Canada *has implemented the DSB recommendation*…". The Appellate Body disagreed with the Panel and stated that Panel proceedings pursuant to Article 21.5 of the DSU involve, in principle, not the original measure, but a new and different measure that was not before the original Panel. Therefore, "in carrying out its review under Article 21.5 of the DSU, a Panel is not confined to examining the 'measure taken to comply' from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings."[7]

In *US–Shrimp (21.5)* the Appellate Body went on to state that:

> "When the issue concerns the consistency of a new measure "taken to comply", the task of a Panel in a matter referred to it by the DSB for an Article 21.5 proceeding is to consider that new measure <u>in its totality</u>. The fulfilment of this task requires that a Panel consider both the measure itself and the measure's application. As the title of Article 21 makes clear, the task of Panels under Article 21.5 forms part of the process of the "*Surveillance of Implementation of the Recommendations and Rulings*" of the

[5]Panel Report, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada* ("*Australia – Salmon (Article 21.5 – Canada)*"), WT/DS18/RW, adopted 20 March 2000, para. 7.10, subpara. 14.

[6]Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States* ("*Mexico – Corn Syrup (Article 21.5 – US)*"), WT/DS132/RW, adopted 21 November 2001, as upheld by the Appellate Body Report, WT/DS132/AB/RW, para. 6.37.

[7]Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU* ("*Canada – Aircraft (Article 21.5 – Brazil)*"), WT/DS70/AB/RW, adopted 4 August 2000, para. 41.

> DSB. Toward that end, the task of a Panel under Article 21.5 is to examine the "consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB. That task is circumscribed by the specific claims made by the complainant when the matter is referred by the DSB for an Article 21.5 proceeding."[8] (footnotes omitted, underlining added)

India submits that it is for these reasons that as such it is entirely "appropriate" for the present Panel to deal with India's arguments under Article 3.5.

With regard to the specifics of this case, since the claim under Article 3.5 was presented once before, India wants to address the question twice, depending on how India should read it.

If the question indeed was intended as "On what basis do you consider that it is appropriate for an Article 21.5 Panel to base its ruling in respect of a certain claim upon arguments that could have been made in the original proceedings, but were not?" India will present its arguments under (I).

Alternatively, if India misunderstands the question of the Panel, and the Panel in fact wishes to revise its finding in the paragraph 6.144 of the original report and conclude that in the present case it should deal with India's additional *arguments* under Article 3.5 as with a new *claim* which could have been raised in the original proceedings, but was not, then India will answer the question "On what basis do you consider that it is appropriate for an Article 21.5 Panel to rule on a claim, that could have been raised in the original proceedings but was not?". In such case India will present its arguments under (II).

India submits at this point that it in no way is suggesting that the claims under Articles 3.4 and 3.5 of the ADA contained in its request for establishment of this Panel are new claims that could have been raised in the original proceedings, but were not. In the original proceedings India did raise claims under those Articles as the Panel explicitly recognised in paragraph 6.144 of its report. India's view in the current proceedings is, therefore, that the Panel should deal with additional arguments under Article 3.5 of the ADA as with additional *arguments* and not as with an additional *claim*. (Question and Answer I, rather than II).

I. On what basis do you consider that it is appropriate for an Article 21.5 Panel to base its ruling in respect of a certain claim upon <u>arguments</u> that could have been made in the original proceedings, but were not?

First of all India refers of course to its general answers recalling the pertinent and existing case law, of which the relevant parts are reproduced above (*Australia–Salmon (21.5)*, *Mexico–HFCS (21.5)*, *Canada–Aircraft (21.5*), *US–Shrimp (21.5)*).

1. India recalls that there is no provision in the DSU that would compel a Member to participate as a party in a Panel proceeding.[9] Accordingly there is nothing that would oblige a Member to bring in claims, to come up with arguments in their support, to add or modify arguments or even to leave claims unsubstantiated without any arguments. Thus, Members are free to make whatever arguments they wish in support of their claims.

[8] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia* ("*US – Shrimp (Article 21.5 – Malaysia)*"), WT/DS58/AB/RW, adopted 21 November 2001, para. 87.

[9] Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the European Communities* ("*EC – Bananas III (Article 21.5 – EC)*"), WT/DS27/RW/EEC and Corr.1, 12 April 1999, para. 4.12.

2. In the particular context of Article 21.5 there is no provision that would allow a Panel to disregard in a preliminary manner arguments made by one of the parties irrespective of the fact that they are new or have not been raised in the original proceedings.

3. As has already been mentioned above it is in the nature of Article 21.5 proceedings that some of the arguments will be new since it is always a new revised measure that is examined in its totality by a 21.5 Panel.

4. As a rule, an omission of certain arguments in the original proceedings is made not in bad faith, but rather in order not to overload the Panel with complicated parallel lines of arguments and thus consistent with one of the objectives of the DSU – the one to achieve prompt settlement of the disputes. To give an example, in the original *Bed Linen* case India in theory could have submitted multiple arguments in support of each and every of its claims. However, in reality in view of the number of *claims* put forward by India (31) it is and it was unreasonable to expect to support each of them with several arguments rather than with one.

India also notes that the premise upon which the original Panel's question is based, namely that if a certain argument is brought in front of a Panel it will automatically be addressed by the Panel is not necessarily correct. India recalls the following statement of the Appellate Body in this regard:

> "Nothing in the DSU limits the faculty of a Panel freely to use arguments submitted by any of the parties -- or to develop its own legal reasoning -- to support its own findings and conclusions on the matter under its consideration. A Panel might well be unable to carry out an objective assessment of the matter, as mandated by Article 11 of the DSU, if in its reasoning it had to restrict itself solely to arguments presented by the parties to the dispute."[10]

Thus, even if an argument is brought in front of the Panel the latter is not obliged to consider it and thus there is no guarantee, as the question posed above assumes, that it will actually be addressed.

5. Finally India submits that the failure of a Member to come up in the original proceedings with certain possible arguments can hardly prejudice any procedural rights of other Members. It is an ordinary practice of the WTO Dispute Settlement that parties to the dispute modify, withdraw and bring in new arguments during different stages of proceedings. If one accepts that litigation *per se* does not hurt those taking part in it, one should also accept that it is equally harmless to bring in new arguments in support of the old claims legitimately forming part of the terms of reference of a Panel.

For these reasons, India believes that it is appropriate for a 21.5 Panel to base its ruling in respect of a certain claim upon the arguments that could have been made in the original proceedings, but were not.

In the alternative, if India has misunderstood the question, it wishes to present its alternative answer to the following question.

II. "On what basis do you consider that it is appropriate for an Article 21.5 Panel to rule on a claim, that could have been raised in the original proceedings but was not?"

Again, India refers to the pertinent and existing case law as recalled above (*Australia–Salmon (21.5), Mexico–HFCS (21.5), Canada–Aircraft (21.5*), *US–Shrimp (21.5)*).

[10]Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)* ("*EC – Hormones*"), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, para. 156.

1. First of all, India notes that as a rule, a "new" claim (claim, that could have been raised in the original proceedings but was not) is contained in the request for the establishment of a 21.5 Panel and thus falls under its terms reference. For example, in the present proceedings claim under Article 3.5 of the ADA forms part of the document WT/DS141/13/Rev.1 and therefore, falls within the terms of reference of the Panel. It is for this reason in the first turn that it is appropriate for this Panel to rule on it.

2. Furthermore, again there is no legal ground in the DSU to exclude from the terms of reference of a 21.5 Panel claims that although specified in the request for the establishment of a Panel, could have been raised in the original proceedings, but were not:

> "The reference to "disagreement as to the … consistency with a covered agreement" of certain measures, implies that an Article 21.5 compliance Panel can potentially examine the consistency of a measure taken to comply with a DSB recommendation or ruling in the light of any provision of any of the covered agreements. Article 21.5 is not limited to consistency of certain measures with the DSB recommendations and rulings adopted as a result of the original dispute; nor to consistency with those covered agreements or specific provisions thereof that fell within the mandate of the original Panel; nor to consistency with specific WTO provisions under which the original Panel found violations. If the intention behind this provision of the DSU had been to limit the mandate of Article 21.5 compliance Panels in any of these ways, the text would have specified such limitation. The text, however, refers generally to "consistency with a covered agreement"."[11] (underlining in the original)

3. Again it is in the nature of Article 21.5 proceedings that some of the claims will be new since it is always a new revised measure that is examined in its totality by a 21.5 Panel.

4. The objective of prompt settlement of disputes embodied in Article 21.5 is best served by an interpretation that allows to bring in new claims:

> "a complainant, after having prevailed in an original dispute, should not have to go through the entire DSU process once again if an implementing Member in seeking to comply with DSB recommendations under a covered agreement is breaching, inadvertently or not, its obligations under other provisions of covered agreements. In such instances an expedited procedure should be available. This procedure is provided for in Article 21.5. It is in line with the fundamental requirement of "prompt compliance" with DSB recommendations and rulings expressed in both Article 3.3 and Article 21.1 of the DSU."[12]

5. The assumption implicitly contained in the question presupposes that every claim brought by the complaining party in the original proceedings is adjudicated by the Panel. It is well known, however, that due to the principle of judicial economy this is not the case:

> "Nothing in this provision or in previous GATT practice requires a Panel to examine all legal claims made by the complaining party… Furthermore, such a requirement is not consistent with the aim of the WTO dispute settlement system. Article 3.7 of the *DSU* explicitly states: "The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a

[11]Panel Report, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada* ("*Australia – Salmon (Article 21.5 – Canada)*"), WT/DS18/RW, adopted 20 March 2000, para. 7.10, subpara. 9.

[12]*Ibid*.

> dispute and consistent with the covered agreements is clearly to be preferred"…. Thus, the basic aim of dispute settlement in the WTO is to settle disputes. This basic aim is affirmed elsewhere in the *DSU*… A Panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute."[13]

To give an example, in the present case the EC in its third request for the preliminary ruling suggests that India should have brought in the original proceedings two claims under the same Article 3.5 of the ADA. India submits that while it is probably clear today, that this should have been done due to the ruling of the original Panel that India has failed to present a *prima facie* case under Article 3.5, it was not clear at all at the moment of drafting of the request for the establishment of the original Panel. In particular, India had no illusions with respect to the fact that the Panel would exercise judicial economy in regard to this claim especially taking into account the fact that the initial complaint contained 31 claims.

This example also demonstrates that an omission of certain claims in the original proceedings was not bad faith, but rather in order not to overload the Panel with too many claims.

6. India also submits that as a rule ruling by a 21.5 Panel on a claim that could have been raised in the original proceedings, but was not will not prejudice procedural rights of the complying Member irrespective of the fact that deadlines are shorter in Article 21.5 proceedings and no reasonable period of time to comply is available following a 21.5 Panel report.

The illustration from the present case is appropriate. Here the EC has had at least four months at its disposal (7 May 2002 – request for the establishment of the Panel – 10 September 2002 – date of oral hearings) to address India's claim concerning Article 3.5. It may be the case that four months is less than Members have during the original proceeding. This in itself, however, is not a proof of the fact that the EC has suffered any prejudice to its procedural rights.

As for the absence of the reasonable period of time for compliance following a 21.5 Panel proceedings, India submits that the prejudice from the lack of such could arise only in one case, *i.e.* when the "new" claim is the only claim before a 21.5 Panel or when a 21.5 Panel has found that there is not a single other inconsistency of a revised measure with the WTO Agreement. As it has been recently noted elsewhere:

> "In waiting until after the defendant government completes its compliance to introduce a new issue, the complainant government puts its adversary in an arguably unfair predicament of having no time to correct an unanticipated violation. In *US-FSC* the Article 21.5 Panel held that *none* of the previously-found WTO violations were corrected, so the addition of a new issue did not engender much unfairness. Yet one can imagine circumstances where the defendant does succeed in responding to all of the recommendations of the DSB only to get blindsided in the Article 21.5 proceeding with a new complaint about a WTO violation that may have been intentionally or unintentionally omitted from the original dispute."[14] (underlining added)

In the present case which resembles the facts of the *US–FSC* (*21.5)* case instead of the situation described in the last sentence of the citation, India has not brought claims exclusively under Article 3.5 of the ADA. Rather India has brought claims with respect to the numerous violations of the

[13]Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India* ("*US – Wool Shirts and Blouses*"), WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323, pages 18-19.

[14]Jason E. Kearns and Steve Charnovitz, Adjudicating Compliance in the WTO: A Review of DSU Article 21.5, JIEL, Volume 5, Issue 2, July 2002: p. 349.

covered agreements some of which have already been accepted by the EC during the meeting with the parties.

7. Finally, as India has already stated in its oral statement during the meeting with the parties the situation of claims that form part of the terms of reference of a 21.5 Panel and that could have been raised in the original dispute, but were not, is already familiar to WTO dispute settlement. In the *US-FSC (21.5)* the EC did not in the original proceedings bring the claim under Article III of the GATT 1994.[15] This, however, has not precluded the EC from raising this issue during the Article 21.5 proceedings. Neither did it preclude first the Panel and then the Appellate Body from making finding in respect of claim under Article III of the GATT 1994.

Furthermore, in the *EC–Bananas (21.5) (Ecuador)* the EC has unsuccessfully argued exactly the same issue:

> "The European Communities notes that it would be disadvantaged if new claims were allowed because the shorter period of time allowed for an Article 21.5 panel process (90 days compared to a normal panel timetable of at least six months) would affect its ability to defend its measures and because it would not be entitled to a new reasonable period of time to implement any new panel recommendations or rulings."[16]

Understandably the Panel did not pay much attention to this argument:

> "As to the EC's argument that it is unfair to expect it to defend itself in respect of new issues in an expedited panel process, we note that the issues raised by Ecuador in this proceeding are quite similar to those raised in *Bananas III*. As to the EC's argument that it will be deprived of a reasonable period of time in which to implement any new recommendations and rulings of the DSB, that would not justify limiting the scope of an Article 21.5 proceeding. In any event, in our view, these arguments to restrict the scope of Article 21.5 on the grounds of alleged unfairness are not based on the text of Article 21.5 and do not offset the arguments outlined above concerning the need to resolve promptly implementation issues in one panel proceeding."[17]

Since adopted Panel and Appellate Body reports create legitimate expectations among the WTO Members[18] India submits that it is legitimate expectation that the present 21.5 Panel as well as subsequent 21.5 Panels will follow this example in their reports.

For these reasons, India believes that it is appropriate for a 21.5 Panel to rule on a claim, that could have been raised in the original proceedings but was not. India, however, emphasises once again that situation described in India's question 2.II addressed in the section 2.II above does not reflect realities of the present case and thus has no relevance to it, unless the Panel decides otherwise.

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[15] *United States – Tax Treatment for "Foreign Sales Corporations"*, Request for the Establishment of a Panel by the European Communities, WT/DS108/2 of 9 July 1998.

[16] Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by Ecuador* ("*EC – Bananas III (Article 21.5 – Ecuador)*"), WT/DS27/RW/ECU, 12 April 1999, para. 6.3.

[17] *Ibid*., para. 6.10.

[18] Appellate Body Report, Japan – Taxes on Alcoholic Beverages ("Japan – Alcoholic Beverages II"), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97, at 14.

3. In para. 72 of its FWS, the EC referred to Article 6.10 to substantiate its arguments and respond to India's arguments with respect to relevant context for the interpretation of Article 2.2.2(ii). Was India referring to this particular provision, as the EC suggests?

Reply

Yes. This was in addition to footnotes 2 and 5 to which India also referred.

4. *In para. 90 of the Indian Second Written Submission, India states that the principle of good faith as enshrined in the Vienna Convention ensures that the EC case law constitute context, and refers to the rulings by the European Court of Justice. How can this be considered as relevant "context" for the interpretation of the ADA under the Vienna Convention? Can India express its views on the difference, if any, between the* ***performance*** *of a treaty and the* ***interpretation*** *of a treaty in the context of the principle of good faith?*

Reply

India recalls that "the principle of good faith, which is, at once, a general principle of law and a principle of general international law, … informs the provisions of the *Anti-Dumping Agreement*, as well as the other covered agreements".[19]

As enshrined in the Vienna Convention this principle requires States to both: (1) perform treaty in good faith (Article 26) as well as (2) to interpret treaty in good faith (Article 31). Thus ***performance*** of a treaty obligation means carrying out the substance of the mutual understanding embodied in the treaty honestly and loyally. Accordingly, ***interpretation*** of a treaty provision pre-supposes the same attitude to the clarification of the mutual understanding embodied in the treaty, *i.e.* in an honest and loyal manner. Naturally both processes are closely related and indeed the failure to demonstrate good faith in one of them necessarily results in the bad faith in the other.

One of the manifestations of the principle of good faith is the concept of estoppel.[20] "Estoppel is premised on the view that where one party has been induced to act in reliance on the assurances of another party, in such a way that it would be prejudiced were the other party later to change its position, such a change in position is "estopped", that is precluded".[21] India submits that the concept of estoppel is of importance in the process of treaty interpretation. In particular, where one party has been induced to act in reliance on a certain interpretation of a treaty provision made public by another party, in such a way that it would be prejudiced were the other party later to change its position, such a change in position is "estopped", that is precluded.

In this context India submits that interpretation of certain provisions of the Regulation 384/96 identical to those of the ADA as applied by the EC in its everyday domestic practice should preclude the EC from advocating a different interpretation of the same provisions at the WTO level. Alternatively, if the panel while not accepting EC arguments develops its own line of reasoning similar to the one contained in the interpretations proposed by the EC, the panel still should find a

[19]Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ("*US – Hot-Rolled Steel*"), WT/DS184/AB/R, adopted 23 August 2001, para. 101. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, para. 158; Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, para. 166.

[20]Ian Brownlie, Principles of Public International Law, 5th ed (Oxford: Clarendon Press 1998), at 17-18.

[21]Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico* ("*Guatemala – Cement II*"), WT/DS156/R, adopted 17 November 2000, para. 8.23.

violation of the respective provision of the ADA as being applied in bad faith. It is in this sense that India consider the judgments of the ECJ to be a relevant context for the interpretation of the ADA under the Vienna Convention. It is India's understanding that Panel's question 16 to the EC in the present proceeding as well as, for example, Panel's questions 3 and 48 in *United States–Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* (WT/DS213) are being put forward precisely in order to identify the good faith of the EC or lack thereof in its arguments.

India also notes that, in the same way as in respect of Article 2.2.2(ii) of the ADA, the EC should be precluded to raise arguments in respect of India's approach to interpretation of Article 5.7 of the ADA. Or, alternatively, the EC should be found to act in bad faith under this latter provision and thus violate it. India recalls that contrary to what it argues in the present case, it was *the EC* in *United States–Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* which took the view that the *de minimis* standard contained in Article 11 of the ASCM should also apply in review proceedings even though Article 21 does not expressly repeat that *de minimis* standard.[22]

5. Could India expand on its assertion that Article 5.7 of the ADA prohibits separate consideration of injury and dumping in the circumstances of this dispute, in view of the fact that Article 11.2 specifically allows separate reviews of injury and dumping ?

Reply

It is correct that Article 11.2 *first* mentions the possibility of a separate review of dumping or injury. Article 11.2 however *also* foresees a review of "*both*" dumping and injury as a third possibility. More specifically, the second sentence of Article 11.2 mentions three situations substantiating the need for a review:

(1) whether the continued imposition of the duty is necessary to offset dumping;

(2) whether the injury would be likely to continue or recur if the duty were removed or varied;

or

(3) both.

When, as a result of the DSB findings—and assuming that the re-determination and the subsequent actions qualify as a review—it was necessary to re-do *both* dumping and injury, the EC found itself in this third situation.

[22]Report on *Certain Corrosion Resistant Carbon Steel Flat Products from Germany WT/DS213/R of 3 July 2002*, paragraph 5.41 last sentence:

> "The EC submits that, for the reasons stated above, this threshold is not appropriate, and that since 0.53 per cent is below the 1 per cent *de minimis* level which should apply in sunset reviews, the US was in breach of Article 21.3 in continuing the measure" (emphasis in original)

and paragraph 5.112:

> "… a systematic and good faith interpretation of Article 21.3 with Articles 21.1, 22.1, 22.7 and 11.9 of the *SCM Agreement*, would suggest clearly that the *de minimis* rule of 1 per cent should be applied also in sunset reviews."

Or, as the EC stated in paragraph 5.417:

> " … the US is proposing again a formalistic interpretation of the terms of Article 21.3 and in complete isolation of its object, purpose and context."

India has not challenged that injury or dumping could be assessed separately. In such a situation it could be possible that either injury or dumping could be assessed without assessing the other.

What India has challenged is that *once both* findings were under reconsideration, the important procedural discipline enshrined in Article 5.7 should be respected. Thus, once injury and dumping were both up for revision it was illegal to do so in various episodes.

In this connection India has recalled the recent Panel Report concerning *Certain Corrosion Resistant Carbon Steel Flat Products from Germany*. In that case it was *the EC* which took the view that the *de minimis* standard contained in Article 11 of the ASCM should also apply in review proceedings even though Article 21 does not expressly repeat that *de minimis* standard.[23] The Panel in that case agreed.[24] While that Panel recognized that the text of the *de minimis* provision did not mandate its application in a review, it found that the terms of the provision were unequivocal.[25]

That Panel took into account that the provision in question was couched in mandatory and strong language, conveying that the drafters had in mind a particular outcome to protect exporters and to prevent trade harassment. Eventually the panel concluded, *inter alia*, that finding otherwise would compromise the disciplinary framework that the drafters sought to create throughout the Agreement.[26]

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[23] *Ibid.* paragraph 5.41 last sentence:

> "The EC submits that, for the reasons stated above, this threshold is not appropriate, and that since 0.53 per cent is below the 1 per cent *de minimis* level which should apply in sunset reviews, the US was in breach of Article 21.3 in continuing the measure" (emphasis in original)

and paragraph 5.112:

> "… a systematic and good faith interpretation of Article 21.3 with Articles 21.1, 22.1, 22.7 and 11.9 of the *SCM Agreement*, would suggest clearly that the *de minimis* rule of 1 per cent should be applied also in sunset reviews."

Or, as the EC stated in paragraph 5.417:

> " … the US is proposing again a formalistic interpretation of the terms of Article 21.3 and in complete isolation of its object, purpose and context."

[24] *Ibid.*, paragraphs 8.56-8.81.

[25] *Ibid.* paragraph 8.59.

[26] *Ibid.* paragraph 8.59:

> " … we recognise, at the outset, that nothing in the text of the provision provides for its de minimis standard to be implied in Article 21.3. What is clear from this language, however, is that a de minimis subsidy cannot be countervailed, and that, upon a finding of a de minimis subsidy, the Agreement mandates but one outcome. Investigating authorities must not only terminate the investigation, but they must do so immediately. The terms of the provision are unequivocal. Such mandatory ("shall") and strong ("immediate") language would suggest that the drafters had an important consideration in mind in drafting this provision, reflected in the precise choice of words. In particular, the mandatory nature and strong language of the provision convey, in our view, that the drafters sought a particular outcome, to protect exporters under investigation and prevent trade harassment through continuation of an investigation of a de minimis subsidy."

And 8.79:

> "In sum, we consider that the rationale for the de minimis standard set out in Article 11.9 is clearly that CVDs are to be used to counter injurious subsidisation, and the threshold set out in this provision demarcates the level below which subsidisation is deemed to be so small as to be non-injurious for purposes of the imposition of CVDs. Having found this to be the case, and having established that one of the objects and purposes of the SCM Agreement is to regulate the imposition of CVDs and to create a disciplinary framework therefor, we are of the view that the de minimis standard must be applicable to sunset reviews as it is to investigations. Finding otherwise would compromise the very object and purpose of the SCM Agreement and the disciplinary framework that the drafters sought to create through the Agreement."

India respectfully submits that the EC admit that similar logic applies to Article 5.7 of the Anti-Dumping Agreement. India has in its submissions already recalled the mandatory and strong language of Article 5.7 conveying the idea that the drafters had in mind a particular outcome to protect exporters and to prevent trade harassment. In other words, having arrived in the third situation substantiating the need for a review, in which both dumping and injury must be re-assessed, such findings should not be separated if one were to respect the disciplinary framework that the drafters sought to create throughout the Agreement.

6. A. Given that Article 6.10 does not require that the "sample" in the investigation of dumping be a "statistically valid" sample, and that therefore there is no guarantee that the chosen sample will, in actual fact, be representative of the whole population of producers, on what basis does India support its assertion that the proportion of imports found to be dumped in the sample must, in all cases, be applied to the imports from non-investigated producers.

Reply

As a preliminary observation India respectfully disagrees with the premise of this question (that Article "does not require" that samples are statistically valid). In particular, the plain text of the second sentence of Article 6.10, provides two possibilities to the investigating authorities.

The authorities may:

> ""limit their examination either to a reasonable number of interested parties or products by
>
> [1] using samples which are statistically valid on the basis of information available to the authorities at the time of the selection,
>
> or
>
> [2] to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated." (underlining added)

The text of the first option of this second sentence of Article 6.10 presumes, therefore, that samples are statistically valid (samples "which are statistically valid").

This first option to limit the examination was the choice that was applied by the authorities in this case: the authorities chose the sample. The original panel report at paragraph 2.5 also acknowledged that the EC conducted its analysis of dumping based on a sample of Indian exporters. It is the Agreement that presumes that the sample is statistically valid. The EC has not challenged the statistical validity of its sample.

Moreover, even if that sample so chosen is not statistically valid (a question which is not in dispute here), one can still argue that a "sample" is still a "sample" and *ipso facto* intended to represent the whole. When India asked the EC, during the meeting with the Parties, what meaning the EC attached to the word "sample" the EC agreed with the dictionary (and common sense) definition of a sample as presented by India in its First Written Submission.

As regards the precise question of the Panel "*on what basis does India support its assertion that the proportion of imports found to be dumped in the sample must, in all cases, be applied to the imports from non-investigated producers*" India recalls that its premise is that a sample is intended to see what the whole is like. Since a sample is meant to see what the whole is like, there is, in principle, no reason to acknowledge the results of a sample in some cases but not in all cases. This is only different

when there would be specific and compelling reasons not to acknowledge such results. No such reasons to disregard the results of the sample exist in the context of the injury determination. If the result of the sample is *de facto* ignored, this time because more than half of the sample is non-dumped, there is no compelling reason to accept the results of the sample in the future, even if the whole sample shows dumping.

In fact, one can seriously wonder why in case of Pakistan the result of the sample was completely accepted to represent the country as a whole; if the "logic" of the EC as applied to India would have prevailed for Pakistan, all zero and *de minimis* margins in that sample should have been disregarded, and co-operating non-sampled producers in Pakistan should have been attributed a weighted average dumping margin, even if there was no proof for it. Indeed, by taking a different, even contradictory, approach for the two countries as regards the meaning of the sample it cannot be said that the evaluation of the facts was "unbiased and objective."

B. Assuming this were done, and an anti-dumping order were applied, would India consider that dumping duties could only be collected on a proportion of future imports equal to the proportion of imports found to be dumped during the investigation period?

Reply

India does not consider this and the question is therefore not applicable.

C. If so, how would India envision that this could be done? In particular, please discuss in this context the implications of the first sentence of Article 9.2.

Reply

As noted, India does not consider this.

D. If India does not consider that dumping duties could only be collected on a proportion of future imports equal to the proportion of imports found to be dumped during the investigation period, could India explain how it would justify the different treatment of imports in the two contexts – i.e., as dumped for the assessment of anti-dumping duties in the future, but as not dumped, in part, for the determination of injury?

Reply

India has pointed out in its written submissions, and during the meeting with the parties, that the rules on the collection and imposition of duties must be separated from the rules that establish dumping and injury.

The dumping and injury findings logically precede the establishment of the level of a duty. The determination of the level of a duty takes place only if and when dumping and injury have been found to exist. The Article 9 that regulates the imposition of a duty is also clearly separate from the rules on the determination of dumping, injury, and the use of a sample.

In the context of the final determination of the duty, *once* dumping and injury are established, Article 9.4 contains a very specific exclusion concept for the purposes of calculating the weighted average duty for co-operating non-sampled producers. Specifically, Article 9.4 mentions that in the determination of the weighted average duty authorities shall disregard three sets of margins. This qualifying language of that Article specifically restricts that exclusion very explicitly to "the purpose of *this* paragraph" for the determination of a duty. This qualifying language is precise and unequivocal. Hence, as India has pointed out, such exclusion concept should not be read into a

situation such as the determination of injury. This qualifying language does not exist elsewhere in the Agreement.

Accordingly it is possible that even though a sample shows no dumping margin for exporters representing 53% of the volume, a weighted average *duty* can still be calculated (if injury is established) based on the results of the other exporters, calculated under the specific rules of Article 9.4.

At the risk of repetition, the qualifying language only exists for the purpose of the establishment of a duty. There is no reason to assume that the qualifying language with its exclusion concept, and which comes as a last step, and only for the determination of a duty, should be interjected in the previous steps of determining dumping and injury. Indeed, it is textually unsound to impute the specific exclusion concept that exists in the context of a duty determination into the preceding context of the dumping and injury determination.

Had the drafters wished that the qualifying language with the exclusion concept should apply in the context of dumping and injury they would have included that specific logic into Article 6.10 ("for the purpose of injury the non-dumped imports in a sample should not count as non-dumped imports"). Or they would not have restricted the text of Article 9.4 into such a limited scope of application ("for the purpose of this Agreement", rather than "for the purpose of this paragraph"). The drafters did neither.

To answer the question more precisely, the different treatment for the purpose of dumping and injury on the one hand, and the purpose of duties on the other hand, follows from the specific method foreseen in Article 9.4 for the determination of the weighted average duty for co-operating non-sampled producers. The express and specific exclusion for duty purposes in Article 9.4 brings with it that no such exclusion should be implied in Article 6.10. As the Appellate Body noted in *India – Patents*: "principles of interpretation neither require nor condone the imputation into a treaty of concepts that were not intended."[27]

For the sake of completeness it may be noted that co-operating exporters, not selected in the sample but subjected to such weighted average duty, could request a refund under Article 9.3.2 if they show, individually, that they are not dumping. They could also request an individual, partial, interim review if they would wish that.

7. In the context of injury factors for which data were analysed by the EC in the redetermination, A. what information relating to inventories, capacity utilisation and investment were not specifically elaborated upon by the EC? B. What in India's opinion were the other factors for which data were neither collected nor ultimately analysed? C. In what respect was the analysis conducted by the EC inadequate?

Reply

India first recalls the recitals of the re-determination as regards stocks and capacity utilisation.

> "4.4.2 Stocks and capacity of production
>
> (28) These indicators were found not to have a bearing on the State of the Community industry.
>
> (29) As to stocks, this is the case for two reasons. Firstly, production (e.g. of printed patterns) often takes place in response to or in anticipation of orders placed by

[27]Appellate Body Report, WT/DS50/AB/R, adopted 16 January 1998, para. 45.

particular clients, thus reducing the possibility to produce purely for stocks. Secondly, stock valuation often takes place at 31 December, which is towards the end of a peak period of activity for the bed linen sector. Large stock variations can take place between one year and another simply because of large orders leaving the warehouse on 30 December in one season and 2 January the next. While some increase in stocks was observed in some companies, neither the complainant nor any sampled producer adduced increase in stocks as evidence of injury. An increase in stocks in this sector can thus indicate increased actual or anticipated orders rather than unsold production.

(30) As to production capacity, the Community industry is characterised by a large number of highly flexible small and medium-sized companies. Machinery can, relatively easy, be bought, sold or used for other products. Under these circumstances, reliable capacity of production figures were extremely difficult to establish throughout the period concerned in the present case. However, the investigation showed that many producers were able to maintain a high rate of capacity utilisation and even had to subcontract surplus production, to allow them to run at high utilisation even in depressed periods."

India will now turn to the specific questions.

7.A "[W]hat information relating to inventories, capacity utilisation and investment were not specifically elaborated upon by the EC?"

7.A.1 Stocks

As a first observation India recalls that the investigation period ran from 1 July 1995 to 30 June 1996. The EC does not provide any data pertaining to these two cut-off points. These two cut-off points would logically have been relevant for measuring the difference between the opening stock and the closing stock, *i.e.* the actual stock movement.

Despite this investigation period running from July to June, the EC only provides a speculative assessment as regards the theoretically expected behaviour of stocks right in the middle of the investigation period (30 December – 2 January). Since both the opening and closing date of the I.P. were at a maximum six-months distance of that midpoint one may only wonder about the relevance of the EC's contemplation.

To answer the question ("*A. what information were not specifically elaborated upon by the EC?*"): the information not elaborated upon is the situation of stocks at the beginning and end of the investigation period. In fact, those data remain completely unknown as of today, more than seven years after the investigation period. India has already pointed out that at the EC wide level consumption was measured (in the original provisional Regulation, recital (63)) with a deliberate disregard for stocks. This latter recital was confirmed in recital (20) of the re-determination.[28]

Despite the absence of stock collection—as also witnessed by the very design of the questionnaire which does not ask such question—the EC then states that "some increase in stocks was observed for some companies"; in fact this is the only "information" that was ever disclosed as regards stocks. This observation from the EC in itself raises two questions: What about the stock situation for other companies? For which period was this increase observed? Was it for the year-end turn that the EC described? Or was it for the difference between 1 July 1995 and 30 June 1996? Again, to answer the question ("*A. what information were not specifically elaborated upon by the EC?*"): The information

[28]See also India FWS, footnote 82.

not elaborated upon here is therefore the actual situation of stocks for other companies not belonging to the "some companies" as defined. To answer the third question ("*C. In what respect was the analysis conducted by the EC inadequate?*"): the analysis is based on an observation only with respect to (allegedly) part of the facts; and even those facts are not known.

7.A.2 Capacity Utilization

The only "hard" fact information that was ever revealed is that "the investigation showed that many producers were able to maintain a high rate of capacity utilisation and even had to subcontract surplus production"; the fact that even these figures are uncertain is because the EC qualifies the statement by a preceding statement indicating that the figures are not reliable. The other sentences in the recital do not reveal any facts but only contain unsubstantiated allegations. To answer the precise question ("*A. what information were not specifically elaborated upon by the EC?*"): no facts are disclosed about the actual rate of capacity utilisation, nor about the benchmark against which this rate of utilisation was compared. The fact that surplus production even had to be subcontracted indicates that there were even more orders than could be digested, a fact which however remains unaddressed. To answer the third question ("*C. In what respect was the analysis conducted by the EC inadequate?*"): there is no analysis based on facts. There is only a statement that the utilization was so high that some production had to be outsourced. No analysis is made based on the scarce facts as disclosed.

7.A.3 Investments

No data on investments are contained in Regulation 1644/2001. Section 4.4.6 of that Regulation that purportedly deals with investments reveals no data. It only states at recital (39) that: " … the maintenance of the production tools was the main purpose of the Community's investments during the period considered". This statement is followed by a table that reveals profits divided by investments, also in indexed form. The only thing, if any, that the table shows is that the profits divided by investments was always positive and always 7% or more. Indeed, the profits on investments during the investigation period were the same as in 1993. To answer the question ("*A. what information were not specifically elaborated upon by the EC?*"): for example, the actual investments are not disclosed. The documents that previously accompanied the disclosure [India-Exhibit-RW-5] only showed that throughout all the years the industry has continued to steadily invest, even though the actual amounts are unclear. Throughout the injury analysis period there was always a positive return on investments. To answer the third question ("*C. In what respect was the analysis conducted by the EC inadequate?*"): the EC does not draw any conclusions as regards the continued investments and positive return on investment over all the years. There was no analysis.

7.B What in India's opinion were the <u>other</u> factors for which data were neither collected nor ultimately analysed?

India first recalls that the Panel found in paragraph 6.167 of the original Report, basing itself on its two preceding paragraphs, that data was not even collected for all the factors listed in Article 3.4. As the EC admitted during the meeting with the parties: it did not go out in the field and collect the missing information.

For India to identify what factors exactly were not collected it may therefore first of all rely on the facts as found in the original panel report. These findings were not challenged by the EC, nor did those facts change after the adoption of the Reports by the DSB (during the meeting with parties the EC once again confirmed that it did not go out in the field and collect data on all missing factors).

In paragraph 6.165 the Panel identified "productivity; return on investments; utilisation of capacity; the magnitude of the margin of dumping; cash flow; inventories; wages; growth; ability to raise capital or investments" as factors that were not even referred to in the original Provisional Regulation.

In paragraph 6.166 the Panel identified that data for the Community industry and the sampled producers was only collected for "trends" concerning production, sales by value, employment, prices, and profitability. The trends at the level of the entire Community (i.e. outside the domestic industry) "provides", as the Panel noted in paragraph 6.182, "no basis for conclusions about the impact of the dumped imports on the domestic industry itself."

No additional data collection took place after the original DSB report. The situation about uncollected information has therefore remained unchanged. This therefore implies that the following factors were neither collected or analysed for the Community industry or the sample:

> market share; productivity; return on investments; utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; cash flow; inventories; wages; growth; ability to raise capital or investments.

Given that in the question above the items (1) inventories, (2) capacity utilization, and (3) investments are already identified in the question as not collected, and granted that the "margin of dumping" was collected in the investigation of dumping, the following other factors also remained uncollected since the original panel findings:

(4) market share;

(5) productivity;

(6) return on investments;

(7) factors affecting domestic prices;

(8) cash flow;

(9) wages;

(10) growth;

(11) ability to raise capital or investments.

It can also be noted from the questionnaire sent to EC producers (page 11) that information on a number of factors has simply never been collected; instead the EC merely requests producers to *"describe the effects"* on items such as (1) market share, (2) sales, (3) prices, (4) production, (5) capacity utilisation, (6) stocks, (7) employment, (8) profitability, (9) ability to invest, (10) etc.

7.C In what respect was the analysis conducted by the EC inadequate?

Data on the aforementioned factors were not collected, as found by the Panel in the original Report, and the EC did not appeal this finding. As the EC admitted during the meeting with the parties: it did not go out in the field and collect the missing information.

Surely a factor cannot be evaluated without the prior collection of the relevant data.

In case it is somehow established that the data were collected, then India refers to paragraphs (157) through (213) of its First Written Submission as to how this analysis was inadequate. In this regard India also refers to paragraphs (150) through (181) of its Second Written Submission.

8. India has challenged the sequence of reasoning of the EC regarding its analysis of injury factors (see in particular, paragraphs 147-152 of India's First Written Submission with respect to inventories and paragraphs 153-156 of that submission with respect to capacity utilization). Does India consider that a particular order or sequence of reasoning could negatively affect the analysis of these factors? If so, can India explain why?

Reply

As India has stated in paragraph 52 of its FWS, "facts pertaining to a certain factor must *first* be collected and brought on record, *after* which they can be evaluated". India submits that only this logical type of reasoning satisfies requirement of Article 3.4 of the ADA to conduct an "evaluation of all relevant economic factors and indices having a bearing on the state of the industry". The reverse type of reasoning proposed by the EC in its re-determination and previously the provisional regulation not only negatively affects the analysis of injury factors, but actually makes it impossible for an investigating authority to conduct an evaluation, let alone an objective one. If facts pertaining to a certain factor have not been first collected, they logically cannot be evaluated.

India finds support to this statement in the original Panel report:[29]

> "… In our view, the text of Article 3.4 indicates that the listed factors are *a priori* "relevant" factors "having a bearing on the state of the industry", and therefore must be evaluated in all cases.[55]

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[55] We note, in this regard, that the Panel in *Korea – Dairy Safeguard*, interpreting the language of Article 4.2 of the Agreement on Safeguards, which provides that, in making a determination of serious injury or threat thereof in a safeguard investigation, the investigating authority:

"shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, …"

The Panel concluded that the text of this provision made it clear that:

"among "all relevant factors" that the investigating authorities "shall evaluate", the consideration of the factors listed is always relevant and therefore required, even though the authority may later dismiss some of them as not having a bearing on the situation of that industry". *Korea – Dairy Safeguard*, Panel Report, para. 8.123." (underlining and emphasis added)

India also recalls the finding of the Panel in *Argentina–Footwear* which addresses precisely the issue under consideration:

> "Article 4.2(a) requires that during the investigation, the competent authority shall "evaluate all relevant factors of an objective and quantifiable nature". It appears that to satisfy this requirement, the authority should first conduct an appraisal of the data, including confirmation or verification of their accuracy and representativeness. Second, Article 4.2(a) and (b) require full analysis and evaluation of those data, and 4.2(c) including by cross-reference Article 3, requires written presentation of a detailed analysis of the case, including the findings and reasoned conclusions reached

[29] Panel Report, para. 6.155.

> on all pertinent issues of fact and law, and a demonstration of the relevance of the factors examined."[30] (underlining added)

By failing to do exactly this, the EC has therefore acted inconsistently with the specific findings of these three Panel reports, and notably *Argentina-Footwear*.

These Panels will surely have considered that the very order of the sequence evaluating the facts and setting forth the conclusions based on the data on record could indeed and very well negatively affect the result. The formal aspect of data collection and the substantive aspect of objective evaluation of data should not be improperly mixed.

Basically, an evaluation cannot take place without collecting the facts first.

Indeed, by first setting out an evaluation any fact-finding process that follows becomes distorted. In other words: by setting forth a pre-conceived conclusion, the subsequent reasoning (or "factual evaluation") that follows is inherently influenced by the conclusion already set forth. An authority could first set forth the pre-ordained conclusion and will then be able to tailor or select the subsequent facts in such a fashion so as to make the facts fit the desired conclusion. Conversely, by adhering to proper sequencing such manipulation becomes more difficult. A proper sequencing of steps therefore inserts a safety-stop into the fact-finding and evaluation process rather than "rushing to justice" and reaching the required conclusion.

9. Does India consider that the EC is limited to consideration of information that it specifically requested in the questionnaires, or does India admit the possibility that it may be possible to derive necessary information from other information submitted, i.e., derive information on inventories from information on production and exports?

Reply

As India also answered during the meeting with the Parties: the short answer is that some information could in theory be derived from other information. Yet such derivatives do not serve the purpose of independent fact finding.

The collection of information on certain of the 15 factors has, at least, a 'control' function, in addition to an independent function of data collection. By means of illustration, as India pointed out in its second written submission at paragraph 138: some data in the accounts are only reflected at a company level. This is for example exactly the case with stocks. For such purpose the questionnaires for *exporters* invariably contain separate detailed questions and tables on stock data for the product concerned. Data on stocks form an important means in EC anti-dumping practice through which sales and production data are double-checked. Stock records are often kept in different departments than the records on sales; collecting both records from different sources within the same company introduces a basic element of objectivity in the data collection process, similar to the way it is always done at the side of the exporters. While it may therefore in theory be possible that information is "derived", this is not enough to satisfy the obligation to "collect". On the contrary, the fact that certain information is allegedly "derived" is in fact proof that it was never collected.

[30]Panel Report, *Argentina – Safeguard Measures on Imports of Footwear* ("*Argentina – Footwear (EC)*"), WT/DS121/R, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS121/AB/R, para. 8.25.

The longer answer is therefore: yes it is in theory possible but no, it makes no sense. By allowing most factors simply to be derivatives from other data undermines the very essence of objective fact finding.

10. At paragraph 26 of its oral statement, India states that "an overall reconsideration and analysis should, for example, have led to the inclusion of the verified sampled EC producer who was importing the product from Pakistan." A. Could India explain on what basis it considers that this producer should have been included? B. Could India further explain how the Panel can make a ruling on this question, given that India explicitly states that it has made no claim under Article 4.1, which governs the exclusion of importing producers from the domestic industry?

A. Article 3.1 mandates that a determination shall be based on positive evidence.

The evidence on the record has always included verified information from one particular EC producer (paragraph 54 Provisional Regulation). In the original proceeding the evidence pertaining to this producer was excluded after verification. This particular exclusion of positive evidence was at that time possible on the basis of application of Article 4.1(i). Now, since Pakistan is no longer dumping, the exclusion of that positive evidence is no longer possible. In other words, with the absence of dumping from Pakistan, this positive evidence on the record should have been considered. There is no longer any justification to invoke Article 4.1(i) and to exclude that positive evidence on the record.

The evidence pertaining to that producer should have been included in order for the injury determination to be objective and based on positive evidence. The failure to consider this positive evidence is not objective and therefore contrary to Article 3.1 (as well as Article 17.6(i)).

The disregard of positive evidence does not require a claim under Article 4.1(i). This latter Article was only mentioned as an illustration as to why that positive evidence could previously be disregarded but not now.

B. Claim 5 of India relates to Articles 3.1 and 3.4. Since India identified these Articles in its request for the Panel it is perfectly possible for the Panel to rule that positive evidence has been ignored. The fact that Article 4.1(i) is no longer an acceptable excuse for the EC to disregard positive evidence was an *argument* of India to support its claim that Article 3.1 was violated—an illustration as to why that positive evidence could previously be disregarded but not now. While a violation of Article 4.1(i) will always result into violation of Article 3.1, there is no reason to believe that Article 3.1 could be violated only in case there is first an inconsistency with Article 4.1(i). Clearly a measure can be inconsistent with Article 3.1 due to many reasons. In this case Article 3.1 was violated by deliberately disregarding positive evidence on the record and thereby not making an objective determination.

In this connection India also refers to paragraphs 215 through 217 of its First Written Submission. India recalls that this information was only excluded after verification. India also refers to its footnote 34 in its Second Written Submission.

11. India's arguments suggest that it considers that the EC was somehow precluded from imposing an anti-dumping measure on bed-linen imports from India. Is this in fact India's view? On what basis would India assert that a Member may not impose an anti-dumping measure ***consistent with the Agreement****, merely because the original measure on the same products was found to be inconsistent by a Panel?*

India does not contest that a Member may impose an anti-dumping measure which is **consistent** with the Agreement. Yet, since the original measure was found illegal on account of elementary aspects of dumping, injury, and developing country status, it would be unsound to merely permit a simple

reformulation of that illegal measure and then allow it to pass. In fact, and in view of the fundamental mistakes on account of dumping, injury, and developing country status, the most proper way to comply would have been to immediately withdraw the entire measure.

12. Could India please respond specifically to the arguments in the EC's oral statement at paragraphs 41 and 42 concerning the question of the basis on which volume should be calculated, if volume were considered to be the appropriate weighting factor in calculating the weighted average under Article 2.2.2(ii) in this case?

Reply

India has not specified that volume should be measured in a particular manner, *e.g.* "units/sets" rather than weight or size. As India pointed out it only required the EC to adhere to the volume as previously defined, *i.e.* 80% for Bombay Dyeing and 14% for Standard Industries. As India has no means to know how that volume was originally calculated (units, sets, weight, size) it cannot mandate a choice for a particular method of measuring the volume.

What is clear however is that volume is neutral as regards the sizes of the companies and does not attach relatively more relevance to companies that sell at higher prices. Volume flows naturally from relevant context such as footnotes 2 and 5, as well as Article 6.10. The allegation by the EC that the violation is "inconsequential" is not true since it would have led to three companies not found dumping, at least if the EC would stick to the sizes 80-14 as originally declared.

13. Does India agree with the EC's representation of its views as set out in the last sentence of paragraph 56 of the EC's oral statement, that India has not disputed the EC's finding that all imports from non-sampled exporters were dumped? If not, could India please point out specifically where it has disputed the finding referred to by the EC?

Reply

India does not agree. The dispute of this EC finding by India has been India's subsidiary argument (secondary to the argument that a sample should mean what it always means).

Specifically, in its Second Written Submission India has disputed this EC finding in paragraphs 130 through 132. In its Oral Statement India has disputed this EC finding in paragraph 42. In its Closing Statement India has disputed this EC finding in paragraph 42.

14. The EC has argued that the increased cost of raw cotton was not, standing alone, a cause of injury to the domestic industry, but was only a cause of injury in combination with the dumped imports which undersold the domestic product and prevented the EC industry from increasing prices in response to increased costs, thereby resulting in declining profits. The EC has also acknowledged that other factors than dumped imports might prevent a domestic industry from raising its prices in response to increased costs. However, the EC argues, India has not alleged or demonstrated that any such other factors were at work in this case. A. Can India point to any other factors which were known at the time of the original determination that the EC authorities should have addressed in considering why EC producers were not able to increase prices in the face of increased raw cotton costs? In para 233 of India's first written submission, India states that "the EC completely fails to ensure that the injurious effects of the other known factors are not attributed to dumped imports. ***For example****, one factor mentioned in recital (50), the result of prices not being able to pace with inflation in prices of consumer goods, is not discussed at all in point 5.3." (emphasis added). India also references the increase in raw cotton prices. B. What additional "other factors", if any, were in India's view known and should have been taken into consideration but were not?*

A. Clearly, the inflation that was known was not addressed. The "depressed period" during which the analysis took place (see also the answer under B) was also not taken into account. The same goes for the "contraction in demand" (see also the answer under B).

B. India does not, of course, know what all the EC knew but has chosen to disregard. However, from the determinations as published, and the disclosures provided, it would appear that there are a number of such other factors at work:

B.1 The "Depressed Period"

Recital (30) of the re-determination states that the analysis covered "depressed periods". More specifically it states that "the investigation showed that many producers were able to maintain a high rate of capacity utilisation and even had to subcontract surplus production, to allow them to run at high utilisation even in depressed periods." Thus, while the *Bed Linen* industry was apparently suffering from that depressed period, the EC ignores to analyze this as an "other factor."

B.2 The Volume and Prices of imports not sold at dumping prices

The effect of volume and prices of non-dumped imports from all third countries was not properly taken into account as recital (63) of the re-determination suggests.

As is clear from India-Exhibit-RW-26 those imports grew from 31.9% in 1992 to 34.5% in the I.P.; this means that the volume of such imports was known.

As regards prices recital (101) of the original Provisional Regulation explicitly stated:

> " … imports from countries not concerned which undercut the Community industry's prices could also have contributed to the injury suffered by the Community industry."

This means that the prices of such imports were known.

Yet, while the volume and prices of these imports were known—and were even acknowledged as a possible cause of injury—the injury caused by this factor was not taken into account in the re-determination.

B.3 The Contraction in Demand

There was a steady decrease in consumption (recital (104) of the original Provisional Regulation). The EC in that same recital acknowledged that this decline:

> " … has contributed to the situation of the Community industry".

In the re-determination the reasoning changed. Specifically, in recital (62) of that Regulation it was concluded that:

> " … the Community industry was hardly affected, if at all, by the developments in the Community consumption."

Hence, while this other factor was known, and should have been taken into consideration, it was not. Even worse: while this factor was in the original Regulation acknowledged to be a cause of injury, it was not acknowledged to be one such cause in the re-determination.

B.4 Export Performance

In view of the collection of sales data the export performance would probably have been known to the EC, but was not taken into account at all.

To the EC :

15. Do we understand from the EC's fourth request for preliminary rulings that, in the EC's view, those parts of the original determination that were not the subject of a claim in the original dispute, and thus remained unchanged and were adopted by reference in the redetermination 1644/2001 are not part of the measure taken to comply? In this regard, the EC's attention is drawn to paragraph 6.144 of the original Panel report, in which the Panel stated:

> *"Finally, with respect to India's claim that the European Communities failed to properly consider "other factors" which might have been causing injury to the domestic industry, as required by Article 3.5 of the AD Agreement, we note that, with the exception of the argument concerning improper consideration of "dumped" imports, India has made no other arguments in support of this claim. Having rejected India's position in that regard, we consider that India has failed to present a prima facie case in this regard."*

Comment of India:

India respectfully submits that the Panel while examining the response of the EC to this question should take into account the following finding of the Panel in the *EC–Bananas (21.5) (Ecuador):*

> "Article 21.5 refers to the "consistency with a covered agreement of measures taken to comply with the recommendations and rulings"… There is no suggestion in the text of Article 21.5 that only certain issues of consistency of measures may be considered. Nor is there a suggestion that the term "measures" has a special meaning in Article 21.5 that would imply that only certain aspects of a measure can be considered."[31] (underlining added)

India recalls that this finding was in response to the opposite argument of the EC, which in the present case again argues the same as it did in *EC–Bananas (21.5) (Ecuador).*

16. In para. 80 of its FWS, the European Communities mentioned that it used sales value to average the amounts of SG&A and profits because that method is easier to apply and can be used in all the investigations. Is the Panel correct in understanding that this is the standing practice of the Communities in all its investigations? May the EC authorities rely on some other basis for weighting the averages of amounts for SG&A and profits in a particular case? Has the EC ever done so? If yes, in what cases, and can the EC explain the reasons for choosing a different basis?
17. Can the EC respond to the arguments made by India in paras. 55-60 of its FWS?

18. How did the EC obtain the information regarding inventories, capacity utilisation, and investment? were there specific questions put to sampled producers regarding these factors in the questionnaires or otherwise? What was the composition of the sample from which these pieces of information were obtained and what was the methodology used to derive such information from that sample?

[31]Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by Ecuador* ("*EC – Bananas III (Article 21.5 – Ecuador)*"), WT/DS27/RW/ECU, 12 April 1999, para. 6.8.

19. Does the EC consider that the calculation of a dumping margin above de minimis for unexamined producers (i.e., those not examined as part of the sample) constitutes a determination of dumping with respect to those producers?

20. Following the adoption of the original Panel and Appellate Body reports in the Bed-Linen dispute, has the EC undertaken to re-calculate dumping margins for any products subject to an anti-dumping order other than the bed-linen imports from India, Egypt, and Pakistan? Was this done on the EC's own initiative, or in response to requests for review received from interested parties?

21. Could the EC explain the basis for the premise, implied in paragraph 114 of its oral statement, that bed linen producers would pass raw cotton price increases through to customers in the form of increases in the prices of bed-linen? What factors might limit the ability of producers to pass through cost increases in the form of price increases, for instance contractions in demand? Did the EC consider whether any such factors were at work in the bed-linen industry, and if so, how did the EC exclude the possibility that such other factors were the reason cost increases were not passed through. Could the EC address the proportion of such raw material cost increases that would be passed through to customers in the form of price increases in the bed-linen industry under what the EC has referred to as "normal" conditions?

22. In recital 57 of regulation 1644/2001, it is stated that "average sales price did not increase." Does this statement refer to the average price of one (or more) of the reference products, or the average price per kilogram of bed linen? Depending on the answer, please clarify the statements concerning price movements in paragraphs 168-172 of the EC's first written statement and paragraphs 78-79 of the EC's oral statement to the Panel.

To both parties and third parties:

23. In your view, should regulation 696/2002 be considered a measure independent of the EC's efforts to comply? If not, on what basis do you consider that it should be treated as part of the process to bring the measures faulted by the original panel into conformity with the EC's obligations? Please explain how you consider that regulation 696/2002 should be treated in this context?

Reply

As an introductory observation India notes that the DSU does not empower a 21.5 Panel to exclude from its terms of reference certain measures explicitly identified in the request for the establishment of a Panel. In this regard India first wishes to provide the following preliminary comments.

Whether regulation 696/2002 (as well as regulation 160/2002) is a measure independent of the EC's efforts to comply or not, is an issue which cannot narrow the scope of the current proceedings.

In considering the scope of terms of reference of the present Panel, India recalls that when this case was referred to it by the DSB, it was provided that the Panel would have standard terms of reference. Such terms of reference are defined in Article 7.1 of the DSU and, as adapted to this case, are as follows:

> "To examine, in the light of the relevant provisions of the covered agreements cited by India in document WT/DS141/13/Rev.1, the matter referred by India to the DSB

> in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."[32]

As explained by the Appellate Body:

> "'[T]he matter referred to the DSB for purposes of Article 7 of the DSU … must be the 'matter' identified in the request for establishment of a panel under Article 6.2 of the DSU. That provision requires the complaining Member, in a panel request, to 'identify the *specific measures at issue* and provide a brief summary of the *legal basis of the complaint* sufficient to present the problem clearly'. The '*matter* referred to the DSB', therefore, consists of two elements: the specific *measures* at issue and the *legal basis of the complaint* (or the *claims*)."[33]

Thus, pursuant to its terms of reference, the Panel is to consider the matter referred to the DSB by India and that matter consists of the measures and claims specified by India in WT/DS141/13/Rev.1. In case a limitation is suggested in the question, then that cannot be found in the terms of reference of this Panel.

India submits that such limitation also cannot be found in the ordinary meaning of the terms of Article 21.5 of the DSU. On the contrary, in *Australia-Salmon (21.5)* the wording of this provision has been used in order to include into terms of reference of the Panel the measure which has not been explicitly mentioned in the request for the establishment of a Panel:

> "As noted earlier, compliance is often an ongoing or continuous process and once it has been identified as such in the panel request, as it was in this case, any "measures taken to comply" can be presumed to fall within the panel's mandate, unless a genuine lack of notice can be pointed to."[34]

Thus, Article 21.5 has been used in order to expand terms of reference of a Panel rather than to limit them. This interpretation of Article 21.5 of the DSU is supported by its context and the object and purpose of the DSU. For example, Article 21.1 of the DSU states that "[p]rompt compliance with the recommendations and rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members". Article 3, which sets out the general provisions of the DSU, provides in its paragraph 3:

> "The prompt settlement of situation in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members."

India also notes that proponents of the opposite interpretation of Article 21.5 often refer to the following statement of the Appellate Body in *Canada–Aircraft (21.5)*:[35]

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[32]*European Communities–Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India–Recourse by India to Article 21.5 of the DSU*, Constitution of the Panel established, Note by the Secretariat, WTO document WT/DS141/14 of 2 July 2002.

[33]Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico* ("*Guatemala – Cement I*"), WT/DS60/AB/R, adopted 25 November 1998, para. 72.

[34]Panel Report, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada* ("*Australia – Salmon (Article 21.5 – Canada)*"), WT/DS18/RW, adopted 20 March 2000, para. 7.10, subpara. 28.

[35]EC FWS, para. 23.

> "Proceedings under Article 21.5 do not concern just *any* measure of a Member of the WTO; rather, Article 21.5 proceedings are limited to those 'measures *taken to comply* with the recommendations and rulings' of the DSB. In our view, the phrase "measures taken to comply" refers to measures which have been, or which should be, adopted by a Member to bring about compliance with the recommendations and rulings of the DSB."[36]

India fails to see how this statement limits the mandate of a 21.5 Panel. If the quotation of the Appellate Body Report is done properly (the entire paragraph is quoted), it becomes clear that this statement is about the temporal aspect of "measures taken to comply" and not about the limitations of terms of reference of a 21.5 Panel. It explains what *is* the matter before a 21.5 Panel rather than mandates what it *should be*:

> "Proceedings under Article 21.5 do not concern just *any* measure of a Member of the WTO; rather, Article 21.5 proceedings are limited to those "measures *taken to comply* with the recommendations and rulings" of the DSB. In our view, the phrase "measures taken to comply" refers to measures which have been, or which should be, adopted by a Member to bring about compliance with the recommendations and rulings of the DSB. In principle, a measure which has been "taken to comply with the recommendations and rulings" of the DSB will *not* be the same measure as the measure which was the subject of the original dispute, so that, in principle, there would be two separate and distinct measures[37]: the original measure which *gave rise* to the recommendations and rulings of the DSB, and the "measures taken to comply" which are – or should be – adopted to *implement* those recommendations and rulings. In these Article 21.5 proceedings, the measure at issue is a new measure, the *revised* TPC programme, which became effective on 18 November 1999 and which Canada presents as a "measure taken to comply with the recommendations and rulings" of the DSB."[38]

India also recalls that in *Canada–Aircraft (21.5)* the task of the Appellate Body was not to decide whether a certain measure was properly before the Panel, but whether the Panel was entitled to decline to examine the substance of one of Brazil's arguments on the basis of the fact that such argument had not formed part of the reasoning of the Panel in the original dispute.

As regards the precise question itself, India is pleased to present the following comments:

Clearly, as the EC has itself recognised during the oral hearings, regulation 696/2002 (as well as regulation 160/2002) is inextricably linked to the EC's unsuccessful efforts to comply, *i.e.* regulation 1644/2001. This follows from the fact that regulation 696/2002 amends the injury re-determination made in regulation 1644/2001. The fact that regulation 696/2002 was necessitated by the adoption of regulation 160/2002 proves that the latter is also part of EC's "implementation" programme. The EC does not contest the fact that regulations 160/2002 and 696/2002 are closely connected.[39] The EC also does not contest that regulation 1644/2001 is a "measure taken to comply". Logically, therefore, all three measures are "measures taken to comply".

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[36]Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft – recourse by Brazil to Article 21.5 of the DSU* (*"Canada – Aircraft (21.5)"*), WT/DS70/AB/RW, para. 36. (Emphasis added in the original).

[37]We recognize that, where it is alleged that there exist *no* "measures taken to comply", a panel may find that there is *no* new measure.

[38]Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft – recourse by Brazil to Article 21.5 of the DSU* (*"Canada – Aircraft (21.5)"*), WT/DS70/AB/RW, para. 36. (Footnotes and emphasis in the original).

[39]Oral Statement of the EC, para. 10.

India recalls that it is a normal practice of the WTO Dispute Settlement to deal with amendments to "measures taken to comply" as with "measures taken to comply". In *EC–Bananas (21.5) (Ecuador)* a mere fact that certain regulations were taken in order to modify the original EC's bananas import regime was enough to find that these measures are "taken to comply".[40] In *Australia-Salmon (21.5)* the Panel has explicitly stated that "any quarantine measure introduced by Australia subsequent to the adoption on 6 November 1998 of DSB recommendations and rulings in the original dispute—and within a more or less limited period of time thereafter—that applies to imports of fresh chilled or frozen salmon from Canada, is a "measure taken to comply"."[41] As recently has been noted elsewhere:

> "In our view, an Article 21.5 Panel should examine an aggravating measure when there is reason to believe that the measure is linked to the measure that the defendant claims is taken to comply with the DSB's recommendations and rulings. Defendant governments should not be allowed to escape oversight by revoking the original measure only to replace it with another measure that has the same effect."[42]

For these reasons India believes that regulations 696/2002 and 160/2002 form part of the EC' efforts to comply. Thus, India submits that these measures should be treated as "measures taken to comply".

24. Could the parties clarify whether the relevant date for considering the existence or consistency of measure taken to comply is considered to be the date of the ***request*** *for establishment of the Panel, or the date on which the DSB actually established the Panel?*

Reply

India submits that the relevant date for considering the *overall* existence or *overall* consistency of measures taken to comply is the date of the request for the establishment of the Panel. This is without prejudice to the fact that the relevant date for considering the existence or consistency of measures taken to comply *within* the reasonable period of time is the date of expiration of the reasonable period of time.

India also refers to paragraph 17 of its closing statement.

25. What, in your view, does the term "dumped imports" as used in Articles 3.1 and 3.2 mean in the context of the analysis and determination of injury? Specifically, may it be interpreted to include imports from unexamined producers for which a determination of dumping under Article 2 has not been made?

With regard to the first question.

As the panel noted in its original report at paragraph 6.137:

> " … all imports from any producer/exporter found to be dumping may be considered as dumped imports for purposes of injury analysis."

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[40]Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by Ecuador* ("*EC – Bananas III (Article 21.5 – Ecuador)*"), WT/DS27/RW/ECU, 12 April 1999, para. 6.8.

[41]Panel Report, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada* ("*Australia – Salmon (Article 21.5 – Canada)*"), WT/DS18/RW, adopted 20 March 2000, para. 7.10, subpara. 22.

[42]Jason E. Kearns and Steve Charnovitz, Adjudicating Compliance in the WTO: A Review of DSU Article 21.5, JIEL, Volume 5, Issue 2, July 2002: p. 347.

A contrario, India may logically assume that all imports from any producer/exporter not found to be dumping may not be considered as dumped imports for purposes of injury analysis.

As regards the second question.

There is no explicit finding of dumping or explicit finding of absence of dumping for co-operating non-sampled producers. The only evidence that exists is the evidence of the sample that was selected in order to represent the whole.

Now suppose that there are unexamined producers. For these unexamined producers no direct determination of dumping or absence of dumping has been made. This compels the investigating authority to make an assumption as regards the existence or absence of dumping for such producers. If no assumption is made then part of the total of exports of the country would be completely ignored, whether as dumped or non-dumped. Since positive evidence on the record cannot be ignored, either way, there has to be an assumption on the basis of what is available.

If, for example, the sample shows that all exporters from the sample were dumping, then authorities would assume that all imports from the country were dumped, even though no explicit determination was made for such imports. This makes sense: otherwise authorities could land a situation where although the total sample of 5000 tonnes is dumped (out of a total 100,000 tonnes) they would need to ignore the nn-examined 95,000 tonnes.

And *vice versa*: if authorities find that all imports from a sample were non-dumped, they would assume that all imports from that country were not dumped. This makes sense: otherwise authorities could land a situation where although the total sample of 5000 tonnes is dumped, out of the total 100,000 they would still consider 95,000 tonnes as dumped. This was done for example in the case of Pakistan: when the EC found that all imports from the sample from Pakistan were non-dumped, they terminated the case for Pakistan. Thus, in the case of Pakistan the EC acknowledged that the sample was meant to represent the whole.

Now, if there is a situation in between, where half of the sample is dumped, and the other half is non-dumped, then it makes no sense to speculate either way. The analysis of the positive evidence has to be made *unbiased* and *objectively*, and the only way to do so is to take the meaning of a sample to its consequence. When out of 5000 tonnes half is dumped, and the total pool was 100,000 then it is fair and makes sense to assume that out of 100,000 half is dumped, and half is non-dumped. There is no evidence for the total pool either way so the assumption that should be made should be "objective" and "unbiased."

26. Can you elaborate on the meaning and implications of the terms "imposition" and "application" of an anti-dumping measure. Can the two terms be considered as alternatives for one another? Please consider, in your response, other provisions of the ADA where these terms are used in explaining your views.

India has in its Second Written Submission (paragraph 227) already referred to the reasoning of the Appellate Body in *Line Pipe*:

> " … Article 9.1 is concerned with the application of a safeguard measure on a *product*. And we note, too, that a duty, such as the supplemental duty imposed by the line pipe measure, does not need actually to be enforced and collected to be "applied" to a product. In our view, duties are "applied against a *product*" when a Member imposes conditions under which that product can enter that Member's

> market—including when that Member establishes, as the United States did here, a duty to be imposed on over-quota imports. Thus, in our view, duties are "applied" irrespective of whether they result in making imports more expensive, in discouraging imports because they become more expensive, or in preventing imports altogether."[43] (underlining added)

Hence, duties are "applied" when a Member imposes conditions under which that product can enter that Member's market. India considers that the same systemic logic of the Appellate Body as enunciated in *Line Pipe* is capable to find application in the context of the ADA. Even though the EC had suggested in its First Written Submission (para. 267) that the suspension was "unconditional" and therefore was not a form of an application, India has already pointed out in its Second Written Submission (para. 228), there *is* a very specific timing condition.

Accordingly, India submits, anti-dumping measures can be considered applied once a Member imposes conditions under which that product can enter that Member's market irrespective of whether these measures result in making imports more expensive.

As regards the word "imposition", it would appear that its meaning is more limited. Thus, Article 9 of the ADA, specifically carries the title "Imposition and Collection of Anti-Dumping Duties". It would appear therefore that the word imposition is connected with the concrete and ultimate action of levying the charge.

Article 7 of the ADA deals with the application of a provisional measure. Article 7.1 enumerates situations under which provisional measures may be "applied" and Article 7.2 provides examples as to the form of the application of a provisional measure. A provisional measure could take the form of a provisional duty, a security (deposit or bond), or the withholding of appraisement. It would appear that therefore that the word applying is connected with the tentative and not-ultimate act of taking a measure as long as imposes conditions under which that product can enter that Member's market—irrespective of whether these measures result in making imports more expensive.

India therefore respectfully submits that the words imposition and application are not interchangeable. The application of a measure is wider and includes even tentative and non-ultimate acts as long as it imposes a condition under which a product can enter the market. By contrast, it appears that the imposition of a duty is more restrictive and related to the ultimate action of levying the charge.

India also recalls the presumption that different words have different meanings. As early as in *US–Gasoline* the use of different expressions of relationship in the various parts of Article XX of GATT 1994 was seen to show an intention of different degrees of connection. This has been constant jurisprudence. For example, in *EC – Hormones* the Appellate Body held that:

> "The implication arises that the choice and use of different words in different places … are deliberate, and that the different words are designed to convey different meanings. A treaty interpreter is not entitled to assume that such usage was merely inadvertent on the part of the Members who negotiated and wrote that Agreement."[44]

For these reasons, India respectfully submits, the words are not mere alternatives for each other.

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[43] Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* ("*US – Line Pipe*"), WT/DS202/AB/R, adopted 8 March 2002, paragraph 129.

[44] *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/A/R, WT/DS48/AB/R, Report of the Appellate Body adopted on 13 February 1998, para. 164 (citation omitted).

*27. One might argue that, for unexamined producers (i.e., those not individually examined as part of the sample), there is no direct evidence, only indirect evidence from the sampled companies) as to whether there is dumping or not, since there is no information collected from these producers on the basis of which a dumping determination under Article 2 of the AD Agreement might be made. If this is considered to be the case, can the parties and third parties point the Panel to any specific provisions of the AD Agreement (not including the Article 3.1 reference to positive evidence) that address the question of **how** a determination of dumping is to be made for producers for which there is no information?*

Reply

First of all, the Appellate Body noted in *US-Hot Rolled Steel* in paragraphs 55-56, that Article 17.6(i) also defines, in effect, when *investigating authorities* can be considered to have acted inconsistently with the ADA in the course of their "establishment" and "evaluation" of the relevant facts. Thus, Panels must assess if the establishment of the facts by the *investigating authorities* was proper and if the evaluation of those facts by those authorities was unbiased and objective.

Thus, an overbearing consideration for any determination of dumping is that the evaluation of the facts should be "unbiased" and "objective".

This Article 17.6(i) is therefore the first basic provision that addresses the question of ***how** a determination of dumping is to be made for producers for which there is no information?* Whatever way the determination is made, it should be made in a way that is "unbiased" and "objective".

Respecting this overbearing and basic consideration, it is the view of India that elementary calculation-concepts of Article 2, must also apply in the context of determining a weighted average dumping margin. It makes no sense if the basic concepts that do apply with respect to the calculation of a company-specific dumping margin can simply be set-aside when determining a country-wide weighted average dumping margin. India has already noted that such a margin should be distinguished from a duty that may apply on a weighted average basis.

Such basic concepts enshrined in Article 2, include, for example, the obligation to make a "fair comparison" between normal values and export prices as well as the prohibition of "zeroing" negative dumping amounts. These concepts are enshrined, respectively, in Article 2.4, and in the *Bed Linen* case law concerning the prohibition of "zeroing". Respect for these basic concepts should therefore provide compelling guidance as to the question of the calculation of a dumping margin for producers for which there is no information.

Summing up, the Indian method is mandated by the basic concepts contained in Articles 2 and 3.1 as interpreted in light of Article 17(6)(i). By the same token, these provisions prohibit the EC method.

28. The EC's actions in the redetermination might be considered to be one method of making a dumping determination for unexamined producers, based on the calculation of a weighted average margin of dumping for examined producers in the sample. India has proposed another method, based on applying the proportion of imports in the sample found to be dumped to the unexamined imports. Can the parties and third parties point to any specific provisions in the Agreement which either prohibit the EC method or require the Indian method?

Reply

As a preliminary remark India respectfully recalls that its interpretation of the word sample was specifically made in the context of the injury determination. Thus, India has proposed to extrapolate, respectively, the non-dumped and dumped imports of the sample, to the total imports as a whole.

India has in its written submissions already pointed to the text of Articles 3.1, 3.2 and 6.10 itself. This has been further clarified during the meeting with the parties. According to India, the meaning of a sample is what it always means, not what it never means. The fact that for duty purposes there is a very specific rule (under Article 9.4) does not detract from this basic fact.

Clearly such purpose of a sample is to form the basis for an "objective examination" of "positive evidence" of "dumped imports" under Article 3.1 and 3.2. In accordance with Article 17.6(i) this assessment should be "unbiased" and "objective". In other words, once a sample shows that part of the exports are non-dumped, this positive evidence should be assessed, objectively, and not in a manner that makes it less likely or more likely that there is a finding of dumping and injury.

Summing up, the Indian method is required by Article 3.1, 3.2 and 17.6(i) as interpreted in light of Article 6.10. By the same token, those provisions prohibit the EC method.

29. Could the parties and third parties address the meaning and significance of the term "positive evidence" as used in Article 3.1of the AD Agreement? In particular, could the parties address the question whether the EC's method, as described in question 0 above, rests on positive evidence, and the question whether India's method, as described in question 0 above, rests on positive evidence.

Reply

Positive evidence was defined in *US-Hot Rolled Steel* at paragraphs 192-193. The Appellate Body held that

> "192. … The term "positive evidence" relates, in our view, to the quality of the evidence that authorities may rely upon in making a determination. The word "positive" means, to us, that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible.
>
> 193. … the term "positive evidence" focuses on the facts underpinning and justifying the injury determination … "

As India has pointed out, the hard evidence on the record is that 53% of the sample was non-dumped. This evidence pertained to 4,888 tonnes, supposedly representing 18,428 tonnes. These are the only hard facts that underpin the injury determination.

As India has pointed out: there is simply no evidence concerning the balance 13,540 tonnes. Yet, the EC merely *assumes* all those tonnes as dumped. As India noted: this is not objective since no such evidence exists. Following such logic India could equally argue that in the absence of evidence on 13,540 tonnes this should all be treated as non-dumped. Such view would be equally biased.

Hence, the only unbiased and correct approach, as India has argued all along, is that the sample 4,888 tonnes should *represent* the total 18,428 tonnes, if the meaning of a sample is to represent the underlying whole. The only objective conclusion, if one finds that 53% of the 4,888 tonnes is non-dumped, is that 53% of the whole is not dumped.

Clearly, India's method, submitting that 53% of the total is non-dumped, is based on the available positive evidence that 53% of the sample was non-dumped. India's method is therefore both unbiased and objective: it does not overstate nor understate the dumped imports either way.

These views from India should be seen in the light of the Appellate Body's finding on an "objective examination":

> "193. … an "objective examination" requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation. The duty of the investigating authorities to conduct an "objective examination" recognizes that the determination will be influenced by the objectivity, or any lack thereof, of the investigative process."

By contrast, a finding that 86% of the total is dumped (as the EC did), based on the evidence that 53% of the sample—representing the whole—was non-dumped cannot be considered unbiased and objective.

30. In light of the Appellate Body findings pertaining to Article 3.5 of the AD Agreement in US-Hot-Rolled Steel Products from Japan, how do your authorities comply with the obligation to "separate and distinguish" the injurious effects of dumped imports from those of other known causal factors?

Reply

India is confident that its own anti-dumping law and practice is fully in accordance with the Anti-Dumping Agreement. Indian authorities separate and distinguish the injurious effects of other factors. Indian authorities also identify the nature and extent of the injurious effects of such factors.

31. Against what standard would you consider that a Panel should assess whether a Member has complied with Article 21.2 of the DSU? In particular, what specific obligations does this provision impose on Members. In this context, would India please address the actions the EC has cited as fulfilling any obligations it may have under this provision.

Article 21.2 of the DSU states the following:

> "Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement."

It goes without saying that different developing countries have different interests. Besides that, the same developing country may have different interests in different cases depending on the circumstances of a particular case. Thus, the issue of what specific obligation does this provision impose on Members should be decided on case-by-case basis.

In the present case India has requested the Panel to find a violation of Article 21.2 of the DSU due to: 1) the initiation by the EC of a partial interim review of the measures against India; as well as 2) the failure of the EC to comply with the original Panel finding under Article 15 of the ADA. In this regard India also refers to section IV.G.2 of its Second Written Submission, paragraphs 232-251.

As for the actions the EC has cited as fulfilling obligations under Article 21.2 of the DSU India notes the following.

The implementation period depended on the mutual agreement and not on the fact that India is a developing country. If the EC had not accepted the reasonable period of time of five months and two days, India has all grounds to suggest that it would have obtained the same or even better outcome under the Article 21.3 arbitration. Moreover, in any case the EC did not comply within the reasonable period of time.

The EC asserts that it accepted India's request for a Panel the first time it was put on the agenda; however, this is not correct since the request had been made once before even though it was later withdrawn.[45]

As a last resort the EC mentions that it took account of India's interests by suspending the imposition of the measures. As we know now that later action seems not to have been taken in good faith: in retrospect it appears no more than temporary lip service to enable the initiation of yet another *Bed Linen* proceeding and soon to impose duties higher than ever.

To the EC and third parties:

32. India is of the opinion that the outcome of a sample analysis must be extended to the whole. On what basis does the EC consider that this is inappropriate, and that it is appropriate, under the Agreement, to assume that imports from non-investigated foreign producers/exporters are dumped? Third parties are also requested to address this question.

To Korea

33. In the original dispute the Panel found, inter alia, that the EC had failed to comply with the obligations of Article 3.4 by failing to address all the factors set out in that Article in its determination. In reaching that conclusion, the Panel noted that, looking at the list of data considered in the examination of injury, "It appears from this listing that data was not even collected for all the factors listed in Article 3.4, let alone evaluated by the EC investigating authorities." In its oral statement, Korea argued that the EC failed to comply with the Panel's ruling in part because the EC did not collect additional data or information. Is Korea of the view that collection of data would always be necessary in order to conduct a redetermination subsequent to a finding by a Panel of a violation of Article 3.4 for failure to address all the factors set out in that Article, or is its argument based on its view that the EC had not, in fact, collected data on all the factors in its original investigation?

34. Korea argues that using sales value as the weighting factor in calculating weighted average SGA and profits for purposes of Article 2.2.2(ii) distorts the relative importance of the producers' whose information makes up the average by over-representing the producers with higher SGA and prices, and is therefore inconsistent with Article 2.2.2(ii). Korea suggest, however, that using sales value as the weighting factor for purposes of Article 9.4(i) is acceptable because the dumping margin is independent of sales value. Could Korea comment on the potential for distortion arising from using sales value as the weighting factor under Article 9.4(i). Would not weight-averaging based on sales value over-represent the producers with higher dumping margins in the average?

To the United States

35. The United States argues that there is no requirement in Article 2.2.2(ii) as to the weighting factor to be used in calculating weighted average SGA and profits, and therefore investigating authorities have discretion to choose among available possibilities. Does the United States consider that this discretion is unlimited? If not, what are the limitations on that discretion? Does the requirement in Article 2.2.2(iii) that any other method chosen be "reasonable" suggest that the choice of a weighting factor for purposes of Article 2.2.2(ii) must be reasonable? If so, how should a Panel assess whether the choice made in a particular case is reasonable?

[45]India's first written submission paragraph 24.

ANNEX E-2

ANSWERS OF THE EUROPEAN COMMUNITIES TO THE QUESTIONS FROM THE PANEL

23 September 2002

Questions to the EC

Question 15

Do we understand from the EC's fourth request for preliminary rulings that, in the EC's view, those parts of the original determination that were not the subject of a claim in the original dispute, and thus remained unchanged and were adopted by reference in the redetermination 1644/2001 are not part of the measure taken to comply?

. Yes. As explained below, the same is true where India formally stated a claim in the original panel request but submitted no arguments in support of that claim, with the consequence that the original Panel made no ruling of inconsistency with respect to the findings of the original determination that were the subject of such claim.

In this regard, the EC's attention is drawn to paragraph 6.144 of the original Panel report, in which the Panel stated:

> *"Finally, with respect to India's claim that the European Communities failed to properly consider "other factors" which might have been causing injury to the domestic industry, as required by Article 3.5 of the AD Agreement, we note that, with the exception of the argument concerning improper consideration of "dumped" imports, India has made no other arguments in support of this claim. Having rejected India's position in that regard, we consider that India has failed to present a prima facie case in this regard."*

2. As explained in the EC's oral statement[1], in India's original panel request the claim under Article 3.5 was so broadly formulated that it could encompass any conceivable claim under that provision, including the specific claims now raised by India with respect to the inflation in consumer prices and the increased cost of raw cotton.

3. However, India made no arguments with respect to those two "other factors" or, indeed, with respect to any "other factors". For that reason, as recalled in the question, the original Panel rejected India's claim. In view of that, when considering the implementing measures at issue, the EC authorities had no reason to revise their analysis of those two factors, or more generally of any "other factors".

Question 16

In para. 80 of its FWS, the European Communities mentioned that it used sales value to average the amounts of SG&A and profits because that method is easier to apply and can be used in

[1] EC's Oral Statement, para. 22.

all the investigations. Is the Panel correct in understanding that this is the standing practice of the Communities in all its investigations?

4. Yes.

May the EC authorities rely on some other basis for weighting the averages of amounts for SG&A and profits in a particular case?

5. Yes. In general, the EC authorities may depart from an established practice where the specific circumstances of a case so warrant.

Has the EC ever done so? If yes, in what cases, and can the EC explain the reasons for choosing a different basis?

6. Although it has not been possible to review the relevant calculations in all the cases concerned, the European Commission believes that there is no case, at least in recent years, where the practice at issue was not followed.

Question 17

Can the EC respond to the arguments made by India in paras. 55-60 of its FWS?

7. The EC has responded to the arguments made in paragraphs 55-60 of India's First Written Submission in paragraphs 70-78 of its own First Written Submission.

Question 18

How did the EC obtain the information regarding inventories, capacity utilisation, and investment?

8. Data and supporting documents on inventories, capacity utilisation and investments was obtained in the replies to questionnaire responses and during the on the spot verification visits.[2] Data on inventories and investments were also included in the audited accounts, which were either annexed to the questionnaire replies or obtained during the on spot verification visits.[3] Further information on production capacity was available from the complainant, Eurocoton[4]. Finally, data on inventories could also be derived from verified data on production and sales volume.[5]

Were there specific questions put to sampled producers regarding these factors in the questionnaires or otherwise?

9. Yes. First, specific questions were put to sampled producers in the questionnaire both directly (section VI) and indirectly for inventories (sections II and V). It is important to note that in the questionnaire the EC specifically requested that all sections of the questionnaire be completed, that all documents and data be kept available for investigation purposes, and that information beyond that requested in the questionnaire may also be requested. Certain further specific questions were put in the deficiency letters addressed to sampled producers and in the pre-verification communications to

[2] EC's First Written Submission, paras. 151, 153; India-RW-Exhibit-17, pages 4 and 5.
[3] EC's First Written Submission, para. 151; India-RW-Exhibit-17, pages 4 and 5.
[4] India –Exhibit –6, page 30.
[5] EC's First Written Submission, para 151; India-RW-Exhibit-17, page 4.

sampled producers, for instance asking companies to supply or make available inter alia relevant supporting documentation on stocks, capacity and investments for the product concerned.

What was the composition of the sample from which these pieces of information were obtained and what was the methodology used to derive such information from that sample?

Investments

10. Data on investments was sought and obtained from all producers within the sample.[6] Given that the machinery used for the product concerned can also be used for other products, turnover was used to allocate the proportion of investments for the product concerned for each sampled company.[7] The data for each sampled company was then aggregated to obtain an overall figure for the sample.

Inventories

11. Data on inventories in terms of value could be derived from the audited accounts for all sampled producers.[8] The proportion of inventories for the product concerned could be allocated according to turnover. The review of the audited accounts revealed that a number of sampled producers did not have stocks for any finished products at all towards the end of the period considered.

12. Data on inventories could also be derived from verified data on production and sales volume.[9] This was then cross-checked with verified data on the cost of production and average prices of key products obtained for all sampled producers.

13. In addition, during the on-the-spot visits, the majority of sampled producers provided more detailed information regarding inventories relating to the product concerned. This permitted the EC investigating authorities to have a more precise view on the extent of inventories, if any, relating to the product concerned. A number of sampled producers were found to be sub-contracting and had no stocks of bed linen of their own. Certain producers had no (or only marginal) stocks since they were only (or predominantly) producing to order.[10]

14. At the level of individual sampled producers, it was found that any fluctuation in stocks was independent from the performance of the company during the period under consideration, since an increase or decrease in stocks in this sector can indicate orders rather than unsold production.[11]

Capacity utilisation

15. With regard to capacity utilisation, the EC has pointed out that data on production capacity (and hence capacity utilisation) did not exist for the majority of sampled producers.[12]

16. During the on the spot visits attempts were made together with technical staff of the sampled company to construct appropriate amounts for production capacity. However given the differing product mixes of the sampled producers throughout the period under consideration (1992 to the IP), it

[6] India-RW-Exhibit-17, page 5.
[7] Ibid.
[8] EC's First Written Submission, para 151.
[9] EC's First Written Submission, para 151.
[10] EC's First Written Submission, para. 192; EC's Oral Statement paras. 67-68.
[11] Regulation 1644/2001, recital 29.
[12] EC's First Written Submission, paras. 153-154.

was impossible to calculate production capacity or capacity utilisation for the sampled producers with any consistency or accuracy.[13]

Question 19

Does the EC consider that the calculation of a dumping margin above de minimis for unexamined producers (i.e., those not examined as part of the sample) constitutes a determination of dumping with respect to those producers?

17. Yes.

Question 20

Following the adoption of the original Panel and Appellate Body reports in the Bed-Linen dispute, has the EC undertaken to re-calculate dumping margins for any products subject to an anti-dumping order other than the bed-linen imports from India, Egypt, and Pakistan? Was this done on the EC's own initiative, or in response to requests for review received from interested parties?

18. On 5 December 2001 the European Commission published a "Notice concerning the initiation of a review of the anti-dumping measures applicable to imports of threaded malleable cast-iron tube or pipe fittings originating in Brazil, the Czech Republic, Japan, the People's Republic of China, the Republic of Korea and Thailand" (2001/C 342/03, OJ C 342, 5.12.2001, p.5). The scope of the review is limited "to the examination of dumping by those exporting producers in the countries concerned whose duty rates are based on a methodology at issue in the [Bed Linen] reports.", i.e. zeroing and Article 2.2.2(ii). This notice was published following a request made by a Czech exporter. The review has not been concluded yet.

19. On 8 May 2002 the European Commission published, on its own initiative, a "Notice regarding the anti-dumping measures in force following a ruling of the Dispute Settlement Body of the World Trade Organisation adopted on 12 March 2001" (2002/C 111/04, OJ C 111, 8.5.2002, p. 4). With this notice, the European Commission invited "any exporting producer whose exports are subject to existing anti-dumping measures and which considers that the measures should be reviewed in the light of the legal interpretations regarding the determination of dumping margins" contained in the reports of the panel and the Appellate Body in the Bed Linen dispute (i.e. zeroing and Article 2.2.2 (ii)), to request a review. No request has been received so far pursuant to this notice.

20. In connection with this question, the EC wishes to clarify that when it has indicated that Regulation 160/2002 was adopted by the EC authorities "on their own initiative" it did not mean to suggest that those authorities had not acted in response to a request from the exporters concerned, but rather that they were under no obligation to adopt that regulation pursuant to the WTO Agreement. In fact, both the Pakistani and the Egyptian exporters did request the EC authorities to re-determine their dumping margins.

Question 21

Could the EC explain the basis for the premise, implied in paragraph 114 of its oral statement, that bed linen producers would pass raw cotton price increases through to customers in the form of increases in the prices of bed-linen?

[13] EC's First Written Submission, paras. 153-154; EC's Oral Statement, paras. 69-70.

21. It is based on the assumption that the producers of bed linen, like any other market operators, will always try to maximise their profits. Therefore, it is reasonable to assume that they would only refrain from passing on the cost increase if that causes them to lose sales and, as a result, profits, due to the presence of factors such as those discussed below.

What factors might limit the ability of producers to pass through cost increases in the form of price increases, for instance contractions in demand? Did the EC consider whether any such factors were at work in the bed-linen industry, and if so, how did the EC exclude the possibility that such other factors were the reason cost increases were not passed through.

22. At the outset, it must be recalled that, in accordance with Article 3.5, the EC authorities were not required to examine each and every "other factor" which might conceivably have affected the ability of the domestic producers to pass on the cost increases, besides the dumped imports, but only those factors which were "known" to them. Having regard to the submissions of the parties and other evidence available, the EC authorities identified three such "other factors": the competition from other EC producers not included in the Community industry; the evolution of the EC consumption; and the non-dumped imports. The Indian exporters did not bring to the attention of the EC authorities any relevant "other factors" in the course of the investigation.

23. The EC authorities found that the competition from other EC producers was not a cause of injury, as production and sales by those producers declined markedly between 1992 and the Investigation Period (IP).[14] Indeed, 29 of those producers went out of business during that period.[15] Furthermore, the prices of the other EC producers were higher than those of the Indian exporters.[16] For those reasons, it was concluded that the other EC producers did not have a negative impact on the prices of the Community industry. India has at no point contested the assessment of this factor made by the EC authorities.

24. As regards the evolution of demand, the EC authorities found that the EC consumption fell by 7 per cent between 1992 and the IP.[17] Nevertheless, it was also found that the supply fell by a much larger amount, due to the fact that, as just mentioned, 29 EC producers went out of business.[18] In accordance with basic economic theory, the supply and demand trends observed in the EC market should have led, all other things being equal, to an increase in prices, rather than to a decrease. Thus, the decline in consumption cannot be considered as a cause of price suppression. India has not disputed before this Panel the assessment of this factor made by the EC authorities.

25. Finally, as regards imports, the EC authorities found that imports from some other sources, notably from Egypt and Pakistan, could have been a cause of injury.[19] The EC authorities concluded, nevertheless, that imports from India were, on their own, a substantial cause of injury having regard, inter alia, to the following findings:

- Indian prices undercut the prices of the Community industry by 19 per cent during the IP[20];

[14] Provisional Regulation, recitals 107-108. Regulation 1644/2001, recital 64.
[15] Provisional Regulation, recitals 81, 82, 91.
[16] Ibid., para. 44.
[17] Ibid., recital 63.
[18] Ibid., recital 105.
[19] Regulation 696/2002, recitals 44 and 50. The EC recalls its position that imports from Pakistan and Egypt can be considered as "non-dumped" for the purposes of this dispute only in so far as the Panel were to find that Regulations 160/2002 and 696/2002 are measures "taken to comply".
[20] Ibid., recital 10.

- Indian prices were among the lowest. They were lower than the Pakistani prices[21];

- Between the 1994 and the IP, when the financial situation of the Community industry deteriorated most, Indian prices decreased by 25 per cent, whereas Pakistani prices decreased by 3 per cent and Egyptian prices increased by 3 per cent[22];

- Indian imports increased significantly in absolute and relative terms between 1992 and the IP. By contrast, imports from Pakistan remained by and large stable during the same period. Imports from Egypt increased, but at the end of the IP they remained still far below the Indian levels.[23]

26. Again, India has at no point during these proceedings contested the analysis of the effects of other sources of imports made by the EC authorities.

Could the EC address the proportion of such raw material cost increases that would be passed through to customers in the form of price increases in the bed-linen industry under what the EC has referred to as "normal" conditions?

27. As explained above, the EC authorities concluded that, of all the known "other factors", only the imports from certain sources (notably Pakistan and Egypt) could have been a cause of injury. Therefore, it may be reasonably assumed that, in the absence of both those other imports and the dumped imports, the Community industry would have been able to pass on most, if not all, of the cost increase.

28. As also explained, the EC authorities found that, although other sources of imports could have contributed to the injury, imports from India were, on their own, a substantial cause of injury, and indeed a more important cause of injury than those other imports. Thus, it may be reasonable to assume that, under "normal" conditions, i.e. in the absence of dumped imports, the Community industry would have been able to pass on a major portion of the cost increase.

29. The EC authorities did not, nevertheless, attempt to make during the investigation the type of quantification suggested by the Panel, and indeed the EC doubts whether it may be feasible at all. In any event, the EC considers that such quantification is not required by Article 3.5 and that the findings summarised above are more than sufficient to support reasonably the conclusion that there was a genuine and substantial causal link between the imports from India and the price suppression suffered by the EC industry.

Question 22

In recital 57 of regulation 1644/2001, it is stated that "average sales price did not increase." Does this statement refer to the average price of one (or more) of the reference products, or the average price per kilogram of bed linen? Depending on the answer, please clarify the statements concerning price movements in paragraphs 168-172 of the EC's first written statement and paragraphs 78-79 of the EC's oral statement to the Panel.

30. The statement in recital 57 of Regulation 1644/2001 that "average sales prices did not increase" refers to the average price (per kg) of all the defined reference products. As noted in Regulation 1069/97, average prices for the defined reference products fell between 1993 and the IP.[24]

[21] Ibid., recitals 39 and 40.
[22] Ibid., recital 40.
[23] Ibid., recital 38.
[24] Regulation 1069/97, recital 86.

31. By contrast, the average price per kilogram for all bed linen products increased over roughly the same period. As the EC noted in its First Submission[25], the fact that there had been an overall increase in average prices (i.e. on a per kilogram basis), even though there had been a decrease in average prices for the defined reference products, merely reflected the shift in production and sales towards higher value niche products.

32. The EC pointed out in its oral statement to the Panel[26] that India has not disputed that there was such a shift in sales and production towards higher value niche products. Nor did India dispute that average prices actually decreased for the defined reference products in the sample. The fact is that average prices per kilogram may still increase even though average prices per product type decrease, if the proportion of higher value products sold increases. This is precisely what happened in the present case.

To both parties and third parties:

Question 16

In your view, should regulation 696/2002 be considered a measure independent of the EC's efforts to comply?

33. Yes. The injury re-determination for imports from India set out in Regulation 696/2002 was rendered necessary by the previous dumping re-determination for Pakistan and Egypt made in Regulation 160/2002. Had the EC authorities not conducted such dumping re-determination, they would not have been required to determine whether imports from India alone were a cause of injury. As explained elsewhere, Regulation 160/2002 is not a measure "taken to comply" because it concerns measures that were not in dispute before the original Panel. Since the adoption of Regulation 696/2002 was entirely dependent upon the adoption of Regulation 160/2002, it follows that Regulation 160/2002 cannot be considered as a measure "taken to comply" either.

If not, on what basis do you consider that it should be treated as part of the process to bring the measures faulted by the original panel into conformity with the EC's obligations? Please explain how you consider that regulation 696/2002 should be treated in this context?

34. Not applicable.

Question 24

Could the parties clarify whether the relevant date for considering the existence or consistency of measure taken to comply is considered to be the date of the ***request*** *for establishment of the Panel, or the date on which the DSB actually established the Panel?*

35. In its First Submission[27], the EC argued that the relevant date for assessing the consistency of the measures taken to comply with the covered agreements is the date of establishment of the Panel, because that was the date which appears to have been considered as relevant by the panel in US – Shrimps (21.5).*[28]* The agrees with the reasoning of that panel.

[25] EC's First Written Submission, paras. 168-169; Regulation 1069/97, recitals 86 and 87.
[26] EC's Oral Statement, para. 79.
[27] EC's First Submission, paras. 34-35.
[28] Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 by Malaysia* ("*United States – Shrimps (21.5)*"), WT/DS58/RW, paras. 5.12-5.13.

36. The EC, nevertheless, considers that the Panel need not reach the issue of whether the relevant date is that of the panel request or that of the establishment of the panel, since, in any event, all the measures cited by India in its panel request were taken before the earlier of those two dates.

Question 25

What, in your view, does the term "dumped imports" as used in Articles 3.1 and 3.2 mean in the context of the analysis and determination of injury? Specifically, may it be interpreted to include imports from unexamined producers for which a determination of dumping under Article 2 has not been made?

37. As explained in its First Submission, the EC considers that dumping is determined for countries and, therefore, that the investigating authorities are entitled to consider all imports from a country found to be dumping as "dumped imports" for the purposes of Article 3.[29]

38. Should the Panel reject the above interpretation, the EC has submitted in the alternative that in Article 3 the term "dumped imports" means those imports for which the authorities have previously determined that they are "dumped" in accordance with the relevant provisions of the Anti-Dumping Agreement dealing with the determination of dumping, regardless of whether such determination is based on the data collected for each exporter concerned, or on data collected for other exporters, where the authorities have limited their examination in accordance with Article 6.10, or on "facts available", where the circumstances of Article 6.8 are present.

Question 26

Can you elaborate on the meaning and implications of the terms "imposition" and "application" of an anti-dumping measure. Can the two terms be considered as alternatives for one another? Please consider, in your response, other provisions of the ADA where these terms are used in explaining your views.

39. The terms "imposition" and "application" are not synonymous and are not used as such in the Anti-Dumping Agreement.

40. The word "imposition" ("establecimiento" in the Spanish version) alludes to the action whereby the authorities adopt a generally applicable act (a Regulation in the EC) providing for the collection of anti-dumping duties on individual shipments. The term "imposition" is used in that sense, for example, in Articles 9.1, 11.2 or 12.2.2.

41. In turn, when used in connection with the term "anti-dumping duties", the word "application" refers to the action whereby an anti-dumping duty previously "imposed" by the authorities is "made operative"[30], i.e. is levied or collected on individual shipments.

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[29] EC's First Submission, paras. 118-121.

[30] According to the Black's Law Dictionary (West Publishing Co., 1990),
the word "apply" is used in connection with statutes in two senses. When constructing a statute, in describing the class of persons, things or functions which are within its scope; as that the statute does not "apply" to transactions in interstate commerce. When discussing the use made of a statute, in referring to the process by which the statute is made operative; as where the jury is told to "apply" the statute of limitations if they find that the cause of action arose before a given date.

42. Thus, for example, Article 10.1 provides that

> … anti-dumping duties shall only be *applied* to products which enter for consumption after the time when the decision taken under paragraph 1 of Article 9 … enters into force, subject to the exceptions set out in this Article.

43. The decision referred to in paragraph 1 of Article 9 is the decision whether to "impose" anti-dumping duties. This confirms that the "application" of duties is an action which is distinct from and subsequent to the "imposition" of duties.

44. By way of exception to the non-retroactivity rule laid down in Article 10.1, the subsequent paragraphs of Article 10 allow in certain cases the retroactive "levying" (cf. Article 10.2, 10.6 10.8) or "collection" (cf. Article 10.7) of duties. This confirms that, in connection with "anti-dumping duties", the Anti-Dumping Agreement uses the word "apply" as a synonymous of "levy" and "collect". (The term "levy" is defined in footnote 12 as "the definitive or final legal assessment or collection of a duty or tax".)

45. The EC's interpretation of the term "application" is consistent with the object and purpose of the second sentence of Article 15, which is to encourage the adoption of measures that, while providing a remedy to the domestic industry, are less onerous for the exporters than the "application of anti-dumping duties". Where, as in the case at hand, the importing Member decides to suspend the assessment and collection of duties, the exploration of constructive remedies provided for by the Agreement would be superfluous, because any such remedy (e.g. a price undertaking) would be far more onerous for the exporters than the suspension.

Question 27

One might argue that, for unexamined producers (i.e., those not individually examined as part of the sample), there is no direct evidence, only indirect evidence from the sampled companies) as to whether there is dumping or not, since there is no information collected from these producers on the basis of which a dumping determination under Article 2 of the AD Agreement might be made. If this is considered to be the case, can the parties and third parties point the Panel to any specific provisions of the AD Agreement (not including the Article 3.1 reference to positive evidence) that address the question of ***how*** *a determination of dumping is to be made for producers for which there is no information?*

46. The EC would disagree with the suggested distinction between "direct" and "indirect" in so far as it were meant to imply that the use of what the question describes as "indirect" evidence would be less appropriate.

47. Article 6.10 provides that, where it is not possible to determine an individual margin of dumping for each of the exporters under investigation, the authorities may limit the examination to some exporters. It is implicit in Article 6.10 that, where the authorities decide to resort to that possibility, they may use the dumping margins established for the examined exporters in order to determine the margin of dumping of the unexamined exporters. Indeed, if the authorities were prevented from doing so, and had to collect data from the unexamined exporters in order to calculate their dumping margin, the possibility offered by Article 6.10 to limit the examination to some exporters would serve no useful purpose.

48. The Anti-Dumping Agreement, and more specifically Article 6.10, does not prescribe any specific formula to calculate the dumping margin of the unexamined exporters on the basis of the dumping margins established for the examined exporters. This is not saying, however, that the

authorities enjoy complete discretion in making that calculation. Article 9.4 places a ceiling on the rate of the duty that may be applied to the imports from the unexamined exporters. Since the duty rate can never exceed the dumping margin (cf. Article 9.3), the formula set out in Article 9.4 also operates, indirectly, as an upper limit on the dumping margin.

49. India has suggested that the dumping margin of the unexamined exporters should be calculated by averaging the margins of the examined exporters, but without excluding the de minimis and zero margins.[31] That interpretation has no basis in the *Anti-Dumping Agreement*. Moreover, it would lead to an absurd result: in accordance with Article 9.4, the importing Member would be entitled to apply anti-dumping duties to imports from the unexamined exporters at a higher rate than that calculated by using India's formula; further, in accordance with Article 9.4, the importing Member could apply anti-dumping duties to imports from the unexamined exporters even where it has been established, by applying India's formula, that such imports are not dumped.

Question 28

The EC's actions in the redetermination might be considered to be one method of making a dumping determination for unexamined producers, based on the calculation of a weighted average margin of dumping for examined producers in the sample. India has proposed another method, based on applying the proportion of imports in the sample found to be dumped to the unexamined imports. Can the parties and third parties point to any specific provisions in the Agreement which either prohibit the EC method or require the Indian method?

50. Contrary to what is suggested in the question, India's "method" is not "one method of making a dumping determination for unexamined exporters". Unlike the EC's "method", India's does not allow to determine what is the dumping margin of the unexamined exporters. Its sole purpose is to establish what is the volume of dumped imports outside the sample.

51. The formula applied by the EC in order to calculate the dumping margin of the co-operative unexamined exporters is not prohibited by any provision of the Anti-Dumping Agreement. Furthermore, the EC's formula is consistent with the formula set out in Article 9.4. In any event, the EC recalls that India has stated no claim in its panel request to the effect that the determinations of dumping for the unexamined exporters (both co-operative and non-co-operative) made by the EC authorities are inconsistent with any of the provisions of the Anti-Dumping Agreement dealing with the determination of dumping. The issue raised in the question, therefore, is beyond the Panel's terms of reference.

52. India's "method" is not required by any provision of the Anti-Dumping Agreement. Indeed, there is no reason why the Anti-Dumping Agreement should prescribe a method to calculate the volume of dumped imports, because the answer to that question follows from the answer to the previous question addressed by the EC's "method", i.e. what is the margin of dumping of the unexamined exporters.

Question 29

Could the parties and third parties address the meaning and significance of the term "positive evidence" as used in Article 3.1of the AD Agreement? In particular, could the parties address the question whether the EC's method, as described in question 28 above, rests on positive evidence, and the question whether India's method, as described in question 28 above, rests on positive evidence.

[31] India's Second Submission, paras. 130-132.

53. The EC considers that Article 3.1 is not relevant in this context. Article 3 is concerned exclusively with the determination of injury. By India's logic, any claim concerning the determination of dumping (e.g. whether an adjustment has been properly rejected) could also be formulated as a violation of Article 3. That would be clearly absurd. The question of whether imports are "dumped" for the purposes of the injury determination must be examined in the light of those provisions of the Anti-Dumping Agreement which deal specifically with the determination of dumping, and not of Article 3. Yet, India has not invoked any such provision in its Panel request.

54. At any rate, the method followed by the EC for establishing the dumping margin of the co-operative unexamined exporters rests on "positive evidence", because it is based on "positive evidence" of dumping for the examined exporters. With the sole exception of the Claim No 1 under Article 2.2.2 (ii), India has not challenged the determination of dumping for those exporters.

55. Although the term "sample" has been loosely used by all the parties during the underlying investigation and in this dispute in order to refer to the group of exporters included in the examination, the EC has never claimed that such group constitutes a "statistically valid sample" within the meaning of Article 6.10. Rather, it represents the largest percentage of the volume of exports which could be reasonably investigated. Accordingly, the EC considers that, as suggested in Question 6 from the Panel to India, it cannot be assumed that the proportion of imports found to be dumped within the "sample" constitutes "positive evidence" of the proportion of dumped imports which would have been found outside the "sample", had all the exporters been examined individually.

Question 30

In light of the Appellate Body findings pertaining to Article 3.5 of the AD Agreement in US-Hot-Rolled Steel Products from Japan, how do your authorities comply with the obligation to "separate and distinguish" the injurious effects of dumped imports from those of other known causal factors?

56. The causality analysis made by the EC authorities in this case takes into account and is in conformity with the guidance provided by the Appellate Body in United States – Hot Rolled Steel.

Question 31

Against what standard would you consider that a Panel should assess whether a Member has complied with Article 21.2 of the DSU? In particular, what specific obligations does this provision impose on Members.

57. As explained, the EC considers that Article 21.2 of the DSU is a non-mandatory provision, which imposes no binding obligations upon developed country Members.[32]

58. The EC has submitted in the alternative that, assuming that Article 21.2 imposed a binding obligation, such obligation would relate to the procedural requirements of the implementation process set out in the other provisions of Article 21, and not to the content of the implementing measures.[33]

In this context, would India please address the actions the EC has cited as fulfilling any obligations it may have under this provision.

59. Not applicable.

[32] EC's First Submission, paras. 279-284. See also EC's Oral Statement, paras. 122-125.
[33] EC's First Submission, paras. 285-288. See also EC's Oral Statement, paras. 126-127.

To the EC and third parties:

Question 32

India is of the opinion that the outcome of a sample analysis must be extended to the whole. On what basis does the EC consider that this is inappropriate, and that it is appropriate, under the Agreement, to assume that imports from non-investigated foreign producers/exporters are dumped? Third parties are also requested to address this question.

60. Contrary to what is suggested in the question, the EC authorities did not "assume" that imports from unexamined exporters were dumped. Rather, the EC authorities determined that those imports were dumped on the basis of the evidence of dumping found for the examined exporters (in the case of the co-operative unexamined exporters) or on the basis of facts available (in the case of the non- co-operative unexamined exporters).

61. As explained above, the EC does not claim that the examined exporters constitute a "statistically valid sample" within the meaning of Article 6.10, but rather the largest percentage of the volume of exports which could be reasonably investigated. The EC does agree, nonetheless, that it is appropriate to rely on data from the examined exporters in order to reach findings for the unexamined exporters. Indeed, that is precisely what the EC authorities did in this case. They relied upon the dumping margins established for the examined exporters in order to determine the dumping margin for the co-operative unexamined exporters.

62. The disagreement between the EC and India rather concerns the question of the purpose for which the data pertaining to the examined exporters should be used. Article 6.10 is concerned with the determination of dumping margins, and not with the determination of injury. Accordingly, the data collected from the examined exporters must be used in order to calculate the dumping margin of the unexamined exporters, rather than in order to estimate the volume of dumped imports. As explained, the answer to that question follows from the answer to the question which precedes it logically, i.e. what is the dumping margin of the unexamined exporters. India's "method" leaves that question unanswered.

To Korea

Question 34

Korea argues that using sales value as the weighting factor in calculating weighted average SGA and profits for purposes of Article 2.2.2(ii) distorts the relative importance of the producers' whose information makes up the average by over-representing the producers with higher SGA and prices, and is therefore inconsistent with Article 2.2.2(ii).

63. As already explained in the EC's First Submission[34], contrary to Korea's suggestion, the fact that a producer/exporter has a bigger total sales value does not necessarily imply that its level of profits and SGA expenses is higher. India acknowledged this in its Second Submission.[35]

64. In the first place, because the level of profits is a function not only of the prices but also of the costs of each producer. Under normal market conditions, the prices of all the operators will tend to be similar, while their costs may diverge substantially due to a variety of reasons (e.g. degree of

[34] EC's First Submission, paras. 83 and 84.
[35] India's Second Submission, paras. 99 and 100.

amortisation of the investments, differences in technology and production methods, different sources of financing, etc.). Thus, in practice, the differences in profitability between the exporters/producers are more likely to arise from differences in costs than from differences in prices.

65. More particularly, Korea overlooks that the level of profits is also a function of the SGA expenses. Lower SGA expenses will result in higher profits and vice-versa. Thus, in the case at hand, Bombay Dyeing, the company with a higher average price (per "units/set") had a higher profit margin, but a lower margin for SGA (10.39 %) than Standard Industries (19.15 %).[36] This contradicts Korea's contention that higher prices reflect always both higher profits and higher SGA.[37]

66. Second, a bigger sales turnover may reflect a different product mix, rather than higher unit prices for comparable products. Indeed, this appears to have been the case here. While Bombay Dyeing's average unit price per "unit/set" (213 rs) was higher than Standard's (73 rs), Standard's average unit price per kg. (306 rs) was higher than Bombay Dyeing's (288rs).[38] This shows that Bombay Dyeing and Standard were selling a very different mix of products.[39]

Korea suggest, however, that using sales value as the weighting factor for purposes of Article 9.4(i) is acceptable because the dumping margin is independent of sales value. Could Korea comment on the potential for distortion arising from using sales value as the weighting factor under Article 9.4(i). Would not weight-averaging based on sales value over-represent the producers with higher dumping margins in the average?

67. Using sales value as the weighting factor for purposes of Article 9.4(i) does not necessarily "overrepresent" the exporters with higher dumping margins. The size of the dumping margin is not directly related to the total export sales value of each exporter. Rather, it is the result of a complex calculation involving the comparison of the export price of each type to the domestic price or cost of production of the same type.

[36] See the table included in India's First Submission, para. 45
[37] The EC requests confidential treatment for the percentages mentioned in this paragraph.
[38] See the table included in the EC's First Submission, para. 93.
[39] The EC requests confidential treatment for the figures mentioned in this paragraph.

ANNEX E-3

ANSWERS OF THE EUROPEAN COMMUNITIES TO THE QUESTIONS FROM INDIA

23 September 2002

Question 1

EC may like to clarify that which provision of the WTO Agreement and Vienna Convention does the EC rely when stating that it is possible to extensively interpret provisions of substantive law (as it has argued in the US–Certain Corrosion Resistant Carbon Steel Flat Products from Germany) and impossible as regards the provisions of procedural law?

1. In the case mentioned by India, the EC argued that the requirement to terminate the investigation where the amount of the subsidy is *de minimis* applies also to sunset reviews. The Panel agreed. The EC considers that the reasoning followed by the panel in *US - Corrosion Resistant Steel* cannot be extrapolated to other provisions. Rather, the question of whether a provision which is not expressly cited in Article 11.4 may nevertheless apply to reviews under Article 11.2 must be considered on a case-by-case basis. The EC considers that, for that purpose, it may be relevant that, unlike the provision at issue in *US – Corrosion Resistant Steel*, Article 5.7 is a purely procedural provision, like the provisions referred to in Article 11.4. The EC, nevertheless, has not argued that no procedural provision, other than those referred to in Article 11.4, can ever be applicable to reviews under Articles 11.2 or 11.3. To repeat, the question must be considered on a case-by-case basis. Unlike the EC in *US - Corrosion Resistant Steel*, India has not cited any compelling reasons to consider that Article 5.7 should apply to reviews, notwithstanding its express wording.

Question 2

It goes without saying that the EC as a third party in the Australia–Salmon (Article 21.5–Canada) case recalls the following finding of the panel:

> *" … we note that an Article 21.5 panel cannot leave it to the full discretion of the implementing Member to decide whether or not a measure is one "taken to comply". If one were to allow that, an implementing Member could simply avoid any scrutiny of certain measures by a compliance panel, even where such measures would be so clearly connected to the panel and Appellate Body reports concerned, both in time and in respect of the subject-matter, that any impartial observer would consider them to be measures "taken to comply"." (emphasis added)*

In light of this statement could the EC in its reply comment upon the reasons not to consider Regulation 160/2002 and Regulation 696/2002 as measures "taken to comply"? Specifically why does the EC believe that these measures are not "clearly connected"? Could the EC in its reply bear in mind the following paragraph of the article by Jason E. Kearns and Steve Charnovitz:

> *"Evidence of a clear connection or inextricable link between the two measures could include the following: the aggravating and implementing measure (1) are linked in official government statements; (2) were enacted or adopted within a reasonably close period of time; (3) affect and specifically target the same product(s) or same*

> *producer(s); (4) were enacted or adopted by the same legislative or administrative body; and (5) are of the same general nature (e.g., both are sanitary measures). In many cases, for example, the aggravating measure will be part of the same legislation or regulation as the implementing measure (and, therefore, will be enacted or adopted by the same body). As a general matter, we would expect that an aggravating measure and an implementing measure that are part of the same legislation or regulation would be sufficiently connected to justify an Article 21.5 review of both measures."*

2. The "subject matter" of Regulation 160/2002 is different from the "subject matter" of the measure in dispute before the original panel. The anti-dumping duties on imports from Egypt and Pakistan were not in dispute before the original panel.

Question 3

> *The EC in paragraph 35 of its First Written Submission (FWS) states:*
>
> *"As submitted above, the EC considers that Regulations 160/2002 and 696/2002 are not measures "taken to comply". However, should the Panel conclude that they are, the EC submits that the relevant date for assessing the consistency of the measures "taken to comply" with the covered agreements is the date of establishment of the panel, and not that of the end of the "reasonable period of time".*

Does the EC generally believe that the scope and substance of the obligation to comply depends on the terms of reference of a subsequent 21.5 panel or is it an ad hoc opinion?

3. The EC believes that the position expressed in paragraph 35 of the EC's First Written Submission is valid with respect to all Article 21.5 disputes.

> *What is the textual support for this approach in the WTO Agreement?*

4. As observed by the Panel in *US – Shrimps*, "the DSU is silent as to the date on which the existence or consistency of the implementing measure must be assessed".[1]

Does the EC suggest that the promptness of compliance depends not on the outcome of Article 21.3 arbitration or mutual agreement of the parties as in the present case, but on how fast a 21.5 panel is established and with what terms of reference?

5. India persists in confusing two different issues: the scope of the Panel's jurisdiction under Article 21.5 and the obligations of the implementing Member under Article 21.3.

Question 4

In US–Section 301 case the EC recalled the US the following ruling of the GATT panel on United States – Measures Affecting Alcoholic and Malt Beverages (Beer II):

> *"Even if Massachusetts may not currently be using its police powers to enforce this mandatory legislation, the measure continues to be mandatory legislation which may influence the decisions of economic operators. Hence, a non-enforcement of a mandatory law in respect of imported products does not ensure that imported beer*

[1] Panel Report, *US – Shrimps*, para. 5.12.

> *and wine are not treated less favourably than like domestic products to which the law does not apply".*

The EC added afterwards:

> *"… the provisions of Sections 301-310 stipulating WTO-inconsistent action would thus remain WTO-inconsistent even if the USTR did not enforce them at all. (underlining in original)*

Why does the EC believe that this reasoning does not apply to the current suspension or non-application of anti-dumping duties which otherwise would be illegal due to the failure to explore constructive remedies?

6. In *US – Malt and Alcoholic Beverages* the United States did not argue that the measure was suspended as a matter of law. Rather, the United States argued that, *de facto*, the authorities of Massachusetts were not using their police powers to enforce it. The panel correctly rejected that argument. Unlike the Massachusetts authorities, the EC customs authorities could not "enforce" the measures in dispute even if they wished to. The decision to suspend the application of the duties means that the EC customs authorities are legally prevented from assessing and collecting any anti-dumping duties on imports from India.

Question 5

Could the EC clarify how the citation from the Appellate Body report in paragraph 227 of its FWS concerning increased imports as "the sole cause" of serious injury support its statement in the same paragraph that "the EC authorities were not required to prove that dumped imports were the cause of the injury suffered by the EC industry"?

7. The EC recalls that in the statement mentioned by India, the EC was citing India's own First Written Submission. The use of the definite article "the", rather than the indefinite "a", in the phrase "the cause of injury" implies that dumped imports must be the sole cause of injury.

Question 6

In the US–Wheat Gluten case the EC argued that Article 4.2(b) of the Agreement on Safeguards requires that a Member demonstrate that "increased imports" caused "serious injury per se, i.e. taken alone". Although India is nowhere arguing the same in the present case, it still would have nothing against the identical EC's position in respect of Article 3.5 of the ADA. Why did the EC change its views? Do Panel or Appellate Body reports prohibit a Member to take a more liberal approach to the issues than may be actually contained in the text of the WTO Agreement?

8. The EC made that argument in connection with Article 4.2 (b) of the *Agreement on Safeguards* and not with respect to Article 3.5 of the *Anti-Dumping Agreement*. Indeed, when making that argument, the EC emphasised the exceptional nature of the *Agreement on Safeguards*.[2]

Question 7

[2] Appellate Body Report, *United States – Definitive Safeguard measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, para. 17.

What is the difference between a "niche product" and a "like product"? Are "niche products" unlike "non-niche products"?

9. As the EC explained before the Panel, a "niche" bed linen product falls within the definition of the like product. The EC noted in its First Submission that cotton type bed linen is a product which comprises several different types or ranges of product, all of which constitute the like product.[3]

10. In this respect, the EC wishes to point out that where India refers in its closing statement to the Panel to "identical" products within the meaning in Article 2.6 of the Anti-Dumping Agreement, it fails to cite that provision in full.[4] Article 2.6 provides:

> Throughout this Agreement the term "like product" ('produit similaire') shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

11. In any event, India has raised no claim under Article 2.6 in this Panel request and has not directly disputed the fact that the niche product is the like product. Rather, India has disputed the fact that the EC refers to the (uncontested) shift in production and sales towards the higher value niche products in analysing the overall increase in average prices of bed linen on a per kilogram basis. The EC maintains, however, that it is entitled to analyse such developments in context.[5]

Question 8

The EC states in paragraph 114 of its oral statement "the increase in the cost of raw cotton is not a different causal factor, because it cannot have any injurious effects on its own." How does the EC reconcile this statement with recital 103 of the original Provisional Regulation wherein it stated: "the Commission concluded that increases in raw material prices had caused injury"? Also, how does the EC reconcile that paragraph 114 with recital (50) of the re-determination?

12. As already explained in paragraphs 245-248 of the EC's First Submission, India takes those statements out of context. In particular, in recital 103 of Regulation 1069/97 it was not merely stated that the increase in raw material prices had caused injury, but that any injury caused was in turn due to inability to pass on the increased cost of the raw material to customers. It should be noted that recital 50 of Regulation 1644/2001 simply points to the injury suffered by the Community industry and highlights the declining and inadequate profitability which is the result of prices which did not reflect the increases in costs of raw cotton and which had not been able to keep pace with inflation in prices of consumer goods. The pertinent analysis as to the causation of this injury is however dealt with in recitals 52 –70 of Regulation 1644/2001 and further explained in the EC's First Written Submission and Oral Statement to the Panel. [6]

Question 9

The EC contends that "the prices of bed linen do not increase in line with the prices of other consumer goods". (paragraph 110 of the oral statement) How does the EC reconcile this statement

[3] EC's First Written Submission, para. 170.
[4] India's closing statement, para 47.
[5] EC's Oral Statement to the Panel, paras 79-81.
[6] EC's First Written Submission, paras. 208-248; EC's Oral Statement to the Panel, paras. 107-114.

with its position in paragraph 78 of the oral statement the prices of "niche products" went up? Has inflation affected only the "niche products"?

13. The EC did not state in para. 78 of its oral statement that the prices of niche products went up. It merely stated that there was a shift (i.e. in the overall product mix sold) towards higher value niche products. As explained in response to the Panel's question 22 to the EC, the average price of a particular product type may decrease but the overall average price per kilogram sold will still increase if there has been a shift in the proportion of higher value products sold.

Question 10

Stating in para. 261 of its FWS that "as long as a developed country Member is not "applying" any anti-dumping duties, it has still the possibility to explore constructive remedies and, therefore, cannot be found to be in violation of Article 15" does the EC accept that if anti-dumping duties were not suspended as of August 14, then that would constitute a violation of Article 15?

14. Had the EC not suspended the application of anti-dumping duties, it would have explored first the possibilities of constructive remedies in accordance with Article 15. If the EC were to end the suspension in place, it would explore first the possibilities of constructive remedies.

ANNEX E-4

RESPONSES OF THE UNITED STATES TO QUESTIONS FROM THE PANEL

23 September 2002

1. The United States provides these responses to questions provided by the Panel to the parties and third parties on 13 September 2002.

To both parties and third parties:

23. In your view, should regulation 696/2002 be considered a measure independent of the EC's efforts to comply? If not, on what basis do you consider that it should be treated as part of the process to bring the measures faulted by the original panel into conformity with the EC's obligations? Please explain how you consider that regulation 696/2002 should be treated in this context?

2. The United States does not take a position on this question at this time.

24. Could the parties clarify whether the relevant date for considering the existence or consistency of measure taken to comply is considered to be the date of the request for establishment of the Panel, or the date on which the DSB actually established the Panel?

3. As we noted in paragraph 7 of our third party submission, Regulation 696/2002 predates both the request for establishment and the establishment of the Panel, so there is no need in this proceeding to reach the issue of which is the proper benchmark.

25. What, in your view, does the term "dumped imports" as used in Articles 3.1 and 3.2 mean in the context of the analysis and determination of injury? Specifically, may it be interpreted to include imports from unexamined producers for which a determination of dumping under Article 2 has not been made?

4. In its original report the Panel in this dispute thoroughly addressed the meaning of the term "the dumped imports" as used throughout Article 3[1] of the *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement").[2] The Panel found that the dumping determination is made with reference to a *product*, not with reference to individual transactions.[3] Consequently, the Panel correctly concluded that investigating authorities may treat all imports from producers/exporters for which an affirmative determination has been made as "dumped imports" for the purposes of the injury analysis.[4]

5. The United States agrees with the analysis and findings of the original Panel. Further, the rationale for the Panel's original findings clearly extends to show that the injury analysis under Article 3 may include consideration of the volume and price effects of imports from unexamined

[1] Report of the Panel in *EC – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted as modified by the Appellate Body in other respects on March 12, 2001, paras. 6.121–141 ("*Bed Linens I*").

[2] Except as otherwise referenced below, all references to Articles are to the AD Agreement.

[3] *Bed Linens I* , para. 6.136.

[4] *Bed Linens I* , paras. 6.136 and 6.139.

producers for which a determination of dumping under Article 2 has not been made. Article 2.1 defines *dumped* products "[f]or the purpose of [the AD] Agreement," on a countrywide basis.

6. The references to "dumped imports" in Articles 3.1 and 3.2 and throughout Article 3 therefore refer to all imports of the product from the countries subject to the investigation.[5] In this respect, the Agreement requires investigating authorities to examine, on one hand, the volume and price effects of *the dumped imports*, and on the other, all relevant economic factors having a bearing on the state of the domestic industry. Through this overlapping examination of both *the dumped imports* and the domestic industry factors, the investigating authorities examine the "consequent impact" of those *dumped imports* on the domestic industry.[6]

7. As the Panel recognized in *Bed Linens I*, "the dumped imports" referenced in Article 3 are neither confined to particular transactions which have been examined for dumping determinations nor limited temporally to the period covered by the dumping determination. Nor are they confined to particular companies which have been examined for dumping determinations. This interpretation is consistent with the AD Agreement's recognition that it will be impracticable in some cases to make individual dumping determinations for each known exporter or producer. In those cases, Article 6.10 allows the authorities to limit their dumping examination to either a sampled selection or the largest percentage of the volume of exports from the subject country which "can reasonably be investigated". In addition, Article 9.4 provides bases for determining the anti-dumping duty margin to be applied to the non-examined exporters or producers. In each of the circumstances illustrated above, the dumping determinations for examined companies would apply equally to the non-examined companies. All imports subject to either their own calculated margin or to a dumping margin for other imports should be treated as "dumped imports" for purposes of the injury determination.

26. Can you elaborate on the meaning and implications of the terms "imposition" and "application" of an anti-dumping measure. Can the two terms be considered as alternatives for one another? Please consider, in your response, other provisions of the ADA where these terms are used in explaining your views.

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[5] The United States appreciates this opportunity to clarify its view on the question of whether dumping is determined for countries. *See Bed Linens I*, para. 6.131 and note 50. The United States agrees with the EC that dumping is determined for countries. In the original panel proceedings in this dispute, the Panel asked the third parties to comment on –

> *whether, in their view, investigating authorities are obligated to exclude, from their examination of volume and price effects, imports attributable to companies for which a negative determination of dumping has been made based on the determination of a zero or de minimis margin of dumping.*

The United States explained in its response to this question that its own practice is to exclude from the injury evaluation companies for which a negative determination of dumping margins has been made based on the determination of a zero or *de minimis* margin.

Thus, once there has been a specific negative dumping determination made with respect to imports from a particular company, the investigating authorities examining injury will not consider those imports as "dumped" for the purposes of the injury evaluation. Absent a negative dumping determination, the Agreement permits, and it is the US practice to include in its injury evaluation, *all* imports from the subject country. We note that this approach is consistent with the analysis and findings of the Panel in paragraph 6.138 of *Bed Linens I*.

[6] *See* Articles 3.1 and 3.3.

8. "Imposition" can be defined as, among other things, "the action of imposing a charge, obligation, duty, etc.".[7] Thus, as used in the AD Agreement, the term "imposition" tends to refer to the initial determination resulting in the collection of anti-dumping duties when subject merchandise enters a Member. See, for example, Articles 9.1 of the AD Agreement. Such uses are not completely uniform throughout the Agreement. See, for example, the references to the "continued imposition" of a duty in Article 11.2.

9. "Application" can be defined as, among other things, "the bringing of a general or figurative statement, a theory, principle, etc., to bear upon a matter; [...] practical operation".[8] Thus, as used in the AD Agreement, the term "application" tends to refer to the collection of an actual anti-dumping duty at the time a particular entry occurs. See, for example, Articles 10.4 and 10.5 (referring to the "period of the application of provisional measures"). As is the case with the term "imposition," "application" is not used in a uniform manner throughout the AD Agreement. See, for example, Article 15 (referring to the consideration of the "application" of anti-dumping measures).

10. As these examples illustrate, the uses of "imposition" and "application" in the AD Agreement, while different in some ways, overlap in other ways. Any attempt to give these terms completely distinct meanings will result in their not being given their ordinary meanings in their context and in the light of the AD Agreement's object and purpose.

27. One might argue that, for unexamined producers (i.e., those not individually examined as part of the sample), there is no direct evidence, only indirect evidence from the sampled companies) as to whether there is dumping or not, since there is no information collected from these producers on the basis of which a dumping determination under Article 2 of the AD Agreement might be made. If this is considered to be the case, can the parties and third parties point the Panel to any specific provisions of the AD Agreement (not including the Article 3.1 reference to positive evidence) that address the question of how a determination of dumping is to be made for producers for which there is no information?

11. Article 6.10 of the AD Agreement provides circumstances under which an administering authority need not individually determine the margin of dumping for each known exporter or producer of a product under investigation. When Article 6.10 has been invoked to limit the number of examined exporters or producers, Article 9.4 provides bases for determining the anti-dumping duty to be applied to the non-examined exporters or producers.

28. The EC's actions in the redetermination might be considered to be one method of making a dumping determination for unexamined producers, based on the calculation of a weighted average margin of dumping for examined producers in the sample. India has proposed another method, based on applying the proportion of imports in the sample found to be dumped to the unexamined imports. Can the parties and third parties point to any specific provisions in the Agreement which either prohibit the EC method or require the Indian method?

12. There are no specific provisions in the AD Agreement which either prohibit the EC method or require the Indian method; however, Article 9.4 of the AD Agreement permits the EC method.

29. Could the parties and third parties address the meaning and significance of the term "positive evidence" as used in Article 3.1 of the AD Agreement? In particular, could the parties address the question whether the EC's method, as described in question 28 above, rests on positive

[7] The New Shorter Oxford English Dictionary (1993).
[8] *Id.*

evidence, and the question whether India's method, as described in question 28 above, rests on positive evidence.

13. The term *positive evidence* as used in Article 3.1 reflects that a determination of injury must be based on affirmative evidence demonstrating that, as provided in Article VI:6 of GATT 1994, "the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry". The term appears only in Article 3.1, and is limited to "a determination of *injury* for the purposes of Article VI of GATT 1994". It has no application to the determination of dumping under Article 2.

30. In light of the Appellate Body findings pertaining to Article 3.5 of the AD Agreement in US-Hot-Rolled Steel Products from Japan, how do your authorities comply with the obligation to "separate and distinguish" the injurious effects of dumped imports from those of other known causal factors?

14. As an initial matter, the United States notes that Article 3.5 of the AD Agreement does not contain the term "separate and distinguish". The Appellate Body did not address the differences between the causation language of the *Agreement on Safeguards* (Article 4.2) and Article 3.5 of the AD Agreement.[9]

15. Consistent with Article 3.5, the US investigating authorities examine the volumes and price effects of the dumped imports against the relevant economic factors bearing on the condition of the domestic industry, to determine whether there is a "causal relationship" between the subject imports and injury to the domestic industry. In making this examination, the authorities also examine the other known real or alleged causal factors to assure that the authorities are not attributing to the dumped imports injury caused by such other factors. The investigating authorities' responsibility in this regard extends only to the examination of factors of which the investigating authorities possess knowledge or with which they are made familiar or become acquainted.[10]

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[9] The United States has expressed its concerns to the Dispute Settlement Body about the Appellate Body report in the *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* dispute. When that report was considered for adoption, the United States said:

> . . .[t]he United States had presented a detailed analysis to the Appellate Body as to why the causation analysis reflected in the "Wheat Gluten" and "Lamb" Appellate Body Reports involving the Safeguards Agreement were different from that in the Anti-Dumping Agreement. These were two separate Agreements, with different objects and purposes and with wholly different texts pertaining to the question of causation and the manner of establishment of a causal link between imports and injury. The Appellate Body had made no reference to these important differences and appeared to have disregarded the interpretative principle that the use of distinct language connoted an intended difference in meaning. Instead, the Appellate Body's findings seemed to depend solely on the similarity of the non-attribution texts in the two Agreements, failing both to acknowledge the distinct context for that language and to ascribe any meaning or importance to the detailed direction regarding causation found in the Anti-Dumping Agreement, but absent from the Safeguards Agreement. Considering the importance of this issue to Members' rights under the Anti-Dumping Agreement, the Appellate Body should have explained why no consideration had been due to paragraphs 3.2 and 3.4 of the Agreement in establishing the relevant causation analysis.

Dispute Settlement Body, Minutes of Meeting Held on 23 August 2001, WT/DSB/M/108, para. 72 (footnotes omitted).

[10] As the panel in *Thailand - H Beams* found –

16. For example, the US investigating authorities generally seek data concerning nonsubject imports. By separating and independently examining the data on nonsubject imports, the investigating authorities assure that subject imports are a cause of material injury to the domestic industry.

31. Against what standard would you consider that a Panel should assess whether a Member has complied with Article 21.2 of the DSU? In particular, what specific obligations does this provision impose on Members. In this context, would India please address the actions the EC has cited as fulfilling any obligations it may have under this provision.

17. The United States does not take a position on this question at this time.

To the EC and third parties:

32. India is of the opinion that the outcome of a sample analysis must be extended to the whole. On what basis does the EC consider that this is inappropriate, and that it is appropriate, under the Agreement, to assume that imports from non-investigated foreign producers/exporters are dumped? Third parties are also requested to address this question.

18. As the United States indicated in response to Question 27, when Article 6.10 of the AD Agreement has been invoked to limit the number of examined exporters or producers, Article 9.4 provides bases for determining the anti-dumping duty to be applied to the non-examined exporters or producers.

To Korea

33. In the original dispute the Panel found, inter alia, that the EC had failed to comply with the obligations of Article 3.4 by failing to address all the factors set out in that Article in its determination. In reaching that conclusion, the Panel noted that, looking at the list of data considered in the examination of injury, "It appears from this listing that data was not even collected for all the factors listed in Article 3.4, let alone evaluated by the EC investigating authorities." In its oral statement, Korea argued that the EC failed to comply with the Panel's ruling in part because the EC did not collect additional data or information. Is Korea of the view that collection of data would always be necessary in order to conduct a redetermination subsequent to a finding by a Panel of a violation of Article 3.4 for failure to address all the factors set out in that Article, or is its argument based on its view that the EC had not, in fact, collected data on all the factors in its original investigation?

> *We consider that other "known" factors would include those causal factors that are clearly raised before the investigating authorities by interested parties in the course of an investigation. We are of the view that there is no express requirement in Article 3.5 that investigating authorities seek out and examine in each case on their own initiative the effects of all possible factors other than imports that may be causing injury to the domestic industry under investigation.*

Report of the Panel in *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* , WT/DS122/R, adopted as modified by the Appellate Body in other respects on 5 April 2001, para. 7.273.

19. The United States does not take a position on this question at this time.

34. Korea argues that using sales value as the weighting factor in calculating weighted average SGA and profits for purposes of Article 2.2.2(ii) distorts the relative importance of the producers' whose information makes up the average by over-representing the producers with higher SGA and prices, and is therefore inconsistent with Article 2.2.2(ii). Korea suggest, however, that using sales value as the weighting factor for purposes of Article 9.4(i) is acceptable because the dumping margin is independent of sales value. Could Korea comment on the potential for distortion arising from using sales value as the weighting factor under Article 9.4(i). Would not weight-averaging based on sales value over-represent the producers with higher dumping margins in the average?

20. The United States does not take a position on this question at this time.

To the United States

35. The United States argues that there is no requirement in Article 2.2.2(ii) as to the weighting factor to be used in calculating weighted average SGA and profits, and therefore investigating authorities have discretion to choose among available possibilities. Does the United States consider that this discretion is unlimited? If not, what are the limitations on that discretion? Does the requirement in Article 2.2.2(iii) that any other method chosen be "reasonable" suggest that the choice of a weighting factor for purposes of Article 2.2.2(ii) must be reasonable? If so, how should a Panel assess whether the choice made in a particular case is reasonable?

21. The Panel in this dispute need not determine that the discretion of an investigating authority to choose a weighting factor is unlimited in order to find that the EC's method of weighting SG&A and profit was not inconsistent with the AD Agreement. Instead, the Panel must simply determine whether the EC actually weight-averaged the figures in question. The term weighted average refers to the result of "the multiplication of each component by a factor reflecting its importance".[11] Thus, provided that the weighting factor is one which allows the result to reflect the relative importance of the individual components, the use of that weighting factor is not inconsistent with the AD Agreement. To that end, both sales volume and sales value are means of reflecting the importance of individual companies' SG&A and profit and permitted as weighting factors pursuant to Article 2.2.2(ii).

22. As noted in the Panel's question, Article 2.2.2(iii) permits an investigating authority to use "any other reasonable method... ". This phrasing makes clear that Article 2.2.2(iii) permits investigating authorities to use "other ... methods" than the two already identified (and approved) in Articles 2.2.2(i) (*i.e.*, same general category of products for the same exporter or producer) and (ii) (*i.e.*, weight averaging of other exporters or producers). The function of the word "reasonable" in Article 2.2.2(iii) is simply to circumscribe the range of "other ... methods" that an investigating authority may use: such "other ... methods" must be reasonable. As such and by its placement, the word "reasonable" in Article 2.2.2(iii) does not apply to the investigating authority's choice of a weighting factor for purposes of Article 2.2.2(ii).

[11] The New Shorter Oxford English Dictionary.

ANNEX E-5

WRITTEN ANSWERS OF THE REPUBLIC OF KOREA TO THE QUESTIONS OF THE PANEL

23 September 2002

1. Answer to Question 33

As Article 3.1 of the ADA stipulates that a determination of injury shall be based on positive evidence and involve an objective examination of both (a) volume of the dumped imports and their effect on prices in the domestic market and (b) the consequent impact of these imports on domestic producers, the collection of data on all relevant economic factors and indices enumerated in Art. 3.4 of the ADA is a prerequisite for the determination of injury.

When it comes to a redetermination following a Panel's finding of a violation of Art. 3.4, Korea believes that the collection of data is necessary because the Panel's ruling of violation was directly based on inadequate data collection. If the losing party intends to implement the DSB ruling through redetermination in such a case, fulfilling the data collection requirement forms an indispensable element of compliance.

In the case where the investigating authorities fulfilled the requirement of data collection according to Art. 3.4 of the ADA but failed to conduct an objective examination, additional data collection would be unnecessary.

2. Answer to Question 34

The purpose of weight-averaging the exporters or producers under Article 9.4(i) is to calculate a margin of dumping which would represent these exporters or producers in a fair and equitable manner. In this exercise, therefore, one should examine whether a particular weighting factor – volume or value – is biased or not.

As Korea has pointed out during the 3rd Parties' Session held on 11 September 2002, assuming that exporters or producers decided to dump their products on foreign markets, they will base their decision with respect to the degree of dumping first and foremost on the situation in their domestic market and the overseas market targeted for dumping, in particular, the price elasticity of demand in the overseas market. In other words, the degree of dumping by the exporters or producers is essentially not related to either the volume or value of domestic and export sales by the dumpers.

As Korea does not see any inherent correlation between the sales value and the degree of dumping, Korea does not recognize any potential for distortion arising from using sales value as the weighting factor under Article 9.4(i). In other words, the dumping margin of a producer with a higher sales value can be lower than a different producer with a lower sales value, and vice versa.

Based on this analysis, Korea believes that weight-averaging based on sales value would not distort the relative importance of the selected exporters or producers for the purposes of Article 9.4(i) of the ADA.

ANNEX E-6

WRITTEN RESPONSES OF JAPAN

1. The Government of Japan, as a third party, has taken the liberty of replying to certain questions of the panel to the third parties, which raise issues of systemic concern and interpretation of the provisions of the AD Agreement.

I. REPLY TO QUESTIONS 25, 27 AND 28

2. We think it is appropriate to reply to these three questions, which are closely related to each other, at the same time.

3. In the view of Japan, the term "dumped imports" used in Articles 3.1 and 3.2 means those imports from suppliers which are found to be dumped (with a dumping margin in excess of the *de minimis* threshold) in accordance with Articles 2 and 6. Article 2 of the AD Agreement provides for substantive rules for the determination of dumping. Applicable evidential rules are stipulated in Article 6.

4. With respect to unexamined producers for which a determination of individual dumping margin has not been made in accordance with Article 2, Article 6.10 would apply. Article 6.10 obligates the authorities to, "as a rule, determine an individual margin of dumping for each known exporter or producer …". If, however, it is impracticable, the Article permits the authorities to "limit their examination … to a reasonable number of interested parties or products by using samples which are *statistically valid* …" (emphasis added) This "statistical validity" is required directly for *sampling*, but would be required indirectly for the *estimation* of the individual margin of dumping using samples; these two processes are logically intertwined and inseparable.

5. The investigating authorities are further required to provide a detailed explanation for the estimation of individual dumping margins of unexamined producers pursuant to Article 12.2. This Article requires that public notice be given of any preliminary or final determination, which explains, among others, the "statistical validity" for both sampling and estimation.

6. The authorities, however, may not base the estimation methodology on Article 9.4. Article 9.4 sets forth restrictions on the amount of anti-dumping duties imposed on unexamined producers (the calculation of the so-called "all others rate") after the investigating authorities determine to impose an anti-dumping duty. In the view of Japan, this is irrelevant to the determination of injury and causation under Article 3. Article 9.4 specifically states "any dumping *duty* applied to imports from exporters or producers not included in the examination shall not exceed …". It further states "the authorities shall apply individual duties … to imports from exporter or producer … who *has provided* the necessary information *during the course of the investigation*" (emphasis added). These languages show the Members' understanding that this Article applies only to the determination of dumping duties, not to the determination of "dumping". Indeed, the formula set forth in Article 9.4 presupposes that *some* amount of anti-dumping duties should be imposed on unexamined producers. For the reasons stated above, this Article is applicable to anti-dumping cases only after the authority finds that all the requirements for imposing anti-dumping duties, i.e. dumping, injury and causation, are met with respect to unexamined producers in accordance with the relevant Articles, in particular, Articles 2, 3 and 6. If Article 9.4 were to be applied to the determination of "dumping", it could result in illogical and unreasonable consequences.

7. Finally, the Panel is required to examine whether the authorities' determination on sampling and estimation is "proper" and "unbiased and objective" based on Article 17.6(i) of the AD Agreement.

8. Japan respectfully requests that the Panel determine the EC's methodologies in light of the above.

II. REPLY TO QUESTION 30

9. Japan has fully complied with Article 3.5 of the AD Agreement. In a recent anti-dumping investigation, for example, we examined each factor known to us that would potentially cause injury to the domestic industry in accordance with Article 3.5, as shown in the relevant public notice (Kanpo gogai No.159, dated July 26,2002, Keizaisangyo Koho No. 15078, dated July 26, 2002). In this case, the authorities concluded that dumped imports under investigation, through the effects of dumping, caused material injury to the domestic industry, among others, based upon the examination of whether and to what extent each of the factors had caused injury to the domestic industry.

ANNEX E-7

COMMENTS OF INDIA ON ANSWERS OF THE EUROPEAN COMMUNITIES TO THE QUESTIONS FROM THE PANEL

30 September 2002

Questions to the EC

Question 15

Do we understand from the EC's fourth request for preliminary rulings that, in the EC's view, those parts of the original determination that were not the subject of a claim in the original dispute, and thus remained unchanged and were adopted by reference in the redetermination 1644/2001 are not part of the measure taken to comply?

1. Yes. As explained below, the same is true where India formally stated a claim in the original panel request but submitted no arguments in support of that claim, with the consequence that the original Panel made no ruling of inconsistency with respect to the findings of the original determination that were the subject of such claim.

COMMENT OF INDIA TO EC's ANSWER TO PANEL QUESTION 15, para. 1

India notes that the EC's answer effectively expands its first request for a preliminary ruling by asking to exclude from the terms of reference of the Panel recitals 10, 15, 16, 20, 34, 36, 60, 63, 64 and 71 of the Regulation 1644/2001. India recalls in this regard that "principle of good faith requires that responding Members seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB or the Panel, so that corrections, if needed, can be made to resolve disputes. The procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes."[1] For that reason India submits that the EC's argument presented above should be disregarded or, if it amounts to modification of request for the preliminary ruling, dismissed.

India also notes that the failure to timely raise procedural objections concerning Regulation 1644/2001 casts doubt on the genuine intention of the EC in its first request for preliminary ruling. If the EC believes that the terms of reference of the Panel should not cover measures that it mistakenly considers to be independent of the implementation process, it should have mentioned that in the first request for the preliminary ruling *all* such measures, *i.e.* Regulations 160/2002 and 696/2002 as well as the aforementioned recitals of Regulation 1644/2001. Absent that, the Panel is entitled to believe that the EC tries to narrow the scope of proceedings not because of its systemic concern with the Panel's terms of reference, but rather with a view to escape the legitimate scrutiny of the Panel in

[1] Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"* ("*US – FSC*"), WT/DS108/AB/R, adopted 20 March 2000, para. 166.

respect to its inconsistent measures. In any event, the EC's ability to defend itself has in no way been prejudiced.[2]

Furthermore, the EC disregards the fundamental difference between claims and arguments.[3] As a result, since claims are not arguments, what may be true for claims would not necessarily be true for arguments. As it follows from the Appellate Body jurisprudence, arguments have no bearing upon the terms of reference of the Panel.[4]

India also refers to its previous comments on this question submitted alongside the answers of India to the questions from the Panel.

In this regard, the EC's attention is drawn to paragraph 6.144 of the original Panel report, in which the Panel stated:

> *"Finally, with respect to India's claim that the European Communities failed to properly consider "other factors" which might have been causing injury to the domestic industry, as required by Article 3.5 of the AD Agreement, we note that, with the exception of the argument concerning improper consideration of "dumped" imports, India has made no other arguments in support of this claim. Having rejected India's position in that regard, we consider that India has failed to present a prima facie case in this regard."*

2. As explained in the EC's oral statement[5], in India's original panel request the claim under Article 3.5 was so broadly formulated that it could encompass any conceivable claim under that provision, including the specific claims now raised by India with respect to the inflation in consumer prices and the increased cost of raw cotton.

COMMENT OF INDIA TO EC's ANSWER TO PANEL QUESTION 15, para. 2

India draws attention of the Panel to the fact that the text of the DSU does not distinguish between a "broadly formulated claim" and a "specific claim". There is no reason to attach to the word "claim" special meaning only because such claim is raised during the 21.5 proceeding.

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[2] Compare *Korea – Dairy Safeguards*, WT/DS98/AB/R, Report of the Appelate Body, Section VII. Or, more recently, *EC – Sardines*, WT/DS231/AB/R, Section IV.A.

[3] "There is a significant difference between the *claims* identified in the request for the establishment of a Panel, which establish the Panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions, and the first and second Panel meetings with the parties as a case proceeds" (Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* ("*India – Patents (US)*"), WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9, para. 88). "Article 6.2 of the DSU requires that the *claims*, but not the *arguments*, must all be specified sufficiently in the request for the establishment of a Panel in order to allow the defending party and any third parties to know the legal basis of the complaint. If a *claim* is not specified in the request for the establishment of a Panel, then a faulty request cannot be subsequently "cured" by a complaining party's argumentation in its first written submission to the Panel or in any other submission or statement made later in the Panel proceeding"(Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas* ("*EC – Bananas III*"), WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591, para. 143).

[4] Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* ("*India – Patents (US)*"), WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9, para. 88; Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas* ("*EC – Bananas III*"), WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591, para. 143.

[5] EC's Oral Statement, para. 22.

3. However, India made no arguments with respect to those two “other factors” or, indeed, with respect to any “other factors”. For that reason, as recalled in the question, the original Panel rejected India’s claim. In view of that, when considering the implementing measures at issue, the EC authorities had no reason to revise their analysis of those two factors, or more generally of any “other factors”.

COMMENT OF INDIA TO EC's ANSWER TO PANEL QUESTION 15 para. 3

Again the EC tries to overlook a fundamental difference between "claims" and "arguments" and thus to rephrase its first request for a preliminary ruling.

India also fails to understand on what basis the EC argues that it had no reason to revise its analysis of "other factors". The original Panel did not rule that the original determination as such was consistent with the ADA. It found that "India has failed to present a *prima facie* case" in respect to Article 3.5. As India has stated on number of occasions during this proceeding, the duty to comply in good faith with the WTO Agreement cannot be presumed to exist only in case when there is a respective DSB ruling.

Question 16

In para. 80 of its FWS, the European Communities mentioned that it used sales value to average the amounts of SG&A and profits because that method is easier to apply and can be used in all the investigations. Is the Panel correct in understanding that this is the standing practice of the Communities in all its investigations?

4. Yes.

May the EC authorities rely on some other basis for weighting the averages of amounts for SG&A and profits in a particular case?

5. Yes. In general, the EC authorities may depart from an established practice where the specific circumstances of a case so warrant.

Has the EC ever done so? If yes, in what cases, and can the EC explain the reasons for choosing a different basis?

6. Although it has not been possible to review the relevant calculations in all the cases concerned, the European Commission believes that there is no case, at least in recent years, where the practice at issue was not followed.

COMMENT OF INDIA TO EC's ANSWER TO PANEL QUESTION 16, para. 6

Except in the Bed Linen case where the EC deviated from previously established sizes for Bombay Dyeing and Standard Industries. It is surprising that the explanations provided during the meeting with the Panel came more than one year after the argument was first presented to the EC. If this is not an *ex post* explanation then India is not clear about the meaning of an *ex post* explanation.

Question 17

Can the EC respond to the arguments made by India in paras. 55-60 of its FWS?

7. The EC has responded to the arguments made in paragraphs 55-60 of India's First Written Submission in paragraphs 70-78 of its own First Written Submission.

Question 18

How did the EC obtain the information regarding inventories, capacity utilisation, and investment?

8. Data and supporting documents on inventories, capacity utilisation and investments was obtained in the replies to questionnaire responses and during the on the spot verification visits.[6] Data on inventories and investments were also included in the audited accounts, which were either annexed to the questionnaire replies or obtained during the on spot verification visits.[7] Further information on production capacity was available from the complainant, Eurocoton[8]. Finally, data on inventories could also be derived from verified data on production and sales volume.[9]

Were there specific questions put to sampled producers regarding these factors in the questionnaires or otherwise?

9. Yes. First, specific questions were put to sampled producers in the questionnaire both directly (section VI) and indirectly for inventories (sections II and V). It is important to note that in the questionnaire the EC specifically requested that all sections of the questionnaire be completed, that all documents and data be kept available for investigation purposes, and that information beyond that requested in the questionnaire may also be requested. Certain further specific questions were put in the deficiency letters addressed to sampled producers and in the pre-verification communications to sampled producers, for instance asking companies to supply or make available *inter alia* relevant supporting documentation on stocks, capacity and investments for the product concerned.

What was the composition of the sample from which these pieces of information were obtained and what was the methodology used to derive such information from that sample?

Investments

10. Data on investments was sought and obtained from all producers within the sample.[10] Given that the machinery used for the product concerned can also be used for other products, turnover was used to allocate the proportion of investments for the product concerned for each sampled company.[11] The data for each sampled company was then aggregated to obtain an overall figure for the sample.

[6] EC's First Written Submission, paras. 151, 153; India-RW-Exhibit-17, pages 4 and 5.
[7] EC's First Written Submission, para. 151; India-RW-Exhibit-17, pages 4 and 5.
[8] India –Exhibit –6, page 30.
[9] EC's First Written Submission, para 151; India-RW-Exhibit-17, page 4.
[10] India-RW-Exhibit-17, page 5.
[11] Ibid.

Inventories

11. Data on inventories in terms of value could be derived from the audited accounts for all sampled producers.[12] The proportion of inventories for the product concerned could be allocated according to turnover. The review of the audited accounts revealed that a number of sampled producers did not have stocks for any finished products at all towards the end of the period considered.

12. Data on inventories could also be derived from verified data on production and sales volume.[13] This was then cross-checked with verified data on the cost of production and average prices of key products obtained for all sampled producers.

13. In addition, during the on-the-spot visits, the majority of sampled producers provided more detailed information regarding inventories relating to the product concerned. This permitted the EC investigating authorities to have a more precise view on the extent of inventories, if any, relating to the product concerned. A number of sampled producers were found to be sub-contracting and had no stocks of bed linen of their own. Certain producers had no (or only marginal) stocks since they were only (or predominantly) producing to order.[14]

14. At the level of individual sampled producers, it was found that any fluctuation in stocks was independent from the performance of the company during the period under consideration, since an increase or decrease in stocks in this sector can indicate orders rather than unsold production.[15]

Capacity utilisation

15. With regard to capacity utilisation, the EC has pointed out that data on production capacity (and hence capacity utilisation) did not exist for the majority of sampled producers.[16]

16. During the on the spot visits attempts were made together with technical staff of the sampled company to construct appropriate amounts for production capacity. However given the differing product mixes of the sampled producers throughout the period under consideration (1992 to the IP), it was impossible to calculate production capacity or capacity utilisation for the sampled producers with any consistency or accuracy.[17]

COMMENT OF INDIA TO EC's ANSWER TO PANEL QUESTION 18

With respect to all its answers in response to question 18 the EC appears to have re-discovered its arguments as it already presented them to the Panel in the original proceeding. It requires no elaboration that the Panel at that time already did not accept those arguments.

[12] EC's First Written Submission, para 151.
[13] EC's First Written Submission, para 151.
[14] EC's First Written Submission, para. 192; EC's Oral Statement paras. 67-68.
[15] Regulation 1644/2001, recital 29.
[16] EC's First Written Submission, paras. 153-154.
[17] EC's First Written Submission, paras. 153-154; EC's Oral Statement, paras. 69-70.

Question 19

Does the EC consider that the calculation of a dumping margin above de minimis for unexamined producers (i.e., those not examined as part of the sample) constitutes a determination of dumping with respect to those producers?

17. Yes.

Question 20

Following the adoption of the original Panel and Appellate Body reports in the Bed-Linen dispute, has the EC undertaken to re-calculate dumping margins for any products subject to an anti-dumping order other than the bed-linen imports from India, Egypt, and Pakistan? Was this done on the EC's own initiative, or in response to requests for review received from interested parties?

18. On 5 December 2001 the European Commission published a "Notice concerning the initiation of a review of the anti-dumping measures applicable to imports of threaded malleable cast-iron tube or pipe fittings originating in Brazil, the Czech Republic, Japan, the People's Republic of China, the Republic of Korea and Thailand" (2001/C 342/03, OJ C 342, 5.12.2001, p.5). The scope of the review is limited "to the examination of dumping by those exporting producers in the countries concerned whose duty rates are based on a methodology at issue in the [*Bed Linen*] reports.", i.e. zeroing and Article 2.2.2(ii). This notice was published following a request made by a Czech exporter. The review has not been concluded yet.

19. On 8 May 2002 the European Commission published, on its own initiative, a "Notice regarding the anti-dumping measures in force following a ruling of the Dispute Settlement Body of the World Trade Organization adopted on 12 March 2001" (2002/C 111/04, OJ C 111, 8.5.2002, p. 4). With this notice, the European Commission invited "any exporting producer whose exports are subject to existing anti-dumping measures and which considers that the measures should be reviewed in the light of the legal interpretations regarding the determination of dumping margins" contained in the reports of the panel and the Appellate Body in the *Bed Linen* dispute (i.e. zeroing and Article 2.2.2 (ii)), to request a review. No request has been received so far pursuant to this notice.

20. In connection with this question, the EC wishes to clarify that when it has indicated that Regulation 160/2002 was adopted by the EC authorities "on their own initiative" it did not mean to suggest that those authorities had not acted in response to a request from the exporters concerned, but rather that they were under no obligation to adopt that regulation pursuant to the WTO Agreement. In fact, both the Pakistani and the Egyptian exporters did request the EC authorities to re-determine their dumping margins.

COMMENT OF INDIA TO EC's ANSWER TO PANEL QUESTION 20

From the first and second answer in paras. 18 and 19 respectively India trusts that it is clear to the Panel that the EC has *not* undertaken to recalculate any dumping margins for any other cases on its own initiative. The only time a recalculation was ever made on its own initiative was in the case of *Bed Linen*. In this endeavour to comply, as India has already pointed out, the EC did so in various episodes, for various parts of the measure, as and when deemed fit (Regulations 1644/2001, 160/2002, 696/2002).

The EC has given a perverse response in its last part of its answer. As the EC previously stated, the margins for Egypt and Pakistan were calculated "*on their own initiative*". Yet, suddenly, as per the current answer, this "own initiative" apparently meant that this was done on "*request from the*

exporters". Such a response defies common sense. India may in good faith rely on the statements published by the EC in its Official Journal. If even *official* statements are unreliable then anything else could be equally defective. Perhaps the EC would also argue that it never selected a sample of Indian exporters.

Question 21

Could the EC explain the basis for the premise, implied in paragraph 114 of its oral statement, that bed linen producers would pass raw cotton price increases through to customers in the form of increases in the prices of bed-linen?

21. It is based on the assumption that the producers of bed linen, like any other market operators, will always try to maximise their profits. Therefore, it is reasonable to assume that they would only refrain from passing on the cost increase if that causes them to lose sales and, as a result, profits, due to the presence of factors such as those discussed below.

What factors might limit the ability of producers to pass through cost increases in the form of price increases, for instance contractions in demand? Did the EC consider whether any such factors were at work in the bed-linen industry, and if so, how did the EC exclude the possibility that such other factors were the reason cost increases were not passed through.

22. At the outset, it must be recalled that, in accordance with Article 3.5, the EC authorities were not required to examine each and every "other factor" which might conceivably have affected the ability of the domestic producers to pass on the cost increases, besides the dumped imports, but only those factors which were "known" to them. Having regard to the submissions of the parties and other evidence available, the EC authorities identified three such "other factors": the competition from other EC producers not included in the Community industry; the evolution of the EC consumption; and the non-dumped imports. The Indian exporters did not bring to the attention of the EC authorities any relevant "other factors" in the course of the investigation.

COMMENT OF INDIA TO EC's ANSWER TO PANEL QUESTION 21, para. 22

This answer clearly contradicts section 3(b) of the provisional regulation (e.g. recital (103): "The Commission concluded that increases in raw material prices had caused injury." This section was explicitly confirmed in recital (60) of the re-determination. The EC's statement also explicitly contradicts recital (50) of the re-determination which mentions that "declining and inadequate profitability … is basically the result of … the increases in the costs of raw cotton …"

23. The EC authorities found that the competition from other EC producers was not a cause of injury, as production and sales by those producers declined markedly between 1992 and the Investigation Period (IP).[18] Indeed, 29 of those producers went out of business during that period.[19] Furthermore, the prices of the other EC producers were higher than those of the Indian exporters.[20] For those reasons, it was concluded that the other EC producers did not have a negative impact on the prices of the Community industry. India has at no point contested the assessment of this factor made by the EC authorities.

[18] Provisional Regulation, recitals 107-108. Regulation 1644/2001, recital 64.
[19] Provisional Regulation, recitals 81, 82, 91.
[20] Ibid., para. 44.

24. As regards the evolution of demand, the EC authorities found that the EC consumption fell by 7 % between 1992 and the IP.[21] Nevertheless, it was also found that the supply fell by a much larger amount, due to the fact that, as just mentioned, 29 EC producers went out of business.[22] In accordance with basic economic theory, the supply and demand trends observed in the EC market should have led, all other things being equal, to an increase in prices, rather than to a decrease. Thus, the decline in consumption cannot be considered as a cause of price suppression. India has not disputed before this Panel the assessment of this factor made by the EC authorities.

COMMENT OF INDIA TO EC's ANSWER TO PANEL QUESTION 21, para. 24

Again, this answer directly contradicts the Provisional Regulation. At recital (104) of the Provisional Regulation the EC declares that: "It is clear that the decline in consumption between 1992 and the investigation period has contributed to the situation of the Community industry."

25. Finally, as regards imports, the EC authorities found that imports from some other sources, notably from Egypt and Pakistan, could have been a cause of injury.[23] The EC authorities concluded, nevertheless, that imports from India were, on their own, a substantial cause of injury having regard, *inter alia,* to the following findings:

Indian prices undercut the prices of the Community industry by 19% during the IP[24];

Indian prices were among the lowest. They were lower than the Pakistani prices[25];

Between the 1994 and the IP, when the financial situation of the Community industry deteriorated most, Indian prices decreased by 25%, whereas Pakistani prices decreased by 3 % and Egyptian prices increased by 3%[26];

Indian imports increased significantly in absolute and relative terms between 1992 and the IP. By contrast, imports from Pakistan remained by and large stable during the same period. Imports from Egypt increased, but at the end of the IP they remained still far below the Indian levels[27].

26. Again, India has at no point during these proceedings contested the analysis of the effects of other sources of imports made by the EC authorities.

COMMENT OF INDIA TO EC's ANSWER TO PANEL QUESTION 21, para. 26

Once the EC acknowledged that imports from third countries were a known factor (section 3.a of the original Provisional Regulation) there was no reason for India to bring that fact once again to the attention of the EC. On the contrary, once this factor was known to the EC, it should have segregated the injurious effects caused by such imports. When this known factor was again

[21] Ibid., recital 63.
[22] Ibid., recital 105.
[23] Regulation 696/2002, recitals 44 and 50. The EC recalls its position that imports from Pakistan and Egypt can be considered as "non-dumped" for the purposes of this dispute only in so far as the Panel were to find that Regulations 160/2002 and 696/2002 are measures "taken to comply".
[24] Ibid., recital 10.
[25] Ibid., recitals 39 and 40.
[26] Ibid., recital 40.
[27] Ibid., recital 38.

confirmed in Regulation 696/2002 (recital (44) first sentence) it should have segregated the injurious effects caused by such imports.

Could the EC address the proportion of such raw material cost increases that would be passed through to customers in the form of price increases in the bed-linen industry under what the EC has referred to as "normal" conditions?

27. As explained above, the EC authorities concluded that, of all the known "other factors", only the imports from certain sources (notably Pakistan and Egypt) could have been a cause of injury. Therefore, it may be reasonably assumed that, in the absence of both those other imports and the dumped imports, the Community industry would have been able to pass on most, if not all, of the cost increase.

COMMENT OF INDIA TO EC's ANSWER TO PANEL QUESTION 21, para. 27

This statement is untrue. One needs only to look at the provisional Regulation, section 3 where the EC did identify the other known factors such as the increase in raw cotton prices or the decrease in consumption; one may also compare the re-determination at recital (50).

28. As also explained, the EC authorities found that, although other sources of imports could have contributed to the injury, imports from India were, on their own, a substantial cause of injury, and indeed a more important cause of injury than those other imports. Thus, it may be reasonable to assume that, under "normal" conditions, i.e. in the absence of dumped imports, the Community industry would have been able to pass on a major portion of the cost increase.

29. The EC authorities did not, nevertheless, attempt to make during the investigation the type of quantification suggested by the Panel, and indeed the EC doubts whether it may be feasible at all. In any event, the EC considers that such quantification is not required by Article 3.5 and that the findings summarised above are more than sufficient to support reasonably the conclusion that there was a genuine and substantial causal link between the imports from India and the price suppression suffered by the EC industry.

COMMENT OF INDIA TO EC's ANSWER TO PANEL QUESTION 21, para. 29

The fact that the EC doubts that this is feasible is legally irrelevant. The segregation and quantification of the injurious effects of other factors is precisely what is required by the non-attribution language.

The fact that the EC then states that this quantification is not required runs contrary to the existing case law as already quoted repeatedly by India.

Question 22

In recital 57 of regulation 1644/2001, it is stated that "average sales price did not increase." Does this statement refer to the average price of one (or more) of the reference products, or the average price per kilogram of bed linen? Depending on the answer, please clarify the statements concerning price movements in paragraphs 168-172 of the EC's first written statement and paragraphs 78-79 of the EC's oral statement to the Panel.

30. -The statement in recital 57 of Regulation 1644/2001 that "average sales prices did not increase" refers to the average price (per kg) of all the defined reference products. As noted in Regulation 1069/97, average prices for the defined reference products fell between 1993 and the IP.[28]

31. By contrast, the average price per kilogram for all bed linen products increased over roughly the same period. As the EC noted in its First Submission[29], the fact that there had been an overall increase in average prices (i.e. on a per kilogram basis), even though there had been a decrease in average prices for the defined reference products, merely reflected the shift in production and sales towards higher value niche products.

32. The EC pointed out in its oral statement to the Panel[30] that India has not disputed that there was such a shift in sales and production towards higher value niche products. Nor did India dispute that average prices actually decreased for the defined reference products in the sample. The fact is that average prices per kilogram may still increase even though average prices per product type decrease, if the proportion of higher value products sold increases. This is precisely what happened in the present case.

COMMENT OF INDIA TO EC's ANSWER TO PANEL QUESTION 22

As India has pointed out, "Bed Linen" is the product under investigation. This was the like product as defined by the EC. By departing from that definition as and when convenient, the EC's analysis is no longer unbiased and objective. In case the EC would have wished to investigate only a certain "niche" type of Bed Linen it would have had the power to define the product as such.

To both parties and third parties:

Question 16

In your view, should regulation 696/2002 be considered a measure independent of the EC's efforts to comply?

33. Yes. The injury re-determination for imports from India set out in Regulation 696/2002 was rendered necessary by the previous dumping re-determination for Pakistan and Egypt made in Regulation 160/2002. Had the EC authorities not conducted such dumping re-determination, they would not have been required to determine whether imports from India alone were a cause of injury. As explained elsewhere, Regulation 160/2002 is not a measure "taken to comply" because it concerns measures that were not in dispute before the original Panel. Since the adoption of Regulation 696/2002 was entirely dependent upon the adoption of Regulation 160/2002, it follows that Regulation 160/2002 cannot be considered as a measure "taken to comply" either.

COMMENT OF INDIA TO EC's ANSWER TO PANEL QUESTION 16

India draws attention of the Panel to the fact that the EC is using circular arguments. First the EC states that the adoption of Regulation 696/2002 was rendered necessary by the adoption of Regulation 160/2002 and thus is not a measure taken to comply. Then it concludes that since Regulation 696/2002 was adopted, Regulation 160/2002 cannot be considered as a measure "taken to comply".

[28] Regulation 1069/97, recital 86.
[29] EC's First Written Submission, paras. 168-169; Regulation 1069/97, recitals 86 and 87.
[30] EC's Oral Statement, para. 79.

In contrast to that pseudo-reasoning, India recalls that all three Regulations— Regulation 1644/2001, 160/2002 and 696/2002—are closely connected as has been recognised by the EC itself during the oral hearings. Respectively, since Regulation 1644/2001 is a measure taken to comply, Regulations 160/2002 and 696/2002 are also measures taken to comply. Indeed, the EC would agree that if A is B and B is C, then A is C.

If not, on what basis do you consider that it should be treated as part of the process to bring the measures faulted by the original panel into conformity with the EC's obligations? Please explain how you consider that regulation 696/2002 should be treated in this context?

34. Not applicable.

Question 24

Could the parties clarify whether the relevant date for considering the existence or consistency of measure taken to comply is considered to be the date of the request for establishment of the Panel, or the date on which the DSB actually established the Panel?

35. In its First Submission[31], the EC argued that the relevant date for assessing the consistency of the measures taken to comply with the covered agreements is the date of establishment of the Panel, because that was the date which appears to have been considered as relevant by the panel in *US – Shrimps (21.5)*[32]. The agrees with the reasoning of that panel.

36. The EC, nevertheless, considers that the Panel need not reach the issue of whether the relevant date is that of the panel request or that of the establishment of the panel, since, in any event, all the measures cited by India in its panel request were taken before the earlier of those two dates.

Question 25

What, in your view, does the term "dumped imports" as used in Articles 3.1 and 3.2 mean in the context of the analysis and determination of injury? Specifically, may it be interpreted to include imports from unexamined producers for which a determination of dumping under Article 2 has not been made?

37. As explained in its First Submission, the EC considers that dumping is determined for countries and, therefore, that the investigating authorities are entitled to consider all imports from a country found to be dumping as "dumped imports" for the purposes of Article 3.[33]

38. Should the Panel reject the above interpretation, the EC has submitted in the alternative that in Article 3 the term "dumped imports" means those imports for which the authorities have previously determined that they are "dumped" in accordance with the relevant provisions of the *Anti-Dumping Agreement* dealing with the determination of dumping, regardless of whether such determination is based on the data collected for each exporter concerned, or on data collected for other exporters, where the authorities have limited their examination in accordance with Article 6.10, or on "facts available", where the circumstances of Article 6.8 are present.

Question 26

[31] EC's First Submission, paras. 34-35.

[32] Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 by Malaysia* ("*United States – Shrimps (21.5)*"), WT/DS58/RW, paras. 5.12-5.13.

[33] EC's First Submission, paras. 118-121.

Can you elaborate on the meaning and implications of the terms "imposition" and "application" of an anti-dumping measure. Can the two terms be considered as alternatives for one another? Please consider, in your response, other provisions of the ADA where these terms are used in explaining your views.

39. The terms "imposition" and "application" are not synonymous and are not used as such in the *Anti-Dumping Agreement.*

40. The word "imposition" ("establecimiento" in the Spanish version) alludes to the action whereby the authorities adopt a generally applicable act (a Regulation in the EC) providing for the collection of anti-dumping duties on individual shipments. The term "imposition" is used in that sense, for example, in Articles 9.1, 11.2 or 12.2.2.

41. In turn, when used in connection with the term "anti-dumping duties", the word "application" refers to the action whereby an anti-dumping duty previously "imposed" by the authorities is "made operative"[34], i.e. is levied or collected on individual shipments.

42. Thus, for example, Article 10.1 provides that

> … anti-dumping duties shall only be *applied* to products which enter for consumption after the time when the decision taken under paragraph 1 of Article 9 … enters into force, subject to the exceptions set out in this Article.

43. The decision referred to in paragraph 1 of Article 9 is the decision whether to "impose" anti-dumping duties. This confirms that the "application" of duties is an action which is distinct from and subsequent to the "imposition" of duties.

44. By way of exception to the non-retroactivity rule laid down in Article 10.1, the subsequent paragraphs of Article 10 allow in certain cases the retroactive "levying" (cf. Article 10.2, 10.6 10.8) or "collection" (cf. Article 10.7) of duties. This confirms that, in connection with "anti-dumping duties", the *Anti-Dumping Agreement* uses the word "apply" as a synonymous of "levy" and "collect". (The term "levy" is defined in footnote 12 as "the definitive or final legal assessment or collection of a duty or tax".)

45. The EC's interpretation of the term "application" is consistent with the object and purpose of the second sentence of Article 15, which is to encourage the adoption of measures that, while providing a remedy to the domestic industry, are less onerous for the exporters than the "application of anti-dumping duties". Where, as in the case at hand, the importing Member decides to suspend the assessment and collection of duties, the exploration of constructive remedies provided for by the Agreement would be superfluous, because any such remedy (e.g. a price undertaking) would be far more onerous for the exporters than the suspension.

[34] According to the Black's Law Dictionary (West Publishing Co., 1990),
the word "apply" is used in connection with statutes in two senses. When constructing a statute, in describing the class of persons, things or functions which are within its scope; as that the statute does not "apply" to transactions in interstate commerce. When discussing the use made of a statute, in referring to the process by which the statute is made operative; as where the jury is told to "apply" the statute of limitations if they find that the cause of action arose before a given date.

COMMENT OF INDIA TO EC's ANSWER TO PANEL QUESTION 26

India obviously disagrees that application is necessarily "subsequent to" imposition, as suggested by the EC. For this one only needs to look at Article 7, which states that provisional measures are "applied". Hence, "application" of provisional measures could obviously be before "imposition" of definitive measures.

India also refers to its comments concerning EC's answers to questions 4 and 10 of India.

Question 27

One might argue that, for unexamined producers (i.e., those not individually examined as part of the sample), there is no direct evidence, only indirect evidence from the sampled companies) as to whether there is dumping or not, since there is no information collected from these producers on the basis of which a dumping determination under Article 2 of the AD Agreement might be made. If this is considered to be the case, can the parties and third parties point the Panel to any specific provisions of the AD Agreement (not including the Article 3.1 reference to positive evidence) that address the question of how a determination of dumping is to be made for producers for which there is no information?

46. The EC would disagree with the suggested distinction between “direct” and “indirect” in so far as it were meant to imply that the use of what the question describes as “indirect” evidence would be less appropriate.

47. Article 6.10 provides that, where it is not possible to determine an individual margin of dumping for each of the exporters under investigation, the authorities may limit the examination to some exporters. It is implicit in Article 6.10 that, where the authorities decide to resort to that possibility, they may use the dumping margins established for the examined exporters in order to determine the margin of dumping of the unexamined exporters. Indeed, if the authorities were prevented from doing so, and had to collect data from the unexamined exporters in order to calculate their dumping margin, the possibility offered by Article 6.10 to limit the examination to some exporters would serve no useful purpose.

48. The *Anti-Dumping Agreement*, and more specifically Article 6.10, does not prescribe any specific formula to calculate the dumping margin of the unexamined exporters on the basis of the dumping margins established for the examined exporters. This is not saying, however, that the authorities enjoy complete discretion in making that calculation. Article 9.4 places a ceiling on the rate of the duty that may be applied to the imports from the unexamined exporters. Since the duty rate can never exceed the dumping margin (cf. Article 9.3), the formula set out in Article 9.4 also operates, indirectly, as an upper limit on the dumping margin.

49. India has suggested that the dumping margin of the unexamined exporters should be calculated by averaging the margins of the examined exporters, but without excluding the *de minimis* and zero margins.[35] That interpretation has no basis in the *Anti-Dumping Agreement*. Moreover, it would lead to an absurd result: in accordance with Article 9.4, the importing Member would be entitled to apply anti-dumping duties to imports from the unexamined exporters at a higher rate than that calculated by using India’s formula; further, in accordance with Article 9.4, the importing Member could apply anti-dumping duties to imports from the unexamined exporters even where it has been established, by applying India’s formula, that such imports are not dumped.

[35] India’s Second Submission, paras. 130-132.

COMMENT OF INDIA TO EC's ANSWER TO PANEL QUESTION 27

India trusts that it is clear to the Panel that Article 9 addresses the question of "imposition and collection of anti-dumping duties."

While a duty is imposed *as a result of* dumping and injury determined, dumping is not calculated and injury is *not* determined *as a result of* the imposition of a duty. There is a clear distinction and logical sequence in these two steps. By inappropriately mixing the one-way order of these two distinct steps the EC comes to repeat its own argument based on that wrong premise.

Question 28

The EC's actions in the redetermination might be considered to be one method of making a dumping determination for unexamined producers, based on the calculation of a weighted average margin of dumping for examined producers in the sample. India has proposed another method, based on applying the proportion of imports in the sample found to be dumped to the unexamined imports. Can the parties and third parties point to any specific provisions in the Agreement which either prohibit the EC method or require the Indian method?

50. Contrary to what is suggested in the question, India's "method" is not "one method of making a dumping determination for unexamined exporters". Unlike the EC's "method", India's does not allow to determine what is the dumping margin of the unexamined exporters. Its sole purpose is to establish what is the volume of dumped imports outside the sample.

51. The formula applied by the EC in order to calculate the dumping margin of the co-operative unexamined exporters is not prohibited by any provision of the *Anti-Dumping Agreement*. Furthermore, the EC's formula is consistent with the formula set out in Article 9.4. In any event, the EC recalls that India has stated no claim in its panel request to the effect that the determinations of dumping for the unexamined exporters (both co-operative and non-co-operative) made by the EC authorities are inconsistent with any of the provisions of the *Anti-Dumping Agreement* dealing with the determination of dumping. The issue raised in the question, therefore, is beyond the Panel's terms of reference.

52. India's "method" is not required by any provision of the *Anti-Dumping Agreement*. Indeed, there is no reason why the *Anti-Dumping Agreement* should prescribe a method to calculate the volume of dumped imports, because the answer to that question follows from the answer to the previous question addressed by the EC's "method", i.e. what is the margin of dumping of the unexamined exporters.

COMMENT OF INDIA TO EC's ANSWER TO PANEL QUESTION 28

While not every conceivable action could probably be expressly prohibited beforehand, this does not mean that this thereby automatically allows all possible actions, if these involve results that are inconsistent with the Agreement. In this case, by disregarding positive evidence of the sample the EC acted inconsistently with Article 3.1. By so wrongly establishing the volume of "dumped" imports the EC has also acted inconsistently with Article 3.2.

Question 29

Could the parties and third parties address the meaning and significance of the term "positive evidence" as used in Article 3.1of the AD Agreement? In particular, could the parties address the

question whether the EC's method, as described in question 28 above, rests on positive evidence, and the question whether India's method, as described in question 28 above, rests on positive evidence.

53. The EC considers that Article 3.1 is not relevant in this context. Article 3 is concerned exclusively with the determination of injury. By India's logic, any claim concerning the determination of dumping (e.g. whether an adjustment has been properly rejected) could also be formulated as a violation of Article 3. That would be clearly absurd. The question of whether imports are "dumped" for the purposes of the injury determination must be examined in the light of those provisions of the *Anti-Dumping Agreement* which deal specifically with the determination of dumping, and not of Article 3. Yet, India has not invoked any such provision in its Panel request.

COMMENT OF INDIA TO EC's ANSWER TO PANEL QUESTION 29, para. 53

While the EC does not wish Article 3.1 to be relevant for the injury determination, it is the basic paragraph that informs the entire Article 3 that addresses the determination of injury. The volume of dumped imports is a basic element in the determination of injury. By disregarding positive evidence of the sample the volume of dumped imports has been misrepresented. Clearly this runs contrary to Article 3.1 itself.

54. At any rate, the method followed by the EC for establishing the dumping margin of the co-operative unexamined exporters rests on "positive evidence", because it is based on "positive evidence" of dumping for the examined exporters. With the sole exception of the Claim No 1 under Article 2.2.2 (ii), India has not challenged the determination of dumping for those exporters.

55. Although the term "sample" has been loosely used by all the parties during the underlying investigation and in this dispute in order to refer to the group of exporters included in the examination, the EC has never claimed that such group constitutes a "statistically valid sample" within the meaning of Article 6.10. Rather, it represents the largest percentage of the volume of exports which could be reasonably investigated. Accordingly, the EC considers that, as suggested in Question 6 from the Panel to India, it cannot be assumed that the proportion of imports found to be dumped within the "sample" constitutes "positive evidence" of the proportion of dumped imports which would have been found outside the "sample", had all the exporters been examined individually.

COMMENT OF INDIA TO EC's ANSWER TO PANEL QUESTION 29, para. 55

The EC seeks to defy common sense by arguing now, suddenly, that it has not selected a sample but, rather, applied the other option of Article 6.10, *i.e.* the largest volume of exports.

One needs only recall the factual record. For example the original Panel Report at paragraph 2.5 makes clear that this assertion now made by the EC is not true. It is a simple fact that a sample was established. One may also recall the EC statement during the recent meeting of the (21.5) Panel with the parties where the EC referred to recital (19) of the Provisional Regulation pointing out that a sample was established. The existence of the sample has never been in doubt.

For the EC to argue now—more than five years after the initiation of investigation—that facts on which that investigation was based were in fact different from reality and different from those published in the EC's Official Journal defies common sense. It even casts general doubts about the veracity of the other statements in the EC's Official Journal. If even official and published statements in the Official Journal are apparently not true then one may only wonder what else is not true.

Question 30

In light of the Appellate Body findings pertaining to Article 3.5 of the AD Agreement in US-Hot-Rolled Steel Products from Japan, how do your authorities comply with the obligation to "separate and distinguish" the injurious effects of dumped imports from those of other known causal factors?

56. The causality analysis made by the EC authorities in this case takes into account and is in conformity with the guidance provided by the Appellate Body in *United States – Hot Rolled Steel*.

Question 31

Against what standard would you consider that a Panel should assess whether a Member has complied with Article 21.2 of the DSU? In particular, what specific obligations does this provision impose on Members.

57. As explained, the EC considers that Article 21.2 of the *DSU* is a non-mandatory provision, which imposes no binding obligations upon developed country Members[36].

58. The EC has submitted in the alternative that, assuming that Article 21.2 imposed a binding obligation, such obligation would relate to the procedural requirements of the implementation process set out in the other provisions of Article 21, and not to the content of the implementing measures[37].

COMMENT OF INDIA TO EC's ANSWER TO PANEL QUESTION 31, para. 58

India notes that there is nothing in the text of Article 21.2 of the DSU which would suggest that this is not a mandatory provision. Neither does India see textual support for the limitation of the scope of this provision by procedural requirements. The EC reads into Article 21.2 words that are not there. In any case, as India has already stated on a number of occasions, the EC has not even complied with the procedural requirements of Article 21.2.

In this context, would India please address the actions the EC has cited as fulfilling any obligations it may have under this provision.

59. Not applicable.

To the EC and third parties:

Question 32

India is of the opinion that the outcome of a sample analysis must be extended to the whole. On what basis does the EC consider that this is inappropriate, and that it is appropriate, under the Agreement, to assume that imports from non-investigated foreign producers/exporters are dumped? Third parties are also requested to address this question.

60. Contrary to what is suggested in the question, the EC authorities did not "assume" that imports from unexamined exporters were dumped. Rather, the EC authorities determined that those imports were dumped on the basis of the evidence of dumping found for the examined exporters (in

[36] EC's First Submission, paras. 279-284. See also EC's Oral Statement, paras. 122-125.
[37] EC's First Submission, paras. 285-288. See also EC's Oral Statement, paras. 126-127.

the case of the co-operative unexamined exporters) or on the basis of facts available (in the case of the non- co-operative unexamined exporters).

61. As explained above, the EC does not claim that the examined exporters constitute a "statistically valid sample" within the meaning of Article 6.10, but rather the largest percentage of the volume of exports which could be reasonably investigated. The EC does agree, nonetheless, that it is appropriate to rely on data from the examined exporters in order to reach findings for the unexamined exporters. Indeed, that is precisely what the EC authorities did in this case. They relied upon the dumping margins established for the examined exporters in order to determine the dumping margin for the co-operative unexamined exporters.

62. The disagreement between the EC and India rather concerns the question of the purpose for which the data pertaining to the examined exporters should be used. Article 6.10 is concerned with the determination of dumping margins, and not with the determination of injury. Accordingly, the data collected from the examined exporters must be used in order to calculate the dumping margin of the unexamined exporters, rather than in order to estimate the volume of dumped imports. As explained, the answer to that question follows from the answer to the question which precedes it logically, i.e. what is the dumping margin of the unexamined exporters. India's "method" leaves that question unanswered.

COMMENT OF INDIA TO EC's ANSWER TO PANEL QUESTION 32

India refers to her comments made above in respect to question 29.

To Korea

Question 34

Korea argues that using sales value as the weighting factor in calculating weighted average SGA and profits for purposes of Article 2.2.2(ii) distorts the relative importance of the producers' whose information makes up the average by over-representing the producers with higher SGA and prices, and is therefore inconsistent with Article 2.2.2(ii).

63. As already explained in the EC's First Submission[38], contrary to Korea's suggestion, the fact that a producer/exporter has a bigger total sales value does not necessarily imply that its level of profits and SGA expenses is higher. India acknowledged this in its Second Submission[39].

64. In the first place, because the level of profits is a function not only of the prices but also of the costs of each producer. Under normal market conditions, the prices of all the operators will tend to be similar, while their costs may diverge substantially due to a variety of reasons (e.g. degree of amortisation of the investments, differences in technology and production methods, different sources of financing, etc.). Thus, in practice, the differences in profitability between the exporters/producers are more likely to arise from differences in costs than from differences in prices.

65. More particularly, Korea overlooks that the level of profits is also a function of the SGA expenses. Lower SGA expenses will result in higher profits and vice-versa. Thus, in the case at hand, Bombay Dyeing, the company with a higher average price (per "units/set") had a higher profit margin,

[38] EC's First Submission, paras. 83 and 84.
[39] India's Second Submission, paras. 99 and 100.

but a lower margin for SGA (10.39 %) than Standard Industries (19.15%).[40] This contradicts Korea's contention that higher prices reflect always both higher profits and higher SGA.[41]

66. Second, a bigger sales turnover may reflect a different product mix, rather than higher unit prices for comparable products. Indeed, this appears to have been the case here. While Bombay Dyeing's average unit price per "unit/set" (213 rs) was higher than Standard's (73 rs), Standard's average unit price per kg. (306 rs) was higher than Bombay Dyeing's (288rs).[42] This shows that Bombay Dyeing and Standard were selling a very different mix of products.[43]

Korea suggest, however, that using sales value as the weighting factor for purposes of Article 9.4(i) is acceptable because the dumping margin is independent of sales value. Could Korea comment on the potential for distortion arising from using sales value as the weighting factor under Article 9.4(i). Would not weight-averaging based on sales value over-represent the producers with higher dumping margins in the average?

67. Using sales value as the weighting factor for purposes of Article 9.4(i) does not necessarily "overrepresent" the exporters with higher dumping margins. The size of the dumping margin is not directly related to the total export sales value of each exporter. Rather, it is the result of a complex calculation involving the comparison of the export price of each type to the domestic price or cost of production of the same type.

[40] See the table included in India's First Submission, para. 45
[41] The EC requests confidential treatment for the percentages mentioned in this paragraph.
[42] See the table included in the EC's First Submission, para. 93.
[43] The EC requests confidential treatment for the figures mentioned in this paragraph.

ANNEX E-8

COMMENTS OF INDIA ON ANSWERS OF THE EUROPEAN COMMUNITIES TO THE QUESTIONS FROM INDIA

30 September 2002

Question 1

EC may like to clarify that which provision of the WTO Agreement and Vienna Convention does the EC rely when stating that it is possible to extensively interpret provisions of substantive law (as it has argued in the US–Certain Corrosion Resistant Carbon Steel Flat Products from Germany) and impossible as regards the provisions of procedural law?

1. In the case mentioned by India, the EC argued that the requirement to terminate the investigation where the amount of the subsidy is *de minimis* applies also to sunset reviews. The Panel agreed. The EC considers that the reasoning followed by the panel in *US - Corrosion Resistant Steel* cannot be extrapolated to other provisions. Rather, the question of whether a provision which is not expressly cited in Article 11.4 may nevertheless apply to reviews under Article 11.2 must be considered on a case-by-case basis. The EC considers that, for that purpose, it may be relevant that, unlike the provision at issue in *US – Corrosion Resistant Steel,* Article 5.7 is a purely procedural provision, like the provisions referred to in Article 11.4. The EC, nevertheless, has not argued that no procedural provision, other than those referred to in Article 11.4, can ever be applicable to reviews under Articles 11.2 or 11.3. To repeat, the question must be considered on a case-by-case basis. Unlike the EC in *US - Corrosion Resistant Steel,* India has not cited any compelling reasons to consider that Article 5.7 should apply to reviews, notwithstanding its express wording.

COMMENT OF INDIA TO EC's ANSWER TO INDIA's QUESTION 1

India draws attention of the Panel to the fact that the EC has changed the position that it took during the oral hearings. Then, the EC was of the opinion that "the requirement to terminate the investigation where the amount of subsidy is *de minimis*" is a provision of *substantive* law. Now the EC claims that it is a provision of *procedural* law in contrast to Article 5.7 of the ADA which is "a *purely procedural* provision". India submits that this distinction is an arbitrary invention of the EC having no support whatsoever in the text of the WTO Agreement. Accordingly India believes that the compelling reasons accepted by the Panel in *U.S. – Corrosion Resistant Steel* to interpret Article 11.9 of the ASCM extensively should also be applied in respect of Article 5.7 of the ADA. India notes that the EC shifts its positions as regards the interpretation of the covered agreements depending on whether the EC is a complainant or a respondent. Thus, the Panel should disregard the EC's arguments made in paragraphs 6, 106-109 of the EC's First Written Submission (FWS), paragraph 10 of the EC's Second Written Submission (SWS) and paragraph 50 of the EC's Oral Statement.

Question 2

It goes without saying that the EC as a third party in the Australia–Salmon (Article 21.5–Canada) case recalls the following finding of the panel:

> *" … we note that an Article 21.5 panel cannot leave it to the full discretion of the implementing Member to decide whether or not a measure is one "taken to comply". If one were to allow that, an implementing Member could simply avoid any scrutiny of certain measures by a compliance panel, even where such measures would be so clearly connected to the panel and Appellate Body reports concerned, both in time and in respect of the subject-matter, that any impartial observer would consider them to be measures "taken to comply"." (emphasis added)*

In light of this statement could the EC in its reply comment upon the reasons not to consider Regulation 160/2002 and Regulation 696/2002 as measures "taken to comply"? Specifically why does the EC believe that these measures are not "clearly connected"? Could the EC in its reply bear in mind the following paragraph of the article by Jason E. Kearns and Steve Charnovitz:

> *"Evidence of a clear connection or inextricable link between the two measures could include the following: the aggravating and implementing measure (1) are linked in official government statements; (2) were enacted or adopted within a reasonably close period of time; (3) affect and specifically target the same product(s) or same producer(s); (4) were enacted or adopted by the same legislative or administrative body; and (5) are of the same general nature (e.g., both are sanitary measures). In many cases, for example, the aggravating measure will be part of the same legislation or regulation as the implementing measure (and, therefore, will be enacted or adopted by the same body). As a general matter, we would expect that an aggravating measure and an implementing measure that are part of the same legislation or regulation would be sufficiently connected to justify an Article 21.5 review of both measures."*

2. The “subject matter” of Regulation 160/2002 is different from the “subject matter” of the measure in dispute before the original panel. The anti-dumping duties on imports from Egypt and Pakistan were not in dispute before the original panel.

COMMENT OF INDIA TO EC's ANSWER TO INDIA's QUESTION 2

India notes the refusal of the EC to enter into a substantive discussion on the objective criteria of a "clear connection" between Regulations 1644/2001, 160/2002 and 696/2002. Thus, the EC confirms once again the statement it made during the oral hearings that these three measures are closely connected. Accordingly, since Regulation 1644/2001 is recognised by the EC as a "measure taken to comply" all three Regulations are "measures taken to comply". As for the subjective criteria of "subject matter" India draws attention of the Panel to the almost identical titles of Regulations 1644/2001 and 160/2002. India recalls in this connection that it was not India who cumulated the imports from India, Egypt and Pakistan in the original Regulation 2398/97 in the first place.

Question 3

> *The EC in paragraph 35 of its First Written Submission (FWS) states:*
>
> *"As submitted above, the EC considers that Regulations 160/2002 and 696/2002 are not measures "taken to comply". However, should the Panel conclude that they are, the EC submits that the relevant date for assessing the consistency of the measures "taken to comply" with the covered agreements is the date of establishment of the panel, and not that of the end of the "reasonable period of time".*

Does the EC generally believe that the scope and substance of the obligation to comply depends on the terms of reference of a subsequent 21.5 panel or is it an ad hoc opinion?

3. The EC believes that the position expressed in paragraph 35 of the EC's First Written Submission is valid with respect to all Article 21.5 disputes.

What is the textual support for this approach in the WTO Agreement?

4. As observed by the Panel in *US – Shrimps*, "the DSU is silent as to the date on which the existence or consistency of the implementing measure must be assessed"[1].

Does the EC suggest that the promptness of compliance depends not on the outcome of Article 21.3 arbitration or mutual agreement of the parties as in the present case, but on how fast a 21.5 panel is established and with what terms of reference?

5. India persists in confusing two different issues: the scope of the Panel's jurisdiction under Article 21.5 and the obligations of the implementing Member under Article 21.3.

COMMENT OF INDIA TO EC's ANSWER TO INDIA's QUESTION 3

India does not "persist in confusing two different issues: the scope of the Panel's jurisdiction under Article 21.5 and the obligations of the implementing Member under Article 21.3". India has merely reproduced the EC's "line" of reasoning contained in paragraph 35 of the EC's FWS. Indeed, it was the purpose of the question to demonstrate that it is *the EC* by making a conditional argument on a systemic problem who confuses two different issues. India thanks the EC for accepting that its logic in paragraph 35 of the FWS is absurd. Thus, the whole second request of the EC for the preliminary ruling is absurd.

Question 4

In US–Section 301 case the EC recalled the US the following ruling of the GATT panel on United States – Measures Affecting Alcoholic and Malt Beverages (Beer II):

> *"Even if Massachusetts may not currently be using its police powers to enforce this mandatory legislation, the measure continues to be mandatory legislation which may influence the decisions of economic operators. Hence, a non-enforcement of a mandatory law in respect of imported products does not ensure that imported beer and wine are not treated less favourably than like domestic products to which the law does not apply".*

The EC added afterwards:

> *"… the provisions of Sections 301-310 stipulating WTO-inconsistent action would thus remain WTO-inconsistent even if the USTR did not enforce them at all. (underlining in original)*

Why does the EC believe that this reasoning does not apply to the current suspension or non-application of anti-dumping duties which otherwise would be illegal due to the failure to explore constructive remedies?

[1] Panel Report, *US – Shrimps*, para. 5.12.

6. In *US – Malt and Alcoholic Beverages* the United States did not argue that the measure was suspended as a matter of law. Rather, the United States argued that, *de facto*, the authorities of Massachusetts were not using their police powers to enforce it. The panel correctly rejected that argument. Unlike the Massachusetts authorities, the EC customs authorities could not "enforce" the measures in dispute even if they wished to. The decision to suspend the application of the duties means that the EC customs authorities are legally prevented from assessing and collecting any anti-dumping duties on imports from India.

COMMENT OF INDIA TO EC's ANSWER TO INDIA's QUESTION 4

India notes that the EC does not comment on the position the EC has taken in the *US–Section 301*. To remind, in this case the fact that the United States argued that the measure had been suspended as a matter of law, did not preclude the EC from arguing that non-application of a measure can be considered as a form of application. Thus, again India notes that the EC shifts its position as for interpretation of the covered agreements depending on whether the EC is a complainant or a respondent. Accordingly, the Panel should disregard the EC's arguments concerning the status of suspension of anti-dumping duties. Undoubtedly, the latter is a form of application of anti-dumping measures.

Question 5

Could the EC clarify how the citation from the Appellate Body report in paragraph 227 of its FWS concerning increased imports as "the sole cause" of serious injury support its statement in the same paragraph that "the EC authorities were not required to prove that dumped imports were the cause of the injury suffered by the EC industry"?

7. The EC recalls that in the statement mentioned by India, the EC was citing India's own First Written Submission. The use of the definite article "the", rather than the indefinite "a", in the phrase "the cause of injury" implies that dumped imports must be the sole cause of injury.

COMMENT OF INDIA TO EC's ANSWER TO INDIA's QUESTION 5

The EC defies common sense by seeing no difference between the phrases "the sole cause" and "the cause". For that reason, EC's arguments contained in paragraphs 227-230 of the EC's FWS, paragraph 13 of the EC's SWS and 107-108 of the EC's Oral Statement should be disregarded.

Question 6

In the US–Wheat Gluten case the EC argued that Article 4.2(b) of the Agreement on Safeguards requires that a Member demonstrate that "increased imports" caused "serious injury per se, i.e. taken alone". Although India is nowhere arguing the same in the present case, it still would have nothing against the identical EC's position in respect of Article 3.5 of the ADA. Why did the EC change its views? Do Panel or Appellate Body reports prohibit a Member to take a more liberal approach to the issues than may be actually contained in the text of the WTO Agreement?

8. The EC made that argument in connection with Article 4.2 (b) of the *Agreement on Safeguards* and not with respect to Article 3.5 of the *Anti-Dumping Agreement*. Indeed, when making that argument, the EC emphasised the exceptional nature of the *Agreement on Safeguards*.[2]

[2] Appellate Body Report, *United States – Definitive Safeguard measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, para. 17.

COMMENT OF INDIA TO EC's ANSWER TO INDIA's QUESTION 6

The EC is well aware of the fact that in spite of the exceptional nature of *safeguard measures* (not the *Agreement on Safeguards*!), "adopted panel and Appellate Body reports relating to the non-attribution language in the *Agreement on Safeguards* can provide guidance in interpreting the non-attribution language in Article 3.5 of the *Anti-Dumping Agreement*."[3] Bearing in mind this awareness India notes that the EC has put forward no explanation to the shift in its position. Thus, again the EC changes its approach to the interpretation of the covered agreements depending on whether it is a complainant or a respondent. Respectively, this represents an additional rationale for the Panel to disregard EC's arguments contained in paragraphs 227-230 of the EC's FWS, paragraph 13 of the EC's SWS and 107-108 of the EC's Oral Statement.

Question 7

What is the difference between a "niche product" and a "like product"? Are "niche products" unlike "non-niche products"?

9. As the EC explained before the Panel, a “niche” bed linen product falls within the definition of the like product. The EC noted in its First Submission that cotton type bed linen is a product which comprises several different types or ranges of product, all of which constitute the like product.[4]

10. In this respect, the EC wishes to point out that where India refers in its closing statement to the Panel to “identical” products within the meaning in Article 2.6 of the Anti-Dumping Agreement, it fails to cite that provision in full.[5] Article 2.6 provides:

> Throughout this Agreement the term “like product” (‘produit similaire’) shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

11. In any event, India has raised no claim under Article 2.6 in this Panel request and has not directly disputed the fact that the niche product is the like product. Rather, India has disputed the fact that the EC refers to the (uncontested) shift in production and sales towards the higher value niche products in analysing the overall increase in average prices of bed linen on a per kilogram basis. The EC maintains, however, that it is entitled to analyse such developments in context.[6]

COMMENT OF INDIA TO EC's ANSWER TO INDIA's QUESTION 7

India is surprised to note that after all these years the EC now takes as a "fact" that "the niche product is the like product." India trusts that it is clear to the Panel that the product under consideration is Bed Linen, as originally defined by the EC, and not part of the Bed Linen as is now submitted by the EC.

[3] Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ("*US – Hot-Rolled Steel*"), WT/DS184/AB/R, adopted 23 August 2001, para. 230.
[4] EC’s First Written Submission, para. 170.
[5] India’s closing statement, para 47.
[6] EC’s Oral Statement to the Panel, paras 79-81.

Question 8

The EC states in paragraph 114 of its oral statement "the increase in the cost of raw cotton is not a different causal factor, because it cannot have any injurious effects on its own." How does the EC reconcile this statement with recital 103 of the original Provisional Regulation wherein it stated: "the Commission concluded that increases in raw material prices had caused injury"? Also, how does the EC reconcile that paragraph 114 with recital (50) of the re-determination?

12. As already explained in paragraphs 245-248 of the EC's First Submission, India takes those statements out of context. In particular, in recital 103 of Regulation 1069/97 it was not merely stated that the increase in raw material prices had caused injury, but that any injury caused was in turn due to inability to pass on the increased cost of the raw material to customers. It should be noted that recital 50 of Regulation 1644/2001 simply points to the injury suffered by the Community industry and highlights the declining and inadequate profitability which is the result of prices which did not reflect the increases in costs of raw cotton and which had not been able to keep pace with inflation in prices of consumer goods. The pertinent analysis as to the causation of this injury is however dealt with in recitals 52 –70 of Regulation 1644/2001 and further explained in the EC's First Written Submission and Oral Statement to the Panel.[7]

COMMENT OF INDIA TO EC's ANSWER TO INDIA's QUESTION 8

Contrary to what the EC states in its answer, the second sentence in recital 103 does not state that "injury caused [by increase in raw material prices] was in turn due to inability to pass on the increased cost of the raw material to customers." The second sentence states that "the *extent* of such injury depends on the ability of the producers to pass on some or all of the increased cost" (emphasis added). The third and the last sentence in this recital then goes on to state that "in this case, it was reasonable to assess that the dumped imports were the main reason why such pass-through did not occur". Thus, the second and the third sentences represent an unsatisfactory attempt of the EC to undertake the second step of the non-attribution analysis mandated by Article 3.5 of the ADA and consisting in separation of injurious effects of other known factors from the injurious effects caused by dumped imports.[8] Respectively, the first sentence cited by India in her question (recital (103) of Provisional Regulation) and the sentence of recital (50) of the re-determination represent the only two sentences devoted by the EC to the examination of this type of other known factors. India has not taken this sentence out of its context simply because there is no context.

Furthermore, India disagrees with the statement of the EC that "the pertinent analysis as to the causation of this injury is however dealt with in recitals 52–70 of Regulation 1644/2001 and further explained in the EC's First Written Submission and Oral Statement to the Panel". The only recital dealing with the injury caused by increase in raw cotton prices is recital 60 stating that "the findings set out in recitals 102 and 103 of the provisional can be confirmed". As for the EC's submissions to the Panel, India fails to understand how can they cure inconsistencies contained in the measures taken by the EC to comply.

[7] EC's First Written Submission, paras. 208-248; EC's Oral Statement to the Panel, paras. 107-114.

[8] "[Article 3.5] requires investigating authorities, as part of their causation analysis, first, to examine *all* "known factors", "other than dumped imports", which are causing injury to the domestic industry "at the same time" as dumped imports. Second, investigating authorities must ensure that injuries which are caused to the domestic industry by known factors, other than dumped imports, are not "*attributed* to the dumped imports." (Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ("*US – Hot-Rolled Steel*"), WT/DS184/AB/R, adopted 23 August 2001, para. 222).

Question 9

The EC contends that "the prices of bed linen do not increase in line with the prices of other consumer goods". (paragraph 110 of the oral statement) How does the EC reconcile this statement with its position in paragraph 78 of the oral statement the prices of "niche products" went up? Has inflation affected only the "niche products"?

13. The EC did not state in para. 78 of its oral statement that the prices of niche products went up. It merely stated that there was a shift (i.e. in the overall product mix sold) towards higher value niche products. As explained in response to the Panel's question 22 to the EC, the average price of a particular product type may decrease but the overall average price per kilogram sold will still increase if there has been a shift in the proportion of higher value products sold.

According to India this answer once again brings to light the flawed logic of the EC. In plain words the EC merely says that a decrease in the average price for a particular product *type* indicates injury, but an overall price increase of the 'like product' does not. India has already pointed out in its second written submission that with such a contrived logic 'injury' can always be found": if average prices for the 'like product' go down then this is apparently a sign of injury while if average prices go up there is apparently a shift in product mix. If this 'logic' of the EC is to be taken serious at all it indicates, if anything, a problem on account of the 'like product' under investigation.

Question 10

Stating in para. 261 of its FWS that "as long as a developed country Member is not "applying" any anti-dumping duties, it has still the possibility to explore constructive remedies and, therefore, cannot be found to be in violation of Article 15" does the EC accept that if anti-dumping duties were not suspended as of August 14, then that would constitute a violation of Article 15?

14. Had the EC not suspended the application of anti-dumping duties, it would have explored first the possibilities of constructive remedies in accordance with Article 15. If the EC were to end the suspension in place, it would explore first the possibilities of constructive remedies.

COMMENT OF INDIA TO EC's ANSWER TO INDIA's QUESTION 10

India takes note of this statement; India also notes that the statement of the EC in paragraph 261 of its FWS should be read in light of the interpretative approach taken by the EC in the *US–Section 301* (see India's comment to the EC's answer to the question 4 from India). India recalls that the EC has been unable to explain why this approach should not be applied in the present case.

ANNEX E-9

COMMENTS OF THE EUROPEAN COMMUNITIES TO INDIA'S ANSWERS TO THE QUESTIONS FROM THE PANEL

30 September 2002

Question 6

1. India suggests that the EC would have acknowledged that the exporters included in the examination constitute a "statistically valid sample" within the meaning of Article 6.10 of the *Anti-Dumping Agreement*.

2. As already explained in the EC's answer to question 29 from the Panel (at paragraph 55), the EC has never claimed that the selected exporters constituted a "statistically valid sample" for the purposes of Article 6.10. In the letter No 060644 of 11 October 1996 addressed to the representatives of the Indian exporters and their association TEXPROCIL[1] the EC Commission specified that

> The aim of this exercise is to select a sample representing the largest volume of exports which can reasonably be investigated within the time available taking also into account the need to cover companies with domestic sales as well as companies of different types (i.e. integrated, semi-integrated, merchant exporters).

3. Furthermore, the validity of a sample depends on the purpose for which the sample is selected. In this case, the selection of the examined exporters was made specifically with a view to calculate the average margin of dumping of the unexamined exporters. The selection criteria would have been different, had the purpose of the selection been to estimate the volume of dumped transactions outside the "sample". Both the purpose of the selection and the selection criteria used by the EC authorities were well known to the Indian exporters and to the Indian Government, which never called them into question.

4. India's claim is based on the same type of reasoning that was rejected by the panel in the original proceedings, where India claimed that the EC should have excluded from the injury examination the non-dumped transactions. The original Panel reasoned that the existence of dumping is established with respect to all the imports of the product concerned from each exporter and not with respect to individual transactions. The consequence of this is that either all the imports from an exporter are "dumped" or all of them are "non-dumped". It is implicit in Article 6.10 that, by way of exception to the rule that the authorities must calculate an individual dumping margin for each exporter, they may calculate a single, "non-individual" margin for all the unexamined exporters. Thus, the question of what proportion of imports from the unexamined exporters is "dumped" does not even arise. Either all such imports are "dumped" or all of them are "non-dumped", just like all imports from each selected exporter are either "dumped" or "non-dumped" .

5. The data collected from the examined exporters does not allow to establish which of the unexamined exporters are dumping, but only to calculate an average dumping margin for all of them. The fact that a certain percentage of the total volume of imports from the group of examined exporters is "non-dumped" is not evidence that the same percentage of the volume of imports from the unexamined exporters is also "non-dumped". This is so because the dumping margin must be

[1] This letter was attached as Annex 22 to India's First Written Submission to the original Panel.

determined for each exporter, rather than on a transaction basis. As a result, it is perfectly possible that, even if it could be shown that in the case at hand transactions accounting for 53% of the import volume from the unexamined exporters were "non-dumped", all the unexamined exporters were nevertheless found to be dumping when the individual dumping margin of each of them is calculated on an overall basis with respect to all the transactions.

Question 7A

6. India argues that the EC's analysis on stocks is somehow deficient since it did not provide data pertaining to the situation at 1 July 1995 and 30 June 1996, the end-to end dates of the investigation period. The EC would recall that for injury purposes, trends are usually analysed over the period considered, namely 1992 to the end of the IP. An analysis of the development in stocks within a one year period alone would be rather meaningless. Since the period considered for injury purposes included four calendar years (1992-1995) as well as the IP, it is obvious why seasonal stock movements at the beginning or end of a calendar year could distort the picture.

7. The EC's statement that some increase in stocks was observed for some companies consequently relates to an increase during the period considered, not merely during the IP or during the seasonal period in any particular year. It should be noted that such an increase in stocks would ordinarily point towards injury. The increase in stocks witnessed in some firms was also confirmed by the information on production and sales at the level of the sample. However, the EC looked beyond the apparent trends in analysing this factor. It noted in particular that annual fluctuations could be distorted due to the high volume of sales and orders towards the end of the calendar year when stock valuations were often performed; some companies produced mainly to order, some were sub-contracting surplus production, and had no or very little stocks. In the light of this information, the EC considered that data and information collected on stocks was not consistent across the sampled producers since an increase in stocks could indicate increased orders rather than unsold production, and therefore concluded that stocks could not be considered as a relevant factor for the assessment of the state of the Community industry.[2]

8. In relation to capacity utilisation and investments, India ignores the explanations already provided and raises no new arguments. The EC therefore refers the Panel to its submissions at paras. 153-154 and 188 of its First Written Submission, paras. 69-70 and 93[3] of its Oral Statement and its replies to Question 18 from the Panel.

Question 7B

9. For the first time in this Panel proceeding, India identifies a number of other factors for which the EC is alleged to have collected no data. For most of these other factors, India relies on paragraph 6.165 of the original Panel report, where the Panel refers to certain factors which were not expressly mentioned in recitals 81-91 of the original Provisional Regulation. The EC has already explained that the original Panel did not make any factual findings regarding the collection of data, it merely noted that in the absence of any express references to those factors in the determination it could not simply be assumed that they had been analysed.

10. In addition to the list of factors referred to by the original Panel at paragraph 6.165, India further alleges that there was no collection of data regarding market share and factors affecting domestic prices. Since the EC has described in detail its analysis of both those factors during these

[2] Regulation 1644/2001, recital 29; EC reply to Question 18 from the Panel.

[3] Please note that footnote 82 should refer to the table in Exhibit-India-RW-5 rather than Exhibit-India-RW-4, which does not contain any table.

Panel proceedings, it is rather astonished that India only now seeks to argue that no data was collected. The EC refers the Panel to the numerous explanations already provided in this respect.[4]

11. Finally, India states a number of times in its reply to Question 7 that the EC "admitted" during the meeting with the parties that "it did not go out in the field and collect the missing information". That assertion is incorrect and misleading. The EC confirmed that it did not collect any new data after the original Panel report because it did not need to; that was simply not necessary as the EC had all the information required. In other words, there was no "missing" data.

Question 7C

12. As regards the alleged inadequacy of the EC's analysis, India raises no new arguments and the EC refers the Panel to its earlier submissions at paras. 156-207 of its First Written Submission and paras. 66-106 of its Oral Statement.

Question 14

13. India cites four "other factors" which were "known" to the EC but were not taken into account by the EC: the "depressed periods" of the domestic industry, the effects of the non-dumped imports, the contraction in demand and the export performance of the domestic industry.

14. As discussed below, one of those factors (the "depressed periods") is not a relevant "other factor", while the other three were properly examined by the EC authorities.

A.- "Depressed periods"

15. India alleges that the EC authorities found that the domestic industry suffered from a "depressed period" but failed to analyse this as an "other factor". India relies on the following statement contained in recital 30 of Regulation 1644/2001.

> The investigation showed that many producers were able to maintain a high rate of capacity utilisation and even had to subcontract surplus production, to allow them to run at high utilisation even in depressed periods.

16. India has misread the above passage. Contrary to what is implied by India, the EC authorities did not find that the domestic producers underwent "*a* depressed period" during the reference period used for the injury determination. Rather, the EC authorities made the observation that the bed linen producers subcontract surplus production (rather than increasing production capacity), so that in "depressed periods" (in the plural form) they may continue to run at a higher rate of capacity utilisation. This is a description of a structural and permanent characteristic of the bed linen industry, and not a factual finding to the effect that the domestic industry was undergoing a conjunctural "depression" during the reference period.

17. India's allegation is based on a misunderstanding of the terms "depressed periods". As explained elsewhere, the bed linen producers usually manufacture to order. Orders and production are not evenly distributed throughout the year and across the sampled producers. As a result, at any given point in time, certain producers may have few orders, while others may have orders in excess of their capacity. This makes it possible for the latter to subcontract the available production capacity of the

[4] Regulation 1644/2001, recitals 35, 45; Regulation 1069/97, recitals 84, 85, and 88; EC First Written Submission, para. 189 and 167; Exhibit-India-RW-17, in particular pages 4, 7 and 8.

former.[5] The terms "depressed period" were used by the EC authorities to designate the periods during which each producer has relatively few orders as compared to its peak periods, rather than to a period where the bed linen industry as a whole was "depressed". Thus, the "depressed periods" mentioned in paragraph 30 are not an indication of injury.

18. In any event, it should be noted that the Indian exporters did not at any point during the original investigation or the re-determination allege that the existence of "depressed periods" was a separate cause of injury.

B. Non dumped imports

19. India alleges that the effects of non-dumped imports from other countries were not "properly taken into account", but submits no arguments in support of such allegation.

20. The EC recalls that it has carefully analysed the effects of other imports in the Provisional Regulation (recitals 100 and 101, confirmed by Regulation 1644/2001, recital 63) and in Regulation 1696/2002 (recitals 30-46). India has nowhere addressed the findings set out in those sections.

C. Contraction in demand

21. India alleges that the contraction in demand was not "taken into account" and that there is a contradiction between the Provisional Regulation and Regulation 1644/2001).

22. Contrary to India's allegations, this factor was duly taken into account by the EC authorities. As explained in the EC's answer to question 21 from the Panel (at paragraph 24), the EC authorities concluded that the contraction in demand was not a cause of injury because the supply of bed linen fell by a much a larger amount, due to the fact that 29 EC producers not included in the Community industry went out of business.

23. There is no contradiction between recital 105 of the Provisional Regulation and recital 62 of Regulation 1644/2001. In both regulations, the EC authorities noted that the contraction in demand had a different impact on the EC producers not included in the Community industry, whose sales fell by 50% more than the total fall in consumption, and the Community industry, whose sales remained by and large stable because they could benefit, although less than the dumped imports, from the disappearance of other EC producers not included in the Community industry.

D. Export performance

24. India alleges that the EC authorities did not take into account the export performance of the domestic industry.

25. India's allegation is unfounded. The EC authorities found that exports from the EC (including exports by the domestic industry) had performed better than domestic sales and that, indeed, the increase in exports was one of the reasons for the overall increase in output of the Community industry (Provisional Regulation, recital 81). Thus, it is plain that the export performance of the domestic industry was not a cause of injury, but rather the opposite, a factor which mitigated the injury suffered by the Community industry on the EC market .

[5] The development of sub-contracting has been further encouraged by the process of consolidation of the bed linen industry though mergers and alliances (provisional regulation, recital 114)

26. In any event, this factor was not raised at any point by the Indian exporters.