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EUROPEAN COMMUNITIES — ANTI-DUMPING DUTIES ON IMPORTS OF COTTON-TYPE BED LINEN FROM 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* is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 30 October 2000 pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/160/Rev.1). Members are reminded that, in accordance with the DSU, only parties to the dispute may appeal a panel report. An appeal shall be limited to issues of law covered in the Panel Report and legal interpretations developed by the Panel. There shall be no *ex parte* communications with the Panel or Appellate Body concerning matters under consideration by the Panel or Appellate Body.

Note by the Secretariat: This Panel Report shall be adopted by the Dispute Settlement Body (DSB) within 60 days after the date of its circulation unless a party to the dispute decides to appeal or the DSB decides by consensus not to adopt the report. If the Panel Report is appealed to the Appellate Body, it shall not be considered for adoption by the DSB until after the completion of the appeal. Information on the current status of the Panel Report is available from the WTO Secretariat.

EUROPEAN COMMUNITIES – ANTI-DUMPING DUTIES ON IMPORTS OF COTTON-TYPE BED LINEN FROM INDIA (DS141)

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I INTRODUCTION

1.1 On 3 August 1998, India requested consultations with the European Communities pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article XXIII of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and Article 17 of the Agreement on Implementation of Article VI of GATT 1994 ("AD Agreement") regarding Commission Regulation No. 2398/97 of 28 November 1997, imposing final anti-dumping duties on imports of cotton-type bed linen from India.[1] On 17 August 1998, Pakistan requested to be joined in the consultations requested by India.[2] India and the European Communities held consultations in Geneva on 18 September 1998 and 15 April 1999, but failed to reach a mutually satisfactory resolution of the matter.

1.2 On 7 September 1999, pursuant to Article XXIII:2 of GATT 1994, Article 6 of the DSU and Article 17 of the AD Agreement, India requested the establishment of a panel to examine the matter.[3]

1.3 At its meeting on 27 October 1999, the Dispute Settlement Body ("DSB") established a Panel in accordance with India's request.[4] 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/DS141/3, the matter referred to the DSB by India in document WT/DS141/3, 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 On 12 January 2000, India requested the Director-General to determine the composition of the Panel, pursuant to paragraph 7 of Article 8 of the DSU. This paragraph provides:

> "If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request."

1.5 The Director-General composed the Panel as follows:

Chairman: Dr. Dariusz Rosati

Members: Ms Marta Lemme
Mr. Paul O'Connor

1.6 Egypt, Japan and the United States reserved their rights to participate in the panel proceedings as third parties.

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[1] WT/DS141/1.
[2] WT/DS141/2.
[3] WT/DS141/3.
[4] WT/DS141/4.

1.7 The Panel met with the parties on 10-11 May 2000 and on 6 June 2000. It met with the third parties on 11 May 2000.

II FACTUAL ASPECTS

2.1 This dispute concerns the imposition of definitive anti-dumping duties by the European Communities on cotton-type bed linen from India.

2.2 On 30 July 1996, the Committee of the Cotton and Allied Textile Industries of the European Communities ("Eurocoton") – the EC federation of national producers' associations of cotton textile products – filed an application with the European Communities for the imposition of anti-dumping duties on cotton-type bed linen from, *inter alia*, India.[5]

2.3 On 13 September 1996, the European Communities published notice of the initiation of an anti-dumping investigation regarding imports of cotton-type bed linen originating in, *inter alia*, India.[6]

2.4 The European Communities established 1 July 1995 to 30 June 1996 as the investigation period, and the investigation of dumping covered this period. The examination of injury covered the period from 1992 up to the end of the investigation period.

2.5 In view of the large number of Indian producers and exporters, the European Communities conducted its analysis of dumping based on a sample of Indian exporters. The European Communities also established a reserve sample, to be used in the event companies in the main sample subsequently refused to cooperate.

2.6 The European Communities established normal value based on constructed value for all investigated Indian producers. One company, Bombay Dyeing, was found to have representative domestic sales of cotton-type bed linen taken as a whole. Five types comparable to those exported to the European Communities were sold in representative quantities on the domestic market. Those five types were found not to be sold in the ordinary course of trade. Therefore, constructed values were calculated for all the types sold by Bombay Dyeing. For the other investigated Indian producers, the information for SG&A and profit used in the constructed normal value was that of Bombay Dyeing. Export price was established by reference to the prices actually paid or payable in the EC market. The weighted average constructed normal value by type was compared with weighted average export price by type for the investigated Indian producers, and a dumping margin was calculated for each such producer.

2.7 The complaint listed companies that produced bed linen in the European Communities. The European Communities excluded certain complainant companies. The 35 remaining companies were found to represent a major proportion of total Community production of bed linen in the investigation period and were, therefore, deemed to make up the Community industry.

2.8 Due to the number of companies in the Community industry, the European Communities established a sample. This sample comprised 17 of the 35 companies in the Community industry, representing 20.7% of total Community production and 61.6% of the production of the Community industry. The European Communities found that the Community industry suffered declining and inadequate profitability and price depression and, accordingly, reached the conclusion that the Community industry had suffered material injury. The European Communities found a direct causal link between the increased volume and the price effects of the dumped imports and the material injury

[5] Exhibit India-6. The other countries whose exporters of cotton-type bed linen were subject to the application for investigation and imposition of anti-dumping duties were Egypt and Pakistan.

[6] Exhibit India-7.

suffered by the Community industry, demonstrated, according to the European Communities, by the existence of heavy undercutting resulting in a significant increase in the market share of the dumped imports and corresponding negative consequences on volumes and prices of sales of Community producers.

2.9 The European Communities published notice of its preliminary affirmative determination of dumping, injury and causal link on 12 June 1997.[7] Provisional anti-dumping duties were imposed with effect from 14 June 1997.

2.10 The European Communities continued its investigation, received comments from interested parties, and provided an opportunity to be heard. Parties were informed of the essential facts and considerations on the basis of which it was intended to recommend the imposition of definitive anti-dumping duties, and the definitive collection, at the level of these duties, of amounts secured by provisional duties, on 3 October 1997.[8] An opportunity for further representations was subsequently provided.

2.11 Notice of the final affirmative determination was published on 28 November 1997. Injury margins were determined to be above the level of dumping margins in all cases, and therefore definitive anti-dumping duties in the amount of the dumping margins determined, ranging from 2.6% to 24.7%, depending on the exporter in question, were imposed on imports of cotton-type bed linen originating in India.[9] Certain handloom products were exempted from the application of the definitive duties, provided a certificate of handloom origin in the required form was provided. Provisional duties were not definitively collected.

III PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. INDIA

3.1 India requests that the Panel find that, by imposing final anti-dumping duties on imports of cotton-type bed-linen from India, the European Communities violated Articles 2.2, 2.2.2, 2.4.2, 3.1, 3.4, 3.5, 6, 6.10, 6.11, 5.3, 5.4, 15, and 12.2.1 and 12.2.2. India makes 31 separate claims with respect to these asserted violations, as follows:

- Claim 1: Inconsistency with Article 2.2.2, by resorting to the option laid down in Article 2.2.2(ii) and by misapplying that option;

- Claim 4: Inconsistency with Article 2.2, by applying the profit amount determined for Bombay Dyeing in calculating constructed value for other producers, even though that amount was clearly not "reasonable";

- Claim 7: Inconsistency with Article 2.4.2, by zeroing negative dumping amounts in calculating dumping margins;

- Claim 8: Inconsistency with Article 3.1, by assuming that all imports of the product concerned during the investigation period were dumped;

- Claim 11: Inconsistency with Article 3.4, by failing to consider all injury factors mentioned in that provision for the determination of the state of the domestic industry;

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[7] Commission Regulation No. 1069/97, Exhibit India-8 ("Provisional Regulation").
[8] Exhibit India-33.
[9] Council Regulation No. 2398/97, Exhibit India-9 ("Definitive Regulation").

- Claim 14: Inconsistency with Article 6, insofar as the European Communities would argue that it did in fact consider all factors in Article 3.4, by failing to disclose or make public findings thereon, which violates the rights of defence contained in Article 6.
- Claim 15: Inconsistency with Article 3.4, by relying in the injury determination on companies outside the domestic industry, by not consistently basing the injury determination on the chosen sample and by relying on different "levels" of industry for different injury indices;

- Claim 16: Inconsistency with Articles 6.10 and 6.11, by selecting a sample of the domestic industry that was not representative;

- Claim 19: Inconsistency with Article 3.4, by taking account of injury allegedly caused by imports before the investigation period, which imports were not determined to be dumped;

- Claim 20: Inconsistency with Article 3.5, by taking account of injury allegedly caused by imports before the investigation period, which imports were not determined to be dumped;

- Claim 23: Inconsistency with Article 5.3, by failing to examine the allegations in the complaint and by failing to take into account information available at the time of initiation pointing to lack of material injury caused by dumped imports;

- Claim 26: Inconsistency with Article 5.4, by failing to properly examine the representativeness of the complainant and/or by failing to make a proper determination on representativeness as required by that provision;

- Claim 29: Inconsistency with Article 15, by failing to explore possibilities of constructive remedies before imposing anti-dumping duties;

3.2 India's claims 2, 5, 9, 12, 17, 21, 24, 27, and 30 assert inconsistency with Article 12.2.1 by failing properly to explain, in the Provisional Regulation, the European Communities' reasoning regarding matters raised in claims 1, 4, 8, 11, 16, 20, 23, 26, and 29, respectively.

3.3 India's claims 3, 6, 10, 13, 18, 22, 25, 28, and 31 assert inconsistency with Article 12.2.2 by failing properly to explain, in the Definitive Regulation, the European Communities' reasoning regarding matters raised in claims 1, 4, 8, 11, 16, 20, 23, 26, and 29, respectively.

3.4 India argues that, in so doing, the European Communities has nullified and impaired benefits accruing to India under the WTO Agreement.

3.5 India further requests that the Panel recommend that the European Communities bring its measures into conformity with its WTO obligations and that the European Communities immediately repeal the Regulation imposing definitive anti-dumping duties and refund anti-dumping duties paid thus far.

3.6 India also requests that the Panel issue the following preliminary ruling:

1. With respect to certain documentary evidence provided by the European Communities in Exhibit EC-4, India notes that this document was never made available to it, or otherwise referred to, at any stage prior to this point in time. India indicates that standing has been a central issue throughout the anti-dumping investigation leading to the imposition of anti-dumping duties on cotton-type bed linen from India, despite which the European Communities has never before

produced Exhibit EC-4. India, therefore, requests that the exact status of Exhibit EC-4 be established.

B. EUROPEAN COMMUNITIES

3.7 The European Communities requests the Panel to reject the requests for recommendations made by India.

3.8 In its first submission, the European Communities requests that the Panel issue the following preliminary rulings:

1. The European Communities objects to the inclusion in India's first written submission of claims that were not mentioned in its Panel request. These include claims that the European Communities has acted inconsistently with the following provisions of the AD Agreement: Article 1; Article 3.4, as regards the allegation that the European Communities assumed that imports before the period of investigation were dumped (claim 19); Article 3.6 (claim 8); Articles 6.2, 6.4 and 6.9 (claim 14); and Articles 6.10 and 6.11 (claim 16).

2. The European Communities submits that India's claims concerning alleged defects in the Provisional Regulation are beyond the Panel's jurisdiction because (i) Article 17.4 defines the circumstances in which a provisional measure may be referred to the DSB and India has not contended that the Provisional Regulation fulfils the requirements of that provision and (ii) India's claims regarding the Provisional Regulation are moot as the Regulation expired in November 1997 and no anti-dumping duties were collected under it. The European Communities requests that the Panel exclude these claims from the scope of these proceedings (claims 2, 5, 8 (in part), 9, 11 (in part), 12, 15 (in part), 17, 19 (in part), 21, 24, 27, 29 (in part) and 30).

3. The European Communities requests the Panel to rule that the verbatim reports of the consultations submitted as evidence by India are inadmissible and will be disregarded.

4. The European Communities requests the Panel to rule that the document submitted by India as Exhibit India-49 is not part of these proceedings, because it is apparently a dumping calculation made by the EC authorities in the course of another investigation. The European Communities condemns the breach of confidentiality and indicates that it is not prepared to comment on the substance of the document.

3.9 In addition to its request for a preliminary ruling regarding the Panel's terms of reference, the European Communities also argued that claim 29 is largely outside the Panel's terms of reference because the Panel request referred to EC behaviour before the Provisional Regulation.

IV ARGUMENTS OF THE PARTIES

4.1 With the agreement of the parties, the Panel has decided that, in lieu of the traditional descriptive part of the Panel report setting forth the arguments of the parties, the parties' submissions will be annexed in full to the Panel report. Accordingly, the parties' first and second written submissions and oral statements, along with their written responses to questions, are attached at **Annex 1** (India) and **Annex 2** (the European Communities). The written submissions, oral statements and responses to questions of the third parties are attached at **Annex 3**.

V INTERIM REVIEW

5.1 On 31 July 2000, the Panel provided its interim report to the parties. The parties submitted their comments on the interim report on 7 August 2000. Neither party requested that the Panel hold an interim review meeting, and as a consequence no meeting was held.

5.2 Having reviewed the parties' comments, the Panel corrected a typographical error in the heading of section VI.C.1, and made a stylistic change to use the designation "European Communities". In addition, we made the following clarifying changes: (i) to the heading of section VI.C.1, to more accurately reflect the legal basis of the claim in question; (ii) to the third sentence of paragraph 6.215, to reflect the nature of inconsistencies in certain photocopied documents submitted to the Panel; and (iii) to footnote 90, to reflect the basis of the European Communities' decision not to apply a lesser duty. We did not make a requested change to the last sentence of paragraph 6.215, as the timing of the EC's offer to inspect documents is already set out in paragraph 6.207, and need not be repeated.

VI FINDINGS

A. REQUESTS FOR PRELIMINARY RULINGS

6.1 In its first written submission, the European Communities requested preliminary rulings with respect to (i) the scope of the claims before us, (ii) certain evidence concerning the consultations presented by India in its first submission, and (iii) certain evidence from a different anti-dumping investigation presented by India in its first submission. India subsequently made a preliminary request with respect to certain evidence presented by the European Communities in its first submission. The parties provided written responses to each others' requests for preliminary rulings prior to our first meeting, and further arguments were made at that meeting. At the close of the first meeting, we ruled orally on the European Communities' request to dismiss India's claims under Article 6 of the AD Agreement, and transmitted a written version of our oral ruling to the parties. We also ruled on the status of an unsolicited amicus curiae submission,[10] and set forth our position regarding certain of the requests for preliminary rulings on which we did not rule. The discussion below sets forth our rulings, with additional clarification, on requests for preliminary rulings disposed of at the first meeting, and disposes of the remaining requests for preliminary rulings in this dispute.

1. EC request

(a) Scope of the claims before the Panel

(i) Parties' arguments

6.2 With regard to the scope of the claims before the Panel, the EC requests, on two bases, a ruling that certain of India's claims are not properly before the Panel.

6.3 First, the European Communities argues that certain of the claims pursued by India in its first written submission were not mentioned in the request for establishment, either because there is no reference to the provision of the AD Agreement allegedly violated or the measure to which the claim is addressed is not before the Panel, or because the basis for the claim is different in the request from that presented in the first submission, and thus is not clearly identified in the request. The European

[10] On Tuesday, 9 May 2000, the day before our first meeting with the parties, the Panel received an unsolicited *amicus curiae* brief in support of the complaint by India in this dispute, submitted on behalf of the Foreign Trade Association by Dr. Konrad Neundörfer. We made copies available to the parties for comment. No party made any substantive comments regarding that submission. We did not find it necessary to take the submission into account in reaching our decision in this dispute.

Communities asserts that the following were not mentioned in the Panel request and are therefore not within the scope of the Panel's terms of reference:

> claims that the European Communities acted inconsistently with the following provisions of the Anti-dumping Agreement:
>
> > Article 1 (Para. 7.3 of India's first submission);
> >
> > Article 3.4, as regards the allegation that the European Communities assumed that imports before the Investigation Period were dumped (Claim 19);
> >
> > Article 3.6 (Claim 8);
> >
> > Article 6.2, 6.4 and 6.9 (Claim 14); and
> >
> > Article 6.10 and 6.11 (Claim 16).
>
> India's contention (paras. 3.106 to 3.107 of India's first submission) that the EC Basic Regulation (Exhibit India-1) is inconsistent with Article 2.2.2 of the Anti-dumping Agreement.

6.4 With regard to these claims, the European Communities argues that it is well established in the WTO that a complainant Member may not introduce a claim during the course of panel proceedings that is not mentioned or referred to in the terms of reference. In this case, the terms of reference are standard terms of reference, referring to the Panel the "matter" set forth in India's request for establishment. The European Communities asserts that the request for establishment in this case does not contain, explicitly or by reference, any mention of the claims set forth above. Regarding Article 1, Article 3.6, and Article 6, the relevant provisions of the AD Agreement are not even mentioned in the request. Regarding Article 3.4, a different claim is set out in the request for establishment than is pursued in India's first submission. Regarding the alleged inconsistency of the EC legislation with Article 2.2.2 of the AD Agreement, the European Communities asserts that the measure at issue in this dispute is the European Communities' final anti-dumping duties, and not the EC Regulation. In addition, the European Communities contends that it has been prejudiced by India's failure to clearly state which of the multiple obligations set forth in the asserted provisions of the AD Agreement have allegedly been violated.

6.5 With regard to Article 1 of the AD Agreement, India acknowledges in its written response that it made no separate claims under that provision. In India's view, Article 1 is a general provision, and a finding of violation of Article 1 of the AD Agreement "automatically follows" from the inconsistencies with the other Articles. India considers that Article 1 of the AD Agreement need not be mentioned separately since the European Communities' rights of defense were not prejudiced.

6.6 With regard to Article 3.6 of the AD Agreement, India asserts that, since it included all of Article 3 of the AD Agreement in its request for establishment, Article 3.6 of that Agreement is within the terms of reference. However, India states that, in a spirit of co-operation, it does not seek a ruling on Article 3.6.

6.7 With regard to the claims under Article 6 of the AD Agreement, India objects to the request that they be dismissed. India maintains that it was clear throughout the dispute settlement process, including the request for consultations, the discussions, and the written questions during the consultations, that India was concerned with the European Communities' actions as regards Article 6 of the AD Agreement. Thus, India maintains, the European Communities could not have been surprised by the claims in this regard (claims 14 and 16), and had not been prejudiced in its ability to

defend itself. India also clarifies that claim 14 forms part of an argument in support of claim 13 (alleging inconsistency with Article 12.2.2 of the AD Agreement), which claim was explicitly mentioned in the request for establishment.

6.8 With regard to claim 19, insofar as it concerns Article 3.4 of the AD Agreement, India asserts that this claim was clearly identified in paragraph 13 of the request for establishment, which mentions Articles 3 and 3.4. India asserts that the reference to Article 3 of the AD Agreement includes Article 3.5. Moreover, India maintains that the European Communities had not been prejudiced in its rights of defence, citing in this regard the European Communities first submission, paragraphs 343-350.

6.9 Second, the European Communities argues that India's claims asserting violations in connection with the Provisional Regulation are beyond the Panel's jurisdiction.[11] In this regard, the European Communities argues that India failed to comply with the requirements of Article 17.4 of the AD Agreement to bring a provisional measure before the Panel, because it did not contend or present evidence that the provisional measure had a significant impact. In addition, the European Communities argues that the Provisional Regulation is moot, that no duties were ever collected under that regulation, and the measure is no longer in force. Consequently, the European Communities argues, there is no meaningful remedy that India can obtain with respect to that regulation - there is no measure to bring into conformity with the AD Agreement, and no measure to withdraw. The European Communities argues that in these circumstances, the Panel should decline to make a ruling on claims relating to the Provisional Regulation.

6.10 India argues that it was clear that the final anti-dumping measure was the measure at issue, but that this did not limit the nature of the arguments and claims that could be made. India refers to EC law and practice which provide that aspects of the Provisional Regulation are adopted by reference in the Definitive Regulation, and asserts that this automatically entails that aspects of the Provisional Regulation can be challenged in the context of the final anti-dumping measures. However, India clarified that, it being understood that this view was correct, it did not seek a ruling on its claims 2, 5, 9, 12, 17, 21, 24, 27, and 30.

6.11 Egypt, as third party, submits that the European Communities' argument that the Panel cannot entertain claims relating to the Provisional Regulation is unfounded and should be rejected by the Panel. Egypt posits that it is clear that, had India and the other countries affected by the measure not thought that the measure was imposed in breach of the provisions of Article 7.1 of the AD Agreement, they would not have found it necessary to participate in these panel proceedings. It also follows, for Egypt, that if the measure had not had any significant impact, India and other affected countries would not have made a complaint. The very fact that they cooperated in the investigation and provided evidence to refute the allegations means, according to Egypt, that they were concerned about the significant impact the imposition of anti-dumping duties would have on their bed linen industries.

(ii) Findings

6.12 At the end of the first meeting, we granted the European Communities' request to dismiss claims under Article 6 of the AD Agreement, that is, India's claims 14 and 16, having concluded that those claims were not within our terms of reference. Our reasons for this decision are set forth below.

[11] India's claims 2, 5, 9, 12, 17, 21, 24, 27, and 30 generally assert inconsistency on the part of the European Communities with Article 12.2.1 by failing properly to explain, in the Provisional Regulation, the legal and evidentiary basis for and analysis underlying elements of the European Communities' decision which are challenged by India.

6.13 Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter "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". In considering what must be in a request for establishment in order to comply with this provision, the Appellate Body has observed that:

> "**Identification of the treaty provisions** claimed to have been violated by the respondent **is always necessary** both for purposes of defining the terms of reference of a panel and for informing the respondent and the third parties of the claims made by the complainant; such **identification is a minimum prerequisite** if the legal basis of the complaint is to be presented at all." [12]

The Appellate Body went on to note that there might be situations where a "mere listing" of treaty Articles would not satisfy the standard of Article 6.2 of the DSU.[13] In this case, we are not faced with the question of whether a "mere listing" of the treaty Articles allegedly violated is sufficient to "present the problem clearly" as required by Article 6.2 of the DSU – rather, it is a case in which the treaty Articles alleged to be violated **are not even listed** in the request for establishment - "Article 6" of the AD Agreement does on appear on the face of the document at all. In this circumstance, we consider that the legal basis of a complaint with respect to that Article has not been presented at all.

6.14 India acknowledged, at our first meeting, that Article 6 of the AD Agreement did not appear on the face of its request for establishment, characterizing this as an inadvertent omission. India argued, however, that its claims under that Article should nonetheless be allowed, asserting that the European Communities sustained no prejudice to its ability to defend its interests as a result of the omission of Article 6 of the AD Agreement from the request for establishment. In support of this contention, India points out that its claims with respect to Article 6 were clearly set out in its first submission, and that Article 6 of the AD Agreement was mentioned in the request for consultations and was actually discussed during the consultations.

6.15 In our view, a failure to state a claim in even the most minimal sense, by listing the treaty Articles alleged to be violated, cannot be cured by reference to subsequent submissions. In this regard, we note the statement of the Appellate Body in *EC-Bananas*:

> "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".[14]

Thus, the fact that India may have fully elucidated its position with respect to alleged violations of Article 6 of the AD Agreement in its first written submission to the Panel avails it nothing as a legal matter. Failure to even mention in the request for establishment the treaty Article alleged to have been violated in our view constitutes failure to state a claim at all.

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

[13] *Id.*

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

6.16 In the absence of any reference in the request for establishment to the treaty Article alleged to have been violated, the question of possible prejudice as a result of failure to state a claim with sufficient clarity simply does not arise. Moreover, we are of the view that the argument that there was no prejudice to the European Communities because Article 6 of the AD Agreement was mentioned in the request for consultations, and may even have been discussed during the consultations is, in this case, irrelevant. Consultations are part of the process of clarifying the matter in dispute between the parties. It is perfectly understandable, and indeed desirable, that issues discussed during consultations do not subsequently become claims in dispute. Thus, the absence of a subject that was discussed in the consultations from the request from establishment indicates that the complaining Member does not intend to pursue that matter further. Whether inadvertent or not, as a result of the omission of Article 6 from the request for establishment the defending Member, the European Communities, and third countries had no notice that India intended to pursue claims under Article 6 of the AD Agreement in this case, and were entitled to rely on the conclusion that it would not do so. Consequently, India would be estopped in any event from raising such claims.

6.17 We conclude that India failed to set forth claims under Article 6 of the AD Agreement in its request for establishment of a panel in this dispute. Therefore, those putative claims, that is, India's claims 14 and 16 as set forth in its first written submission, are beyond the scope of our terms of reference. As we noted in issuing our ruling at the end of the first meeting, this does not, of course preclude India from presenting arguments referring to the provisions of Article 6 of the AD Agreement. However, we make no findings on India's claims 14 and 16.

6.18 With respect to the European Communities' request concerning India's claims regarding Article 1 of the Anti-Dumping Agreement, India's claims regarding Article 3.6 of the Anti-Dumping Agreement, and India's claims challenging the Provisional Regulation under Article 12.2.1, that is, claims 2, 5, 9, 12, 17, 21, 24, 27, and 30, we took note at our first meeting of the statements of India in its written response, and the statements of the parties at the first meeting. In light of those statements, we did not consider it necessary to rule on these aspects of the European Communities' request. We noted at that time, and we reiterate here, our view that India has withdrawn these claims. Again, of course, this does not preclude India from presenting arguments referring to the provisions of these articles. However, as with India's claims 14 and 16, we make no findings on these claims.

6.19 We did not, at out first meeting, resolve the European Communities' assertion that India's claim 19 under Article 3.4 as set out in its first submission is not the same as the claim under Article 3.4 set out in the request for establishment. We turn to that question now.

6.20 India's request for establishment sets forth, as a provision allegedly violated, "Article 3, especially, but not exclusively Articles 3.1, 3.2, 3.4, and 3.5". With respect to India's claim number 19 under Article 3.4, the European Communities acknowledges that Article 3.4 appears on the face of the request for establishment, but argues that the facts and circumstances described as constituting a violation of Article 3.4 in the request for establishment are entirely different from those presented in support of the claim in India's first written submission. Therefore, the European Communities asserts that India failed to clearly identify this aspect of its claim under Article 3.4, thus preventing the European Communities from properly preparing its defense and denying third parties their right to be alerted to the issues that are the subject of this dispute.

6.21 The request for establishment contains the following statements in connection with Article 3.4 of the AD Agreement:

> "14. The European Communities has chosen a sample from the domestic industry, but did not consistently base its injury determination on this sample, In addition, the European Communities has explicitly determined that the domestic industry consists of 35 companies, but relied in its injury determination on companies outside this

> group in order to determine injury. In both cases, separately, the European Communities acted inconsistently with Article 3.4. The European Communities' failure to explain its determination properly is inconsistent with Article 12.2.
>
> 15. The European Communities failed to consider all injury factors mentioned in Article 3.4 of the ADA for its determination on the state of the domestic industry, including 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. The European Communities thus acted inconsistently with Article 3.4. As far as the European Communities would argue that it did in fact consider all factors in Article 3.4, it failed to disclose or make public its findings thereon and thus acted inconsistently with Article 12.2.
>
> 16. The European Communities failed to make an unbiased and objective analysis of the development of market share of the domestic industry and insufficiently explained its position, as required by Article 3.4 of the ADA. As far as the European Communities would argue that it did in fact make such analysis, it has insufficiently explained it, and thus acted inconsistently with Article 12.2."[15]

6.22 The European Communities argues that India's Claim 19, as set forth and argued in India's first submission, relates to a different question than that specified in the request for establishment - the question of whether the European Communities included in its examination of injury the impact of imports that were not dumped. In the European Communities' view, this claim cannot reasonably be identified from the request for establishment as a claim under Article 3.4. Therefore, the European Communities argues, India's request for establishment does not present the problem addressed in claim 19 as set out in the first written submission clearly and is thus not within the Panel's terms of reference. The European Communities raises no objections with respect to the other Indian claims under Article 3.4 (Claims 11 and 15).

6.23 We note that in paragraph 13 of the request for establishment, India does seem to have made a claim about the consideration of all imports as dumped under Article 3.5 of the AD Agreement:

> "13. Contrary to the wording of Article 3 and especially Article 3.5 of the ADA, the European Communities automatically and without any further explanation assumed that *all* imports of the product concerned during the years immediately preceding the investigation period were dumped. Consequently, the causality finding between imports from India and the alleged injury caused to the domestic industry is tainted and inconsistent with Article 3.5. The European Communities' failure to explain this determination properly is inconsistent with Article 12.2."[16]

India has identified and argued this claim as claim 20 in the first written submission, and the European Communities has no objection to this claim.

6.24 However, it is not clear from the face of the request for establishment that India made any claim with respect to the consideration of all imports as dumped **under Article 3.4** of the AD Agreement, as opposed to Article 3.5 of that Agreement. Therefore, we must look more closely into the matter to determine whether India's request for establishment provides "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" in this regard, and therefore

[15] WT/DS141/3.
[16] *Id.*

satisfies the standard set out in Article 6.2 of the DSU.[17] We note that it is important that a panel request be sufficiently precise for two reasons: first, it often forms the basis for the terms of reference of the panel pursuant to Article 7 of the DSU; and, second, it informs the defending party and potential third parties of the legal basis of the complaint.[18]

6.25 As noted above, Article 6.2 of the DSU provides, in relevant part:

> "The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly . . . "

We recall that the Appellate Body addressed this requirement recently, in *Korea – Dairy Safeguard*.[19] The Appellate Body's analysis in that case offers guidance as to how a panel should address the issue of whether a request for establishment provides "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" in accordance with Article 6.2 of the DSU. First, the issue is to be resolved on a case-by-case basis. Second, the panel must examine the request for the establishment of the panel very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU. Third, the panel should take into account the nature of the particular provision at issue – *i.e.*, where the Articles listed establish not one single, distinct obligation, but rather multiple obligations, the mere listing of treaty Articles may not satisfy the standard of Article 6.2. Fourth, the panel should take into account whether the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings, by the fact that the panel request simply listed the provisions claimed to have been violated. It seems that even if the panel request is insufficient on its face, an allegation that the requirements of Article 6.2 of the DSU are not met will not prevail where no prejudice is established.

6.26 In essence, the Appellate Body seems to set a two-stage test to determine the sufficiency of a panel request under Article 6.2 of the DSU: first, examination of the text of the request for establishment itself, in light of the nature of the legal provisions in question; second, an assessment of whether the respondent has been prejudiced by the formulation of claims in the request for establishment, given the actual course of the panel proceedings.

6.27 Applying this "two step" approach to the facts of this case, we first consider the text of the request for establishment itself, to determine the extent to which Article 3.4 is addressed. In this case, Article 3.4 is explicitly listed in the request for establishment. However, we recall that a "mere listing" may not necessarily be sufficient for the purposes of Article 6.2 DSU. In this case, the explanation regarding Article 3.4 in the request for establishment does not refer to or relate in any way to the argument in the first submission concerning the consideration of all imports as dumped in the injury analysis under Article 3.4. This raises an implication that the request for establishment was not, in fact, sufficiently clear on this aspect of India's claims under Article 3.4.

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[17] The special or additional rules applicable to anti-dumping disputes have not been raised by the European Communities in this context. The Panel in *Mexico - HFCS* concluded that Article 17.4 of the AD Agreement, which describes the matters that may be referred for dispute settlement, "does not…set out any further or additional requirements with respect to the degree of specificity with which claims must be set forth in a request for establishment challenging a final anti-dumping measure.", and noted in this regard that Article 17.4 does not refer to "claims". *Mexico - Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States ("Mexico - HFCS")*, Panel Report, WT/DS132/R, adopted 24 February 2000, para. 7.14 and note 531.

[18] *EC - Bananas*, para. 142; *Brazil - Measures Affecting Dessicated Coconut*, Appellate Body Report, WT/DS22/AB/R, adopted 20 March 1997, p. 22.

[19] *Korea - Dairy Safeguard*, Appellate Body Report, para. 6.

6.28 We therefore turn next to the question whether the European Communities, or any of the third parties, has been prejudiced by this lack of sufficient clarity, "given the actual course of the panel proceedings". It is clear that the European Communities was able to respond to the Indian arguments in this regard. Moreover, while it is possible that potential third parties were not alerted to the fact that India intended to pursue the issue of consideration of all imports as dumped **under Article 3.4** of the AD Agreement, it was clear from the face of the request for establishment that India was pursuing this issue **under Article 3.5** of that Agreement. Moreover, all three third parties did address the issue of whether the European Communities acted inconsistently with the AD Agreement in considering all imports as dumped. In our view, this suggests a lack of prejudice to third parties' interests in this dispute. While it is not clear whether potential third parties understood the claim to be asserted under Article 3.4 or Article 3.5, the substance of the issue was clearly apparent to them, and was addressed by those Members that participated as third parties. The specific provision of the AD Agreement alleged to have been violated is, in our view, of less importance than the question whether the particular practice, consideration of all imports as dumped, is permitted by the AD Agreement or not, and that question has clearly been addressed by all parties and third parties in this dispute, and was clearly put before us by the request for establishment.

6.29 Thus, we conclude that, in the particular circumstances of this case, the lack of sufficient clarity in the request for establishment concerning India's claim 19 that challenges the consideration of all imports as dumped in the injury analysis under Article 3.4 was not prejudicial to either the European Communities or third parties. We therefore deny the European Communities' request to dismiss this aspect of claim 19. Of course, this is without prejudice to our substantive decision on this claim, which is addressed further below.

(b) Evidence regarding the substance of the consultations

(i) Parties' arguments

6.30 The European Communities also objects to the inclusion by India in its submission of reports of the consultations between the parties prior to the establishment of the Panel. The European Communities argues that these were drafted by India, without the European Communities' endorsement, are inaccurate and intrinsically unreliable, and are not evidence that can properly be submitted to the Panel.

6.31 In its response on this point, India stressed the "absolute accuracy of the verbatim reports" it had prepared and on which it relied in its first submission. India acknowledged that it was unusual to present such reports, but maintained that it was obliged to do so as these reports bore witness to the European Communities' lack of respect for the basic objective of the consultation process, to seek an amicable solution

(ii) Findings

6.32 At the outset, we note that India appears to acknowledge that there is nothing new or substantive in the reports of the substance of the consultations that is not otherwise before the Panel. India states that it is relying on the reports of the consultations as bearing "witness to the lack of respect on the part of the European Communities for the basic objective of the consultation process, which is to seek an amicable solution." This latter assertion is without relevance to either the issues in dispute (which do not relate to the adequacy of the consultations) or the question whether the evidence regarding the consultations should be considered by the Panel. Thus, it seems that the evidence concerning the consultations is at best unnecessary, and may be irrelevant. That said, however, merely because the evidence is unnecessary or irrelevant does not require us to exclude it.

6.33 A panel is obligated by Article 11 of the DSU to conduct "an objective assessment of the matter before it". The Panel in *Australia-Automotive Leather* observed that:

> "Any evidentiary rulings we make must, therefore, be consistent with this obligation. In our view, a decision to limit the facts and arguments that the United States may present during the course of this proceeding to those set forth in the request for consultations would make it difficult, if not impossible, for us to fulfill our obligation to conduct an "objective assessment" of the matter before us."[20]

Similarly in this case, we consider that it is not necessary to limit the facts and arguments India may present, even if we might consider those facts or arguments to be irrelevant or not probative on the issues before us. In our view, there is a significant and substantive difference between questions concerning the admissibility of evidence, and the weight to be accorded evidence in making our decisions. That is, we may choose to allow parties to present evidence, but subsequently not consider that evidence, because it is not relevant or necessary to our determinations or is not probative on the issues before it. In our view, there is little to be gained by expending our time and effort in ruling on points of "admissibility" of evidence *vel non*.

6.34 In addition, we note that, under Article 13.2 of the DSU, Panels have a general right to seek information "from any relevant source". In this context, we consider that, as a general rule, panels have wide latitude in admitting evidence in WTO dispute settlement. The DSU contains no rule that might restrict the forms of evidence that panels may consider. Moreover, international tribunals are generally free to admit and evaluate evidence of every kind, and to ascribe to it the weight that they see fit. As one legal scholar has noted:

> "The inherent flexibility of the international procedure, and its tendency to be free from technical rules of evidence applied in municipal law, provide the "evidence" with a wider scope in international proceedings . . . . Generally speaking, international tribunals have not committed themselves to the restrictive rules of evidence in municipal law. They have found it justified to receive every kind and form of evidence, and have attached to them the probative value they deserve under the circumstances of a given case".[21]

It has clearly been held in the WTO that information obtained in consultations may be presented in subsequent panel proceedings.[22]

6.35 There is nothing to be accomplished by limiting the evidence in this dispute by granting the European Communities' request, and we therefore deny it. Moreover, we note that we have not relied on the evidence concerning the consultations in making our decisions in this dispute. We therefore consider that the accuracy of India's representations as to what happened in the consultations is not relevant to our decision and we reach no conclusions in that regard.

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[20] *Australia - Subsidies Provided to Producers and Exporters of Automotive Leather*, Panel Report, WT/DS126/R, adopted 16 June 1999, para. 9.25.

[21] Kazazi, Mojtaba, *Burden of Proof and Related Issues – A Study of Evidence Before International Tribunals*, Malanczuk, Peter, ed., Kluwer Law International, The Hague, pp. 180, 184.

[22] *Korea - Taxes on Alcoholic Beverages*, Panel Report, WT/DS75/R–WT/DS84/R, adopted 17 February 1999, para. 10.23 (issue not raised on appeal). This is unlike the situation before many international tribunals, which often refuse to admit evidence obtained during settlement negotiations between the parties to a dispute. The circumstances of such settlement negotiations are clearly different from WTO dispute settlement consultations, which are, as the Appellate Body has noted, part of the means by which facts are clarified before a panel proceeding.

(c) Evidence containing confidential information from a different investigation

(i) Parties' arguments

6.36 Finally, the European Communities notes that India's Exhibit 49 to its first submission appears to contain a dumping calculation from a different anti-dumping investigation than the one at issue in this dispute. The European Communities asserts that if this is true, the submission of this evidence constitutes a breach of confidentiality obligations in that other case, and the European Communities is not prepared to comment on the substance of the document. The European Communities does not argue that the information in the Exhibit is untrue or irrelevant. Rather, the European Communities argues that India has, or may have, violated an obligation of confidentiality regarding the contents of Exhibit 49. The European Communities requests the Panel to rule that the document is not part of these proceedings.

6.37 India stated that it was entitled to present the information in question in support of its arguments, that the Panel's working procedures required that all information submitted be kept confidential, and that there was no breach of confidentiality, citing in this regard India's Exhibit 81, setting forth the explicit written consent of the producer whose information is at issue to its submission in this dispute settlement proceeding.

6.38 The United States, as third party, agrees with the European Communities that if India's Exhibit 49 is in fact a confidential document from another anti-dumping investigation, unless it is demonstrated that the parties whose confidential information is contained in that document consented to the release of that information, the submission of the document to this panel represents a deplorable breach of confidentiality which should not be encouraged by the Panel. However, the United States does not suggest any specific ruling in this regard.

(ii) Findings

6.39 The issue we must decide is whether certain confidential information which was before the European Communities in an anti-dumping investigation unrelated to the anti-dumping measure in dispute before us can be considered by this Panel. We note the view of the European Communities that the submission of this information constitutes a breach of confidentiality. Although the European Communities does not specifically so state, presumably the concern is with the alleged unauthorised disclosure of confidential information in violation of the last sentence of Article 6.5 of the AD Agreement. We recall, however, that there is no claim before us that India has violated Article 6.5 of the Agreement. Our task is limited to addressing those issues which are necessary to resolve the European Communities' assertion that this information is inadmissible.

6.40 We consider that an issue of the admissibility of evidence might be presented if we had reason to believe that the party to whom the confidential information belonged objected to its disclosure and consideration in this dispute. However, in this case the party to whom the information belongs and whose interests are protected by confidential treatment has waived its rights and stated its consent to our consideration of the information in question.[23] Under these circumstances, we can perceive no useful purpose to be served by excluding the information. That the document consenting to the submission of the information in this proceeding is dated after the date that the information was first submitted to us does not, in our view, change that conclusion. We note that, in any event, the evidence in question purports to demonstrate that the European Communities' practice concerning zeroing is not consistently applied by the European Communities in all cases. Since the issue before us is whether the European Communities' practice as applied in this case is consistent with its obligations under the AD Agreement, we do not consider it necessary to decide whether the European

[23] Exhibit India-81.

Communities applies that practice consistently.[24] If zeroing is prohibited, the European Communities has violated its obligations under the AD Agreement in this case. If zeroing is allowed, then it has not. Whether it has zeroed in some other anti-dumping investigation will not affect our conclusions on this point. We therefore deny the European Communities' request to rule that Exhibit 49 is not admissible in this proceeding.

2. India request

(a) Parties' arguments

6.41 India submitted a letter objecting to Exhibit 4 to the European Communities' first submission, and requesting a preliminary ruling concerning the exact status of the document in question. While not stated explicitly, it appears that India considers that this document was created *post hoc* for the purposes of this dispute, and that it should not be considered by the Panel.

6.42 The European Communities asserted that the document was a recapitulative table of the declarations of support for the application received prior to initiation, and did not constitute new evidence. On the contrary, the European Communities maintained that the exhibit simply systematised evidence that had always been available to India, and cited in this regard to India's Exhibit 59, which the European Communities asserted contained some of the same evidence.

(b) Findings

6.43 Article 17.5(ii) of the AD Agreement provides that a panel shall consider a dispute under the AD Agreement "based upon: . . . the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member". It does not require, however, that a panel consider those facts exclusively in the format in which they were originally available to the investigating authority. Indeed, the very purpose of the submissions of the parties to the Panel is to marshal the relevant facts in an organized and comprehensible fashion in support of their arguments and to elucidate the parties' positions. Based on our review of the information that was before the European Communities at the time it made its decision, in particular that presented by India in its Exhibits, the parties' extensive argument regarding this evidence, and our findings with respect to India's claim under Article 5.4, we conclude that the Exhibit in question does not contain new evidence. Thus, we conclude that the form of the document, (*i.e.*, a new document) does not preclude us from considering its substance, which comprises facts made available to the investigating authority during the investigation. There is in our view no basis for excluding the document from consideration in this proceeding, and we therefore deny India's request.

B. BURDEN OF PROOF AND STANDARD OF REVIEW

6.44 In reviewing the European Communities' final measure imposing anti-dumping duties, which is the measure at issue in this dispute, we keep in mind the applicable principles concerning the burden of proof, and the standard of review in disputes involving anti-dumping proceedings. In WTO dispute settlement proceedings, the burden of proof with respect to a particular claim or defense rests with the party that asserts such claim or defence.[25] The burden of proof is "a procedural concept which speaks to the fair and orderly management and disposition of a dispute".[26] In the context of the present dispute, which is concerned with the assessment of the WTO consistency of a definitive anti-

[24] India has made no claims concerning alleged inconsistent application of EC law.

[25] *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, Appellate Body Report, WT/DS33/AB/R, adopted 23 May 1997, p. 14.

[26] *Canada - Measures Affecting the Export of Civilian Aircraft*, Appellate Body Report, WT/DS70/AB/R, adopted 20 August 1999, para. 198.

dumping measure imposed by the European Communities, India is obliged to present a *prima facie* case of violation of the relevant Articles of the AD Agreement. In this regard, the Appellate Body has stated that ". . . a *prima facie* case is one which, in the absence of *effective refutation* by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case".[27] Thus, where India presents a *prima facie* case in respect of a claim, it is for the European Communities to provide an "effective refutation" of India's evidence and arguments, by submitting its own evidence and arguments in support of the assertion that the European Communities complied with its obligations under the AD Agreement. Assuming evidence and arguments are presented on both sides, it is then our task to weigh and assess that evidence and those arguments in order to determine whether India has established that the European Communities acted inconsistently with its obligations under the AD Agreement.

6.45 Article 17.6 of the AD Agreement sets out a special standard of review for disputes arising under that Agreement. With regard to factual issues, Article 17.6(i) provides:

> "(i) 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;"

Assuming that we conclude that the establishment of the facts with regard to a particular claim in this case was proper, we then may consider whether, based on the evidence before the EC investigating authorities at the time of the determination, an unbiased and objective investigating authority evaluating that evidence could have reached the conclusions that the EC investigating authorities reached on the matter in question.[28]

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

> "(ii) 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."

Thus, in considering those aspects of the European Communities' determination which stand or fall depending on the interpretation of the AD Agreement itself rather than or in addition to the analysis of facts, we first interpret the provisions the AD Agreement. 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 European

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[27] *European Communities – Measures Concerning Meat and Meat Products* (*"EC – Hormones"*), Appellate Body Report, WT/DS26/AB/R–WT/DS48/AB/R, adopted 13 February 1998, para. 104.

[28] We note that this is the same standard as that applied by the Panel in *Mexico - HFCS*, which, in considering whether the Mexican investigating authorities had acted consistently with Article 5.3 in determining that there was sufficient evidence to justify inititaion, stated: "Our approach in this dispute will … be to examine whether the evidence before SECOFI at the time it initiated the investigation was such that an unbiased and objective investigating authority evaluating that evidence could properly have determined that sufficient evidence of dumping, injury and causal link existed to justify initiation." *Mexico - HFCS*, Panel Report, para. 7.95.

Communities' interpretation is one that is "permissible" in light of the customary rules of interpretation of international law. If so, we allow that interpretation to stand, and unless there is error in the subsequent analysis of the facts under that legal interpretation under the standard of review under Article 17.6(i), the challenged action is upheld.

6.47 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.

C. CLAIMS UNDER ARTICLE 2

6.48 The European Communities, in its investigation, relied on constructed normal value, *i.e.*, it established the normal value on the basis of the cost of production plus a reasonable amount for administrative, selling and general costs (hereinafter "SG&A") and for profits. India does not challenge this decision on the part of the EC authorities. India does, however, challenge aspects of the European Communities' methodology for calculating the constructed normal value. In addition, India argues that the "zeroing" methodology the European Communities applied in comparing normal value and export price to calculate the dumping margins is inconsistent with the requirements of the AD Agreement.

1. Claim under Article 2.2.2 – determination of amount for profit (claim number 1)

(a) Article 2.2.2 - order of options

(i) Parties' arguments

6.49 Articles 2.2.2(i)-(iii) set forth three separate bases for deriving the amount of SG&A expenses and profit to be used in a constructed value calculation. India argues that the European Communities applied Article 2.2.2(ii), which was not available to the European Communities, instead of Article 2.2.2(i), which was available, and that this action violates the spirit and structure of Articles 2.2.2 and 2.2. India contends that the text of the AD Agreement reveals a gradually declining scale in the order of options as far as the relation with the producer is concerned. The first alternative, set out in the chapeau of Article 2.2.2, is the "actual dumping situation" and the fourth option (Article 2.2.2(iii)) is the "most alternative" method. Recourse to the options provided for in Articles 2.2.2(ii) and (iii) would normally deprive an exporter not only of the possibility of verifying the calculation of his own dumping margin, at least in the EC system, but also of the possibility of preventing dumping, because he would never know whether he is dumping in the first place. Therefore, India argues, those provisions are ranked such that their use is less available than Articles 2.2.2 and 2.2.2(i). It is India's position that, on the basis of the wording of Article 2.2.2, as well as the concept of dumping, Article 2.2.2 establishes a preference for the use of producer-specific data.

6.50 India points out that the EC legislation – Article 2(6) of Regulation 384/96 – in fact lists the options for determining the amounts for SG&A and for profit identified in Article 2.2 of the AD Agreement in a different order than they appear in the Agreement. This would appear to suggest, according to India, that the European Communities implicitly does not consider the order of options to be relevant. The European Communities did not even consider which option would be most reasonable, but simply applied Article 2(6)(a). India believes that, in fact, Article 2(6)(c) could have been applied, pointing to the situation of at least one company which had domestic sales of other products in the same general category in the domestic market. In India's view, the European Communities apparently considers the order in which options are set out in Article 2(6) of its Regulation as mandatory. Further, India notes that case law from the European Court of Justice confirms that the order of the Regulation is of a mandatory nature and recent EC literature on the subject confirms that the order set out in the Regulation is followed in practice. India considers that the *de facto* order of preference established by the European Communities is inconsistent with the order of preference established by the AD Agreement as applied in the bed linen proceeding.[29]

6.51 The European Communities disagrees with India's interpretation finding a priority of Article 2.2.2(i) over Article 2.2.2(ii). The European Communities maintains that the ordinary meaning of the text of Article 2.2.2 does not indicate any priority between the three options. The three sub-paragraphs contain no wording indicating that one is to be applied in preference to another, nor is any preference inherent in the nature of the three options, or at least of the first two. Consequently, following from the correct interpretation of Article 2.2.2, Members have complete discretion to choose between the options. Moreover, the European Communities contends that, while the particular exporter or producer is no doubt an important element in the calculation of normal value, so is the particular product. In fact, from an economic point of view, the commonality of products is more important than that of producer, because market forces operate most strongly between products of the same kind. Thus option (ii) is at least as economically realistic as option (i).

6.52 The European Communities notes that India draws attention to certain disadvantages for the exporter/producer of using option (ii) or (iii). The implication of this argument, to the European Communities, is that the drafters would have sought to avoid such disadvantages. Protecting the interests of the exporter/producer is arguably one of the purposes implicit in the AD Agreement, but others are equally plausible. For instance, compared to option (ii), the use of option (i) would involve much greater investigative effort, with consequent inconvenience and delays for all concerned. In contrast, the data relevant to option (ii) would already be in the hands of the investigating authorities. The European Communities believes that it would be more in accordance with the object and purpose of the AD Agreement to conclude that the text leaves Members free to decide whether to give priority to option (i) or option (ii).[30]

6.53 The United States, as third party to the dispute, submits that the text of Article 2.2.2 is not hierarchical with respect to alternative methods for computing SG&A and profit. Dumping is both a producer-specific and product-specific determination; therefore, the chapeau of Article 2.2.2 expresses a clear preference for the use of actual data of the producer or exporter under investigation, for sales of the like product in the ordinary course of trade. When the method of the chapeau of Article 2.2.2 cannot be applied, any of the three alternatives that follow may be applied instead. Notably, it is permissible to infer both from the presence of an explicit hierarchy between the chapeau and the three alternatives that follow, and from the absence of such a hierarchy among the three

[29] India has not made a claim regarding the Regulation itself, only its application in this case.

[30] In this regard, the European Communities notes that India addresses the drafting of Article 2(6) of the European Communities' Basic Regulation, in particular, the fact that options (i) and (ii) are set out in the opposite order as that in the AD Agreement. As noted above, India has not made a claim regarding the Regulation itself, and we make no ruling on its consistency with the AD Agreement.

alternatives, that the drafters of the Agreement intended no such hierarchy to exist among Articles 2.2.2(i), (ii) and (iii).

(ii) Findings

6.54 We first consider India's argument that the order of methodological options for calculating a reasonable amount for profit set out in Article 2.2.2 reflects a preference for one option over another, notably the option set out in paragraph (i) over that in paragraph (ii).

6.55 Article 2.1 of the AD Agreement articulates the general requirement for price comparison to determine the existence of dumping. It stipulates:

> "For the purpose of this Agreement, a product is to be considered as being dumped, *i.e.*, introduced into the commerce of another country at less than its normal value, if 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."

6.56 Article 2.2 provides:

> "When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country[2], such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.
>
> _____
>
> [2]Sales of the like product destined for consumption in the domestic market of the exporting country shall normally be considered a sufficient quantity for the determination of the normal value if such sales constitute 5 per cent or more of the sales of the product under consideration to the importing Member, provided that a lower ratio should be acceptable where the evidence demonstrates that domestic sales at such lower ratio are nonetheless of sufficient magnitude to provide for a proper comparison."

6.57 Thus, Article 2.2 of the AD Agreement provides that, in certain circumstances, the margin of dumping can be determined using a constructed normal value, comprising "the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits". Article 2.2.2 then sets forth how investigating authorities shall arrive at the amounts for SG&A and for profits to be used in the calculation of this constructed normal value. It states:

> "For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:

(i) the actual amounts incurred and realised by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products;

(ii) 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;

(iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realised by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin."

6.58 The chapeau and paragraphs (i) and (ii) of Article 2.2.2 thus outline specific methods available to the investigating authorities to arrive at the amounts for SG&A and for profits to be used in the calculation of constructed normal value, and paragraph (iii) allows for the use of any other reasonable method. The chapeau of Article 2.2.2 requires the use of the profit margin from like product sales in the ordinary course of trade in the home market in calculating constructed normal value. When the amount cannot be determined on this basis, a Member may resort to an approach set out in paragraphs (i)-(iii).

6.59 Looking first at the text of Article 2.2.2, we see nothing that would indicate that there is a hierarchy among the methodological options listed in subparagraphs (i) to (iii). Of course, they are listed in a sequence, but this is an inherent characteristic of any list, and does not in and of itself entail any preference of one option over others. Moreover, we note that where the drafters intended an order of preference, the text clearly specifies it. Thus, Article 2.2.2 provides "When such amounts cannot be determined on this basis . . . ", an investigating authority may turn to subparagraphs (i) to (iii). There is no similar language regarding the subparts themselves. Had the drafters wished to indicate a hierarchy among the three options, surely they would have done so in a manner that made that hierarchy explicit. Certainly, we would have expected something more than simply a numbered listing. Thus, in context, it seems clear to us that the mere order in which the options appear in Article 2.2.2 has no preferential significance.

6.60 India's argument, that subparagraph (i) must be considered first, and that option (ii) can only be applied if option (i) cannot be applied, rests on implicit conclusions about the relative desirability of the three options in Article 2.2.2, and asks us to conclude that option (i) is, in all circumstances, preferable to option (ii). Paragraphs (i)-(iii) provide three alternative methods for calculating the profit amount, which, in our view, are intended to constitute close approximations of the general rule set out in the chapeau of Article 2.2.2. These approximations differ from the chapeau rule in that they relax, respectively, the reference to the like product, the reference to the exporter concerned, or both references, spelled out in that rule.[31] Thus, Article 2.2.2(i) allows the calculation of the profit amount on the basis of data for the exporter concerned, corresponding to *a general category of products*, including the like product. In turn, Article 2.2.2(ii) permits the calculation of the profit rate on the basis of the weighted average profit rate for *other investigated exporters*, corresponding to the like product itself. Finally, Article 2.2.2(iii) allows the use of any other method, as long as the resulting

[31] There is a question as to whether the methods outlined in Articles 2.2.2(i)-(iii) also relax the "ordinary course of trade" requirement present in Article 2.2.2. In fact, this is one of the questions at issue in this dispute (*See* section VI.C.1.(c)).

rate is not higher than the weighted average profit rate realised by *other investigated exporters* in respect of sales in the same *general category of products*.[32]

6.61 In our view, there is no basis on which to judge which of these three options is "better". Certainly, there were differing views during the negotiations as to how this issue was to be resolved,[33] and there is no specific language in the Agreement to suggest that the drafters considered one option preferable to the others. Given, as explained above, that each of the three options is in some sense "imperfect" in comparison with the chapeau methodology, there is, in our opinion, no meaningful way to judge which option is less imperfect – or of greater authority – than another and, thus, no obvious basis for a hierarchy. And it is, in our view, for the drafters of an Agreement to set out a hierarchy or order of preference among admittedly imperfect approximations of a preferred result, and not for a panel to impose such a choice where it is not apparent from the text.

6.62 We therefore conclude that the order in which the three options are set out in Articles 2.2.2(i)-(iii) is without any hierarchical significance and that Members have complete discretion as to which of the three methodologies they use in their investigations. We thus find that the European Communities was not required by the AD Agreement to resort to option (i) before it could resort to option (ii) and it did not act inconsistently with Article 2.2.2 by using the latter option.

(b) Article 2.2.2(ii) – data from "other exporters or producers"

(i) Parties' arguments

6.63 India next claims that the European Communities misapplied Article 2.2.2(ii) of the AD Agreement by relying on data of one other producer as the amount for profits. India argues that the calculation method provided for in Article 2.2.2(ii) was not available to the European Communities, because the conditions for its application had not been met, pointing to the words "other exporters or producers" in that provision. India argues that the production and sales amounts of other exporter**s** or producer**s** are to be averaged, and that the production and sales amount of a single "other" exporter or producer cannot be used under Article 2.2.2(ii). In this regard, India adds that all definitions of the word "average" entail that the group set of which the average is to be calculated should consist of more than one unit. An average, by its very nature, cannot be inferred from a single variable. The fact that Article 2.2.2(ii) uses the words "weighted average", *i.e.*, an average that attributes statistical weight to each of the parameters being summarised into a single value, only stresses the fact that more than one factor needs to be taken into account. India asserts that "amounts" in Article 2.2.2(ii) refers to "the amounts for administrative, selling and general costs and for profits". It is, therefore, clearly the amount**s** for "administrative, selling and general costs and for profits" from "other producers or exporters" for which a "weighted average" needs to be established. However, the European Communities applied just one amount from one producer as the data to be used pursuant to Article 2.2.2(ii).

6.64 India considers that the logic underlying the European Communities' action perverts the text of Article 2.2.2(ii). The calculation of the constructed normal values for companies without domestic sales is coloured by factors unique to the single producer whose SG&A and profit amounts were used, thereby artificially finding dumping for all producers, where, in reality, none exists for most. It is precisely to avoid such extreme results, in India's view, that the Agreement requires that the weighted average of data for at least two exporters or producers be used. This rationale can be inferred from the principal rule of the chapeau of Article 2.2, namely that the amount for SG&A and profit be

[32] In fact, in order to come up with a benchmark, this method requires calculation of the weighted average profit rate for other investigated exporters, corresponding to the same general category of products.

[33] *See* Stewart, Terence P., ed., *The GATT Uruguay Round: A Negotiating History (1986-1992)*, Kluwer Law International, The Hague, pp. 171-190.

"reasonable". India submits that Bombay Dyeing is a wholly atypical company in India, and the SG&A and profit from one peculiar and extraordinary company cannot be considered "reasonable". India submits that another company did have sufficient representative domestic sales, was included in the sample selection, and its data should have been taken into account by the European Communities.

6.65 The European Communities disputes India's interpretation of Article 2.2.2(ii). The European Communities emphasises that the approach required by Article 31 of the *Vienna Convention* relies on the ordinary meaning of the words of the treaty in their context and in light of the treaty's object and purpose. The European Communities notes that India alleges that the word "average" requires consideration of more than one parameter. The European Communities does not agree that provisions containing the word "average" (or the words "weighted average") become inapplicable if the circumstances are such that the class of data that is to be "averaged" contains only one item. Article 2.4.2, for instance, uses the notion of "a weighted average normal value with a weighted average of prices of all comparable export transactions". There is no reason, for the European Communities, to think that the formula could not be applied if either side of the comparison contained only one sale. The European Communities further asserts that this interpretation of Article 2.2.2 entails focusing on the use of the word "amounts" rather than amount. The European Communities submits that the use of this word is more complex. Since the first sentence of the chapeau of Article 2.2.2 refers to an individual "exporter or producer", it would be surprising, in the opinion of the European Communities, if there were more than one amount for "administrative, selling and general costs" and one amount for "profits". Therefore, the word "amounts" most plausibly reflects the fact that there would be two amounts (one of each type) for each exporter or producer.

6.66 Regarding the use of the word "amounts" in Article 2.2.2(ii), the European Communities comments that the word is in the plural in two senses, first, as explained above with respect to Article 2.2.2, and, second, because in many cases there would be more than one other exporter or producer, as is also envisaged by the reference to "other exporters or producers". The European Communities submits, however, that, both in ordinary speech and in carefully drafted legal texts, a plural phrase is often used with the intention of including the case where there is only one such person or thing. Articles 4.1 and 17.4 of the AD Agreement use similar language. In the European Communities' view, it would be absurd to prevent the operation of such provisions merely because there was only one other producer or exporter. Nor does India explain why the normal usage of the phrase should not apply in this case. The European Communities adds that it is the phrase "other exporters or producers" in Article 2.2.2(ii) that is the central element, and the mention of "average" adds nothing to the use of the plural in the phrase "exporters or producers".

6.67 Finally, the European Communities submits that, when the words "other exporters or producers" are considered in light of the object and purpose of the AD Agreement, it becomes clear that the evident purpose of this part of the agreement is to secure data that are independent of the company in question, but are nevertheless limited to the sales of like products. There is no intrinsic reason why the use of data from a single firm could not achieve this goal.

6.68 The United States, as third party, argues that Article 2.2.2(ii) does not require a minimum number of companies to be used in calculating SG&A and profit amounts, and it neither forbids an investigating authority from using a single company for purposes of this calculation, nor requires it to use more than one company. The use of plural forms in this provision, without more, is not determinative of the issue.

(ii) Findings

6.69 Having concluded that the three options in Articles 2.2.2(i)-(iii) are not set out in preferential order, and that the European Communities therefore was entitled to resort to the methodology in Article 2.2.2(ii) the next issue before us is whether, as India argues, the European Communities was

precluded from applying the option set out in Article 2.2.2(ii) because that provision may not be applied in the situation where the data concerning amounts for profit and SG&A are available for only one other exporter or producer, as was the situation in this case. Otherwise put, is the existence of data for more than one other exporter or producer a necessary prerequisite for application of the approach set out in paragraph (ii)?

6.70 We first consider the language of Article 2.2.2(ii). India's argument has two principal elements – the use of the plural in the text of Article 2.2.2(ii), and the phrase "weighted average". With respect to the first element, the European Communities argues that a phrase in the plural form is often used, in general and in the AD Agreement, with the intention of including the case where there is only one such person or thing. We agree. The phrase "other exporters or producers" as a general matter, admits of an understanding where the plural form includes the singular case – the case where there is only one other producer or exporter. In both common speech and legal texts, it is accepted that the ordinary meaning of the plural form may include the singular case. Moreover, the focus of the options set out in Article 2.2.2 on the use of actual data suggests to us that such an understanding is permissible. The question we must consider is whether that is the meaning to be given to the phrase as used in Article 2.2.2(ii). As discussed above, Article 2.2.2(i) maintains the focus on the producer being investigated, but allows consideration of data concerning a broader range of products, while Article 2.2.2(ii) maintains the focus on the like product, but allows consideration of other producers or exporters. The third option, Article 2.2.2(iii) allows any other reasonable method, subject to a cap on the results. In this context, we do not consider that the reference to other producers or exporters in the plural necessarily must be understood to preclude resort to option (ii) in the case where there is only one other producer or exporter of the like product.

6.71 With respect to the second element, India argues that because a weighted average must be based on more than one data point, there must be more than one “other” producers' or exporters' data under consideration. However, we do not consider that the phrases “weighted average” and “other producers and exporters” constitute two separate requirements. Rather, we are of the opinion that the concept of weighted averaging is relevant only **when there is information from more than one other producer or exporter** available to be considered. In our view, the obligation to consider a weighted average of the information of other producers or exporters eliminates the possibility of a result-oriented or otherwise biased or discriminatory choice among available data. However, when the data available is from only one source, such a possibility does not arise. The interpretation argued by India would limit the analytical options available to investigating authorities for determination of the profit rate and SG&A in a constructed normal value in a manner we cannot see as mandated by the text.

6.72 In this regard, we consider informative other provisions which use the plural form, but are applicable in the singular case. For instance, Article 4.1 of the AD Agreement defines the domestic industry in terms of "domestic producers" in the plural. Yet we consider it indisputable that a single domestic producer may constitute the domestic industry under the AD Agreement, and that the provisions concerning domestic industry under Article 4 continue to apply in such a factual situation. Similarly, we note that Article 9.4(i) provides that the dumping duty applied to imports from producers/exporters not examined as part of a sample shall not exceed "the weighted average margin of dumping established with respect to the selected exporters or producers". We consider that this provision does not become inoperative if there is only one selected exporter or producer – rather, the dumping margin for that exporter or producer may be applied. In our view, these considerations lend support to an understanding of Article 2.2.2(ii) pursuant to which Members may apply the methodology in that provision even in a case where data is available for only one "other" exporter or producer. Thus, we conclude, based on our understanding of the text of the provision, that a Member is not precluded from employing the methodology set out in Article 2.2.2(ii) in a case where there is only one other producer or exporter.

6.73 We also consider that the negotiating history of Article 2.2.2 confirms our view that Article 2.2.2(ii) is not limited to the case where there is more than one "other" producer or exporter. There was no provision in the Tokyo Round Anti-Dumping Code corresponding to Article 2.2.2(ii). In the absence of guidance in this regard, it was the practice of some Members, notably the United States, to calculate profit and SG&A amounts in a constructed value on the basis of benchmarks established without reference to specific relevant information developed in the course of the investigation. This practice was strongly objected to by other Parties to the Tokyo Round Anti-Dumping Code, and was the subject of negotiations in the Uruguay Round leading to the adoption of Article 2.2.2, and its subparts, to provide guidance for the derivation of profit and SG&A amounts in constructed value calculations.[34] In our view, this background indicates that the provision is intended to ensure that actual data is used for determining the profit rate and SG&A in a constructed normal value, rather than arbitrarily determined amounts. That there is only one producer whose information is available for this use does not undermine this purpose. The requirement of a weighted average resolves the question of how to determine the appropriate amounts in a case where there is more than one investigated exporter whose actual data can be used. Thus, investigating authorities may not select a single producer as the source of the necessary information when information is available from more than one such producer, but must take a weighted average of the available information.

6.74 However, in this case, the European Communities did not arbitrarily pick one producer's data to use in its calculation. Rather, it was faced with the factual situation that there was only one producer whose data was available for the calculation under Article 2.2.2(ii). It is true that there was at least one other exporter which had domestic sales of the like product during the period of investigation. However, that producer was not in the sample on which the European Communities based its calculations in the dumping investigation. It might, in theory at least, have been possible for the EC investigating authorities to calculate a weighted average profit rate including that producer's information.[35] However, India has made no persuasive argument as to why, absent a conclusion that the sample was not properly selected[36], the European Communities should have been **obligated** to consider, in this aspect of its analysis, information for a company not part of the sample, and whose information was not considered otherwise. India argues that this producer was in the sample, but this is not factually correct. It was considered by the European Communities as being in the reserve sample, which is established in case the companies selected for the sample do not cooperate or provide usable information.[37] Information was gathered from companies in the reserve sample to be used if it became necessary, which did not happen. We therefore consider that, as a matter of fact, there was only one producer whose data was available for use under Article 2.2.2(ii).

6.75 As we have concluded that Article 2.2.2(ii) may be applied in a case where there is data concerning profit and SG&A for only one other producer or exporter, we conclude that the European Communities was not precluded from applying the methodology set out in that provision in this case, and therefore did not act inconsistently with Article 2.2.2(ii) in this regard.

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[34] *See* Stewart, Terence P., ed., *The GATT Uruguay Round: A Negotiating History (1986-1992)*, Kluwer Law International, The Hague, pp. 171-190.

[35] We note in this regard that the European Communities argues that the information for the producer in question would not have been considered in any event, as it had insufficient sales in the ordinary course of trade to allow its information to be used. Moreover, the European Communities suggests that the inclusion of data for that producer would have had little effect on the outcome.

[36] We note that India has made no claim concerning the sample relied upon by the European Communities.

[37] Provisional Regulation, Exhibit India-8, para. 21; Exhibit India-22.

(c) Article 2.2.2(ii) – production and sales amounts “incurred and realised”

(i) Parties' arguments

6.76 India also asserts that the European Communities acted inconsistently with Article 2.2.2(ii) in its application of the provision by using the production and sales amounts "incurred and realised" on transactions in the ordinary course of trade, instead of the production and sales amounts “incurred and realised” on all transactions. For India, the European Communities' approach is demonstrably inconsistent with the express wording of Article 2.2.2(ii), which indicates that the entire purpose of the provision is to provide for a different and alternative basis from the basis contained in the chapeau of Article 2.2.2 upon which to establish SG&A and profits. Indeed, the second sentence of the chapeau of Article 2.2.2 expressly states that one is only entitled to resort to the methodology under Article 2.2.2(ii) when the basis under the chapeau of Article 2.2.2 “cannot” be used; it is clearly an “either-or” situation. It would, therefore, be in India's view absurd to conclude that the limitation to sales in the ordinary course of trade under Article 2.2.2 may be applied to calculations under Article 2.2.2(ii).

6.77 India notes that the definition of amounts for SG&A and profits in the first sentence of the chapeau includes the words “ordinary course of trade”. In India's view, since those words appear after the words “based on”, that requirement was clearly intended to form part of the basis or foundation for the specific method provided under the chapeau, but only for that method. Consequently, the words “such amounts” in the second sentence of the chapeau cannot logically be taken to refer back to SG&A and profits “in the ordinary course of trade”, but instead only to SG&A and profits as a whole. India concludes that the word “amounts” used for the purposes of Article 2.2.2(ii) does not, therefore, include any requirement that the amounts be incurred or realised in the ordinary course of trade.

6.78 In the European Communities' view, the issue under Article 2.2.2(ii) is whether the EC authorities were entitled to limit the data they would consider for purposes of constructing the normal value. The excluded classes of data in this case were, in the case of SG&A, data from sales that were unrepresentative, and in the case of profits, data derived from sales that were unrepresentative and/or unprofitable. These classes, the European Communities points out, correspond to the concepts mentioned in the opening clauses of Article 2.2, which makes it clear that one object and purpose of this part of the AD Agreement is to avoid reliance on sales that fall into either of these categories. The European Communities argues that India is evidently suggesting that the drafters did not object to normal value being based on unprofitable or unrepresentative sales as long as that data came from other producers or exporters, which interpretation is not, in the European Communities' view, based on a proper application of the rules of treaty interpretation of Article 31 of the *Vienna Convention* and, even if it were, would lead to a result that was “manifestly absurd or unreasonable” and require resort to the interpretive principles in Article 32 of the *Vienna Convention*.

6.79 Finally, the European Communities asserts that the basic principle of the “ordinary course of trade” is expressed in Article 2.2. In fact, it is a two-part principle: data associated with sales that are unprofitable, or are unrepresentative, are not reliable. For reasons of consistency, the European Communities maintains that this principle applies to all provisions falling within Article 2.2, including Article 2.2.2(ii).

6.80 Egypt, as third party, alleges that costs calculated by the European Communities were not based on the records kept by the exporters or producers under investigation in the case of Egypt, as required by Article 2.2.1.1, nor were amounts for SG&A costs based on actual data submitted by the relevant exporters or producers, as required by Article 2.2.2.

6.81 Japan, as third party, argues that Article 2.2.2(ii) does not allow the exclusion of below-cost sales before determining the profit amount. Article 2.2.2(ii) refers to “the actual amounts incurred

and realised" and does not include any qualifications. According to Japan, if authorities choose this option, they must determine the weighted average of the actual profit margins reported by the exporters or producers in their accounting records or reflected in the price and cost of the transactions at issue. Article 2.2.2(ii) does not allow the authorities to modify these actual profit margins. Japan considers it improper to graft the concept of "ordinary course of trade" onto Article 2.2.2(ii). It sees the language of the first sentence of Article 2.2.2 as explicitly including the notion of "ordinary course of trade" but grammatically distinct from the second sentence that serves as the chapeau for the remainder of this provision. Japan notes the fact that the drafters were quite careful to insert the concept "ordinary course of trade" where they intended it to apply, and the decision not to include the concept in Article 2.2.2(ii) must, therefore, be given meaning when interpreting this language. Finally, Japan considers that an interpretation which allows the exclusion of below-cost sales would give no significance to the important distinction between the language of the option set out in Article 2.2.2 based on "actual data" and the language of the option set out in Article 2.2.2(ii) based on "actual amounts incurred and realised".

6.82 The United States, as third party, asserts that it is a permissible interpretation of Article 2.2.2(ii) to restrict consideration of "actual amounts incurred and realised" to those attributable to sales made in the ordinary course of trade. Such an application is not prohibited by the Agreement and would, in fact, be a more reasonable interpretation of the Agreement. There is no explicit requirement within Article 2.2.2(ii) determining whether sales not in the ordinary course of trade should be included or excluded from the calculation of SG&A and profit to be used to calculate the constructed value for other producers or exporters. Further, although Article 2.2.2(ii) does not explicitly provide for the exclusion of below-cost sales, Article 2.2.1 makes it clear that, when below-cost sales have been made, the authorities are under no obligation to consider them in the determination of normal value, provided that certain conditions have been met. Moreover, excluding sales not in the ordinary course of trade is consistent with the overall operation of Article 2 of the AD Agreement.

(ii) Findings

6.83 The last issue that we must address under Article 2.2.2 is whether the European Communities erred in its application of Article 2.2.2(ii). In particular, the question before us is whether the European Communities acted inconsistently with that provision in using production and sales amounts incurred and realised only on transactions that were not made below cost – that is, transactions it considered to be in the ordinary course of trade – instead of using all production and sales amounts incurred and realised. More specifically, may the principle, set out in Article 2.2 – that data associated with sales that are unprofitable are not reliable[38] – be applied to all provisions falling within Article 2.2?

6.84 Looking first at the text of Article 2.2.2(ii), we note that there is no reference to sales in the ordinary course of trade. Thus, we would agree with the view that exclusion of sales not in the ordinary course of trade is not mandated by that provision.[39] However, we do not understand the European Communities to be arguing that it was required to exclude those sales in its determination of

[38] Article 2.2 sets out the rule that data associated with unrepresentative sales are not reliable. A question similar to the one raised by India would be whether this principle carries to Article 2.2.2, given that only the "ordinary course of trade" rule is mentioned in Article 2.2.2. India does not, however, raise this issue, and we, therefore, need not and do not consider the question.

[39] Indeed, we note that although the chapeau of Article 2.2.2 indicates that such sales must not be considered in calculating profit under that provision, Article 2.2 merely provides that sales below the cost of production **may** be treated as not being in the ordinary course of trade. That is to say, even if the relevant criteria for consideration of sales below cost as sales not in the ordinary course of trade are satisfied, an investigating authority is not obligated to exclude those sales from its calculation of normal value except, apparently, in determining the amounts for profit and SG&A under the chapeau of Article 2.2.2.

the profit rate, merely that it was permitted to do so, based on the general principle allowing the exclusion of sales not in the ordinary course of trade from the calculation of normal value.

6.85 We consider that this principle may be properly understood to apply to all provisions falling within Article 2.2, including Article 2.2.2(ii). We do **not** consider that a Member is obligated to exclude sales not in the ordinary course of trade for purposes of determining the profit rate under the subparagraphs of Article 2.2.2, merely that such exclusion is not prohibited by the text. In our view, to read Article 2.2.2 as prohibiting the exclusion of sales not in the ordinary course of trade might, in some cases, yield results under the alternatives set out in paragraphs (i) and (ii) that would be contradictory of a basic principle contained in the chapeau methodology. Article 2 establishes as a general principle that Members may base their calculations of normal value only on sales made in the ordinary course of trade. We consider that in this context, absent a specific prohibition, it is permissible to interpret the subparagraphs of Article 2.2.2 to allow application of this general principle in the specific case of a profit rate determination under Article 2.2.2(ii). If the alternative advocated by India were accepted, a prohibition on the exclusion of sales not in the ordinary course of trade might result in a constructed value being based on data concerning the very sales that could not be considered in determining normal value. Indeed, that would be the result in this case. Application of the methods in paragraphs (i)-(iii) might, thus, yield results inconsistent with the basic principles of Article 2.2.

6.86 We recall that the "ordinary course of trade" limitation forecloses the possibility of calculating profits on the basis of sales at prices below cost.[40] The profit amount on sales at prices below cost would be negative. In our view, to require the calculation of constructed normal value including such sales would not be in keeping with the overall object and purpose of the provision – to establish methodologies for the determination of a reasonable amount for profit to be used in the calculation of a constructed normal value. If sales that are considered not in the ordinary course of trade because they are below cost were used for the calculation of the profit rate, the constructed value could be equal to cost and thus would not include a reasonable amount for profit. This would render the calculation of a constructed value meaningless, and not consistent with Article 2.2.[41] In this context, we recall that one reason an investigating authority would construct a normal value is because the actual sales of the investigated exporter or producer are deemed inappropriate to serve as the basis of normal value because they are made below cost. To conclude that such sales below cost **must** then be taken into account in the construction of normal value in these circumstances makes no sense.

6.87 Thus, we consider that an interpretation of Article 2.2.2(ii) under which sales not in the ordinary course of trade are excluded from the determination of the profit amount to be used in the calculation of a constructed normal value is permissible. We therefore conclude that the European Communities did not err in its application of paragraph (ii) by using data only on transactions in the ordinary course of trade.

2. Claim under Article 2.2 – reasonability (claim number 4)

(a) Parties' arguments

6.88 India submits that the European Communities acted inconsistently with Article 2.2 by applying the SG&A and profit incorrectly determined under Article 2.2.2(ii) even though they were

[40] It may also foreclose the possibility of calculating profits on the basis of sales between related parties (albeit possibly made at cost). However, this is not an issue in this dispute.

[41] With regard to the comments made by Egypt, we note that India has not brought a claim of violation of Article 2.2.1.1 or the chapeau of Article 2.2.2. "Claims" brought by third parties are clearly not within the terms of reference of, and, therefore, not properly before, the Panel.

clearly not "reasonable". For India, Article 2.2.2 lays down how the "amounts for administrative, selling and general costs and for profits" are to be determined. It does not, however, explain how the **reasonable** amounts for SG&A and for profits are to be determined. For India, the word reasonable in Article 2.2 has a separate function, and the "reasonable" test of Article 2.2 is an independent, over-arching requirement in addition to the requirements of Article 2.2.2, rather than a rule concretised by Article 2.2.2. "Reasonable" must thus be interpreted as a substantive requirement: whatever method under Article 2.2.2 is used, Article 2.2 requires that the result must be "reasonable". Moreover, India argues that Article 2.2.2(iii) contains an implicit definition of the notion of "reasonable", which can be used to test the results reached under the methods set out in the chapeau and paragraphs (i) and (ii) of Article 2.2.2.

6.89 In respect of the specific factual situation in the bed linen proceeding, India recalls that some producers did have sales of other products in the same general category (textiles). The average same-category domestic profit rate of these other producers was 7.04% and the average overall profit rate of these other producers was 5.41%. The average profit rate for bed linen was found to be 6.1% for the other countries in the investigation, Egypt and Pakistan. India recalls that the reasonable profit rate imputed to the EC industry was 5%. Finally, India notes that the profit rate determined by the European Communities on the basis of the profitable sales of one Indian company, and applied in calculating normal value for all other Indian producers was 18.65% . It is evident, in India' view, that in comparison with all the other profit rates that were relevant in the context of the bed linen proceeding, the figure of 18.65% stands out as a complete anomaly and does not reflect the profits actually realised by bed linen producers inside and outside India. The figure is three times higher than the average profit rates determined for the other two countries involved in the investigation as well as that of the European Communities' own bed linen industry. India submits that, if the word reasonable is defined by reference to the criteria set out in the Article 2.2.2(iii), it is obvious that the profit rate established for other Indian producers is unreasonable.

6.90 The European Communities is of the view that the methods of calculating SG&A and profits that are set out in Articles 2.2.2(i)-(iii) provide for the determination of "a reasonable amount for administrative, selling and general costs and for profits". Those options represent, for the European Communities, particular and detailed formulations of what constitutes "reasonable" amounts. The European Communities also believes that the limitation set out in the third option – "provided that the amount for profit so established shall not exceed . . ." – applies only to the third option, and not to the other two. Had the drafters wished to apply this proviso to all the options, the European Communities submits they would have attached it to the chapeau of Article 2.2.2.

6.91 The European Communities rejects India's argument that option (iii) defines what is reasonable. Options (i) and (ii) are, in the European Communities' view, formulae that produce reasonable solutions. The European Communities further considers that it was obviously the intention of the drafters that the application of these formulae would always produce figures for SG&A and for profits that meet the standard of reasonability specified in the last sentence of the chapeau of Article 2.2. The words "any other reasonable method" in option (iii) clearly refer to *methods* other than those described in the preceding options (i) and (ii), which are in themselves reasonable and do not need to be qualified as such. The wording of these options at least implies that the results obtained through the application of options (i) and (ii) are presumed to satisfy the standard of reasonability. The relevant question, the European Communities proposes, would then be: What kind and weight of evidence would be required to overturn the presumption? The European Communities asserts that India has presented no relevant evidence to rebut the presumption that the results obtained through the application of option (ii) in the case were reasonable.

6.92 The European Communities suggests that the three options in Article 2.2.2 are intended to produce approximations of the amounts that would emerge from applying the formula in the chapeau, that is to say the SG&A and profits of a producer selling the like product in its own market. This, in

its turn, is intended to allow investigating authorities to construct a normal value that is as close as possible to the normal value that would have been established on the basis of domestic prices, had there been sufficient comparable sales in the ordinary course of trade. The European Communities points out that Bombay Dyeing has representative sales in the Indian market. That a single producer can have 80% of the domestic market for bed linen and make a profit of over 18%, while numerous other producers ignore this market and devote themselves to exports, may be an uncommon situation, but that does not make the results arising from the use of data from this company *ipso facto* unreasonable. Rather, the European Communities is of the view that it would have been unreasonable to ignore this company and choose another source, which would inevitably be less typical of sellers in that market.

6.93 The United States, as third party, maintains that Articles 2.2 and 2.2.2 of the Agreement set forth the requirements for calculating profit when normal value is based on constructed value instead of prices. Article 2.2 provides, *inter alia*, for the addition to cost of production of a reasonable amount for profit. Article 2.2.2 then sets forth several explicit options for how a reasonable profit may be determined. The United States disagrees with the view that there is a limitation on the amount for constructed value profit. In the US view, no such limitation exists in the Agreement. With one exception – subpart (iii) – the methodologies in Article 2.2.2 limit *how* the authorities may determine the profit amount, *not the amount of the profit itself*. The "profit cap" in subpart (iii) is necessary to impose some limitations on "other" "reasonable" methodologies for determining profit not specifically articulated in the Agreement. Significantly, subpart (iii) *does not* expressly or implicitly impose a similar limitation upon the preferred profit methodology in the chapeau or the alternatives in subparts (i) or (ii).

(b) Findings

6.94 Having concluded that the European Communities could properly apply the option set out in Article 2.2.2(ii), and that it acted consistently with that provision in making its calculation on the basis of information for one other producer for its sales of the like product in the ordinary course of trade, the next issue before us is whether the results of a proper calculation under Article 2.2.2(ii) are subject to a separate test of "reasonability" before they may be used in constructing a normal value for other producers.

6.95 We first consider the text of the provision. The chapeau of Article 2.2.2 begins with the phrase "For the purpose of paragraph 2", and provides that the amounts for, *inter alia*, profits "shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. The second sentence of Article 2.2.2 specifies that if the chapeau methodology cannot be used, these amounts "may be determined on the basis of" subparagraphs (i)-(iii). Article 2.2, which is referred to in the first sentence, establishes the basic principle that when a constructed value is used, it shall include, *inter alia*, a reasonable amount for profit.

6.96 The text thus indicates that the methodologies set out in Article 2.2.2 are outlined "for the purpose" of calculating a **reasonable** profit amount pursuant to Article 2.2. There is no specific language establishing a separate reasonability test, or indicating how such a test should be conducted. In these circumstances, we consider that there is no textual basis for such a requirement. Thus, the ordinary meaning of the text indicates that if one of the methods of Article 2.2.2 is properly applied, the results are by definition "reasonable" as required by Article 2.2.

6.97 Further, we note that Article 2.2.2(iii) provides for the use of "any **other** reasonable method", without specifying such method, subject to a cap, defined as "the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin". To us, the inclusion of a cap where the methodology is not defined indicates that

where the methodology is defined, in subparagraphs (i) and (ii), the application of those methodologies yields reasonable results. If those methodologies did not yield reasonable results, presumably the drafters would have included some explicit constraint on the results, as they did for subparagraph (iii).

6.98 Thus, we conclude that the text indicates that, if a Member bases its calculations on either the chapeau or paragraphs (i) or (ii), there is no need to separately consider the reasonability of the profit rate against some benchmark. In particular, there is no need to consider the limitation set out in paragraph (iii). That limitation is triggered only when a Member does not apply one of the methods set out in the chapeau or paragraphs (i) and (ii) of Article 2.2.2. Indeed, it is arguably precisely because no specific method is outlined in paragraph (iii) that the limitation on the profit rate exists in that provision.

6.99 We note further that the methodology set out in the chapeau of Article 2.2.2, as well as those in subparagraphs (i) and (ii), rely on actual data from the books of the producer(s) or exporter(s) being used as sources. India, however, argues that even where the chapeau methodology is applied, which requires the use of actual data concerning the product under investigation sold by the producer being investigated, the results are subject to a separate test of reasonability.[42] To test for reasonability results arrived at through the use of **actual** data for the production of the like product by the producer/exporter being investigated does not, in our view, serve any meaningful purpose. Whatever the argument about the "reasonability" of a particular result – a 50% profit rate, for instance – if it is based on actual data and properly calculated, then that is the reality. An important object and purpose of Article 2.2.2, as discussed above, is to base the calculation of the profit amount on actual data. Similarly, while the methods set out in paragraphs (i) and (ii) are derivatives of the chapeau methodology, where actual data are used as required and the calculation is correct, the results obtained themselves reflect objective reality. Thus, 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.

6.100 In this regard, we note that the standard of reasonability proposed by India – the Article 2.2.2(iii) profit cap – is, in our view, arbitrary in the context of the "reality" of the results obtained under paragraphs (i) and (ii). The other benchmarks suggested by India in respect of the specific factual situation in the bed linen proceeding seem equally arbitrary and subjective. India asserts that the average category domestic profit rate of other producers on the same category of goods was 7.04% and the average overall profit rate of these other producers was 5.41%. India also indicates that the average profit for bed linen producers in Egypt and Pakistan was determined to be 6.1% during the investigation. There is no objective basis we can discern for concluding that these amounts are more "reasonable" than the amount determined on the basis of the actual data. The only factor common to these figures is that they are all lower than 18.65%, the profit rate determined by the European Communities on the basis of the profitable sales of one Indian producer and applied in the construction of normal value for the other Indian companies.[43] India puts forth no reason as to why a "reasonable" profit rate in this case should be defined by reference to these data, except to emphasise the difference between the profit rate actually used and these suggested benchmark profit rates. 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 European Communities.

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[42] In response to a question from the Panel, India confirms that "[t]he criterion of reasonability, as laid down in Article 2.2, instructs the chapeau of Article 2.2.2 and its subparagraphs". Response of India to Question 1 from the Panel following the first meeting of the Panel, Annex 1-6.

[43] We note in this context that India has **not** challenged the reasonability of this rate, calculated on the basis of the chapeau methodology, as applied to Bombay Dyeing itself, but only its use as the rate applied, pursuant to Article 2.2.2(ii) for other Indian producers.

6.101 We, therefore, conclude that Article 2.2.2(ii), when applied correctly, necessarily yields reasonable amounts for profits, and that the AD Agreement does not require consideration of a separate reasonability test in respect of results arrived at through the use of that methodology. The European Communities did not, therefore, act inconsistently with the requirements of Article 2.2 by not having applied such a test to the results that it obtained under Article 2.2.2(ii).

3. Claim under Article 2.4.2 - "zeroing" (claim number 7)

6.102 The practice of "zeroing" arises in situations where an investigating authority makes multiple comparisons of export price and normal value, and then aggregates the results of these individual comparisons to calculate a dumping margin for the product as a whole. In this case, the European Communities compared weighted averages of export prices and normal value for each of several models or product types of bed linen. India has no complaint about this aspect of the EC determination.[44] The comparisons for the different models in some cases showed the export price to be lower than the normal value, and in some cases showed the export price to be higher than the normal value. The results of the latter comparisons are referred to as "negative" margins. The European Communities then calculated a weighted average dumping margin for the product at issue, cotton-type bed linen, on the basis of the results obtained in the comparisons by model. In the course of this part of the calculation, the European Communities summed up the total value of the dumping – the total "dumping amount" – on the investigated imports. The European Communities calculated the dumping amounts by multiplying the value of the imports of each model by the margin of price difference for each model. The European Communities counted as zero the dumping amount for those models where the margin was negative. The European Communities then divided the total dumping amount by the value of the exports involved, including the value of those models for which the individual margin was negative, and the dumping amount was thus counted as zero. It is this aspect of the calculation, the assigning of a value of zero to the comparisons yielding a "negative" margin, which constitutes the challenged practice of zeroing which is the subject of India's claim under Article 2.4.2.

(a) Parties' arguments

6.103 India argues that the European Communities acted inconsistently with Article 2.4.2 of the AD Agreement by zeroing "negative dumping" amounts for certain types of bed linen in calculating the overall weighted average dumping margin for the like product bed linen. According to India, the European Communities effectively averaged only within a model, and not between models, and thus did not compare a weighted average normal value to a weighted average of prices of all comparable export transactions, as required by Article 2.4.2 of the AD Agreement. In India's view, Article 2.4.2 provides for three possibilities to establish a dumping margin:

- A comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions;
- A comparison of normal value and export prices on a transaction-to-transaction basis; or
- A comparison of the normal value established on a weighted average basis to prices of individual export transactions (in certain specific cases).

[44] Indeed India appears to acknowledge that comparisons for individual product types within a single like product are appropriate in the context of an anti-dumping investigation, that the weighted average normal value and weighted average export price for each model at issue in this case were properly calculated by the European Communities, and that a fair comparison was made with respect to each product type considered.

India asserts that the European Communities opted to apply the first option in establishing the dumping margin in this case, but did not properly make this comparison by engaging in the practice of zeroing.[45]

6.104 In India's view, the practice of zeroing is not consistent with the requirement set forth in Article 2.4.2 that the comparison take into account the "weighted average of prices of all comparable export transactions". India asserts that this language precludes excluding certain amounts from the calculation simply because they showed "negative" dumping. India argues that, given the use of the words "weighted average" in Article 2.4.2 and the definition of the word "average", there is clearly no justification for excluding certain amounts in establishing an average. An "average" relates to the total of given amounts and not to a number of given amounts from which a selection can be made as to which ones are to be averaged. The use of the word "all" in Article 2.4.2 underlines this idea. And, finally, India posits that the practice of attributing a zero value to "negative dumping" for the eventual calculation of overall dumping margins is contrary to the concept of weighting and in fact distorts the process of actually weighting dumping margins. Moreover, India maintains that this EC method always will lead to a higher dumping margin compared to the method India asserts is envisaged by the AD Agreement. India acknowledges that in the situation where all models are dumped, the results would be the same, but argues that this situation did not occur in the bed linen case. However, India asserts that in this case, because all models in the bed linen proceeding were not dumped, the zeroing of "negative dumping" margins calculated for certain product types resulted in the overstatement of the dumping margins for four companies, and for one company a finding of dumping where dumping did not exist.

6.105 The European Communities maintains that its practice in calculating the dumping margin is consistent with the requirements of Article 2.4.2. In the European Communities' view, the practice of "zeroing" as applied in this case recognizes that the process of calculating dumping margins is directed at dumping, and therefore the European Communities' methodology focuses on those product types where dumping has been found. In the case of any product types for which there is no dumping (i.e. the margin is zero or less than zero ("negative dumping")), the European Communities treats this margin as zero. However, the types of products that are found to have margins less than zero (and which therefore are not being dumped), are nevertheless kept in the calculation (albeit at notional zero margins), on a weighted average basis, of the overall dumping margin for the like product, and thereby reduce the overall weighted average dumping margin determined for that product.

6.106 The European Communities focuses on the need to consider all "comparable" export transactions, which it asserts is done in its practice, which observes the principle of comparing weighted averages for those products that are comparable. Moreover, the European Communities argues, Article 2.4.2 refers to "the existence of margins of dumping", making clear that the process of comparing weighted averages will normally conclude with more than one dumping margin. However, the process of determining a single dumping margin, on which the collection of the duty is based, from these margins does not, in the European Communities' view, fall within the express terms of Article 2.4.2, but is left to the discretion of Members. The European Communities also disputes India's contention that its methodology will always lead to a higher dumping margin than would have been the case if "zeroing" had not taken place.

[45] India asserts that the European Communities does not always follow the practice of zeroing as applied in the bed linen proceeding, referring to a document disclosing the calculation in another EC anti-dumping proceeding. In that other case, India maintains that the "negative" dumping found for certain models was offset against the dumping found for other models which were dumped. We do not consider that the European Communities' practice in other investigations has any relevance to our decision here, as India has made no claim of discriminatory treatment in this dispute.

6.107 Egypt argues that the European Communities manipulated the calculation of the overall dumping margin for Egyptian producers by zeroing negative dumping amounts on a per-type basis, in violation of Article 2.4.2 of the AD Agreement. In Egypt's view, had the Commission followed strictly its own established practice, the outcome would have been different. In failing to do that, it is, for Egypt, clear that the European Communities was determined to have bigger dumping margins.

6.108 Japan asserts that the EC practice of "zeroing" is not consistent with the requirements of Article 2.4.2. In Japan's view, this provision explicitly calls for dumping margins to be based on a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions, and a proper weighted average does not arbitrarily raise some of the numbers in the average in an effort to increase the final result of the weighted average. Japan maintains that the term "comparable" as used in Article 2.4.2 cannot justify the European Communities' practice. In Japan's view, the term speaks only to the need to make the comparison on an "apples-to-apples" basis, and does not authorize zeroing. Japan argues that the European Communities seems to believe that if it properly weight-averages once **within** the product type, then it need not properly weight-average in the next stage, aggregation **across** the various product types. In Japan's view, this interpretation ignores the plain meaning of Article 2.4.2, which requires the comparison of a weighted average based on all comparable export transactions, not just those transactions found to be dumped. The EC approach, including the volume of the non-dumped product types in the overall average, considers only part of the export transactions, the volume element, but ignores the price element. By setting the value of the non-dumped product type to zero, Japan asserts that the European Communities essentially changed the prices of the underlying export transactions. In Japan's view, the text of Article 2.4.2 explicitly calls for a weighted average of the **prices**, not of some actual prices and some arbitrarily adjusted prices. In addition, Japan asserts that Article 2.4 creates an overall obligation of fair comparison for the calculation of dumping margins. Japan maintains that it is not fair to skew a weighted average by adjusting upward some prices used in the calculation of that weighted average.

6.109 The United States maintains that Article 2.4.2 does not prohibit the practice of zeroing.[46] In the United States' view, all that Article 2.4.2 requires is that, in making comparisons between the export price and the normal value of the like product in an investigation, each comparison shall be made either on a weighted-average-to-weighted-average basis or a transaction-to-transaction basis. This requirement of comparing weighted-average-to-weighted-average figures or transaction-to-transaction figures is explicitly made subject to the requirements of Article 2.4. Thus, it is clear that the weight-averaging normally is not to involve transactions which are distinct in terms of physical characteristics of the products, conditions and terms of sale, and other differences affecting price comparability. In the United States' view, the "zeroing" practice applied by the European Communities in this case is not covered by Articles 2.4 and 2.4.2 because it arises at a step **subsequent** to the comparison of export price and normal value, when the individual, model-specific margins were combined into an overall average rate of dumping. The United States asserts that its view is confirmed by the fact that Article 2.4.2 explicitly permits transaction-to-transaction comparisons without providing a methodology for combining margins calculated pursuant to that methodology either. The United States points out that when this stage of combining the results of the actual comparisons is reached, the individual, product-specific differences between normal value and export price may be positive or negative. If positive, they represent the aggregate amount of dumping duties that the importing country is permitted to collect for that product or group of transactions. If negative, they represent the amount by which the export price exceeded the normal value. However, the United States asserts that the AD Agreement imposes no requirement on the importing country to make payments with respect to a lack of dumping of the merchandise in question. The negative

[46] The United States notes that nothing in its argument on this issue should be construed as expressing agreement or disagreement with the European Communities' actual calculation of the dumping margin in this case, because the United States does not have access to the specific factual information considered by the European Communities.

difference between normal value and export price simply means there is no dumping;, *i.e.*, the dumping margin for that product or group of transactions is zero. Thus, for such products with no dumping margins, the amount of dumping duties which the importing country is permitted to collect is properly considered to be zero. The United States argues than when the investigating authority calculates an overall, average rate of dumping, no provision of the AD Agreement requires that more credit be given for "negative dumping" amounts than if the dumping duties were to be collected on a product-specific basis, which it asserts would be the result if India's interpretation of Article 2.4.2 were accepted. The United States also argues that India's reading of Article 2.4.2 would fail to give meaning to the requirements of Article 2.4, which contemplate that comparisons be made at least on a product-specific basis in order to account for physical and other differences which affect price comparability. Finally, the United States notes that Article 2.4.2 was introduced to the AD Agreement during the Uruguay Round to address the concern of certain Members with the practice of some Members, including the European Communities and the United States, of comparing individual export price transactions to weighted-average normal values. Article 2.4.2 was included in the Agreement to provide that, except in the case of targeted dumping, margin calculations in an investigation would be made on a consistent basis, *i.e.*, weight-average to weight-average or transaction to transaction.[47] Thus, the United States asserts, the intent was to eliminate transaction-to-average comparisons in investigations, not to alter the manner in which authorities calculated overall margins after all appropriate comparisons were made.

(b) Findings

6.110 Article 2.4.2 of the AD Agreement provides:

> "Subject to the provisions governing fair comparison in [Article 2.4], the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison."

6.111 As background, we note that Article 2.4 of the AD Agreement (which is not the subject of a claim by India in this dispute) provides, in pertinent part:

> "A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.[7]. . . ".

[47] The United States cites, in this regard, Stewart, Terence P., ed., *The GATT Uruguay Round: A Negotiation History (1986-1992)*, Kluwer Law International, The Hague, pp. 155-61 (discussing the negotiations concerning, *inter alia*, weighted-average comparisons), and *EC - Anti-Dumping Duties on Audio Tapes and Cassettes Originating in Japan*, Panel Report, ADP/136, 28 April 1995 (unadopted), para. 348 (discussing the European Communities' prior practice of comparing individual export prices to a weighted average normal value).

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[7] It is understood that some of the above factors may overlap, and authorities shall ensure that they do not duplicate adjustments that have been already made under this provision.

The two subparagraphs of Article 2.4 deal with specific aspects of the comparison of normal value and export price. Article 2.4.1 (which is not at issue in this dispute) provides rules for the conversion of currencies, when such conversion is necessary for the purposes of a comparison under Article 2.4. Article 2.4.2 establishes that, subject to the provisions of Article 2.4 governing fair comparison, dumping margins should normally be established on the basis of an average-to-average comparison or a transaction-to-transaction comparison. These provisions are new to the AD Agreement - the Tokyo Round AD Code contained no similar provisions.

6.112 In accordance with the provisions of the *Vienna Convention* governing treaty interpretation, we look first to the ordinary meaning of the phrase "a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions", in its context and in light of its object and purpose, in determining whether the practice of zeroing is permitted under Article 2.4.2. Looking first at the text, we note that Article 2.4.2 requires that normally, except in circumstances not applicable here, the existence of "margins of dumping" is to be established on the basis of "a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions" or on the basis of comparison of individual transactions.

6.113 The European Communities argues that this provision simply does not address the question of what to do with "multiple" margins determined on the basis of comparisons for different models within the like product. This "subsequent stage" of the calculation simply does not fall within the scope of Article 2.4.2 in the European Communities' view, and therefore the methodology to be applied in arriving at the dumping margin for the like product as a whole, in a case where multiple comparisons are made, is within the discretion of the Member conducting the investigation.

6.114 We cannot agree. The language of Article 2.4.2 specifically establishes the permissible bases for establishing the "existence of margins of **dumping**". "Dumping" is defined in Article 2.1 of the AD Agreement, which states that

> "For the purpose of this Agreement, a **product is to be considered as being dumped**, *i.e.*, introduced into the commerce of another country at less than its normal value, if 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".

The succeeding provisions of Article 2 of the AD Agreement, which is entitled "Determination of Dumping" set forth, in some detail, various information and methodologies to be used in the determination of whether dumping exists. Article 2.4.2 sets out the permissible bases for comparison of normal value and export price in order to establish the existence of margins of dumping. In light of Article 2.1 of the AD Agreement, we consider that the "margins of dumping" established under Article 2.4.2, based on the comparison methodologies set forth, must relate to the ultimate question being addressed: whether the product at issue is being dumped. Thus, in our view, a margin of dumping, that is, a determination that there is dumping, can only be established for the product at issue, and not for individual transactions concerning that product, or discrete models of that product.

6.115 We note also that Article 2.4.2 specifies that the weighted average normal value shall be compared with " a weighted average of prices of **all** comparable export transactions". In this case, the European Communities' calculation of the final weighted average dumping margin for the product did

not, in fact, rest on a comparison with the prices of all comparable export transactions. By counting as zero the results of comparisons showing a "negative" margin, the European Communities, in effect, changed the prices of the export transactions in those comparisons. It is, in our view, impermissible to "zero" such "negative" margins in establishing the existence of dumping for the product under investigation, since this has the effect of changing the results of an otherwise proper comparison. This effect arises because the zeroing effectively counts the weighted average export price to be equal to the weighted average normal value for those models for which "negative" margins were found in the comparison, despite the fact that it was, in reality, higher than the weighted average normal value. This is the equivalent of manipulating the individual export prices counted in calculating the weighted average, in order to arrive at a weighted average equal to the weighted average normal value. As a result, we consider that an overall dumping margin calculated on the basis of zeroing "negative" margins determined for some models is not based on comparisons which fully reflect all comparable export prices, and is therefore calculated inconsistently with the requirements of Article 2.4.2.

6.116 We recognize that Article 2.4.2 does not, in so many words, prohibit "zeroing". However, this does not mean that the practice is permitted, if it produces results inconsistent with the obligations set forth in that Article, as we believe it does. We consider that the requirements of Article 2.4.2 must be understood to apply to the entire process of determining the existence of margins of dumping for the product, and that there is no "subsequent stage" which escapes entirely from the strictures of Article 2.4.2.

6.117 We do not mean to suggest that anything in Article 2.4.2 prohibits an investigating authority from undertaking multiple comparisons of weighted average normal value and a weighted average of prices of all comparable export transactions. To the contrary, we agree with the European Communities and India that Article 2.4.2 allows investigating authorities to make multiple comparisons on a model basis within the like product being investigated, as the European Communities did in this case. In this regard, we note the word comparable in Article 2.4.2. Read in light of the obligation in the Article 2.4 to make a fair comparison, the specific requirements to make comparisons at the same level of trade and at as nearly as possible at the same time, and the obligation to make due allowance for differences affecting price comparability, the use of the word comparable in Article 2.4.2 indicates to us that investigating authorities may insure comparability either by making necessary adjustments under Article 2.4, or by making comparisons for models which are, themselves, comparable. However, in arriving at a conclusion whether the product as a whole is being dumped, we consider that Article 2.4.2 obligates an investigating authority to make its determination in a way which fully accounts for the export prices on **all** comparable transactions. The European Communities' methodology, which focuses on those models which are, in its view, dumped, and takes less than full account of those models where the comparison results in a negative margin, does not accomplish this goal.

6.118 We note that the European Communities argues that Article 2.4.2 refers to the establishment of "the existence of margins of dumping" in the plural, asserting that it is thus clear that the process of comparing weighted averages will normally conclude with more than one dumping margin. As discussed above, however, we consider that a dumping margin is established for the **product** under investigation, and not for individual **models** being compared as the basis of the establishment of the dumping margin. Thus, in our view, the fact that Article 2.4.2 refers to the existence of margins of dumping in the plural is a general statement, taking account of the fact that, as is made clear in Articles 6.10 and 9 of the AD Agreement, individual dumping margins are determined for each producer or exporter under investigation, and for each product under investigation. While the comparisons required under Article 2.4.2 yield margins of price difference, these are not, properly speaking, margins of dumping to the extent that they relate to discrete models of or transactions concerning the product under investigation, rather than the product under investigation as a whole.

6.119 Based on the foregoing, we conclude that the European Communities acted inconsistently with Article 2.4.2 of the AD Agreement in establishing the existence of margins of dumping on the basis of a methodology which included zeroing negative price differences calculated for some models of bed linen.

D. CLAIMS UNDER ARTICLE 3

6.120 India's claims as to injury and causation raise multiple issues relating to the interpretation of several provisions of Article 3 – in particular, Articles 3.1, 3.4 and 3.5.[48] Although India has broken the issues down into multiple discrete claims and arguments, there are essentially three questions under Article 3 before us: 1) whether the European Communities violated its obligations under Articles 3.1, 3.4, and 3.5 by considering all imports from India (and Egypt and Pakistan) to be dumped in carrying out its analysis of injury caused by dumped imports (India's claims numbers 8, 19, and 20), 2) whether the European Communities violated its obligations under Article 3.4 by failing to evaluate "all relevant economic factors and indices having a bearing on the state of the industry", (India's claim number 11) and 3) whether the European Communities violated its obligations under Article 3.4 by considering information for various groups of EC producers in its analysis of the impact of dumped imports on the domestic industry (India's claim number 15).

1. Claims under Articles 3.1, 3.4, and 3.5 - consideration of all imports from India (and Egypt and Pakistan) as dumped in the analysis of injury caused by dumped imports (claims numbers 8, 19, and 20)

(a) Parties' arguments

6.121 India asserts that the European Communities assumed, for the purposes of the injury determination, that all imports of the product concerned during the investigation period (1 July 1995-30 June 1996) were dumped. In addition, India asserts that the European Communities assumed that imports during the entire period of the injury investigation (1 January 1992-30 June 1996), as well as imports prior to that period, were dumped. India asserts that, with respect to the first assumption, much of the bed linen exported from India during the investigation period was not, or should have been found not to be, dumped, and that with respect to the second assumption, there was no investigation covering those periods on the basis of which a finding of dumping could have been made, and thus imports before the period of the dumping investigation clearly can not be assumed to be dumped. In India's view, inclusion of non-dumped imports in the analysis of injury and causation is inconsistent with Articles 3.1, 3.2, 3.4, 3.5 and 3.6.[49]

6.122 India notes that the European Communities cumulated the volume of all imports from the three countries under investigation – Egypt, India and Pakistan – and not just the volume of imports that was the subject of dumped transactions. (Exhibits India-23 and India-52). India further asserts that if the European Communities had not zeroed, the imports from one company would have been found not to be dumped at all. This company accounted for 28.5% of the volume of Indian bed linen exports by sampled companies. Thus, India maintains that it is clear that the total amount of non-dumped imports accounted for more than one-third of India's exports. India asserts that, assuming the percentages of non-dumped imports from Egypt and Pakistan are of a similar order of magnitude, this

[48] In its response to the European Communities' request for preliminary rulings, India withdrew any putative claims under Article 3.6, a fact of which we have taken note, stating that we would issue no ruling on any such claim. See paragraph 6.18 above.

[49] As noted above, India withdrew its Article 3.6 claim in this regard. The Article 3.4 claim in this regard is the subject of the European Communities' preliminary objection based on failure to sufficiently identify the claim in the request for establishment, which we have denied. See paragraph 6.28 above. In addition, we note that while the parties have made reference to Article 3.2 in their arguments, India has made no claim in respect of that Article, and we therefore make no findings under Article 3.2 of the AD Agreement.

indicates that the total market share of dumped imports was overstated by more than a fifth. With respect to the imports during years prior to the dumping investigation period, India maintains that, as no finding of dumping was ever made for any imports during this period, it was incorrect for the European Communities to consider imports of bed linen from India in the years preceding the dumping investigation period as dumped.

6.123 India also maintains, with reference to Article 3.5 of the AD Agreement, that the European Communities failed to determine to what extent injuries caused by other factors (such as, for instance, contraction in demand or changes in consumption patterns) were responsible for the injury allegedly suffered by the domestic industry. Consequently, India argues that the establishment of the facts considered under Article 3.5 was not proper and/or the evaluation of those facts was not unbiased and objective. In particular, India argues that the term "dumped imports" in Article 3.5 has the same meaning as in Article 3.4. Consequently, in India's view, the European Communities acted inconsistently with Article 3.5 by automatically considering all imports of bed linen from India between 1992 and 30 June 1995 as dumped.

6.124 The European Communities considers that the term "dumped imports" as used in Article 3 of the AD Agreement includes all the imports of the product in question from the country that is found to be dumping, as opposed to only those transactions that are dumped, as suggested by India. For the European Communities, the interpretation of the term "dumped imports" proposed by India raises doubts because of its uncertainty. If each transaction is to be allocated to a dumped or non-dumped classification, there is no provision to cope with the situation where an exporter conceals the volume of dumping by varying the prices from one consignment to another, perhaps in collusion with the importer. There would need to be sub-categorisation by exporter in that case.

6.125 The European Communities cites Articles 2.1, 3.1 and 5.7of the AD Agreement as contextual support for its view that dumping and injury-causation issues are to be analysed on a product and country, rather than transaction, basis. Article 2.1, in the European Communities' view, makes clear that the *existence of* dumping is to be determined for a country at the level of the product under investigation, referred to as the "like product". While Article 2 allows, or may even require, that the product under investigation from a country be divided up by exporter and type in calculating the margin of dumping, the determination of dumping is still made for the product under investigation and the country. Further, the European Communities argues, Article 3.1 requires that a determination of injury caused by dumped imports has to be made for the domestic market for, and the domestic producers of, the like product. In the European Communities' view, it is not possible to isolate the effects of individual transactions in a single product market, and the market situation is determined by the overall impact of imports. The European Communities also maintains that Article 5.7 requires that "[t]he 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 than the earliest date on which in accordance with the provisions of this Agreement provisional measures may be applied". Since injury has to be investigated before it is established which transactions are dumped, it is clear, to the European Communities, that the term "dumped products" used in connection with the injury provisions of Article 3 must refer to all imports of the product under investigation (although a finding of injury is of course conditional upon dumping being found).

6.126 Finally, the European Communities indicates that a consideration of the object and purpose of Article 3 supports its interpretation of the term "dumped imports". The European Communities states that the unlikelihood of Article 3 pursuing its object and purpose with the needlessly complex notion of "dumped imports" forwarded by India is reinforced by an examination of the first sentence of Article 3.2, which requires consideration whether there have been significant increases in dumped imports. In the European Communities' view, the AD Agreement evidently intends national authorities to gather information covering a lengthy period, since the investigation period used to

assess dumping (typically a year) would hardly be enough to assess trends in the volume of imports. Article 3.2 is manifestly for the benefit of exporters, according to the European Communities, because it sets conditions that must be satisfied before causation is established. Nevertheless, on India's interpretation, in order to apply this provision, the exporters would have to provide not just one, but several, years' price data in order to establish whether dumping was occurring throughout the longer period for which import volumes are considered. Far from benefiting exporters, such an interpretation would in many cases make this provision unworkable.

6.127 The European Communities rejects India's assertion that it assumed imports prior to the dumping investigation period to be dumped and found injury caused by those imports. The European Communities maintains that there is nothing in either the EC Regulation, or any other statement by EC authorities that expressly or implicitly supports the view that it reached such a conclusion. The European Communities maintains that imports in years preceding the dumping investigation period were examined in order to put the situation during that period into context. The phrase "injury investigation period" is used by the European Communities to refer to the longer period over which the condition of the industry is evaluated, but this does not imply dumping during that period.

6.128 In response to the Indian contention that the European Communities "at several instances puts great emphasis on companies allegedly disappeared from the EC market in the period 1992-POI", the European Communities draws attention to the statement in the Regulations that the principal basis for the finding of material injury was the reduced profitability and price suppression of the Community industry as observed among the sampled companies. The information on the contraction in the number of producers showed that what might otherwise have seemed a contradiction was in fact a realistic scenario. Otherwise put, the EC authorities found injury principally because of the domestic industry's reduced profitability and price suppression, and the data of the disappeared companies was relevant to explaining the improved position of the industry with regard to sales and market share.

6.129 Egypt submits that by failing to separate out dumped exports and those that were not dumped, the European Communities acted contrary to Articles 3.1, 3.2, 3.4, 3.5 and 3.6 of the AD Agreement. Egypt focuses on the use of the words "dumped imports" in Article 3.1. Moreover, Egypt argues, the European Communities failed to properly consider whether other factors could have caused the injury, as required by Article 3.5 of the AD Agreement.

6.130 Japan believes that the language "dumped imports" in various places in Article 3 means that the injury determination set forth in Article 3 must reflect the authorities' assessment of only "dumped imports", and not imports that were not found to have been "dumped". In Japan's view, if the authorities find that some imports were "dumped" and others were not, then they must distinguish between the two in making their injury determination. Japan asserts that this obligation extends to imports that are cumulated, as the investigating authority is obliged to make the injury determination only for the "dumped" portion of the cumulated imports. Allowing "dumped" imports to taint all imports from a company seriously skews the injury analysis required under Article 3.

6.131 The United States disagrees with the European Communities' reasoning that dumping is determined for countries, and therefore that it is entitled to consider all imports from a country found to be dumping as dumped imports for purposes of the injury investigation. However, the United States submits that, even assuming the European Communities did treat all subject imports during the injury assessment period as dumped, that treatment would have been consistent with the AD Agreement. The reasons supporting the European Communities' view that it acted consistently with the Agreement in treating all subject imports as dumped during the period of investigation similarly apply with respect to the treatment of subject imports during the portion of the injury

assessment period that was prior to the dumping investigation period.[50] In the United States' view, the requirements of the injury determination necessarily oblige Members to gather and consider information for a period longer than the period of the dumping investigation, in order to evaluate volume and price changes. This disparity of time periods has been an element of dumping investigations since long before the current AD Agreement was negotiated and came into effect. However, there is, in the United States' view, no reasonable way to eliminate this disparity, as it would not be meaningful to assess injury only over the period of the dumping investigation, and it would be unduly burdensome to investigating authorities and exporters to extend the period of the dumping investigation. The United States points out that in the *Salmon* cases[51] the United States had considered all imports during the injury investigation period to be dumped (and subsidised). The Panels reviewing that injury determination concluded that the United States had properly considered whether there had been a significant increase in the volume of dumped (and subsidised) imports under the Tokyo Round Anti-Dumping and Subsidies Codes. The relevant text of the AD Agreement is the same as that of the Tokyo Round Anti-Dumping Code.

(b) Findings

6.132 India's claim regarding the European Communities' treatment of all imports of the product concerned during the investigation period as dumped is primarily characterised as a claim of inconsistency with Article 3.1.

6.133 Article 3.1 states:

> "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."

Article 3.1, which requires consideration of the volume, price, and consequent impact of dumped imports on the domestic industry sets out the general requirements for a determination of injury, and the succeeding sections of Article 3 provide more specific guidance for such determinations. Articles 3.4 and 3.5 similarly require consideration of dumped imports.

6.134 There is no dispute between the parties as to the facts with respect to the consideration of imports as dumped during the period of the dumping investigation. The European Communities explicitly acknowledges that it considered all imports from the three countries investigated, India, Egypt and Pakistan, as dumped, and considered the volume and price effects of all imports from those countries during that period in evaluating whether injury was caused by dumped imports. India asserts that the European Communities was only entitled to consider as dumped imports in its injury analysis those imports attributable to specific transactions as to which dumping was actually found during the period of the dumping investigation.

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[50] The United States stated, in response to questions from the Panel, that its own practice is to exclude from the volume and price effects analysis imports from producers or exporters for which a finding of no dumping is made. These are considered in its injury investigation in the category of "non-dumped" imports, as are imports from third countries not subject to the investigation. However, while the United States clearly disputes the principle espoused by the European Communities that dumping is determined for countries, it does not assert that its own practice is required by the AD Agreement.

[51] *Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway* ("*Salmon - Anti-Dumping Duties*"), Panel Report, ADP/87, adopted 26 April 1994, BISD 41S/228; *Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway* ("*Salmon - Countervailing Duties*"), Panel Report, SCM/153, adopted 28 April 1994, BISD 41S/576.

6.135 Thus, we are faced with the question of the interpretation of the term “dumped imports” in Articles 3.1, 3.4, and 3.5 of the AD Agreement, rather than an assessment of the facts as such. If we were to conclude that the term “dumped imports” may be understood to comprise the volume of imports of the product in question from the country for which an affirmative determination of dumping has been made then we must, under the standard of review set forth in Article 17.6(ii), find in favor of the European Communities on this issue, at least with respect to the consideration of imports during the period of the dumping investigation. On the other hand, to sustain India's position, we would have to conclude that the phrase "dumped imports" must be understood to refer only to imports which are the subject of transactions in which export price was below normal value, which India considers to be "dumping" transactions.

6.136 However, consideration of the ordinary meaning of the phrase "dumped imports" in its context, and in light of the object and purpose of Article 3 of the AD Agreement, leads us to the conclusion that the interpretation proposed by India is not required. As discussed above,[52] we consider that dumping is a determination made with reference to a **product** from a particular producer/exporter, and not with reference to individual transactions. That is, the determination of dumping is made on the basis of consideration of transactions involving a particular product from particular producers/exporters. If the result of that consideration is a conclusion that the product in question from particular producers/exporters is dumped, we are of the view that the conclusion applies to all imports of that product from such source(s), at least over the period for which dumping was considered. Thus, we consider that the investigating authority is entitled to consider all such imports in its analysis of "dumped imports" under Articles 3.1, 3.4, and 3.5 of the AD Agreement.

6.137 We note that Article 9.2 of the AD Agreement, which may be considered relevant context for our analysis, provides:

> "When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury, except as to imports from those sources from which price undertakings under the terms of this Agreement have been accepted. The authorities shall name the supplier or suppliers of the product concerned".

We consider that this provision lends support to our conclusion that all imports from any producer/exporter found to be dumping may be considered as dumped imports for purposes of injury analysis.

6.138 In this regard, we note that, although the European Communities found *de minimis* margins for four Pakistani exporters of bed linen, it did not make a negative determination of dumping with respect to any producer or exporter subject to the investigation. India, of course, has made no claim with respect to the treatment of Pakistani imports as dumped. India does argue that, had the European Communities properly calculated the dumping margins for Indian producers, it would have come to the conclusion that imports from one company were not dumped. We have found above that the European Communities did act inconsistently with its obligations under Article 2.4.2 of the AD Agreement in its calculation of dumping margins for Indian producers. 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 purposes of injury analysis. However, we lack legal competence to make a proper calculation and consequent determination of dumping for any of the Indian producers – our task is to review the determination of the EC authorities, not to replace that determination, where found to be

[52] *See* section VI.C.3 (zeroing), *supra*.

inconsistent with the AD Agreement, with our own determination. In any event, we lack the necessary data to undertake such a calculation. Thus, while the treatment of imports attributable to producers or exporters found to **not** be dumping is an interesting question, it is not an issue before us and we reach no conclusions in this regard.

6.139 Our conclusion that investigating authorities may treat all imports from producers/exporters for which an affirmative determination of dumping is made as "dumped imports" for purposes of injury analysis under Article 3 is bolstered by our view that the interpretation proposed by India, which entails the conclusion that the phrase "dumped imports" refers **only** to those imports attributable to **transactions** in which export price is below normal value, would lead to an unworkable result in certain cases. One of the objects and purposes of the AD Agreement is to establish the conditions under which Members may impose anti-dumping duties in cases of injurious dumping. An interpretation which would, in many cases, make it impossible to assess one of the necessary elements, injury, is not consistent with that object and purpose.

6.140 An assessment of the volume, price effects, and consequent impact, only of imports attributable to transactions for which a positive margin was calculated would be, in many cases, impossible, or at least impracticable. 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] Similarly, if dumping is determined on the basis of a comparison of weighted average normal value to weighted average export price, there would be no comparisons concerning individual transactions which could serve as the basis for segregating imports in "dumped" and "not-dumped" categories.

6.141 We note, in this context, the findings of the GATT Panels in the *Salmon* cases. While the specific issue raised here was neither raised nor addressed in that case, the Panel in *Salmon - Anti-Dumping Duties* was considering the question of whether the United States had properly determined that the imports caused material injury to the domestic industry "through the effects of dumping". The Panel found that this language, which is found in Article 3.5 of the AD Agreement, did not require that the volume, price, and impact "effects" to be considered be those of the dumping, but rather those of the dumped imports, that is, the "effects of the dumping" were equated by the Panel with "the effects of the dumped imports".[54] 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.

6.142 We therefore conclude that the European Communities, having made an affirmative determination of dumping with respect to imports from all producers/exporters in this case, did not act inconsistently with Articles 3.1, 3.4, and 3.5 of the AD Agreement by considering all imports from India (and Egypt and Pakistan) in its evaluation of the volume, price effects, and consequent impact of dumped imports.

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[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.

[54] *Salmon - Anti-Dumping Duties*, Panel Report, paras. 565-571; *Salmon - Countervailing Duties*, Panel Report, paras. 328-340 ("effects of the subsidy" and "effects of the subsidised imports").

6.143 With respect to the question whether the European Communities improperly considered imports before the dumping investigation period as dumped, we note the European Communities' explanation that it did not determine injury caused by dumped imports for any period before the dumping investigation period. Since we have concluded, as discussed below, that the European Communities' determination of injury was not made consistently with its obligations under Article 3.4, we do not consider it necessary or appropriate to decide this question.

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.

2. Claim under Article 3.4 - failure to evaluate "all relevant economic factors and indices having a bearing on the state of the industry" (claim number 11)

(a) Parties' arguments

6.145 India considers that the European Communities failed to consider all injury factors mentioned in Article 3.4 of the AD Agreement for the purpose of its determination of the impact of the dumped imports on the domestic industry concerned. In particular, India asserts that the European Communities did not consider the following elements: productivity; return on investments; utilisation of capacity; magnitude of margin of dumping; cash flow; inventories; wages; growth; and ability to raise capital or investments. In India's opinion, the European Communities, therefore, acted inconsistently with Article 3.4.

6.146 India emphasises the use of the word "shall" in Article 3.4, arguing that it follows that the evaluation mentioned in Article 3.4 shall by necessity include "all relevant . . . factors". The word "all" indicates that all relevant factors must be included in this "evaluation". The word "all", according to India, is given further meaning by the word "including". In India's view, it follows from the word "including" that, at a minimum, the factors and indices listed after the word "including" must be evaluated.

6.147 The European Communities presents three defences to India's claim, which it characterises as relying on the supposedly compulsory nature of the evaluation of the factors listed in Article 3.4 and not on the argument that, because of the circumstances of this particular case, the listed factors should be evaluated. First, the European Communities asserts that the factors listed in Article 3.4 were evaluated during the investigation.[55] For several of the factors, the data could be derived from the exporters' accounts and, for others, from the questionnaire sent to the domestic producers. The European Communities also indicates the evaluation accorded to each of the factors.

6.148 Second, the European Communities asserts that the factors listed in Article 3.4 are negative in character and, as such, were properly evaluated during the investigation. The European Communities stresses that the one feature that stands out in a close examination of the terms of Article 3.4 is that the listed factors are explicitly concerned with indications of injury, not the absence of injury. Of fifteen factors, only two are not qualified by the words "decline" or "negative effects". The opening clause of Article 3.4 – which speaks of the "*impact* of the dumped imports" – reinforces this interpretation of the listed factors. The purpose of the examination under Article 3.4 is to determine what is wrong with the domestic industry, not what is right with it. The European Communities does not wish to suggest that non-negative factors have no relevance. However, in the view of the European

[55] *See* First Submission of the European Communities, Annex 2-1, Table 4.

Communities, India seeks to establish that Article 3.4 requires investigating authorities to evaluate in an explicit fashion all the fifteen listed factors. However, the wording of Article 3.4 refers almost exclusively to negative factors and, consequently, according to the European Communities, what might be called the 'comprehensive evaluation' requirement, if it exists, applies only to such factors. Profits and prices were the two principal negative factors identified by the EC authorities in the bed linen proceeding, and these were thoroughly examined and evaluated.

6.149 Third, the European Communities puts forward various reasons for concluding that Article 3.4 does not require that every one of the listed factors need be evaluated in every investigation. The European Communities points to the use of the words "relevant" and "have a bearing on the state of the industry" in Article 3.4 as well as the last sentence of the provision, which states: "This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance." The European Communities also underlines the use of the word "including" and emphasises what it calls the "nature" of the list, explaining that it is "broken into parts by semicolons, and the word 'or' is used to indicate that not all of the factors need be considered". Not only do the factors differ in importance from case to case, but, for the European Communities, it is possible to deduce that certain of them are inherently likely to be more significant than others and that findings on some may make findings on others superfluous.

6.150 The European Communities argues that the obligation in Article 3.4 to consider injury factors does not exist in isolation and, in particular, account must be taken of Articles 6.13 and 6.14, which deal with the difficulties experienced by interested parties – particularly small companies – in supplying information requested and the need for a Member to proceed expeditiously in its investigation, respectively. In this context, aspects of the evaluation required by Article 3.4 may have to be limited in order to observe the spirit of Article 6.13. The European Communities posits that the decision on the limits to be set on the obligation in Article 3.4 is a matter of judgement that must be exercised by the investigating authorities.

6.151 Japan, as third party, asserts that the language of Article 3.4 requires all listed factors to be considered, and the list of factors is the minimum that must be evaluated by the investigating authorities. The degree of importance of each factor may vary from case to case, but all of the listed factors must be fully considered and evaluated in each case. Authorities may not exclude certain factors because they deem these to be irrelevant. Japan is of the opinion that this interpretation finds support in the change in the language of this provision over time. The change from the phrase "such as" in the comparable provision of the Tokyo Round Anti-Dumping Code to the word "including" in the AD Agreement underscores the interpretative significance of the word "including". Because "including" means "part of a whole", the factors after the word "including" must be viewed as a subset of a potentially larger group of factors that must be evaluated by the authorities. Had the drafters intended this list of factors to be a discretionary checklist from which authorities may pick and choose, they would not have changed the words "such as" to "including". The drafters would also have used language to more clearly provide that authorities could consider as many or as few of these factors as they wished.

6.152 The United States, as third party, takes the position that while, 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, it should be discernible from the authorities' determination that they evaluated each of the enumerated factors. This objective may be achieved when a determination, through its demonstration of why the authorities relied on the specific factors they found to be material in the case, thereby discloses why other factors on which they do not make specific findings were accorded little weight. In the current case, however, the United States shares some of India's concerns about the inadequacy of the European Communities' findings, because the European Communities' specific findings on the factors it addressed do not elucidate why it did not give weight to factors it did not discuss. The United States does not agree with the European Communities'

argument that some of the Article 3.4 factors are negative in character. The United States points out that the European Communities ignores that Article 3.5 refers to "the *effects* of dumping, as set forth in paragraphs 2 and 4 of Article 3". The "relevance" of the Article 3.4 factors extends beyond supporting an injury determination. Article 3.4 states that "all relevant economic factors and indices having a bearing on the state of the industry" must be evaluated. Thus, even if a factor does not lend support to an affirmative injury determination, the authority must evaluate it so long as it sheds light on the condition of the domestic industry.

(b) Findings

6.153 India's claim raises a number of issues. The most basic of these is the interpretation of Article 3.4, *i.e.*, whether the list of factors set out in that provision is illustrative or mandatory and, if mandatory, whether there are only four groups of "factors" represented by the subgroups separated by semicolons that must be evaluated, or whether each individual factor listed must be considered. We must also consider the nature of the evaluation of the factors that is required, how the "relevance" of a given factor is to be determined, and the extent to which the final determination must reflect the required consideration, whatever its nature. Finally, we must consider the facts.

6.154 Article 3.4 provides:

> "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 utilisation 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."

The use of the phrase "shall include" in Article 3.4 strongly suggests to us that the evaluation of the listed factors in that provision is properly interpreted as mandatory in all cases. That is, in our view, the ordinary meaning of the provision is that the examination of the impact of dumped imports must include an evaluation of all the listed factors in Article 3.4.

6.155 The European Communities emphasises the use of the terms "relevant", "having a bearing on the state of the industry" and "including" in Article 3.4 in arguing that not all factors need be evaluated in all cases. We do not consider that these textual elements affect the conclusion that the ordinary meaning of Article 3.4 is properly understood as requiring the evaluation of all the listed factors in all cases. We note that the terms "relevant" and the phrase "having a bearing on the state of the industry" precede the introduction of the list of factors. 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.[56]

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[56] We note, in this regard, that the Panel in *Korea - Dairy Safeguard*, considered 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:

6.156 With regard to the use of the word "including", we consider that this simply emphasises that there may be other "relevant economic factors and indices having a bearing on the state of the industry" among "all" such factors that must be evaluated. We recall that, in the Tokyo Round AD Code, the same list of factors was preceded by the phrase "such as", which was changed to the word "including" that now appears in Article 3.4 of the AD Agreement. The term "such as" is defined, *inter alia*, as "Of the kind, degree, category being or about to be specified; for example".[57] By contrast, the verb "include" is defined, *inter alia*, to mean "enclose"; "contain as part of a whole or as a subordinate element; contain by implication, involve"; or "place in a class or category; treat or regard as part of a whole".[58] We thus read the phrase "shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including . . ." as introducing a mandatory list of relevant economic factors which must be evaluated in every case. The change in the wording that was introduced in the Uruguay Round in our view supports an interpretation of the current text of Article 3.4 as setting forth a list that is mandatory, and not merely indicative or illustrative.[59]

6.157 The European Communities also focuses on the semicolons in the list of factors in Article 3.4. However, in our view, neither the presence of semicolons separating certain groups of factors in the text of Article 3.4, nor the presence of the word "or" within the first and fourth of these groups, serves to render the mandatory list in Article 3.4 a list of only four "factors". We further note that the two "ors" appear within – rather than between – the groups of factors separated by semicolons. Thus, we consider that the use of the term "or" here does not detract from the mandatory nature of the textual requirement that "all relevant economic factors" shall be evaluated. With respect to the second "or," it appears in the phrase "ability to raise capital or investments", which clearly indicates that the factor that an investigating authority must examine is the "ability to raise capital" or the "ability to raise investments", or both.

6.158 Finally, we consider the European Communities' assertion that not all factors listed in Article 3.4, "being solely negative in character", need to be evaluated. This characterisation of the European Communities of the factors listed in Article 3.4 is somewhat perplexing to us. Each of the factors to be evaluated may be found to indicate material injury, or not, to the industry. We fail to see the purpose of describing them as "negative factors", or factors having "negative character". Nor are we able to reconcile the European Communities' statement that "the listed factors are explicitly concerned with indications of injury, not the absence of injury" with its statement that "[t]he

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> "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. 7.55.

See also, *Argentina - Safeguard Measures on Imports of Footwear*, Appellate Body Report, WT/DS121/AB/R, adopted 12 January 2000, para. 136. The similarities between the drafting of the provisions is obvious, and we consider that the same conclusion is appropriate in interpreting Article 3.4 of the AD Agreement. While the standard for injury in safeguards cases ("serious injury") is different from that applied to injury determinations in the anti-dumping context ("material injury"), the same type of analysis is provided for in the respective covered agreements, *i.e.*, evaluation or examination of a listed series of factors in order to determine whether the requisite injury exists.

[57] *The New Shorter Oxford English Dictionary*, Clarendon Press, Oxford, 1993.

[58] *Id.*

[59] Article 3.2 of the DSU directs panels to clarify the provisions of the covered agreements "in accordance with customary rules of interpretation of public international law", which are set out in Articles 31 and 32 of the *Vienna Convention*. *See, e.g., Japan – Taxes on Alcoholic Beverages*, Appellate Body Report, WT/DS8/AB/R–WT/DS10/AB/R–WT/DS11/AB/R, adopted 1 November 1996, pp.10-12. Here, we look to negotiating history pursuant to Article 32 of the *Vienna Convention* in order to confirm the meaning resulting from the application of the general rule of interpretation in Article 31 of the *Vienna Convention*.

European Communities does not wish to suggest that non-negative factors have no relevance". On the contrary, the European Communities' comment that "[the] wording [of Article 3.4] refers almost exclusively to negative factors and, consequently, what might be called the 'comprehensive evaluation' requirement, if it exists, applies only to such factors" suggests that the European Communities believes that only factors indicating material injury to the industry must be evaluated. Such an interpretation of Article 3.4 clearly runs counter to the requirement to properly establish a factual basis in support of a well-reasoned and meaningful analysis of the state of the industry and a finding of injury as well as to the requirement of an unbiased and objective evaluation as provided for in Articles 3.1 and 17.6(i) of the AD Agreement.

6.159 Based on the foregoing, we conclude that **each** of the fifteen factors listed in Article 3.4 of the AD Agreement must be evaluated by the investigating authorities in each case in examining the impact of the dumped imports on the domestic industry concerned.

6.160 We note that our conclusion is the same as that reached by the Panel on *Mexico - HFCS* on this specific issue.[60] The Panel stated [61]:

> "The text of Article 3.4 is mandatory:
>
> '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**. . . ' (emphasis added by *HFCS* panel)
>
> In our view, this language makes it clear that the listed factors in Article 3.4 must be considered in all cases. There may be other relevant economic factors in the circumstances of a particular case, consideration of which would also be required."

6.161 Turning to the question of the nature of the evaluation of each factor that is required, we note the views of the *Mexico-HFCS* panel on this question:[62]

> "But consideration of the Article 3.4 factors is required in every case, even though such consideration may lead the investigating authority to conclude that a particular factor is not probative in the circumstances of a particular industry or a particular case, and therefore is not relevant to the actual determination. Moreover, the consideration of each of the Article 3.4 factors must be apparent in the final determination of the investigating authority.[602]
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> [602]In this regard, we note the text of Article 12.2.2, which provides:
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> 'A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures . . .'"

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[60] While that panel was examining the application of the requirements of Article 3.4 in a case involving "threat of material injury", we consider that its views on Article 3.4 are also relevant in this case, dealing with material injury.

[61] *Mexico - HFCS*, Panel Report, para. 7.128.

[62] *Id.*

6.162 In other words, while the authorities may determine that some factors are not relevant or do not weigh significantly in the decision, the authorities may not simply disregard such factors, but must explain their conclusion as to the lack of relevance or significance of such factors. We agree. Thus, we are of the view that every factor in Article 3.4 must be considered, and that the nature of this consideration, including whether the investigating authority considered the factor relevant in its analysis of the impact of dumped imports on the domestic industry, must be apparent in the final determination.

6.163 We now consider the implications of a ruling that consideration of each factor must be apparent in the final determination, and that the relevance or lack thereof of each factor must be explained. The European Communities objects to the concept of a "checklist" and argues that the relevance of some factors may be apparent early in the investigation. Even granting that the investigating authority may be aware early in the proceeding, or indeed from the outset, that a certain factor is not relevant to the examination of the impact of dumped imports on the domestic industry, it must nonetheless be possible for a panel, reviewing that determination, to be able to assess whether all of the Article 3.4 factors have been evaluated. We consider that an authority, in discussing why it found certain factors relevant, may at the same time make apparent why it did not deem other factors to be material and, thus, without following a checklist approach, make it possible for a reviewing panel to determine whether it complied with the requirements of Article 3.4. Thus, we conclude that, as long as the lack of relevance or materiality of the factors not central to the decision is at least implicitly apparent from the final determination, the Agreement's requirements are satisfied. While a checklist would perhaps increase an authority's and a panel's confidence that all factors were considered, we believe that it is not a required approach to decision-making under Article 3.4.

6.164 Having concluded that Article 3.4 requires an evaluation of all listed factors, which might result in a conclusion that some of the listed factors are not relevant to the examination of the impact of dumped imports on the domestic industry in the particular circumstances of the investigation at hand, and that the consideration of all the Article 3.4 factors must be apparent from the final determination, the question before us is whether the European Communities' determination is consistent with this obligation.

6.165 The European Communities submits that it evaluated the factors listed in Article 3.4 during the investigation. In paragraphs 81-91 of the Provisional Regulation,[63] the European Communities, under the heading "Situation of the Community industry", addresses the following factors: (a) production; (b) sales by volume; (c) sales by value; (d) market share; (e) price development; (f) profitability; and (g) employment. The other factors listed in Article 3.4 – 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 – are not even referred to in this section.

6.166 We further note that, in paragraph 62 of the Provisional Regulation, the European Communities states:

> "Data for the examination of injury caused to the Community industry was collected and analysed at three different levels, as follows:
>
> - at the level of the entire Community (EU-15) for trends concerning production, consumption in the Community, imports, exports and market share . . .
>
> - at the level of the Community industry . . . for trends concerning production, sales by value and employment.

[63] Exhibit India-8.

> - at the level of the sampled Community producers, for the factors mentioned above and also for trends concerning prices and profitability."

6.167 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.

6.168 The European Communities explains that certain factors were evaluated, but were "found not to be a significant independent factor". In response to a question from the Panel regarding the meaning of the phrase "not a significant independent factor" as used by the European Communities, the European Communities states: "The interpretation to be given to the phrase 'an evaluation of all relevant economic factors and indices' must be flexible enough to cope with the enormous variety of circumstances that arise in investigations into injury and injury causation. Relevance is a matter of degree rather than of 'yes or no'." [64] While we certainly agree with the European Communities as to the "enormous variety of circumstances" that may arise in investigations, and the need to be flexible in the evaluation of relevant factors, we fail to see how relevance of a factor to the determination of injury **in a particular investigation** can be a matter of degree. That is to say, it is clear that not all factors will be, or will be equally, "relevant", in the sense of bearing on the state of the industry, in all cases. Nonetheless, it would seem to us that **in a particular** case, a particular factor either is or is not relevant to the determination of whether there is injury, depending on the particular facts and circumstances of the industry in question. Indeed, it is precisely because, as the European Communities states, "the process of determining the relevance of a factor may be little different from that of evaluating it" that the authorities' assessment of the lack of relevance of a factor, that is, the conclusion that it has no (or little) bearing on the determination of injury, should that be the case, must be as apparent from the determination as the authorities' evaluation of a factor that does bear on the determination of injury. Otherwise, it becomes impossible to determine which of the many factors that have a bearing on the state of the industry actually were considered to weigh in the determination of injury and were evaluated by the investigating authority. We find that, where factors set forth in Article 3.4 are not even referred to in the determination being reviewed, if there is nothing in the determination to indicate that the authorities considered them not to be relevant, the requirements of Article 3.4 were not satisfied. A conclusion that a factor is not relevant which must be assumed from the absence of any discussion of it is, in our view, simply not tenable.

6.169 Based on the foregoing, we conclude 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.

3. Claim under Article 3.4 - consideration of information for various groupings of EC producers in analysis of the state of the domestic industry (claim number 15)

(a) Parties' arguments

6.170 India submits that the European Communities acted inconsistently with Article 3.4 by considering information relating to different groupings of EC producers of bed linen in evaluating certain of the factors under Article 3.4. India asserts that the European Communities, after defining

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[64] *See* Response of the European Communities to Question 20 from the Panel following the first meeting, Annex 2-5.

the "Community industry" as a group of 35 producers, selected a sample of 17 of those 35 for purposes of the injury investigation. However, India argues, the European Communities did not consistently base the injury analysis on this sample group. India argues that the European Communities' reliance on information for companies outside this group, specifically by considering information for the "Community industry" as a whole, and for all EC producers of bed linen, in determining injury, was a violation of Article 3.4. Moreover, India maintains, the European Communities' choice of which group of producers to consider with respect to different aspects of its analysis was without any apparent reason other than a goal-oriented 'picking and choosing' in order to find injury.

6.171 The European Communities argues that Article 4.1 provides Members with two options for defining the domestic industry, either the "domestic producers as a whole" of the like product, or "those of them [the domestic producers] whose collective output of the products constitutes a major proportion of the total domestic production of those like products". In EC practice, a "major proportion" is defined by reference to the standing requirements of Article 5.4 of the Agreement, that is, producers accounting for at least 25 per cent of domestic production. The European Communities states that in the bed linen investigation, it applied the second option, defining as the "Community industry" a group of 35 producers of bed linen supporting the application whose collective output constituted more than 25 per cent of EC production of the like product. Because of the number of companies in the Community industry, the European Communities decided to resort to sampling. An initial list of 19 companies was decided upon for inclusion in the sample, which was subsequently reduced to 17 companies. The European Communities collected and analysed data for the examination of injury to the Community industry at three levels, *i.e.*, for the sampled companies, for the Community industry, and for all EC producers of bed linen.[65]

6.172 The European Communities notes that the conclusions drawn from evidence must ultimately concern the domestic industry as defined in the investigation, but argues that there is no intrinsic limit to the types of evidence that may be used to arrive at such conclusions. In particular, the European Communities submits that it cannot be excluded *ab initio* that the condition of EC producers of bed linen as a whole may provide evidence of the condition of those producers who comprise the domestic industry. The European Communities emphasises that the principal basis for the finding of material injury was the reduced profitability and price suppression of the Community industry as observed among the sampled companies.

6.173 In Egypt's view, there is no textual support in the AD Agreement for the approach adopted by the European Communities, which is incompatible with Article 3.1, as well as Articles 3.3, 3.4, 3.5 and 3.6, of the AD Agreement. These provisions require the European Communities to determine whether the domestic industry has suffered injury and do not permit an injury determination based on data relating to companies not belonging to the domestic industry. As an ancillary matter, Egypt states that the Commission, by ignoring the results of its own sample of the domestic industry, failed to make an unbiased and objective assessment of the facts and thus acted inconsistently with Article 6.10 in conjunction with Articles 3.4, 3.5 and 3.6. In Egypt's view, in assessing whether the domestic industry suffered material injury, the European Communities improperly considered both the Community industry and the total EC production, drawing conclusions regarding the situation of the Community industry on the basis of information concerning total EC production. Egypt submits that the evidence shows that the domestic industry was in a healthy state, and that in any event, the European Communities failed to take into account in its analysis the fact that consumption of the like product in the European Communities decreased over the relevant period.

6.174 In the United States' view, the parties' arguments on this issue miss an important underlying point. The United States is of the opinion that the European Communities, in applying its Regulation

[65] Provisional Regulation, Exhibit India-8, para. 62; *see* para. 6.166, *supra*.

on definition of the domestic industry, has defined the domestic industry in this case in a manner which violates Article 4 of the AD Agreement, and that therefore the entire injury analysis is based on a flawed premise. In the United States' view, the European Communities' position that Article 4.1 allows two equally valid options for defining the domestic industry - either producers as a whole, or producers of a major proportion of domestic production, is wrong. The United States believes that the second option is not a separate basis for defining industry, but is a provision which allows a determination to be made in situations where information for the industry as a whole is not available, so long as that information relates to producers of a major proportion of domestic production. The United States asserts that the European Communities' industry definition limited the domestic industry to those producers that came forward to affirmatively pursue the investigation, and thus was fundamentally skewed. A proper definition of the domestic industry under Article 4.1 would have required the European Communities to define the "domestic industry" as all EC producers of the like product, and obtain information from that universe of producers, or at least from a sample drawn from that universe of producers. Thus, with respect to India's claim that the European Communities acted impermissibly by considering some information concerning all EC producers, the United States, in contrast, believes that the European Communities acted inconsistently with the AD Agreement by *not* including all EC producers of bed linen in the domestic industry for the purposes of evaluating factors such as price and impact under Articles 3.1, 3.2, 3.4 and 3.5. Moreover, the United States argues that the European Communities' definition of domestic industry conflates the "domestic industry" definition of Article 4.1 with the standing determination under Article 5.4, and thus misconstrues the relationship between the two provisions. If Article 4.1 were intended to define the domestic industry as those producers who expressly supported the petition, an injury investigation would be mostly a *pro forma* exercise in which the authorities would simply check whether petitioning firms really were materially injured. Article 5.4 does not provide a basis for the creation of such a self-selecting industry and does not purport to define the term "a major proportion" as used in Article 4.1. The United States adds that Article 3.1 reflects that Article 4.1 establishes a preference for basing an injury determination on examination of the domestic producers as a whole. Further, Articles 3.4 and 3.5 specifically direct that an injury analysis shall concern "*the* domestic industry". These provisions accordingly do not contemplate that an authority will at its discretion use one industry definition in a determination examining injury and another definition in that determination for other purposes.

(b) Findings

6.175 We first note that the issue raised by the United States regarding the European Communities' interpretation of "domestic industry" is an interesting one, and raises questions regarding the proper application of that term in this case. However, India has made no claim under Article 4 of the AD Agreement in this dispute regarding the European Communities' definition of the domestic industry. Our analysis and finding relate only to the claim before us, whether having defined the Community industry as a group of 35 producers and resorted to a sample of those producers, the European Communities was precluded from considering information relating to producers not within that sample, or not within the Community industry. We express no opinion as to the correctness *vel non* of the European Communities' interpretation of Article 4 of the AD Agreement or its application in this case.

6.176 India's claim raises two related questions. First, we must consider whether the fact that the European Communities considered information for different groupings of producers of bed linen, the 17 producers in the sample, the 35 producers comprising the "Community industry", and all EC producers of bed linen, constitutes a violation of Article 3.4. The second question is whether, assuming that the consideration of different data sets with regard to analysis of the state of the domestic industry under Article 3.4 is permissible, the European Communities explained how its consideration of the information at the different levels supported its determination.

6.177 India's claim rests on premises concerning the correct definition of domestic industry and sampling which are outside the scope of our terms of reference. Focusing solely on the claim that is before us, we note that the European Communities defined the domestic industry by starting with the list of companies which supported the application. After eliminating seven found not to be complainants,[66] and excluding several others for various reasons, the European Communities arrived at a group of 35 companies whose production of bed linen the European Communities considered to constitute a "major proportion" of total EC production of the like product. The European Communities defined this group as the "Community industry".[67] The European Communities decided to establish a sample of this Community industry, and in consultation with the complainant Eurocoton, an initial list of 19 producers was arrived at, which was subsequently reduced to 17 producers. These 17 companies represented 20.7 per cent of total EC production of bed linen, and 61.6 per cent of the production of the Community industry (*i.e.*, the 35 producers referred to above). The EC investigating authorities considered this sample to be representative of the domestic industry.

6.178 As noted above, the European Communities collected information concerning injury with respect to three groups of companies – all EC producers of bed linen (referred to in the Provisional and Definitive Regulations as the "EU-15") for trends concerning production, consumption, imports, exports, and market share; the Community industry for trends concerning production, sales by value, and employment; and the sample for the factors mentioned above and for trends concerning prices and profitability.[68] In its analysis of factors regarding the state of the domestic industry, the EC authorities considered data for the three levels where available for the various factors.

6.179 To succeed, India's claim requires us to determine that, having selected a sample, the European Communities was **precluded** as a matter of law from considering, in its analysis under Article 3.4, any information for any factor for any producers of bed linen not included in the sample. One aspect of this claim relates to those producers of bed linen who, while not included in the sample set selected by the investigating authorities, were members of the "Community industry" as defined by the European Communities. A second aspect of India's claim relates to those EC producers of bed linen who were not members of the "Community industry" as defined by the European Communities.

6.180 There is simply no basis in the AD Agreement for the first aspect of India's claim. Keeping in mind that India has made no claim regarding the constitution of the sample, and no claim regarding the definition of the domestic industry, the only basis for India's position is that the findings of the European Communities were not reached in an objective manner based on properly established facts. However, India has not challenged the facts themselves, but rather the European Communities' choices as to which facts, among those it had gathered, it would consider in evaluating the Article 3.4 factors. There may be inadequate explanation or analysis of those facts, which might constitute a violation of Article 12.2.2 or a failure adequately to evaluate the Article 3.4 factors. However, this does not answer the question whether consideration of evidence for domestic producers outside the selected sample **but within the domestic industry** constitutes, *ipso facto*, a violation of Article 3.4.

6.181 It is clear from the language of the AD Agreement, in particular Articles 3.1, 3.4, and 3.5, that the determination of injury has to be reached for the **domestic industry** that is the subject of the investigation. Article 3.4 specifically requires 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. . . " (emphasis added). In this case, the European Communities defined the domestic industry as 35 producers of the like product. In our

[66] We are somewhat at a loss to understand how the European Communities could find that companies listed in the complaint were nonetheless not complainants, but this is not a question to be resolved in this case.

[67] In EC proceedings, the "Community industry" is the domestic industry for purposes of the AD Agreement.

[68] Provisional Regulation, Exhibit India-8, para. 62.

view, it would be anomalous to conclude that, because the European Communities 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. Such a conclusion would be inconsistent with the fundamental underlying principle that anti-dumping investigations should be fair and that 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. Thus, we consider that the European Communities did not act inconsistently with Articles 3.1, 3.4, and 3.5 of the AD Agreement by taking into account in its analysis information regarding the Community industry as a whole, including information pertaining to companies that were not included in the sample.

6.182 However, our conclusion with respect to the second aspect of India's claim is different. As we have noted, the determination of injury has to be reached for the domestic industry as defined by the investigating authorities, in this case the 35 producers comprising the "Community industry" as defined by the European Communities. In our view, 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. This is true even though those companies may presently produce, or may have in the past produced, the like product, bed linen. 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. If other present or former bed linen producers had been considered part of the domestic industry, the fact that some of them went out of business would be relevant to the evaluation of the impact of dumped imports on the domestic industry. But given that the European Communities defined the domestic industry as 35 producers of bed linen, information concerning other companies does not inform the evaluation of "factors and indices having a bearing on the state of the industry" under Article 3.4 of the AD Agreement, and thus cannot serve as the basis of findings regarding the impact of dumped imports on the domestic industry.

6.183 We therefore conclude that, by relying on information concerning producers not part of the domestic industry in its evaluation of the impact of dumped imports on the domestic industry under Article 3.4 of the AD Agreement, the European Communities failed to act consistently with that provision.[69]

E. CLAIMS UNDER ARTICLE 5

6.184 India makes two substantive claims under Article 5. First, India argues that the European Communities failed to examine the accuracy and adequacy of the allegations in the complaint before initiating the anti-dumping investigation, as required by Article 5.3 (claim number 23). Second, India argues that the European Communities failed to determine the standing of the domestic industry consistently with Article 5.4 (claim number 24). These claims are addressed below. The associated claims concerning the alleged failure of the European Communities to sufficiently explain its decision in the Definitive Regulation (claims 25 and 28) are addressed in section VI.G, below.

[69] Having found a violation of the AD Agreement in this regard, and having found a violation in the failure of the European Communities to evaluate all the Article 3.4 factors, we do not consider it necessary to consider questions regarding the European Communities' evaluation of information on Article 3.4 factors for the different groupings of producers.

1. Claim under Article 5.3 - failure to examine accuracy and adequacy of evidence (claim number 23)

(a) Parties' arguments

6.185 India asserts that the European Communities failed to comply with the obligation to "examine the accuracy and adequacy of the evidence in the application". India maintains there is no evidence on the record that such an examination was carried out prior to the initiation of the investigation. India argues that the available evidence from the first bed linen anti-dumping proceeding made such examination even more important in this case.[70] India asserts that it raised the issue of lack of sufficient evidence to initiate during the course of the proceeding, but received no response from the EC authorities beyond the bare statement in the Provisional Regulation that "the complaint contained evidence of dumping of the said product and of material injury resulting therefrom, which was considered sufficient to justify the initiation of a proceeding".[71]

6.186 India asserts that the investigating authorities did not "examine" the allegations in the complaint on the state of the domestic industry before initiating the anti-dumping investigation. In this regard, India points to the notice of initiation, which stated that:

> "The complainant alleges and has provided evidence that imports from Egypt, India and Pakistan have increased significantly in absolute terms and in terms of market share, during a period where the apparent consumption in the Community has decreased.
>
> It is further alleged that the volume and prices of the imported products have, among other consequences, had a negative impact on the quantities sold and the prices charged by the Community producers, resulting in substantial adverse effects on employment and the financial situation of the Community industry. . . .
>
> Having determined, after consulting the Advisory Committee, that the complaint has been lodged by or on behalf of the Community industry and that there is sufficient evidence to justify the initiation of proceedings, the Commission has commenced an investigation pursuant to Article 5 of Regulation (EC) No 384/96." (Emphasis added by India)[72]

In India's view, these statements constitute an admission, in effect, that the EC authorities did not "examine" the evidence before deciding to initiate the investigation, since they refer only to the allegations of the complainant, and do not specifically refer to the examination by the authorities. India argues that the EC authorities "considered" the allegations in the complaint sufficient to justify initiation, but did not "examine the accuracy and adequacy of the evidence provided in the application".

6.187 India also argues that the EC authorities had more information at their disposal than merely the complaint, notably the facts related to the terminated first bed linen investigation. India acknowledges that the first bed linen investigation was terminated because the complaint was withdrawn, but argues that the authorities knew or could have known that the complaint was

[70] In January 1994, the European Communities had initiated an anti-dumping investigation of bed linen from India, Pakistan, Thailand, and Turkey, based on an application filed by Eurocoton, the complainant in this investigation. The investigation was terminated, without any measures being imposed, in July 1996, following the withdrawal of the complaint.

[71] India acknowledged, in its response to Question 7 from the Panel following the first meeting, that it was not challenging the sufficiency of the application under Article 5.2 of the AD Agreement. Annex 1-6.

[72] Exhibit India-7.

withdrawn because it would have been impossible to make an injury finding. In India's view, these circumstances strongly indicated that the EC industry might not be injured, since it had refused to support the previous proceeding. India asserts that the allegations in the complaint underlying the investigation at issue here largely covered the same products, period and countries. In India's view this was strong evidence against initiation, warranting further examination. India takes the position that, while an investigating authority is not required to conduct any particular sort of investigation prior to determining whether there is sufficient evidence, since there is an obligation to "examine" the evidence in the application, that evidence "can in itself never be the only element "to justify the initiation of an investigation"", citing the report of the Panel in *Guatemala-Cement*.[73]

6.188 In its reply to the Panel's question number 7 following the first meeting, India asserts that it did argue that the European Communities erred in determining that the evidence was sufficient to justify initiation, pointing to the above-quoted statement in support. India is of the view that the European Communities failed to take counter-evidence (relating to the first bed linen investigation) into account, and therefore failed to examine the accuracy and adequacy of the evidence in the application, and therefore initiated inconsistently with Article 5.3

6.189 In the European Communities' view, India's arguments are based on an impermissible and vague interpretation of Article 5.3 of the AD Agreement as requiring some specific action in connection with the "examination" of the accuracy and adequacy of the evidence in the application. The European Communities asserts that India's argument seems to suggest that the information in a complaint may not be relied upon, but must be substantiated by other information obtained by the investigating authorities, a position which the European Communities rejects as having no basis in the text of Article 5.3.

6.190 The European Communities argues that Article 5.3 must be considered in light of Article 5.2 of the AD Agreement. The European Communities suggests that, taken together, these provisions suggest that evidence will be adequate if it covers the topics listed in Article 5.2, and will be accurate if it is sufficiently credible. Regarding the standard of proof required in making this decision, the European Communities argues that the Panel in *Mexico-HFCS* observed that it is less than that appropriate to a preliminary or final determination of dumping, but more than mere allegation or conjecture.[74] Furthermore, in regard to injury, the European Communities notes that that Panel concluded there is no need for the investigating authority “to have or consider information on all the Article 3.4 factors”.[75]

6.191 The European Communities maintains that, in accordance with ordinary practice, the EC authorities examined the complaint in the light of the requirements of Articles 5.2 and 5.3 of the AD Agreement, and with the benefit of their considerable experience in dealing with such documents, and concluded that initiation was warranted, which was recorded in the Notice of Initiation. In the European Communities' view, this demonstrates that the authorities examined the information contained in the Complaint and found it sufficient. The European Communities interprets India as arguing that there must be something more on the record, and/or conveyed to the parties through publication or a report, demonstrating the process of "examination" of the evidence in the application and the conclusions based thereon. The European Communities rejects this suggestion, arguing that there is no such obligation under the WTO.

6.192 In this regard, the European Communities notes that India has not challenged the sufficiency of the notice of initiation, and refers to the views of the Panel in *Mexico-HFCS* in support of the

[73] First Submission of India, Annex 1-1, para. 5.20.
[74] *Mexico - HFCS*, para. 7.94.
[75] *Id.*, para. 7.97.

position that a more detailed explanation of the decision to initiate and the determinations underlying that decision was not required by the AD Agreement:

> "In our view, Article 5.3 cannot be interpreted to require the investigating authority to issue an explanation of how it has resolved **all** underlying questions of fact at initiation. That is a requirement that arises at later stages of the proceeding, and is explicitly set forth in Article 12.2."[76]

6.193 The European Communities also argues that the information concerning the first bed linen investigation, while known to EC officials and considered, was not relevant to the decision to initiate the subject investigation. The first bed linen investigation concerned different exporters (Egypt was not subject to that investigation, while Thailand and Turkey were), and concerned a different investigation period. In any event, the European Communities notes that no substantive conclusions were made in that investigation, and in particular, there was no finding that there was no injury.

6.194 Egypt, as third party, is of the view that, contrary to the express wording of Article 5.3 of the AD Agreement, the European Communities failed to examine thoroughly the allegations in the complaint. In Egypt's view, the European Communities failed to take into account information available to it at the time of initiation pointing to lack of material injury caused by dumped imports, *i.e.*, information from the first bed linen investigation.

6.195 The United States, as third party, submits that Article 5.3 does not obligate the European Communities to consider a previously terminated, incomplete investigation against a different group of countries before initiating the investigation at issue here. The premise of each aspect of Articles 5.2 and 5.3 is that the information covered is "evidence". The chapeau of Article 5.2 specifies that "Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph." In this case, the United States does not believe that the earlier investigation must be considered "evidence" within the meaning of Articles 5.2 and 5.3. First, the earlier investigation was terminated based upon the withdrawal of the application without any final determination by the investigating authorities. Second, that earlier investigation, although it may have involved the same products, involved a different mix of countries. Finally, each bed linen investigation constituted a separate proceeding for which a separate record was established by the European Communities. The European Communities was obligated, consistent with the Agreement, to base its determination on its assessment of the facts of the matter which were before it. To the extent that it did so, and its decision was based on an unbiased and objective evaluation of the facts before it, consistent with the standard contained in Article 17.6(i), that decision should not be overturned.

(b) Findings

6.196 Article 5.3 of the AD Agreement provides:

> "The authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation."

6.197 It seems clear, and India does not dispute, that in this case, there was evidence submitted to the EC authorities in the application, and that the application was sufficient under Article 5.2 of the AD Agreement. It is also clear, simply from the language of the EC notice of initiation (which India has not challenged), that the European Communities determined that there was sufficient evidence to justify the initiation. Moreover, the European Communities asserts that it did, in fact, take into

[76] *Id.*, para. 7.110.

account the circumstances of the previous bed linen investigation, but that nothing in those circumstances precluded the conclusion that there was sufficient evidence to justify initiation.

6.198 India claims that the European Communities failed **to examine** the accuracy and adequacy of the evidence before initiating the investigation. Thus, we must determine what the parameters are of the requirement to "examine" the accuracy and adequacy of the evidence, and on what basis can it be assessed whether the necessary examination was carried out. It is difficult to see a basis on which a violation of Article 5.3 could be found based purely on the claim that the investigating authorities failed to examine the accuracy and adequacy of the evidence in the application unless we conclude that the text of Article 5.3 establishes a specific process requirement, that is, a requirement as to **how** the examination of the evidence must be conducted. Further, it is difficult to see a basis on which a violation of Article 5.3 could be found on the basis of India's claim unless we conclude that Article 5.3 establishes **how** the fact of and sufficiency of that examination must be made known, beyond the notice required by Article 12.1, which as noted is not at issue here. We can find no such requirements in the text of Article 5.3.[77] It is clear that Article 5.3 requires an investigating authority to examine the evidence, and that the examination has a purpose – to determine whether there is sufficient evidence to justify initiation of the investigation. However, Article 5.3 says nothing regarding the nature of the examination to be carried out. Nor does it say anything requiring an explanation of how that examination was carried out.

6.199 The only basis, in our view, on which a panel can determine whether a Member's investigating authority has examined the accuracy and adequacy of the information in the application is by reference to the determination that examination is in aid of - the determination whether there is sufficient evidence to justify initiation. That is, if the investigating authority properly determined that there was sufficient evidence to justify initiation, that determination can only have been made based on an examination of the accuracy and adequacy of the information in the application, and consideration of additional evidence (if any) before it.

6.200 However, in this case India has made no claim that the European Communities violated Article 5.3 of the AD Agreement by initiating this investigation without sufficient evidence to justify doing so. Even assuming that India had actually raised such a claim, India has failed to present a *prima facie* case that the European Communities erred in concluding that there was sufficient evidence to justify initiation. India has presented no arguments or evidence to support such a contention - rather, it has relied on the particular argument that the European Communities failed to examine the evidence. It is difficult to imagine how a defending Member might demonstrate that it has "examined" evidence in the face of India's allegations in this dispute, except by reference to the determination that there was sufficient evidence to justify initiation, which is not at issue before us.[78]

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[77] We note that Article 5.3 was recently considered by the Panel in *Mexico - HFCS*. In that case, an issue similar to that before us was addressed, concerning the obligation (if any) on the investigating authority to make specific determinations about factual issues involved in the initiation, based on the evidence in the application prior to initiation, and the obligation (if any) to make such determinations known to the parties. That Panel concluded that Article 5.3 did not itself establish any obligation to make, or to make known, a determination concerning issues underlying the decision to initiate. *Mexico - HFCS*, paras. 7.105 and 7.110. In our view, this lends support to our conclusion that there are no obligations in Article 5.3 regarding how the examination of the accuracy and adequacy of the evidence is to be undertaken, or explained.

[78] Moreover, India appears to be arguing that the European Communities failed to "examine" evidence outside the scope of the application, when it argues that the European Communities failed to consider the events concerning the first bed linen investigation. However, Article 5.3 specifically requires the investigating authority to examine the "accuracy and adequacy **of the evidence provided in the application**…". We note that India appears to misapprehend the decision of the Panel in *Guatemala - Cement*, which held that the obligation of the investigating authority under Article 5.3 goes beyond a determination that the requirements of Article 5.2 are satisfied. In that case, the Panel further found that an investigating authority may, **but is not obligated to**, seek out information beyond that in the application, and take such information into account in

In our view, it is clear from the mere fact that the EC investigating authorities initiated the investigation indicates that they examined the evidence in the application to determine that it was sufficient to justify initiation.

6.201 We therefore conclude that the European Communities did not violate Article 5.3 of the AD Agreement by failing to examine the accuracy and adequacy of the information in the application.

2. Claim under Article 5.4 - failure to properly establish industry support (claim number 26)

(a) Parties' arguments

6.202 India makes two principal arguments challenging the European Communities' standing determination, *i.e.*, the determination that the application was supported by producers accounting for at least 25 per cent of total EC production of the like product. First, India asserts that in assessing the level of support for the application filed by Eurocoton, the European Communities wrongly considered the support expressed by producers' associations on behalf of their members. In India's view, while it is possible for an association of producers to **file** a complaint, it is not permissible, under Article 5.4 of the AD Agreement, for the support of a producers' association to be **substituted** for support expressed by its members, the producers of the like product. Thus, in India's view, only the expressions of support by individual producers, and not those of producers' associations, may be considered in determining whether there is sufficient support for an application under Article 5.4 of the AD Agreement.

6.203 Second, India argues that the European Communities failed to examine the level of support prior to initiating the investigation. In this regard, India argues that the information in the non-confidential file, which India submitted as exhibits, and that submitted by the European Communities, concerning the expressions of support by individual producers of the like product, suggests that those expressions of support were not received prior to initiation. India relies in this regard on conflicts in the dates of the letters of support themselves, and the headers and footers imposed by sending and receiving fax machines, which were not evident on the copies of these documents in the non-confidential file. India acknowledges that, if the letters of support from individual producers were accepted as fact (which India maintains they are not), the necessary level of support would have existed, but maintains that the European Communities could not have made the standing examination before initiation, an error which can not be corrected after the fact. India asks the Panel to conclude that the documents submitted on the question of support do not show that the European Communities examined standing prior to initiation the investigation, and that the removal of the fax headers and the different "versions" of the letters of support would suggest that the European Communities is trying to conceal its mistake of not examining standing prior to initiation.

6.204 India also argues that the European Communities could not have determined standing prior to initiation based on the different numbers of producers which (a) are listed in the application as supporting the complaint (46), (b) actively expressed support for the application either directly or thorough producers association and were considered in the standing determination (38), and (c) were considered as the domestic industry (35). India argues that the decisions defining the 38 and 35 producer groups took place only after initiation, but that the European Communities relied on the

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determining whether there is sufficient evidence to justify initiation under Article 5.3 of the AD Agreement. *See Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico*, Panel Report, WT/DS60/R, adopted 25 November 1998, paras. 7.50-7.52. That is very different from the proposition suggested by India that the obligation to examine the accuracy and adequacy of information in the application is rendered "more acute" because an investigation of the same product from one of the same countries had recently been terminated. The obligation imposed on investigating authorities under Article 5.3 does not vary by virtue of the factual circumstances.

production of the 38 producers in justifying its standing determination after the fact. In support of this contention, India asserts that the volume of production referenced in a note to the file dated 12 September 1996[79] refers to the production of the 38 producers, and thus can only have been produced after the initiation, and back-dated.

6.205 The European Communities maintains that it properly made the standing determination required by Article 5.4 of the Anti-dumping Agreement. The European Communities asserts that India's argument is premised on the application of an unnecessarily and improperly high standard of proof regarding the standing determination under Article 5.4 of the AD Agreement. The European Communities also takes issue with India's view that the support of domestic producers for an application must be expressed by each producer itself directly to the investigating authorities, and, in particular, that support expressed by an association of producers does not count. The European Communities argues that India's position imposes unnecessary and unworkable limitations that are not intended by the text of the AD Agreement. In the European Communities' view, Article 5.4 of the AD Agreement does not define to whom support must be expressed by producers, or whether that expression of support must be made directly to the investigating authorities (although it obviously has to be brought to their attention), or may be made indirectly. Furthermore, the provision explicitly envisages that the *application* may be made *on behalf of* the domestic industry. Therefore, the European Communities argues that the phrase "expressed *by* domestic producers", considered in its context, and in the light of the object and purpose of the Agreement, may include expressions of support by a trade association.[80] The European Communities notes that there have been several GATT/WTO dispute proceedings in which the anti-dumping measures at issue were initiated at the instance of trade associations, and this fact was never challenged.[81]

6.206 In any event, the European Communities asserts that even without considering the support expressed by trade associations on behalf of their member-producers, the information on the record demonstrated that the 25 per cent threshold set in Article 5.4 of the AD Agreement was satisfied. The European Communities maintains that the record is clear that the individual expressions of support were received prior to initiation, and that the apparent confusion of dates in the letters themselves and the fax headers and footers is a result of photocopying. In addition, the European Communities asserts that the investigating authority had estimated total EC production of bed linen, on the basis of statistical information available to it from Eurocoton and Eurostat, as between 123,917 and 130,128 tonnes. Production of the 38 producers the European Communities considered as having expressed support for the application was 45,952 tonnes, or 34 per cent of that total. The European Communities points out that India bears the burden of proof in this regard, and argues that there is no basis for finding that the European Communities erred in concluding that the information before the investigating authority at initiation indicated that producers accounting for a sufficient percentage of production of the like product supported the application to justify the determination of standing made by the EC authorities.

6.207 After the second meeting with the parties, the European Communities offered to submit to the Panel, for its inspection, in India's presence, the originals of the disputed faxes.

6.208 Egypt, as third party, argues that Eurocoton did not have the standing required under Article 5.4 of the AD Agreement to lodge a complaint. Egypt asserts that the investigation revealed that those Community producers who supported the complaint were in the minority, and that the proportion of production represented by the complainant producers is extremely low, 34 percent.

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[79] Exhibit India-59.

[80] In the European Communities' view, footnote 14 to Article 5.4, which allows trade unions to express support on behalf of their members, also undermines India's arguments.

[81] The European Communities cites, in this regard, the Panel Reports on *Salmon - Anti-Dumping Duties* and *Mexico - HFCS*.

Egypt maintains that this percentage is sufficient **only if** producers accounting for the remaining 66 of production did not object to the initiation of the investigation. For Egypt, the information on the record does not contain conclusive proof that the complainants indeed represented 34 per cent of total EC production of the like product. Furthermore, Egypt maintains that the European Communities was obliged to inquire of EC producers to ascertain their position regarding the application, in order to verify the claim of the applicant Eurocoton that it represented a "major proportion of the Community industry" within the meaning of the AD Agreement.

6.209 The United States, as third party, argues that consideration of industry support information submitted by associations of domestic producers is not inconsistent with Article 5.4 of the AD Agreement. While the United States agrees with India that Article 5.4 places certain affirmative obligations upon the authorities to evaluate the evidence concerning standing prior to initiating an anti-dumping investigation and establishes numeric standards which the authorities must find to have been met prior to initiation, in the United States' view, Article 5.4 does not address from whom the authorities may receive this evidence. Rather, the evidence which may be considered by the authorities in making any determinations and the parties entitled to provide such evidence are discussed in Article 6 of the Agreement. The United States points out that Article 6.11(iii) of the AD Agreement makes clear that trade and business associations qualify as interested parties, provided that a majority of their members produce the like product in the territory of the importing Member. Further, the AD Agreement provides that these associations shall have the full opportunity to defend their interests. The United States notes that the AD Agreement does, however, provide a limited counter-balance to trade and business associations representing their members. Article 6.6 requires the authorities to satisfy themselves as to the accuracy of the information provided by interested parties upon which their findings are based. Nevertheless, if the authorities have, in fact, confirmed the accuracy of the representations, contrary to the position of India, the AD Agreement, in the view of the United States, does not prohibit reliance on the representations of the associations to determine the necessary level of support. The United States contends that the European Communities' interpretation of the Agreement is permissible under Article 17.6(ii) of the AD Agreement. The United States, however, takes no position as to whether the European Communities' determination of industry support, as a factual matter, was consistent with the standards required by Articles 5.4 and 6 of the AD Agreement.

(b) Findings

6.210 Article 5.4 of the AD Agreement provides:

> "5.4 An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed[13] by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry.[14] The application shall be considered to have been made "by or on behalf of the domestic industry" if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.

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[13] In the case of fragmented industries involving an exceptionally large number of producers, authorities may determine support and opposition by using statistically valid sampling techniques.

> [14] Members are aware that in the territory of certain Members employees of domestic producers of the like product or representatives of those employees may make or support an application for an investigation under paragraph 1".

6.211 Article 5.4 thus sets up two separate calculations to determine that a minimum level of "support" for the application is shown by domestic producers. The first requires that producers accounting for more than 50 per cent of production **of those producers expressing either support or opposition** express support for the application. That test is not at issue in this case, and we do not address it here.[82]

6.212 The second calculation requires that producers accounting for at least 25 per cent of **total** production of the like product by the domestic industry support the application. It is the European Communities' determination in this regard, both as a legal and as a factual matter, that is challenged by India.

6.213 The issues raised by the Indian claim in this regard are similar to those discussed above regarding Article 5.3 with respect to the lack of an express process requirement in Article 5.4 and the question of whether and how the determination of standing must be made known to the parties. As with Article 5.3, Article 5.4 of the AD Agreement requires that the investigating authorities make certain determinations before an investigation may be initiated, and establishes the substance of the determinations to be made, including that the application is supported by producers accounting for at least 25 per cent of domestic production, but does not set out any specific requirements as to the process by which that determination must be made. In our view, whether the necessary examination of the degree of support for the application was carried out prior to the initiation can only be assessed by reference to the determination that was actually made, and the evidence before the authority at the time it made the determination. In this case, the EC investigating authority clearly concluded that the application was supported by producers accounting for more than 25 per cent of total EC production of bed linen, and we have before us documents which it asserts contain the relevant evidence on which it relied. We therefore turn first to the facts of this matter.

6.214 We have carefully examined the documents submitted by both parties.[83] These documents are photocopies, and in some cases photocopies of photocopies, of faxes of (1) letters of support sent by individual producers of bed linen to the investigating authority indicating support for the application, (2) letters of support sent by national associations of producers of bed linen to the investigating authority expressing support on behalf of individual producers listed in annexes, and (3) letters of support from national associations of producers of bed linen sent to the investigating authority expressing support on behalf of their members. It appears that these letters of support were first sent, by fax, to Eurocoton, which then sent them on, again by fax, to the EC investigating authority. All of the letters themselves are dated prior to the initiation of the investigation by the European Communities on 13 September 1996. Based on the letters themselves, individual producers of bed linen individually communicating support for the application directly to the investigating authorities accounted for 26.7 per cent of total EC production of bed linen. This is more than the minimum necessary under Article 5.4 of the AD Agreement to find sufficient support for the application.

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[82] Consequently, we express no views on Egypt's arguments as third party, which seem to address this aspect of the Article 5.4 determination in asserting that the European Communities was obliged to inquire of producers concerning their support or opposition for the application, and that the European Communities erred in finding sufficient support without finding that producers who did not support the application did not object to it.

[83] These documents were submitted in various iterations as Exhibits India-59, India-86, India-87, EC-4 and EC-5.

6.215 India asks us to conclude that these letters were not, in fact, received by the EC investigating authority prior to initiation, that the EC investigating authority did not, in fact, examine them prior to initiation, and that the European Communities has tried to cover this fundamental error by manufacturing evidence *post hoc* and misrepresenting the facts before us. This we decline to do. We recognise that the dates in the fax headers and footers in the photocopied documents submitted to us are inconsistent with one another and with the dates of the letters themselves. However, all these dates are **prior** to the relevant date, that of initiation on 13 September 1996. We note that the European Communities has offered to submit the originals of the faxes for our (and India's) inspection in this dispute, should we deem it necessary to resolve this issue.

6.216 As noted above, India bears the burden of coming forward with sufficient evidence to make a *prima facie* case that the European Communities failed to act consistently with its obligations under Article 5.4 to determine the necessary level of support prior to initiation. We presume that Members act in good faith in the context of dispute settlement proceedings, and are unwilling to assume possible malfeasance in the absence of evidence to that effect. We consider that the "doubts" which India has as to the European Communities' actions in this regard do not establish the necessary *prima facie* case in this context – the "evidence" of the fax headers relied on by India does not, in our view, constitute evidence of fraud sufficient to overcome the presumption of good faith. Moreover, we believe it is more probable that these inconsistencies in the photocopies are attributable to the photocopying itself, rather than to the perpetration of a massive fabrication of fax headers and footers by the EC investigating authority to hide a failure to make a determination of standing prior to initiation. We therefore do not consider it necessary to examine the originals of the documents in question.

6.217 We conclude that, as a matter of fact, the EC investigating authority had before it expressions of support from 38 producers of bed linen prior to initiation.[84] Some of those expressions of support were received from the individual producers directly, some were received from national producers associations. As noted above, counting only those submitted by individual producers directly to the EC investigating authority, that authority had before it expressions of support from producers accounting for more than the necessary 25 per cent of total EC production of bed linen. Having concluded that the European Communities' determination of standing does not violate Article 5.4 of the AD Agreement on the basis of the express support of individual producers, we do not consider it necessary to determine whether the European Communities could properly count the support of associations of producers.

6.218 We therefore conclude that the European Communities did not violate Article 5.4 of the AD Agreement by failing to make a proper determination of standing prior to initiation of the anti-dumping investigation at issue.

[84] India makes numerous references to the differences between the number of producers listed in the application, the number of producers expressing support, and the number of producers eventually found to comprise the domestic industry. While the import of its arguments in this regard is not entirely clear, we do not, in any event, consider these differences to have any significance for the issue before us, whether the producers expressing support accounted for the necessary minimum 25 per cent of total EC production of bed linen. It is in our view understandable that some companies listed in the application as producers of the like product may not subsequently specifically express support for the application. It is also understandable, in our view, that following initiation, the actual definition of the domestic industry may change, as a result of exclusions, such that the set of producers in the industry is not, in fact, the same as that considered in evaluating support. However, in this latter respect, we note that the question is not before us, as India has made no claim suggesting that standing somehow was lost or evaporated **after initiation**.

F. CLAIM UNDER ARTICLE 15 - FAILURE TO EXPLORE POSSIBILITIES OF CONSTRUCTIVE REMEDIES (CLAIM NUMBER 29)

1. Parties' arguments

6.219 India asserts that the European Communities acted inconsistently with Article 15 of the AD Agreement by not exploring possibilities of a constructive remedy prior to the imposition of anti-dumping duties (provisional or final) and by not reacting to detailed arguments from Indian exporters pertaining to Article 15. India maintains that, despite repeated and detailed arguments by the Indian parties stressing the importance of the bed linen and textile industries to India's economy, the European Communities failed to even mention India's status as a developing country, let alone consider or comment on possibilities of constructive remedies. India also pointed out that Texprocil, the Cotton Textiles Export Promotion Council of India, acting on behalf of Indian producers and exporters, had communicated to the European Communities its desire, and that of its members, to offer price undertakings. India charges that this offer was rejected by the European Communities without substantive consideration.

6.220 India asserts that the two sentences of Article 15 are separate and distinct, and that the first sentence does not impose any specific legal obligation, but simply expresses a preference that the special situation of developing countries should be an element to be weighted when making that evaluation. The second sentence, however, imposes a specific legal obligation to "explore possibilities". In India's view, this requires a determination (or assessment) whether the essential interests of the developing country concerned may be involved, to be made after a determination (preliminary or final) of dumping and injury caused thereby, but before the application of anti-dumping duties, including the imposition of provisional measures. Then (still before provisional measures are imposed) the investigating authorities are required to explore possibilities of constructive remedies "provided for by this Agreement". India suggests that the reference to remedies provided for by the AD Agreement indicates that such remedies may consist of, among others, the non-imposition of anti-dumping measures, or an undertaking. India rejects the notion that any procedural mechanisms, such as simplified questionnaires or extensions of time, can ever satisfy the requirements of the second sentence of Article 15.

6.221 The European Communities agrees that the second sentence of Article 15 imposes a legal obligation on Members. The European Communities further does not dispute that bedlinen producers are part of the textile industry, that this is an "essential interest" of India, and that anti-dumping duties would "affect" this interest. The European Communities asserts that its practice, when developing countries are involved in an anti-dumping investigation, is to give special consideration to the possibility of accepting undertakings from their exporters. However, the European Communities maintains that the difficulty that frequently arises in relation to undertakings, that of effective supervision, can also apply in the case of developing countries. In this case, the European Communities argues, the reason no undertaking was accepted was that none had been offered by the exporters within the time limits set by the EC Regulation. Under EC procedures, undertakings may be offered during the 10 day period following the disclosure of the confidential final dumping margin calculations for investigated producers. In this case, such disclosure was made on 3 October 1997. The European Communities asserts that these time limits are a reflection of those imposed by Article 5.10 of the AD Agreement, and the general obligation to manage investigations expeditiously (Article 6.14 of the AD Agreement).

6.222 The European Communities pointed out that the offer from Texprocil referred to by India was made on the last day, under the normal EC schedule, for acceptance of offers of undertakings, and was not in fact an offer of an undertaking by any producer, but merely an expression by the producers association Texprocil of intent to offer an undertaking. The European Communities asserts that its authorities waited nine days, but no further details concerning such offers was made, as Texprocil's

letter had indicated would be the case, and thus the European Communities replied that it would no longer be able consider any offers of undertakings, as it was necessary to proceed to conclude the investigation.

6.223 Egypt, as third party, argues that Article 15 of the AD Agreement obligated the European Communities to explore the possibilities of constructive remedies before applying anti-dumping duties, and that the European Communities failed to comply with this provision, as it did not suggest to the Egyptian exporters the possibility of, for instance, price undertakings. Egypt is of the view that Article 15 imposes a legal obligation on developed countries any time they contemplate imposing anti-dumping duties, and it is therefore up to those developed countries then to suggest to the developing countries involved whether or not they would be interested in offering price undertakings.

6.224 In response to a question from the Panel, Japan asserted that the requirements of Article 15 do not go beyond those of Article 8.3 of the AD Agreement, that the "constructive remedies under this Agreement" referred to in Article 15 would include price undertakings, and that Article 15 imposes no specific obligations on developed country Members.

6.225 The United States, as third party, submits that Article 15 of the AD Agreement, while it provides procedural safeguards, does not require any particular substantive outcome, or any specific accommodations to be made on the basis of developing country status. In the United States' view, the second sentence of Article 15 does not impose anything other than a procedural obligation to "explore" possibilities of constructive remedies. The word "explore" cannot fairly be read to imply an obligation to reach a particular substantive outcome; it merely requires consideration of these possibilities. The United States cites to the Tokyo Round Anti-Dumping Code Panel Report on *Cotton Yarn from Brazil* as support for this interpretation. The question then, according to the United States, is whether the European Communities explored the possibility of entering into such constructive remedies, which is a factual determination. The United States takes no position on whether the European Communities' actions were sufficient under Article 15. With regard to the timing of such exploration under Article 15, the United States asserts that the reference in Article 15 to "applying anti-dumping duties" relates to the actual imposition and collection of anti-dumping duties pursuant to Article 9 of the Agreement, which did not occur until the European Communities made its final determination of dumping and injury. The imposition of provisional measures, which may be provisional anti-dumping duties, is a separate and earlier step which is distinct from the application of anti-dumping duties themselves. Furthermore, if the "possibilities" to be explored include price undertakings, the United States maintains that this exploration can only occur after any provisional determination by the investigating authorities, in light of the language of Article 8.2 of the AD Agreement. In response to the Panel's questions, the United States observed that, in its view, the Article 15 and Article 8.3 obligations were complementary, and that the Article 15 obligation did not extend beyond the Article 8.3 obligation. In addition, the United States suggested that a developing country might be obligated to identify those instances in which its essential interests would be affected, so that the developed country Member considering the imposition of anti-dumping duties would know to consider possible constructive remedies before imposing duties.

2. Findings

6.226 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."

6.227 We turn first to consideration of the text of the second sentence of Article 15, which is the basis of India's claim.[85] We note that there is no dispute in this case that the application of anti-dumping duties would affect the essential interests of a developing country Member, India. However, the parties disagree on what constitutes "constructive remedies provided for by this Agreement", whether that exploration must take place before the application of provisional measures, or only before the application of final anti-dumping measures, and what is required by the obligation to "explore" the "possibilities" of such remedies.

6.228 "Remedy" is defined as, *inter alia*, "a means of counteracting or removing something undesirable; redress, relief".[86] "Constructive" is defined as "tending to construct or build up something non-material; contributing helpfully, not destructive".[87] The term "constructive remedies" might consequently be understood as helpful means of counteracting the effect of injurious dumping. However, the term as used in Article 15 is limited to constructive remedies "provided for under this Agreement". The European Communities states that, in what it refers to as the "spirit" of Article 15, it undertook several procedural steps which it considered helpful to Indian exporters, but it does not consider that these procedural steps constitute "constructive remedies" *per se*. Rather, the European Communities seems to view price undertakings as the constructive remedies provided for in Article 15. India has declined to offer concrete suggestions as to other possible "constructive remedies under this Agreement" that might be available under Article 15.[88] In India's view, the obligation is on the European Communities to find and propose such remedies to developing countries prior to imposition of anti-dumping measures. In this regard, India having asserted that the European Communities failed to engage in some action which it was obligated to undertake, we view it as part of India's burden to present a *prima facie* case of violation to indicate what actions it believes should have been undertaken. India did suggest that a "constructive remedy" might be a decision not to impose anti-dumping duties at all. We cannot agree. In our view, Article 15 refers to "remedies" in respect of injurious dumping. 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[89], is not a "remedy" of any type, constructive or otherwise.

6.229 We cannot come to any conclusions as to what might be encompassed by the phrase "constructive remedies provided for under this Agreement" - that is, means of counteracting the effects of injurious dumping - except by reference to the Agreement itself. The Agreement provides for the imposition of anti-dumping duties, either in the full amount of the dumping margin, or desirably, in a lesser amount, or the acceptance of price undertakings, as a means of resolving an anti-dumping investigation resulting in a final affirmative determination of dumping, injury, and causal link. Thus, in our view, imposition of a lesser duty, or a price undertaking would constitute "constructive remedies" within the meaning of Article 15. We come to no conclusions as to what other actions might in addition be considered to constitute "constructive remedies" under Article 15, as none have been proposed to us.[90]

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[85] The parties are in agreement that the first sentence of Article 15 imposes no legal obligations on developed country Members. As there is no claim in this regard, we express no views on this matter.

[86] *The New Shorter Oxford English Dictionary*, Clarendon Press, Oxford, 1993.

[87] *Id.*

[88] *See*, *e.g.*, Response of India to Question 13 from the Panel following the first meeting, Annex 1-6, and Oral Statement of India at the first meeting of the Panel, Annex 1-4, paras. 87-91.

[89] Article 9.1 provides, in pertinent part, that "It is desirable that the imposition [of an anti-dumping duty] be permissive…".

[90] It is clear that the European Communities did consider the imposition of a lesser duty, although it concluded that such a duty would not be appropriate in this case since the injury margin exceeded the dumping margin for each company (paragraph 131, Provisional Regulation, Exhibit India-8). India has made no claim or arguments in this regard.

6.230 With regard to the timing of the obligation in the second sentence of Article 15, India argues that the exploration of possibilities of constructive remedies must take place prior to the imposition of any provisional measures, as well as prior to the application of any final measures, while the European Communities argues that the obligation only arises prior to the application of any final anti-dumping duties.

6.231 In this regard, we note Article 1 of the AD Agreement, which provides that:

> "An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement." (footnote omitted).

In our view, this implies that the phrase "before applying anti-dumping duties" in Article 15 means before the application of definitive anti-dumping measures. Looking at the whole of the AD Agreement, we consider that the term "provisional measures" is consistently used where the intention is to refer to measures imposed before the end of the investigative process. Indeed, in our view, the AD Agreement clearly distinguishes between provisional measures and anti-dumping duties, which term consistently refers to definitive measures. We find no instance in the Agreement where the term "anti-dumping duties" is used in a context in which it can reasonably be understood to refer to provisional measures. Thus, in our view, the ordinary meaning of the term "anti-dumping duties" in Article 15 is clear – it refers to the imposition of definitive anti-dumping measures at the end of the investigative process.

6.232 Consideration of practical elements reinforces this conclusion. Provisional measures are based on a preliminary determination of dumping, injury, and causal link. While it is certainly permitted, and may be in a foreign producer's or exporter's interest to offer or enter into an undertaking at this stage of the proceeding, we do not consider that Article 15 can be understood to **require** developed country Members to explore the possibilities of price undertakings prior to imposition of provisional measures. In addition to the fact that such exploration may result in delay or distraction from the continuation of the investigation, in some cases, a price undertaking based on the preliminary determination of dumping could be subject to revision in light of the final determination of dumping. However, unlike a provisional duty or security, which must, under Article 10.3, be refunded or released in the event the final dumping margin is lower than the preliminarily calculated margin (as is frequently the case), a "provisional" price undertaking could not be retroactively revised. We do not consider that an interpretation of Article 15 which could, in some cases, have negative effects on the very parties it is intended to benefit, producers and exporters in developing countries, is required.

6.233 We consider next the term "explore", which is defined, inter alia, as "investigate; examine scrutinise".[91] In our view, while the exact parameters of the term are difficult to establish, the concept of "explore" clearly does not imply any particular outcome. We recall that Article 15 does not require that "constructive remedies" must be explored, but rather that the "possibilities" of such remedies must be explored, which further suggests that the exploration may conclude that no possibilities exist, or that no constructive remedies are possible, in the particular circumstances of a given case. Taken in its context, however, and in light of the object and purpose of Article 15, we do consider that the "exploration" of possibilities must be actively undertaken by the developed country authorities with a willingness to reach a positive outcome. Thus, in our view, Article 15 imposes no obligation to actually provide or accept any constructive remedy that may be identified and/or offered.[92] It does,

[91] *The New Shorter Oxford English Dictionary*, Clarendon Press, Oxford, 1993.

[92] We note that our interpretation of Article 15 in this regard is consistent with that of a GATT Panel which considered the predecessor of that provision, Article 13 of the Tokyo Round Anti-Dumping Code, which provision is substantively identical to present Article 15. That Panel found:

however, impose an obligation to actively consider, with an open mind, the possibility of such a remedy prior to imposition of an anti-dumping measure that would affect the essential interests of a developing country.

6.234 Based on the foregoing understanding of Article 15 of the AD Agreement, we consider the issue before us in this case to be whether the EC authorities actively considered with an open mind the possibilities of price undertakings with Indian exporters prior to the imposition of final anti-dumping measures in the bed linen investigation.

6.235 India stresses that the Indian exporters and Texprocil made numerous arguments and submissions concerning the developing country status of India, and the importance of the bed linen proceeding for Indian interests. India appears to be dissatisfied as a general matter with the European Communities' failure to address these arguments in the various public notices, but makes no specific claims in this regard.[93] We make no specific findings in this regard, as a consequence. However, we do note in general that the provisions of Article 12, which we address below, are quite specific as to the matters to be addressed in public notices. Beyond those public notices, we are not aware of, and India has not presented any arguments indicating, a general obligation on the investigating authorities to "explain" any aspect of their analysis or determinations. Clearly, when, in dispute settlement, a *prima facie* case is made that a Member has failed to comply with its obligations under the AD Agreement, that Member must present evidence and explanations as to how it considers that it did comply with the relevant obligation. This does not, however, impose any general obligation to explain various elements of the analysis or decision during the course of the proceedings, or in dispute settlement, beyond the explanations required by the Agreement itself, or in order to rebut a claim of inconsistent action.

6.236 According to India, counsel for Texprocil, and Texprocil itself, sought during the course of the investigation to persuade Indian exporters to propose undertakings, but these attempts were unsuccessful until very late in the proceeding. During the month of October 1997, there were telephone communications between the EC authorities and counsel for the Indian producers' association, Texprocil. According to the European Communities, during these conversations, the EC authorities:

> "emphasised the difficulty of drafting satisfactory undertakings because the product was supplied in consignments according to individual specifications of purchasers, involving hundreds of suppliers. They were advised to discuss the possibilities with Texprocil, the exporters' association. This willingness to contemplate undertakings by a trade association is not an automatic feature of the European Communities' practice in this respect".[94]

Following the final disclosure of the anti-dumping calculations, a series of faxes between counsel for Texprocil and Texprocil and Indian government authorities indicate that counsel explained the nature

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> "The Panel noted that if the application of anti-dumping measures "would affect the essential interests of developing countries", the obligation that then arose was to explore the "possibilities" of "constructive remedies". **It was clear from the words "[p]ossibilities" and "explored" that the investigating authorities were not required to adopt constructive remedies merely because they were proposed.**" *EC - Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, Panel Report, ADP/137, adopted 30 October 1995, para. 584 (emphasis added).

[93] India's specific Article 12 claim with respect to the European Communities' determination in connection with Article 15 is addressed below.

[94] Response of the European Communities to Question 16 from the Panel following the second meeting, Annex 2-8. India has not disputed this statement by the European Communities.

of undertakings and the relevant deadline for offering undertakings, in this case 13 October 1997.[95] Following further communications between the Indian parties and counsel,[96] on 13 October 1997, counsel for Texprocil sent a telefax to the EC investigating authorities, communicating "the desire of . . . Texprocil and its Members to offer price undertakings" in the bed linen investigation.[97] The letter continued to note that Texprocil was "working on a detailed formula concerning the practical aspects of this offer", and indicated that the proposed formula implementing the practical details of the offer would be relayed "as soon as this has been worked out in detail". The letter expressed the hope that the offer "can be given due consideration especially in light of Article 15 of the WTO Agreement".[98] There were no further communications from the Indian parties to the EC authorities in this regard. On 14 October 1997, counsel for Texprocil informed the Texprocil representatives that the letter had been submitted, asked that the details of the formula for undertakings be sent at Texprocil's earliest convenience, and noting that the EC authorities had indicated that "Bed Linen was "too complicated a product for undertakings"".[99]

6.237 There was no response from the European Communities until a letter to counsel for Texprocil dated 22 October 1997. That response noted that the letter from counsel for Texprocil had reached the European Communities the last day of the period for offering undertakings, but that "no detailed offer of price undertakings has been made yet". The EC response noted that the investigation was to be concluded within 15 months of initiation under EC law (in this case, by 13 December 1997), and continued to state that the EC authorities would "not be in a position to consider any offer of undertakings which your client may be considering submitting at this stage."[100]

6.238 It is these facts which we must evaluate to determine whether the European Communities gave adequate consideration to, that is "explored" the possibility of entering into an undertaking with the Indian producers. As noted above, while the obligation is on the European Communities to explore possibilities, we do not consider that this entails acceptance of any particular offer that might be made. In this case, it is clear to us that no formal proposal of a price undertaking was made. However, in light of the expressed desire of the Indian producers to offer undertakings, we consider that the European Communities should have made some response upon receipt of the letter from counsel for Texprocil dated 13 October 1997. The rejection expressed in the European Communities' letter of 22 October 1997 does not, in our view, indicate that the possibility of an undertaking was explored, but rather that the possibility was rejected out of hand. We cannot conclude, based on these facts, that the European Communities explored the possibilities of constructive remedies prior to imposing anti-dumping duties. In our view, the European Communities simply did nothing different in this case, than it would have done in any other anti-dumping proceeding – there was no notice or information concerning the opportunities for exploration of possibilities of constructive remedies given to the Indian parties, nothing that would demonstrate that the European Communities actively undertook the obligation imposed by Article 15 of the AD Agreement. Pure passivity is not sufficient, in our view, to satisfy the obligation to "explore" possibilities of constructive remedies, particularly where the possibility of an undertaking has already been broached by the developing country concerned. Thus, we consider that the failure of the European Communities to respond in some fashion other than bare rejection, **particularly once the desire to offer undertakings had been communicated to it**, constituted a failure to "explore possibilities of constructive remedies", and therefore conclude that the European Communities failed to act consistently with its obligations under Article 15 of the AD Agreement.

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[95] Exhibit India-89.
[96] Exhibits India-90 and -91.
[97] Exhibit India-72.
[98] *Id.*
[99] Exhibit India-93.
[100] Exhibit India-72.

G. CLAIMS UNDER ARTICLE 12.2.2 (CLAIMS NUMBERS 3, 6, 10, 13, 18, 22, 25, 28, AND 31)

1. Parties' arguments

6.239 India argues, with respect to almost all of its substantive claims of violation of the AD Agreement, that the European Communities failed adequately to explain its decisions relating to those matters in the Definitive Regulation. India asserts that the Definitive Regulation does not set forth the European Communities' reasoning as to why it applied relevant provisions of its domestic legislation and the AD Agreement in the way it did, which in India's view is inconsistent with the requirements of the AD Agreement. India also argues that the European Communities failed adequately to explain its choices of methodology, analysis, and conclusions on questions of fact, and failed adequately to explain why it rejected arguments by the Indian exporters. India's claims under Article 12.2.2 of the AD Agreement correspond to its substantive claims as follows:

- Claim 3 – Insufficient notice with respect to Article 2.2.2 (Claim 1)
- Claim 6 – Insufficient notice with respect Article 2.2 (Claim 4)
- Claim 10 – Insufficient notice with respect Article 3.1 (Claim 8)
- Claim 13 – Insufficient notice with respect Article 3.4 (Claim 11)
- Claim 18 – Insufficient notice with respect Article 6.10 and 6.11 (Claim 16)
- Claim 22 – Insufficient notice with respect Article 3.5 (Claim 20)
- Claim 25 – Insufficient notice with respect Article 5.3 (Claim 23)
- Claim 28 – Insufficient notice with respect Article 5.4 (Claim 26)
- Claim 31 – Insufficient notice with respect Article 15 (Claim 29)

6.240 India sets out four bases for its claim 3, asserting insufficient notice of the European Communities' decisions and analysis under Article 2.2.2. First, India argues that the European Communities failed to provide a sufficient explanation of why it applied Article 2.2.2(ii) instead of Article 2.2.2(i). Second, India asserts that the European Communities failed to provide a sufficient explanation as to why it applied an option for which the requirements were not fulfilled. Third, India posits that the European Communities failed to explain why it considered only sales in the ordinary course of trade in deriving an amount for profit under Article 2.2.2(ii). Finally, India maintains that the European Communities failed to explain why it considered the profit rate it established to be reasonable under Articles 2.2.2(iii) and 2.2.

6.241 India also argues that, to the extent the European Communities may argue that it did not commit certain of the substantive violations alleged, and in particular to the extent the European Communities may argue that it did consider all the relevant economic factors under Article 3.4 (India's claim 13), the European Communities' notice is inconsistent with the requirements of Article 12.2.2. In India's view, any such consideration cannot be determined from that notice, which is thus insufficient. India argues that, apart from access to the non-confidential file of the investigation, the notice is the only basis for the Indian exporters to understand the facts on which the determination was based, and know the determination that was made, and thus must be complete in order to further the interest of transparency which underlies Article 12.2 as a whole.

6.242 Finally, India argues, based on the text of Article 12.2.2, that the notice of final determination must contain a detailed explanation of decisions taken and information considered in the context of initiation. This argument underlies India's claims25 and 28, which assert that the European Communities' Definitive Regulation is inconsistent with Article 12.2.2 because it does not explain the European Communities' examination of the information in the application under Article 5.3, and does not address the information and arguments made by the Indian exporters concerning the standing of the applicant under Article 5.4.

6.243 The European Communities posits, in general, that not every aspect of a final determination must be explained in the notice thereof. Rather, the European Communities asserts that only certain matters need to be set out in the final determination – those that are relevant to the final determination itself, and those that are not known to the parties without reference to the final determination, because, for example, they were discussed or addressed during earlier stages of the proceedings, or are well-known elements of the practice of the investigating authorities. The European Communities maintains that its Definitive Regulation (taken together with the Provisional Regulation where appropriate) adequately explains its final determination, the legal analysis and facts relied upon and the reasoning underlying its conclusions. In addition, the European Communities argues that to the extent India's arguments under Article 12.2.2 assert that the European Communities failed to explain why it acted in a manner that India considers inconsistent with the AD Agreement, there was nothing to explain, since the European Communities maintains that it committed no substantive violations.

6.244 Turning to the specific claims, the European Communities argues with regard to India's claim 3 that since the AD Agreement does not obligate a Member to explain its choice between the options listed in Article 2.2.2, there can be no obligation to provide notice of such an explanation. With regard to India's claim 6, the European Communities asserts that paragraphs 18 and 19 of the Definitive Regulation adequately address various arguments raised by the exporters concerning the determination of the profit rate for the constructed normal value. Moreover, the European Communities maintains that since it did not act inconsistently with the AD Agreement in the application of Article 2.2.2, no further explanation or justification of the European Communities' decisions is necessary. Finally, the European Communities asserts that Article 12.2.2 requires notice of decisions taken by the investigating authorities, while the European Communities' practice under Article 2.2.2 is a matter of policy, not a case-by-case decision. Similarly, with respect to India's claim 10, the European Communities argues that the European Communities' methodology in injury analysis is standard practice and, in the absence of any argument on the point by one of the interested parties to the investigation, the European Communities was not obligated to publish details of the methodology applied.

6.245 With respect to India's claim 13, the European Communities maintains that paragraphs 40 and 41 of the Definitive Regulation set forth a detailed account of the factors considered in the examination of injury, including those listed in Article 3.4 that were relevant to the determination. As regards the alleged failure to address "relevant arguments or claims made by the exporters", the European Communities maintains that the arguments of the exporters were not raised in the final phase of the investigation, but were directed at the original Complaint, and as such were not arguments relevant to the final decisions made by the EC authorities. Consequently, the Article 12.2.2 requirement to give reasons for their acceptance or rejection did not apply.

6.246 With respect to India's claim 22, the European Communities argues that the Definitive Regulation makes clear that employment was not a factor on which the European Communities relied in concluding that the domestic industry was suffering injury. Consequently, the exporters' argument on this point was not relevant, and therefore the European Communities was not required to address it. Moreover, the European Communities asserts that it did not regard imports prior to the investigation period as constituting "dumped imports". Consequently, it had no obligation to explain such a conclusion, which it did not reach, in the Definitive Regulation.

6.247 With respect to India's claims 25 and 28, the European Communities disputes India's interpretation of Article 12.2.2. The European Communities asserts that India's approach fails to take proper account of the structure of the Article. In the European Communities' view, Article 12 is straightforward – initiation issues are dealt with by paragraph 1, while paragraph 2 covers the measures adopted during and after the investigation (that is, provisional measures, definitive measures and undertakings). India's claim 25 asserts failure to explain matters arising under Article 5.3, concerning alleged failure to examine the evidence prior to initiation. The European Communities maintains that the Definitive Regulation addresses the issues of dumping and causation of injury at the end of the investigation and the imposition of final measures, as required by Article 12.2.2. In the European Communities' view, arguments regarding the initiation of the investigation and the determination of standing were not relevant to the final determination and definitive measure and, therefore, there was no obligation to include any discussion of them in the Definitive Regulation. The European Communities also asserts that the investigating authorities are under no obligation to review an initiation decision with benefit of hindsight and, thus, arguments directed to the initiation decision later in the investigation could never be relevant arguments that must be addressed in the notice of final determination. The European Communities makes similar arguments concerning the obligation to address only **relevant** arguments with respect to India's claim 28, asserting failure to address the determination of standing. The European Communities asserts that the arguments of the exporters which are allegedly not addressed in the Definitive Regulation were not relevant to the final determination described in that notice.

6.248 Finally, with respect to India's claim 31, the European Communities argues that its practice with respect to the obligations set forth in Article 15 is well-known to exporters, and therefore no further explanation was required. Moreover, the European Communities points out that, as India acknowledges, the matter was discussed with the exporters.

6.249 Egypt, as third party, argues that, even if the European Communities carried out the examination required by Article 5.3 of the Agreement, it failed to disclose this fact to the interested parties and, therefore, acted in breach of Articles 12.1 (an Article of which India has **not** alleged a violation) and 12.2 of the AD Agreement.

2. Findings

6.250 We will consider in turn each of India's claims under Article 12.2.2. Before doing so, we recall our conclusion that India has withdrawn its claims under Article 12.2.1 regarding the Provisional Regulation (India's claims 2, 5, 9, 12, 17, 21, 24, 27, and 30). Therefore, we have made no rulings concerning these claims. In addition, we note that India's claim 18 relates to its substantive claim 16, alleging a violation of Articles 6.10 and 6.11. We recall our conclusion that India's claims under Article 6, claims 14 and 16, are not within our terms of reference. In these circumstances, we consider it unnecessary and inappropriate to address India's claim 18.

6.251 Article 12 governs the contents of public notices issued in the course of anti-dumping investigations. It provides, in pertinent part:

> "12.2. Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 8, of the termination of such an undertaking, and of the termination of a definitive anti-dumping duty. Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein.

> 12.2.1 A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular:
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> (i) the names of the suppliers, or when this is impracticable, the supplying countries involved;
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> (ii) a description of the product which is sufficient for customs purposes;
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> (iii) the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2;
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> (iv) considerations relevant to the injury determination as set out in Article 3;
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> (v) the main reasons leading to the determination.
>
> 12.2.2 A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6."

Claims 3 and 6

6.252 We consider first India's claims 3 and 6, which assert that the Definitive Regulation failed to give sufficient notice of the European Communities' substantive determinations and analysis in applying Article 2.2.2, which India alleges, in its claims 1 and 4, were inconsistent with Articles 2.2.2 and 2.2. We recall our conclusion that the order in which the three options are set out in Article 2.2.2 is without any hierarchical significance and that Members have complete discretion as to which of the three methodologies they use in their investigations.[101] We found, therefore, that the European Communities was not required by the AD Agreement to resort to option (i) before it could resort to option (ii) and it did not act inconsistently with Article 2.2.2 by using the latter option. We note, further, that the European Communities resorted to the methodology set out in paragraph 2.2.2(ii) in accordance with Article 2(6) of its Regulation. In light of our finding in respect of the order of options set out in Article 2.2.2 and the fact that the European Communities applied what is its customary methodology for the calculation of SG&A and profit rates, and the basis for its determination in this regard is clear from the final determination, we do not consider that Article 12.2.2 requires the European Communities to explain its choice of methodology.

[101] *See* paras. 6.54-6.62, *supra*.

6.253 We also recall our conclusion that Article 2.2.2(ii) may be applied in a case where there are data concerning SG&A and profit for only one other exporter or producer.[102] We found, therefore, that the European Communities was not precluded from applying the methodology set out in that provision in this case and, therefore, did not act inconsistently with Article 2.2.2(ii) in this regard. India's argument in support of its claim under Article 12.2.2 presupposes an inconsistency with Article 2.2.2(ii), which we did not find. Since we did not find that the European Communities applied an option for which the requirements were not fulfilled, and the basis for its determination in this regard is clear from the final determination, we do not consider that the European Communities was required to give any further explanation in this regard.

6.254 We also recall our conclusion that an interpretation of Article 2.2.2(ii) under which sales not in the ordinary course of trade are excluded from the determination of the profit rate to be used in the calculation of a constructed normal value is permissible.[103] We found, therefore, that the European Communities did not err in its application of paragraph (ii) by using data only on transactions in the ordinary course of trade. We note, further, that the European Communities excluded data for sales not in the ordinary course of trade in accordance with Article 2(4) of its Regulation. In light of our finding in respect of the exclusion of data for sales not in the ordinary course of trade, the fact that the European Communities applied the customary methodology set forth in its legislation for the calculation of SG&A and profit rates, and the fact that its analysis in this regard is clear in its determination, we do not consider that the European Communities was required to explain its decision to derive profit on the basis of sales in the ordinary course of trade.

6.255 Finally, we recall our conclusion that Article 2.2.2(ii), when applied correctly, necessarily yields amounts for profits that are deemed "reasonable" for purposes of Article 2.2, and that the AD Agreement does not require consideration of a separate reasonability test in respect of results arrived at through the use of that methodology.[104] We found, therefore, that the European Communities did not act inconsistently with the requirements of Article 2.2 by not having applied such a test to the results that it obtained under Article 2.2.2(ii). Clearly, where there is no obligation for the European Communities to consider whether the profit established is reasonable on the basis of a separate test of reasonability – as we have found to be the case – there can be no obligation to explain a consideration that need not be undertaken.

6.256 The basis for the European Communities' application of and its analysis under Article 2.2.2 are apparent on the face of the Definitive Regulation, taken together with the Provisional Regulation as appropriate, and with reference to EC legislation. For the foregoing reasons, we find that India's claims 3 and 6, asserting that the European Communities failed to sufficiently explain why and how it applied Article 2.2.2 and that the European Communities failed to sufficiently explain why and how it applied Article 2.2, must both fail.

Claims 10 and 22

6.257 The next issue before us is whether, as India claims, the European Communities failed to explain its consideration of all imports from India during the period of investigation (Claim 10) as well as in the years prior to the period of investigation, *i.e.*, 1 January 1992-30 June 1995 (Claim 22). We recall our conclusion that the phrase "dumped imports" refers to all imports of the **product** from exporters/producers as to which an affirmative determination of dumping has been made. [105] We found, therefore, that the European Communities, having made an affirmative determination of dumping with respect to imports from all producers/exporters in this case, did not act inconsistently

[102] *See* paras. 6.69-6.75, *supra*.
[103] *See* paras. 6.83-6.87, *supra*.
[104] *See* paras. 6.94-6.101, *supra*.
[105] *See* paras. 6.132-6.142, *supra*.

with Articles 3.1, 3.4 and 3.5 of the AD Agreement by considering all such imports in its evaluation of the volume, price effects and consequent impact of dumped imports. That the European Communities carried out its analysis on the basis of all imports is clear from the final determination. It follows, therefore, in our view, that the European Communities' explanation of its determination is adequate and in conformity with the AD Agreement, and that India's claim 10 must fail.

6.258 We turn next to India's claim regarding the European Communities' failure to explain its consideration of imports from all producers/exporters as "dumped imports" in the years prior to the period of investigation. We recall that we did not address this issue as a substantive matter, in light of our conclusion that the European Communities' determination of injury was not made consistently with its obligations under Article 3.4.[106] We find it neither necessary nor appropriate to address India's claim 22 asserting a failure to explain this aspect of the determination.

Claim 13

6.259 We now turn to India's claim that the European Communities failed to adequately explain its evaluation of certain factors listed in Article 3.4. We recall our finding that the European Communities acted inconsistently with Article 3.4 of the AD Agreement by failing to evaluate all the economic factors set forth in Article 3.4.[107] In light of our finding of inconsistency with Article 3.4, we find it neither necessary nor appropriate to address India's claim of inadequate notice. We note that our finding concerning Article 3.4 was based principally on the explanation of the injury determination in the European Communities' notices. 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 inadequate 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.

Claims 25 and 28

6.260 We turn next to India's claims regarding the failure of the European Communities to explain, in the Definitive Regulation, its examination of the evidence in the application under Article 5.3 and the determination of industry support under Article 5.4. We do not agree with India's view that Article 12.2.2 requires explanations relating to initiation to be set out in the notice of final determination. Article 12.1 of the AD Agreement requires public notice of an initiation, and sets out the requirements regarding the information to be contained in such notices. India has made no claim under Article 12.1 in this dispute. Article 12.2 requires notice of preliminary and final determinations, whether affirmative or negative, and notice of undertakings, and sets forth in some detail in Articles 12.2.1, 12.2.2, and 12.2.3 the information to be included in such notices. Those requirements, in addition to basic information concerning the product and parties, all provide for transparency with respect to the decisions of which notice is being given. There is no reference to the initiation decision among the elements to be addressed in notices under Article 12.2. Moreover, in our view, it would be anomalous to interpret Article 12.2 as also requiring, in addition to the detailed information concerning the decisions of which notice is being given, explanations concerning the initiation of the investigation, of which notice has previously been given under Article 12.1. This is

[106] *See* paras. 6.153-6.169, *supra*.
[107] *Id.*

particularly the case with respect to elements which are not within the scope of the information to be disclosed in the notice of initiation itself.[108] We do not believe that Article 12.2.2 requires a Member to explain, in the notice of final determination, aspects of its decision to initiate the investigation in the first place. We find, therefore, that India's claims under Article 12.2.2 regarding the European Communities' examination of the evidence in the application under Article 5.3 and its determination of industry support under Article 5.4 must fail.

Claim 31

6.261 Finally, we turn to India's claim that the European Communities failed to explain its consideration of the Indian exporters' arguments concerning Article 15 of the AD Agreement. In light of our finding of inconsistency with Article 15,[109] we find it neither necessary nor appropriate to address this claim. As discussed above in connection with India's claim 13, we consider that where there is a violation of the substantive requirement, the question of whether the notice is sufficient under Article 12.2.2 is immaterial. We therefore make no findings on claim 31.

VII CONCLUSIONS AND RECOMMENDATION

7.1 In light of the findings above, we conclude that the European Communities did not act inconsistently with its obligations under Articles 2.2, 2.2.2, 3.1, 3.4, 3.5, 5.3, 5.4, and 12.2.2 of the AD Agreement in:

(a) calculating the amount for profit in constructing normal value (India's claims 1 and 4),

(b) considering all imports from India (and Egypt and Pakistan) as dumped in the analysis of injury caused by dumped imports (India's claims 8, 19, and 20),

(c) considering information for producers comprising the domestic industry but not among the sampled producers in analyzing the state of the industry (India's claim 15, in part),

(d) examining the accuracy and adequacy of the evidence prior to initiation (India's claim 23),

(e) establishing industry support for the application (India's claim 26), and

(f) providing public notice of its final determination (India's claims 3, 6, 10, 22, 25 and 28).

7.2 In light of the findings above, we conclude that the European Communities acted inconsistently with its obligations under Articles 2.4.2, 3.4, and 15 of the AD Agreement in:

(g) determining the existence of margins of dumping on the basis of a methodology incorporating the practice of zeroing (India's claim 7),

(h) failing to evaluate all relevant factors having a bearing on the state of the domestic industry, and specifically all the factors set forth in Article 3.4 (India's claim 11),

[108] We note, in this regard, the decision of the Panel in *Mexico - HFCS* concerning the scope of the information required in a notice of initiation.

[109] *See* paras. 6.226-6.238, *supra*.

(i) considering information for producers not part of the domestic industry as defined by the investigating authority in analyzing the state of the industry (India's claim 15, in part), and

(j) failing to explore possibilities of constructive remedies before applying anti-dumping duties (India's claim 29).

7.3 With respect to those of India's claims not addressed above we have:

(a) found that India has withdrawn those claims (claims 2, 5, 9, 12, 17, 21, 24, 27, and 30),

(b) concluded that the claims are not within our terms of reference (claims 14 and 16), and

(c) concluded that, in light of considerations of judicial economy, it is neither necessary nor appropriate to make findings on those claims (claims 13, 18, and 31).

7.4 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent the European Communities has acted inconsistently with the provisions of the AD Agreement, it has nullified or impaired benefits accruing to India under that Agreement.

7.5 We recommend that the Dispute Settlement Body request the European Communities to bring its measure into conformity with its obligations under the AD Agreement.

ANNEX 1-1

FIRST SUBMISSION OF INDIA

(6 March 2000)

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EXECUTIVE SUMMARY

1. On 27 October 1999 the Government of India requested for the second time the establishment of a panel in the matter concerning the imposition by the EC of definitive anti-dumping duties on cotton-type bed linen from India. The Panel was constituted on 24 January 2000. This submission is the first submission of India to the panel.

2. India believes that the EC, by adopting Council Regulation (EC) No 2398/97 of 28 November 1997 imposing a definitive anti-dumping duty on imports of cotton-type bed linen originating in *inter alia* India, has in many ways acted inconsistently with the WTO Agreement, and more specifically with the Anti-Dumping Agreement [hereinafter: "ADA"]. As a result, India's benefits accruing under the WTO Agreement have been nullified and/or impaired.

3. The EC did not properly examine the standing of the complainant. Moreover, the EC failed to take into account information available to it at the time of initiation pointing to lack of material injury caused by dumped imports. In the determination of dumping an unreasonable profit margin of over 18 per cent was applied, leading to artificially inflated dumping margins. The dumping margins were further inflated through the use of a *partial* weighted-average to weighted-average comparison. In the injury determination, only certain injury factors were examined and discussed. Furthermore, the EC explicitly determined that the domestic industry consisted of 35 companies, but relied in its injury determination on companies outside this group in order to determine injury. The EC chose a sample from the domestic industry, but did not consistently base its injury determination on this sample. Rather, the EC chose to rely on different 'levels' of industry for different injury indices without any apparent reason other than goal-oriented 'picking and choosing' of injury. The EC has failed to appropriately determine to what extent injuries caused by other factors were responsible for the injury allegedly suffered by the domestic industry. Finally, in the imposition of measures, there is nothing to show which would consider India's special status as a developing country. All of the above deficiencies were criticized during the administrative proceeding, but were never addressed by the administering authority. This is not a complete summary of claims, but merely a succinct overview of some of the most important ones. The full claims are addressed in detail below.

4. India respectfully requests that the Panel recommend that the EC bring Regulation No 2398/97 of 28 November 1997 imposing a definitive anti-dumping duty on imports of cotton-type bed linen originating in, *inter alia*, India into conformity with the ADA and GATT 1994; and suggest that, in light of the numerous outcome-decisive violations of the ADA, the EC immediately repeal the Regulation imposing definitive anti-dumping duties and refund anti-dumping duties paid thus far.

5. For the sake of clarity India's claims are divided in four parts. Part III deals with the claims concerning the dumping margin determination. Part IV discusses the claims concerning the injury determination. Part V elaborates the claims concerning procedural issues. Last, Part VI contains the claims relating to India's status as a developing country. In addition India raises various claims under Article 12 of the Anti-Dumping Agreement. It was deemed convenient to discuss such transparency claims together with the substantive claims to which they are related. For example, the claims related to the not transparent explanation by the EC of its application of Article 2.2.2 are discussed with the substantive claims concerning that provision, and so on.

6. India's claims as set out in this submission are summarised as follows:[1]

[1] The descriptions in this executive summary are given for brief summarisation purpose only. For the full elaboration of the facts and arguments the Panel is referred to the Part concerned.

A. DUMPING ISSUES

7. **Claim 1:** The EC misapplied Article 2.2.2 by resorting to the option laid down in Article 2.2.2(ii), and by misapplying this option.

8. **First argument of first claim:** While the EC has applied the calculation method as foreseen in Article 2.2.2(ii), this method was not open to it. This method could not be applied since its requirements for application were not met. The explicit wording of the ADA, mandates that amounts of other exporters or producers need to be averaged, and not that an amount itself (of one single exporter or producer) has to be established by means of using a method involving weighted averages.

9. Moreover, the exact wording of Article 2.2.2(ii) makes abundantly clear that more than one exporter or producer should be involved: *"other exporters or producers"* clearly refers to a plural. This text of the ADA makes sense since it would otherwise not be mathematically possible to establish a (weighted) average of such amounts. The concept of an average, as defined above, does by its nature not allow itself to be inferred from one parameter only, such as only one producer.

10. Nevertheless, the EC applied just one amount from one producer. The fact that no average from more than one exporter or producer was ever applied is not contested.

11. **Second argument of first claim:** Even within the application of Article 2.2.2(ii), the EC has acted inconsistently with the provision. Instead of inferring the amounts from other producers or exporters which were *'incurred and realized'* (12.09 per cent), the EC inferred the amounts from other producers or exporters which were 'determined' (18.65 per cent).

12. **Third argument of first claim:** In the calculation of the dumping margins the EC has, in the Regulation imposing provisional measures, as confirmed by the Regulation imposing definitive measures, applied Article 2.2.2(ii) of the ADA. However, as noted above, the method foreseen in Article 2.2.2(ii) was not available to the EC since its requirements were not met. Moreover, this option was applied instead of Article 2.2.2(i), which *was* available to the investigating authorities. This is inconsistent with, and violates the spirit and structure of, Articles 2.2.2 and 2.2.

13. **Claim 2:** The EC failed to properly explain its reasoning at the provisional stage and thus acted inconsistently with Article 12.2.1.

14. **Claim 3:** The EC further failed to properly explain its determination at the definitive stage and thus acted inconsistently with Article 12.2.2.

15. **Claim 4:** The EC further applied the selling, general and administrative expenses (SG&A) and profit amounts thus determined even though these amounts were clearly not 'reasonable' and therewith acted inconsistently with Article 2.2.

16. The EC failed to properly explain why it considered the amounts determined to be 'reasonable', and consequently acted inconsistently with Article 12.2.1 (**claim 5**) and 12.2.2 (**claim 6**).

17. **Claim 7:** The EC acted inconsistent with Article 2.4.2 by zeroing negative dumping amounts on a per-type basis. Therefore, effectively the EC only averaged within a model, and not between models.

B. INJURY AND CAUSALITY ISSUES

18. **Claim 8:** Contrary to the wording of Article 3.1 of the ADA, the EC automatically and without further explanation assumed that *all* imports of the product concerned during the investigation period were dumped.

19. The EC's failure to explain this determination properly is inconsistent with Article 12.2.1 (**claim 9**) and Article 12.2.2 (**claim 10**);

20. **Claim 11:** The EC failed to consider all injury factors mentioned in Article 3.4 of the ADA for its determination on the state of the domestic industry. Particularly, the EC did not consider:

- Productivity;
- Return on investments;
- Utilization of capacity;
- The magnitude of the margin of dumping;
- Cash flow;
- Inventories;
- Wages;
- Growth;
- Ability to raise capital or investments.

The EC thus acted inconsistently with Article 3.4.

21. As far as the EC would argue that it did in fact consider all factors in Article 3.4, it failed to disclose or make public its findings thereon and thus acted inconsistently with Article 12.2.1 (**claim 2**) and Article 12.2.2 (**claim 13**). This also violates the rights of defence as contained in Article 6 (**claim 14)**;

22. **Claim 15:** The EC acted inconsistently with Article 3.4. The EC has explicitly determined that the domestic industry consists of 35 companies, but relied in its injury determination on companies outside this group in order to determine injury (**first argument of claim 15**). The EC has chosen a sample from the domestic industry, but did not consistently base its injury determination on this sample (**second argument of claim 15**). The EC chose to rely on different 'levels' of industry for different injury indices without any apparent reason other than goal-oriented 'picking and choosing' of injury (**third argument of claim 15**). The sample selected by the EC was not representative in violation of Articles 6.10 and 6.11 (**claim 16**).

23. The EC's failure to explain its determination properly is also inconsistent with Article 12.2.1 (**claim 17**) and Article 12.2.2 (**claim 18**);

24. **Claim 19:** The EC failed to make an unbiased and objective analysis (as per Article 17.6 ADA) of the development of market share of the domestic industry and insufficiently explained its position, as required by Article 3.4 of the ADA;

25. **Claim 20:** The causality finding made by the EC is inherently flawed and unintelligible. The EC has failed to appropriately determine to what extent injuries caused by other factors (such as, for example, contraction in demand or changes in the patterns of consumption) were responsible for the injury allegedly suffered by the domestic industry. As such, the establishment of the facts for the

determinations required by Article 3.5 of the WTO Anti-Dumping Agreement was not proper and/or the evaluation of those facts was not unbiased and objective;

26. As far as the EC would argue that it did in fact make such analysis with respect to claim 18, it has insufficiently explained it, and thus acted inconsistently with Article 12.2.1 (**claim 21**) and Article 12.2.2 (**claim 22**);

C. PROCEDURAL ISSUES

27. The procedure leading up to Regulation 2398/97, including the imposition of provisional anti-dumping duties, suffered from among others the following shortcomings:

28. Inconsistently with Article 5, and especially Article 5.3 of the ADA, the EC did not examine the allegations in the complaint (**first argument of claim 23**). Moreover, and also inconsistently with Article 5.3, the EC failed to take into account information available to it at the time of initiation pointing to lack of material injury caused by dumped imports (**second argument of claim 23**);

29. In any event, even if the EC made such examination, no record has been made available in the file or in the notice of initiation or in the published Regulations attesting to this, even though Indian exporters had raised this issue. This is inconsistent with Article 12.2.1 (**claim 24**) and 12.2.2 (**claim 25**);

30. The EC did not properly examine the representativeness of the complainant, and/or failed to make a proper determination on representativeness as required by Article 5.4 of the ADA. Such information as has been made available belatedly in the non-confidential file appears to contradict the published findings. The EC thus acted inconsistently with Article 5.4 (**claim 26**);

31. Moreover, the EC has never during the investigation or in the published Regulations adequately responded to detailed queries from Indian exporters on this issue, and thus acted inconsistently with Articles 12.2.1 (**claim 27**) and 12.2.2 (**claim 28**);

D. OTHER ISSUES

32. **Claim 29**: Inconsistently with Article 15 ADA, the EC failed to consider India's special situation of developing country Member before imposing provisional anti-dumping duties. Even if the EC would have considered India's special status as a developing country it did not explain this in the public notice, or make available through a separate report that it did so. This is inconsistent with Article 12.2.1. (**claim 30**) and Article 12.2.2 (**claim 31**).

I. INTRODUCTION

1.1 On 27 October 1999 the Government of India requested for the second time the establishment of a panel in the matter concerning the imposition by the EC of definitive anti-dumping duties on cotton-type bed linen from India. This submission elaborates the claims made by India in the dispute concerning the second EC anti-dumping proceeding concerning bed linen from, *inter alia*, India.

1.2 The EC initiated the anti-dumping proceeding against the import of cotton type bed linen from India by publishing a notice of initiation in September 1996. Provisional anti-dumping duties were imposed by EC Commission Regulation N° 1069/97 dated 12 June 1997. This was followed by the imposition of definitive duties by the above-mentioned Regulation of 28 November 1997. The Government of India [hereinafter: GOI] considers that the procedure which led to the adoption of

Regulation 2398/97 including the initiation of the proceeding and the imposition of provisional duties, the determination of dumping and injury caused thereby in such Regulation, and thus that Regulation itself, are inconsistent with WTO law. Accordingly, India respectfully requests that the Panel recommend that the EC bring Regulation No 2398/97 of 28 November 1997 imposing a definitive anti-dumping duty on imports of cotton-type bed linen originating in, *inter alia*, India into conformity with the ADA and GATT 1994; and suggest that, in the light of the numerous outcome-decisive violations of the ADA, the EC immediately repeal the Regulation imposing definitive anti-dumping duties and refund anti-dumping duties paid thus far.

1.3 The structure of this first submission to the Panel is as follows: Part II discusses the general factual background to the matter. Part III discusses the claims relating to the dumping determination. Part IV discusses the claims relating to the injury and causality determination. Part V discusses claims relating to procedural matters. The claims relating to India's status as a developing country are discussed in Part VI. Last, the requests to the Panel are set forth in Part VII.

1.4 India believes that in various instances the EC acted inconsistently with Article 12. For the sake of convenience, and in order to avoid tedious repetition, such claims are discussed as much as possible with the fact pattern to which they refer. Thus, claims concerning inconsistencies with Article 12 in the context of the dumping determination are discussed in Part III, *etc.*

II. GENERAL FACTUAL BACKGROUND

1. The measure concerned[2]

2.1 The European Community's [hereinafter: "EC"] current anti-dumping law is laid down in Council Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community, as amended [hereinafter: "basic Regulation", attached as Annex 1].[3] Under the basic Regulation, the European Commission acts as the investigating authority in anti-dumping proceedings. If it finds that the substantive conditions are fulfilled, it may impose provisional anti-dumping duties. The EC Council of Ministers may replace such provisional anti-dumping duties by definitive anti-dumping measures.

2.2 In 1997 the EC imposed definitive anti-dumping duties on bed linen from India, Egypt and Pakistan by Regulation 2398/97.[4] As far as India is concerned, duties were imposed up to 24.7 per cent, the weighted average duty being 11.6 per cent, and the residual duty being 24.7 per cent.[5] This definitive anti-dumping measure is the subject of the present WTO dispute settlement proceeding.

[2] The summary in this Part is merely intended to provide the broad background to the case. Factual details are, whenever necessary, elaborated in Parts III and following.

[3] Official Journal ["OJ"] (1996) L 56/1

[4] Council Regulation (EC) No 2398/97 of 28 November 1997 imposing a definitive anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan, OJ (1997) L 332/1.

[5] The residual duties for Pakistan and Egypt were respectively 6.7 and 13.5 per cent, with respective weighted averages of 6.4 and 13 per cent.

2. History: the first Bed linen proceeding

2.3 On 25 January 1994 the Commission initiated an anti-dumping proceeding concerning bed linen[6] from India, Pakistan, Thailand and Turkey [hereinafter: "Bed Linen I"] (notice of initiation in Annex 2). [7] The complainant was the Committee of the Cotton and Allied Textile Industries of the EC ["Eurocoton"]. This organisation is the EC federation of national producers' associations of cotton textile products. The complaint[8] in the Bed Linen I proceeding is attached as Annex 3.

2.4 It appears that Eurocoton had polled support for its complaint by consulting its national member associations. In any event, no evidence was made available in the non-confidential file showing that the European Commission had checked, before initiating the proceeding, that the proceeding carried sufficient support among EC producers.

2.5 The cooperation of Indian exporters in the Bed linen I proceeding was exemplary: 41 Indian exporters submitted a confidential questionnaire response and a non-confidential summary thereof.[9] By contrast, the large majority of Community producers refused to submit questionnaire responses or, at least, no or virtually no non-confidential summaries from them were made available in the non-confidential file. After some time (and, as far as India believes, after some secret correspondence between the European Commission and the complainant), Eurocoton withdrew the complaint. The Bed linen I anti-dumping proceeding was consequently terminated on 10 July 1996.[10] In the Decision terminating this proceeding the European Commission noted that:

> *"[t]he complainant Community producers formally withdrew the complaint concerning imports of certain types of bedlinen originating in India, Pakistan, Thailand and Turkey. The Commission considers that a termination in this context would not be contrary to the interest of the Community.*
>
> *Consequently, the anti-dumping proceeding concerning imports of certain types of bedlinen originating in India, Pakistan, Thailand and Turkey should be terminated without imposition of protective measures."* (Annex 5)

This—rather terse—statement, however, only partially reflects the facts. Even though the formal reason for the termination was the withdrawal of the complaint, it would appear that the termination was connected with the non-co-operation of the Community industry in the Bed linen I proceeding.

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[6] The product scope of the Bed linen I proceeding consisted of Combined Nomenclature headings 6302 2100, 6302 2290, 6302 3110, 6302 3190 and 6302 3290. For easiness' sake this is henceforth referred to as *"bed linen"* or *"the product"*.

[7] OJ (1994) C 21/8. For background information it is noted that Eurocoton also submitted complaints concerning alleged dumping of cotton fabrics and synthetic fabrics from (*inter alia*) India. The two anti-dumping proceedings pursuant to these complaints were initiated around the same time as Bed linen I, and terminated for largely the same reasons and on the same grounds. The proceeding concerning cotton fabrics was thereafter re-initiated twice, in neither case leading to definitive anti-dumping duties, and the second time leading to WTO consultations between India and the EC.

[8] In EC parlance, the application is called *"complaint"*. In this submission the two terms are used interchangeably.

[9] Evidence attached as Annex 4.

[10] OJ (1996) L 171/27.

3. The second Bed linen proceeding

2.6 The complainant Eurocoton brought a new complaint that was formally submitted on 30 July 1996, *i.e.* twenty days after the termination of Bed linen I.[11] The European Commission initiated an anti-dumping proceeding on the basis of this new complaint on 13 September 1996 [hereinafter: "Bed linen II"].[12] The Indian industry again co-operated massively: most exporters made themselves known, accounting for well over 80 per cent of total exports.[13]

2.7 In the Bed linen II proceeding, the European Commission decided to first take a sample from among the Indian exporters, and to determine the dumping margin for the co-operating exporters on the basis of a weighted average of this sample. As in the Bed linen I proceeding, Indian exporters were represented by the Cotton Textiles Export Promotion Council of India [hereinafter: "Texprocil"]. Negotiations on the sample ensued between the EC case handlers and Texprocil's representatives. However, no agreement could be reached on the sample and the European Commission unilaterally selected the sample on the basis of Article 6.10 of the WTO Anti-Dumping Agreement ["ADA"].

2.8 The European Commission imposed provisional anti-dumping duties with effect from 14 June 1997 [hereinafter: "provisional Regulation", attached as Annex 8].[14]

2.9 Definitive anti-dumping duties varying from 2.6 per cent to 24.7 per cent were imposed on bed linen from India by Council Regulation (EC) No 2398/97 of 28 November 1997 [hereinafter: "definitive Regulation", attached as Annex 9].[15]

4. Dispute settlement thus far

2.10 On 3 August 1998 India requested consultations with the European Community pursuant to Article 17 of the ADA and Article 4 of the Understanding on Rules and Procedures governing the Settlement of Disputes ["the DSU"] concerning this issue. This request was notified to the Dispute Settlement Body and was circulated to WTO Members.[16] Pakistan requested to be joined in the consultations on 25 August 1998.[17]

2.11 The first round of consultations was held in Geneva on 18 September 1998[18] (list of questions raised by India attached as annex 10; verbatim report drafted by the Indian delegation attached as

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[11] The complaint is attached as Annex 6.

[12] The notice of initiation can be found in OJ (1996) C 266/2 (Annex 7).

[13] Page 2 of the provisional disclosure document (attached as Annex 23).

[14] 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 (1997) L156/11.

[15] Council Regulation (EC) No 2398/97 of 28 November 1997 imposing a definitive anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan, OJ (1997) L 332/1.

[16] WT/DS141/1, G/L/253, G/ADP/D13/1 of 7 August 1998.

[17] WT/DS141/2 of 25 August 1998.

[18] On the issue of using the information obtained during the dispute settlement consultations for panel proceedings we note the panel report Korea—Taxes on Alcoholic Beverages, Report of the Panel, WT/DS75/R, WT/DS84/R of 17 September 1998 at § 10.23:

> "We note that Article 4.6 of the DSU requires confidentiality in the consultations between parties to a dispute. This is essential if the parties are to be free to engage in meaningful consultations. However, it is our view that this confidentiality extends only as far as requiring the parties to the consultations not to disclose any information obtained in the consultations to any parties that were not involved in those consultations. We are mindful of the fact that the panel proceedings between the parties remain confidential, and parties do not thereby breach

Annex 11). On 1 October the European Community provided written answers to part of the questions raised by India (Annex 12).

2.12 Although the EC noted in its letter of 1 October 1998 that a second round was necessary for replying to the remainder of India's questions, it proved excessively difficult for the EC to agree to a second round within a reasonable time. Ultimately, after considerable delay, the EC could agree to a second round of consultations on 15 April 1999 (verbatim report drafted by the Indian delegation attached as Annex 13).

2.13 The legal representatives of Texprocil again requested access to the non-confidential file in April 1999, but this was refused in May 1999.[19]

2.14 On 29 June the European Community provided further written answers to part of the questions raised by India (Annex 14).

III. CLAIMS RELATED TO THE DUMPING DETERMINATION AND THE EXPLANATION THEREOF

A. ARTICLE 2.2.2: DETERMINATION OF SG&A AND PROFIT AMOUNTS

3.1 Summary: the EC misapplied Article 2.2.2 by resorting to the option laid down in Article 2.2.2(ii), and by misapplying this option (**claim 1**). The EC failed to properly explain its reasoning at the provisional stage and thus acted inconsistently with Article 12.2.1 (**claim 2**). The EC further failed to properly explain its determination at the definitive stage and thus acted inconsistently with Article 12.2.2 (**claim 3**). The EC further applied the SGA and profit amounts thus determined even though these amounts were clearly not 'reasonable' and therewith acted inconsistently with Article 2.2 (**claim 4**). The EC failed to properly explain why it considered the amounts determined to be 'reasonable', and consequently acted inconsistently with Article 12.2.1 (**claim 5**) and 12.2.2 (**claim 6**).

1. Facts[20]

3.2 The European Commission (the investigating authority) decided to resort to sampling of the Indian exporters. The Notice of initiation (Annex 7) as well as the European Commission's letter of 13 September 1996 (Annex 15) requested data for the sampling selection. The relevant part of the notice of initiation stated the following:

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any confidentiality by disclosing in those proceedings information acquired during the consultations. Indeed, in our view, the very essence of consultations is to enable the parties to gather correct and relevant information, for purposes of assisting them in arriving at a mutually agreed solution, or failing which, to assist them in presenting accurate information to the panel. It would seriously hamper the dispute settlement process if the information acquired during consultations could not subsequently be used by any party in the ensuing proceedings."

(Emphasis added)

This part of the Panel report was not overturned by the Appellate Body.

[19] Annex 78.

[20] These facts are also relevant in the context of some of the other claims (notably, those concerning Article 2.4.2).

" . . . In order to enable the Commission to decide whether sampling is necessary and, if so, to select a sample, exporters, or representatives acting on their behalf, are hereby requested to make themselves known by contacting the Commission and by providing the following information . . . :

— *the turnover in local currency of cotton-type bed linen sold for export to the Community during the period 1 July 1995 to 30 June 1996,*

— *the turnover in local currency of cotton-type bed linen sold on the domestic market during the period 1 July 1995 to 30 June 1996, . . ."*

The relevant part of the letter requested the same information:

" . . . To facilitate the selection of a sample, each producer/exporter in your country is requested to provide the following information by 28.9.96 at the latest:

— *the turnover in local currency of cotton-type bed linen sold for export to the Community during the period 1 July 1995 to 30 June 1996;*

— *the turnover in local currency of cotton-type bed linen sold on the domestic market during the period 1 July 1995 to 30 June 1996. . . ."*

3.3 On 26 September 1996 the legal representatives of the Indian exporters submitted to the European Commission information in connection with the above.[21] The relevant part of that letter (Annex A) can be summarized as follows:

Ser No	Name	Export quantity	%	Export value	%	Local quantity	Local value	Willingness for sample
64	Prakash	1726000	18.48	427484000	18.63	-	-	Yes
15	Madhu	902989	9.67	244630080	10.66	-	-	Yes
27	Omkar	915321	9.8	205447090	8.95	-	-	Yes
73	Bombay Dyeing	748000	8.01	150800000	6.57	465000	1006000000	Yes
4	Hindoostan	418576	4.48	66484958	2.90	-	-	Yes
16	Standard	71090	0.76	26070000	1.14	87000	24992000	Yes

The respective stages of production of these companies were as follows:

Ser No	Name	Stages of Production
64	Prakash	SP-WV
15	Madhu	MA-PA
27	Omkar	TR-JW
73	Bombay Dyeing	SP-WV-DY-PT
4	Hindoostan	SP-WV-DY-PT-MA-PA
16	Standard	SP-WV-DY-PT-JW

3.4 In addition it was mentioned in the cover letter attached in Annex 16 that the company Jindal had an export sales quantity of 93,492 kgs and an export sales value of 217,687,914 and production stage TR. It was also mentioned in this cover letter that the company Jindal had no domestic sales.

[21] Please refer to Annex 16.

3.5 On 27 September 1996 the legal representatives of Texprocil submitted further information from the companies regarding the sample.[22] The relevant attachments from the various companies were as follows:

"No 15 Madhu Industries . . .
1. Turnover . . . for export to the community . . . is Rs 24,46,30,080 and Kgs 9,02,989 (detail statement enclosed).
2. The Turnover . . . of bedlinen sold on the domestic market . . . is NIL."

"No 16 Standard Mills . . .
I. Turnover . . . of bedlinen sold for export to the community . . . Kgs 71090, Value Lac Rs. 260.7
II. The turnover of bedlinen sold on the domestic market . . . Kgs 87000, Value Lac Rs 249.92"

"No 27 Omkar Exports . . .
6. . . .turnover of . . . bed linen exported to the EC . . . Kgs 915321, Rupees 20,54,47,090
7. . . .turnover of . . . bed linen sold in India . . .: NIL"

"No 64 Prakash Cotton . . .
1. . . . . turnover . . . for export to the Community . . . Rs 4274.84 Lacs and Qty 17.260 Lacs Kgs. . . .
2. . . . turnover . . . of bedlinen sold on domestic market . . .: NIL"

"No 73 Bombay Dyeing . . .
5. . . . turnover of bed linen to the EC: 748 metric tonnes, Rs 150.8 Millions
6. turnover of cotton type bed linen sold in India; 465 metric tonnes, Rs 100.6 Millions"

3.6 On 30 September 1996 Texprocil's legal representatives submitted a letter with further information regarding the sample selection including the relevant data from the company Anglo-French.[23] The attached table contained the following information regarding Anglo-French:

Ser No	Name of the Exporter	Export to EC (Kgs)	Export to EC (Rs)	Local qty/ Local value	Willingness for sample
26	Anglo French	9,02,467	161.11 Million Rs	0.25% of total turnover	Yes

The production stages of Anglo-French were SP/WVG/DY/PT/MA/PA.

3.7 The relevant part of the attached statement of Anglo-French mentioned the following:

"page 42 Anglo French Textiles . . .
1) For the period . . . we have exported 9,02,467 kgs of Cotton bed Linen to the European Community and the total invoice value of this quantity is Indian Rs 161.11 million.
2) With respect to sales of Cotton Bed Linen in the Domestic market for the period . . . we wish to bring to your kind attention that we are selling Bed Linen qualities only in the Export market, and that the value of Bed Linen sold in the domestic market will be

[22] Please refer to Annex 17.
[23] Annex 18.

less than 0.25 per cent of our total turnover of around Indian Rs.1,200 million, and hence our turnover for Cotton Bed Linen in the Domestic market will be less than Indian Rs.3.00 million. . . .”

3.8 On the basis of the above information the EC proposed a sample on 8 October 1996 (Annex 19). The European Commission’s letter stated the following:

“As it has already been discussed during our meeting of 1 October 1996 the following criteria should be taken into account in the selection of the sample:
1. size of company with regard to export sales to the EU;
2. size of company with regard to domestic sales;
3. stages of production performed by the company.

On the basis of the above criteria the Commission is proposing the following companies to be included in the sample:

(1) Prakash Cotton Mills Ltd;
(2) Madhu Industries Ltd;
(3) Jindal Worldwide Ltd;
(4) Anglo French Textiles;
(5) The Bombay Dyeing & Manufacturing Co. Ltd.

As reserve companies the Commission is proposing Omkar Exports and Standard Industries Ltd.

Due to the strict time constraints, we would appreciate any comments on our proposal by tomorrow the 9 October 1996 at 16:00 at the latest.”

3.9 In its response dated 9 October 1996 Texprocil’s legal representatives made a counterproposal[24] on the basis of suggestions made by Texprocil (attached to the same fax):

“You will note that we propose that the sample be changed slightly as follows:
1. Prakash Cotton Mills
2. Bombay Dyeing & Mfg
3. Standard Industries
4. Hindoostan Spg & Wvg Mills
5. Madhu Industries
Reserve:
1. Anglo French Textiles
2. Omkar Exports”

3.10 On 10 October 1996 the legal representatives reiterated once again in writing their preference for the inclusion of Standard Industries in the main sample:[25]

“Standard Industries would be more appropriate to be included as a fourth company.”

3.11 On 11 October 1996 the EC finally selected the sample, excluding Standard from the main sample:[26]

[24] Please refer to Annex 20.
[25] Please refer to Annex 21.

". . . we do not consider it appropriate to include Standard Industries Ltd in the sample because of its minor export sales to the EU during the investigation period. Nevertheless we insist on maintaining this company in the reserve because of its significant domestic sales."

3.12 The final sample thus selected included Prakash, Madhu, Omkar Exports ["Omkar"], Anglo-French, and Bombay Dyeing. The companies included in the reserve sample were Jindal and Standard Industries.

3.13 Texprocil and its legal representatives never agreed to this sample. Nevertheless, the Indian exporters co-operated to the best of their ability with the investigating authorities. On-the-spot verifications took place in India in January and February 1997.

3.14 On 2 June 1997 the EC provided provisional general disclosure.[27] As far as the dumping determination is concerned, this general disclosure included the same considerations as the provisional Regulation. The provisional Regulation provided in relevant part that:

"(15) In view of the large number of exporters in the countries concerned, the Commission decided to apply sampling techniques in accordance with Article 17 of the basic Regulation.

In order to enable the Commission to select a sample, exporters and representatives acting on their behalf, were, pursuant to Article 17(2) of the basic Regulation, requested to make themselves known within three weeks of the initiation of the proceeding and to provide basic information on their export and domestic turnover, the stages of production performed and the names and activities of all related companies in the bed linen sector. The authorities of the countries concerned were in this context also contacted by the Commission.

2. Pre-selection of the sample

(16) The companies which identified themselves, provided the requested information within the three weeks period and had exported the product concerned to the Community during the investigation period, were considered as cooperating companies and were taken into account in the selection of the sample.

These companies represented approximately 100 per cent, 82 per cent and 77 per cent of the total exports to the Community from Egypt, India and Pakistan respectively.

(17) The companies which were not finally retained in the sample, were informed that any anti-dumping duty on their exports would be calculated in accordance with the provisions of Article 9(6) of the basic Regulation, i.e. without exceeding the weighted average margin of dumping established for the companies in the sample.

(18) The companies which did not make themselves known within the three weeks period were considered as non-cooperating companies.

3. Selection of the sample

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[26] Please refer to Annex 22.
[27] Please refer to Annex 23.

(19) For all the countries concerned, the selection of the sample was made in agreement with the representatives of the companies, associations and/or governments concerned.

(20) The companies selected in the sample and which fully cooperated with the investigation were attributed their own dumping margin and individual duty rate.

(21) The Commission also selected reserve companies which though having to reply to the questionnaire would only be investigated in the event that companies in the main sample would subsequently refuse to cooperate.

These companies were also informed that any anti-dumping duty on their exports would be calculated in accordance with the provisions of Article 9(6) of the basic Regulation unless they were selected to replace a company in the original sample in which case they would have their own dumping margin and individual duty rate.

4. Individual examination of companies not selected in the sample

(22) Seven co-operating companies not selected in the sample requested the calculation of individual margins of dumping and accompanied this request with a reply to the questionnaire within the deadlines set for this purpose. In accordance with Article 17(3) of the basic Regulation, their requests, however, could not be accepted in the current investigation since the number of exporters was so large that individual examinations would have been unduly burdensome and prevented completion of the investigation in good time. The seven companies in question were informed accordingly.

D. DUMPING

1. Normal value

(a) India

1. (23) In accordance with Article 2(2) of the basic Regulation, the Commission first examined whether global domestic sales of cotton-type bed linen by each exporter/producer were representative, i.e. whether the total volume of such sales was greater than or equal to 5 per cent of the total volume of the corresponding export sales to the Community.

This assessment revealed that only one exporter/producer had representative sales of cotton-type bed linen on the domestic market during the investigation period.

(24) The Commission then examined whether the different product types exported to the Community were sold in representative quantities on the domestic market. In this context, the Commission found that domestic and export types which had similar size, weaving construction, finish of fabric and final presentation were comparable products.

Domestic sales of a particular type were considered as sufficiently representative when the volume of that type sold on the domestic market during the investigation period represented 5 per cent or more of the total volume of the comparable type sold for export to the Community.

For the sole company with representative global domestic sales, this assessment revealed that five types of cotton-type bed linen exported to the Community had also been sold in representative quantities on the domestic market during the investigation period.

(25) The Commission subsequently examined whether the domestic sales of each of the five representative types of this company could be considered as being made in the ordinary course of trade pursuant to Article 2(4) of the basic Regulation.

It was found that the five types in question had been sold at a loss i.e. at prices below cost of production plus selling, general and administrative costs (hereafter 'SG& A'). Therefore, it was considered that these types were not sold in the ordinary course of trade and that the domestic prices did not provide an appropriate basis for establishing normal value.

(26) For all types sold for export to the Community by all companies normal value had, therefore, to be constructed in accordance with Article 2(3) of the basic Regulation.

The constructed value was determined by adding to the cost of production of the exported types of each company, a reasonable amount for SG&A and a reasonable amount for profit.

2. Since only one company had representative global domestic sales and the profitable domestic types represented less than 80 per cent but more than 10 per cent of total domestic sales, the amount for SG&A and profit used for the construction of normal value for all companies investigated were those respectively incurred and realised by this company, in accordance with Article 2(6) of the basic Regulation.

. . .

2. Export price

(37) In general, sales of cotton-type bed linen made by the exporters/producers on the Community market were made to independent customers. Consequently the export price was established by reference to the prices actually paid or payable in accordance with Article 2(8) of the basic Regulation.

. . .

3. Comparison

3. (39) For the purpose of ensuring a fair comparison between normal value and export price, due allowances in the form of adjustments were made where applicable and justified for differences affecting price comparability in accordance with Article 2(10) of the basic Regulation.

The adjustments made were as follows:

India: allowances for differences in import charges and indirect taxes, transport and handling, ocean freight, ocean insurance, packing costs, credit and commissions;

. . .

(40) The Indian exporter/producer with representative global domestic sales requested an adjustment to normal value of 5 per cent for differences in levels of trade based on the fact that export sales to distributors in the Community are made in much larger quantities than sales through three distinct sales channels on the domestic market (exclusive wholesalers for branded products, other wholesalers and industrial users).

As a result of this request, the Commission examined whether such an adjustment could be granted under Article 2(10) of the basic Regulation.

An adjustment for differences in quantities was not justified since no indication was found that distributors in the domestic market had benefited from discounts or rebates because of the larger quantities allegedly purchased by them.

An adjustment for differences in levels of trade could not be granted either, since the company concerned limited itself to refer to the different distribution channels in the domestic and export markets but failed to show that the alleged difference between the levels of trade of the export price and the normal value had affected price comparability as demonstrated by consistent and distinct differences in the functions and prices between the different levels of trade in the domestic market.

(41) The same company also requested an adjustment to normal value of 10 per cent for differences in brand promotion expenses on the basis that it was incurring excessive promotion expenses when selling to its exclusive domestic wholesalers which were not incurred in its exports to the Community. In order to evaluate whether such a difference in promotion expenses borne could have affected price comparability, the Commission looked at the total of SG&A incurred by this company with respect to domestic sales to exclusive wholesalers which bought only branded products and found that it was the same as that incurred on domestic sales to other wholesalers which bought non-branded products only. Furthermore, no evidence was supplied that customers had been consistently paying higher prides [sic] *for branded products. Since exports to the Community of the company concerned consisted of non-branded products, it was concluded that brand promotion expenses was not a factor affecting price comparability. Consequently, the request for such an adjustment was also rejected.*

(42) Finally, it should be noted that the quantification of both adjustments requested (see recitals (40) and (41)) was not supported by any verifiable data and was found to exceed the total level of SG& A expenses incurred by the company concerned during the investigation period.

(43) All Indian exporters/producers claimed an adjustment for credit granted in respect of export sales on the basis of their actual credit costs. However, since the basic Regulation provides in Article 2(10)(g) that such adjustment shall be made when the credit granted is a factor taken into account in the determination of prices charged, the Commission calculated this adjustment on the basis of the credit agreed at the time of sale, i.e. cost calculated on payment terms/number of days and prevailing interest rate.

(44) The Indian exporter/producer with representative global domestic sales claimed an adjustment for credit costs in respect of domestic sales. This had to be rejected on the ground that there was no evidence during the investigation period that any payment terms had been

agreed at the time of sale. In fact the investigation revealed that the delivery of the goods always took place after payment.

. . .

4. Dumping margins

(a) General methodology

(46) In general, weighted average constructed normal value by type was compared with weighted average export price by type.

. . .

(b) Methodology for groups of companies

(47) It has been the consistent practice of the Commission to consider related companies or companies belonging to the same group as one single entity and, therefore, to establish for all of them one single dumping margin. Indeed, calculating individual dumping margins might encourage circumvention of anti-dumping measures, thus rendering them ineffective, by enabling related producers to channel their exports to the Community through the company with the lowest individual dumping margin.

In accordance with this practice, related exporters/producers belonging to the same group were regarded as one single entity and attributed one single dumping margin. For exporters/producers belonging to a same group it was decided to first calculate a dumping margin per company. Then, a weighted average of these dumping margins was established and attributed to the group as a whole.

(c) Specific application

(48) The above methodology was applied to two Indian and two Pakistani groups of companies. However, with regard to both one Indian and one Pakistani group, the exports to the Community of one company of each group were considered minor and have not been taken into account in the calculations.

. . .

(d) Dumping margins for companies in the sample

(49) The comparison, as described under recital (39) and (46) to (48), showed the existence of dumping in respect of all companies which fully cooperated in the investigation. The provisional dumping margins expressed as a percentage of the cif import price at the Community frontier are the following:

India

— Anglo French Textiles,	*27.3 %,*
— The Bombay Dyeing Manufacturing Co., Ltd,	*9.4 %,*
— Nowrosjee Wadia Sons Ltd,	*9.4 %,*
— Madhu Industries Ltd,	*19.5 %,*

— Madhu International, 19.5 %,
— Omkar Exports, 16.5 %,
— Prakash Cotton Mills Ltd, 3.9 %;
. . .

(e) Dumping margin for cooperating companies not in the sample

(50) Cooperating companies not selected in the sample (see recitals (17) and (21)) were attributed the average dumping margin of the companies in the sample, weighted on the basis of their export turnover to the Community. In accordance with Article 9 (6) of the basic Regulation, when calculating this average dumping margin de minimis margins established have been disregarded. Expressed as a percentage of the cif import price at the Community frontier, these provisional dumping margins are the following:

— India13.6 per cent,
. . .

(f) Dumping margin for non-cooperating companies

(51) For non cooperating companies a dumping margin was determined on the basis of the facts available in accordance with Article 18 of the basic Regulation. Since the level of cooperation was high, it was considered appropriate to set the dumping margin for non cooperating companies in each country concerned at the level of the highest dumping margin established for a company in each sample because it would constitute a bonus for non-cooperation to assume that the dumping margin attributable to exporters/producers which did not make themselves known is lower than the highest found for a cooperating exporter/producer.

These provisional dumping margins expressed as a percentage of the cif import price at the Community frontier, are the following:
— India 27.3 per cent,
. . .

(130) In all but one case, the undercutting margins calculated as a percentage of free-at-the-Community-frontier price were higher than the respective dumping margins established for exports in the sample and there was therefore, in accordance with the lesser duty rule as set out in Article 7 (2) of the basic Regulation, no need to establish injury elimination levels based on the difference between the export price and the cost of production of the Community producers plus a minimum amount of profit required to ensure the viability of the Community industry.

However, in the case of one exporter the undercutting margin was slightly lower than the respective dumping margin and therefore, in order to calculate the amount of duty, an injury elimination level was established by comparing the export prices to the result of adding to the Community cost of production a very conservative profit margin of 5 per cent on turnover. The injury elimination level thus established was higher than the dumping margin. Therefore, in all cases, the provisional duties, for exporters in the sample, should be limited to the dumping margins . . .”

3.15 The EC also provided company-specific disclosures[28], the relevant excerpts of which are quoted hereunder.

3.16 For Bombay Dyeing (and its related company Nowrosjee Wadia) the relevant part of the disclosure reads as follows:

> *"Although Bombay Dyeing had representative global domestic sales of the product concerned, it had no representative domestic sales made in the ordinary course of trade during the investigation period (see section C.1.(a) of the Disclosure Document)* [corresponding to recital (23) of the provisional Regulation]. *Its related company Nowrosjee Wadia had no domestic sales at all. Normal value had, therefore, to be constructed for each type of bed linen exported to the EU during the investigation period for both companies in accordance with Article 2(3) of Regulation (EC) No 384/96.*
>
> . . .
>
> *2. <u>NORMAL VALUE</u>*
>
> *As indicated in section C.1.(a) of the Disclosure Document, the five representative domestic types of Bombay Dyeing (D14, D22, D36, D37, D51) were sold in the domestic market at a loss. Consequently, constructed values have been calculated for all export types reported in the ECSALUR listings of both companies.*
>
> *= cost of production (COP) of exported types plus selling, general and administrative expenses (SG&A) incurred in domestic sales plus profit realized on domestic sales.*
>
> **COST OF PRODUCTION: use of COP as given in ECCOP - Annex III I.2.f . . .*
>
> **SG&A: the amount for SG&A used was based on the average SG&A expenses incurred by Bombay Dyeing on its global domestic bed linen sales during the investigation period and it is 10.39 per cent on turnover (see attached summary of DMPROFIT - Annex III 1.2.g).*
>
> **PROFIT: the profit margin used was the weighted average profit margin realized by the same company on its global domestic sales of profitable sales of bed linen and it is 18.65 per cent on turnover (see attached summary of DMPROFIT - Annex III 1.2.g.) . . .*
>
> *<u>NORMAL VALUE</u> = COP/(1-0.2904) = <u>COP/0.7096</u>*
>
> *ALLOWANCES on Normal Value:*
> *actual packing cost*
>
> *<u>REMARKS</u>:*
>
> *As explained in section C.3 of the Disclosure Document, Bombay Dyeing failed to justify the adjustments claimed on Normal Value for level of trade, brand promotion and credit costs . . ."*

[28] Attached as Annex 24.

3.17 For the other four companies in India, the relevant part of the disclosure are reproduced hereunder.

3.18 For Prakash:

"NORMAL VALUE: Constructed value (no domestic sales of the product under investigation)

= cost of production (COP) of exported types plus a reasonable amount for selling, general and administrative expenses (SG&A) and a reasonable amount for profit.

**COST OF PRODUCTION: Use of COP as given in Exhibits 8 . . .*

**SGA+PROFIT: the amount for SG&A and profit used is 29.04 per cent on turnover . . .*

NORMAL VALUE = COP/(1-(29.04%)) = COP/(1-0.2904) = COP/0.7096 . . ."

3.19 For Omkar Exports:

"NORMAL VALUE: Constructed value (no domestic sales of the product under investigation)

= cost of production (COP) of exported types plus a reasonable amount for selling, general and administrative expenses (SG&A) and a reasonable amount for profit.

**COST OF PRODUCTION: Use of COP as given in Exhibit 5A of the on-the-spot investigation (statement showing COP per set)*

**SGA+PROFIT: the amount for SG&A and profit used is 29.04 per cent on turnover*

NORMAL VALUE = COP/(1-(29.04%)) = COP/(1-0.2904) = COP/0.7096 . . ."

3.20 For Madhu Industries:

"NORMAL VALUE: Constructed value (no domestic sales of the product under investigation)

= cost of production (COP) of exported types plus a reasonable amount for selling, general and administrative expenses (SG&A) and a reasonable amount for profit.

**COST OF PRODUCTION: Use of COP as given in Exhibit 3 of the on-the-spot investigation . . .*

**SGA+PROFIT: the amount for SG&A and profit used is 29.04 per cent on turnover*

NORMAL VALUE = COP/(1-(29.04%)) = COP/(1-0.2904) = COP/0.7096 . . ."

3.21 And for Anglo French:

"The company had domestic sales of the product concerned during the investigation period but they were not considered representative (2.10 per cent of sales volume to the Community). Normal value had, therefore, to be constructed for each type of bed linen exported to the EU

during the investigation period in accordance with Article 2(3) of Regulation (EC) No 384/96.

Constructed normal value = cost of production (COP) of exported types plus a reasonable amount for selling, general and administrative expenses (SG&A) and a reasonable amount for profit.

COST OF PRODUCTION: *Use of COP as given in ECCOP.XLS file*

SGA+PROFIT: *the amount for SG&A and profit used is 29.04 per cent on turnover . . .*

CONSTRUCTED NORMAL VALUE = COP/(1-(29.04%)) = COP/(1-0.2904) = COP/0.7096"

3.22 In response to these disclosures, a number of companies submitted comments. Anglo-French and Madhu submitted among others the following comments.

3.23 Anglo-French:[29]

"We note that since our domestic sales of the product concerned for the investigation period was only 2.10 per cent of sales volume to the Community, the same was not considered representative. Hence, normal value was constructed for each type of Bed linen exported to the European Union. In so constructed normal value [sic]*, we note with regret that extremely high Selling, General and Administrative expenses and a margin of profit of 29.04 per cent on turnover has been added to our cost of production!*

The Selling, General and Administrative expenses of 10.39 per cent on sales price is based on global calculations for dissimilar products sold in the domestic market by one of the Indian producers, presumably Bombay Dyeing, who sell their products through chain stores and under specific Brand/Trade names. In fact, Bombay Dyeing is the only Textile Company in India which sell the product concerned through specific chain stores and under specific Brand/Trade names created by vigorous administrative and promotional efforts for over a period of more than 4 decades. In fact, on account of this, Bombay Dyeing would have incurred huge advertisement and other costs which are not at all required by any other Producer for marketing products concerned in India. Further, since the exports are also made to traders without any Brand names, it is unreasonable and unjust to add these additional costs of S, G and A to the cost of production. This will lead to unfair and unjust comparisons.

The Commission Services have also in construction of normal values added a very high percentage of profit margin of 18.65 per cent alleged to be reasonable, earned presumably by Bombay Dyeing on some of its dissimilar domestic products, sold under Brand names to its chain shops. [Article C(1)(a) of disclosure document clearly demonstrates that Bombay Dyeing had only five (5) types which were representative and all of them were not sold in the normal course of trade, and as such disregarded for the purpose of calculation of profit]. We would respectfully submit that such a high margin of profit is not only abnormal, unjust and unimaginable, but also non-existent in the Textile Industry and can be attributed only to a high realisation of a Brand name by the specific Indian producer marketing products through chain stores. Therefore, it is prayed that the additional realisation on account of Brand/Trade

[29] Annex 25.

names by the relevant Indian producer may be discounted to a reasonable level as specified in Article 2(6)(c) of the basic regulations [sic].

We would also like to re-emphasize that if such profits are existent in the domestic market for the product concerned, there would have been no need to export the goods at a profit margin of even less than five percent (5 per cent).

The Commission Services have the responsibility to ensure vide provisions of Article 2(6)(c) that profit margins established shall not exceed the normally realised profit margins incurred by other exporters or producers on sales of the product of the same category in the domestic market of the Country of origin."

3.24 Madhu submitted the following comments to the provisional disclosure:[30]

"(I) <u>NORMAL VALUE:</u>

(A) In construction of normal values very high percentage of S.G. and A. of 10.39 per cent on sales price has been added which is based on global calculations for dis-similar products sold in domestic market by one of the Indian producer presumably Bombay Dyeing who sell their products through chain store and under specific brands/trade name. In fact on account of these two factors Bombay Dyeing is the only textile company in India which sells the product concerned through specific chain stores and under a brand name created by vigorous administrative and promotional efforts including huge advertisement and other costs, which are not at all required for marketing product concerned in India by any other producer. In fact for the product under consideration no such additional effort and cost are normally required by any body else. Further since the exports are also made to traders without any brand name it is unreasonable and unjust to add the additional cost of SG and A which involves higher cost of selling general and administration. This will also lead to an unfair comparison.

(B) The commission services have also in construction of normal value added a very high percentage of profit margin of 18.65 per cent alleged to be reasonable, earned presumably by Bombay Dyeing on some of its dissimilar domestic products, sold under the brand name to the chain shops (Article C(1)(a) of disclosure document clearly demonstrates that Bombay Dyeing had only 5 types which were representative and all of them were not sold in normal course of trade and as such disregarded for the purpose of calculation of profit). Madhu would respectfully submit that such a high margin of profit is not only abnormal, unjust, unimaginable but also non-existent in the textile industry and can be attributed only to a high realisation of brand name by the specific Indian producer marketing products through such chain stores. Therefore it is prayed that the additional realisation of on account of dis similarity of the product marketing by the relevant Indian producer may be discounted to a reasonable level as specified in Article 2(6)(c) of the basic regulations [sic].

The commission services have the responsibility to ensure vide provisions article 2(6)(c) that profit margin established shall not exceed the normally realised profit margin incurred by other exporters or producers on sales of the product of the same category in the domestic market of the country of origin."

[30] Annex 26.

3.25 Texprocil and the companies also filed responses to these disclosures through their legal representatives. Relevant excerpts are as follows:

3.26 Comments made on behalf of Texprocil:[31]

> *"2.2 Apart from the fact that profits were not reliable [as per point 2.1], the Commission Services have acted not in accordance with the law by applying Article 2(6)(a). The application of this Article is not allowed under the current factual circumstances. Hence, Article 2(6)(b) or 2(6)(c) should be applied for the determination of a 'reasonable' profit as per Article 2(3)*
>
> *Apart from the fact that profits were not reliable [as per point 2.1], the Commission Services have also acted not in accordance with the law by applying Article 2(6)(a). The very language of Article 2(6)(a) does not allow a profit to be inferred from one producer only: it should be a "weighted average" of [other] "exporters or producers." A weighted average by its nature can only be inferred from more than one producer. Also the wording exporters or producers makes clear that it was the intention of the legislator that the law of averages be applied so that there is no distortion due to the special status of one single producer or exporter. In the present case the single producer/exporter whose profit margins have been used has a special status as discussed hereinafter.*
>
> *In the view of our client therefore the admonition in Article 2(6)(a) has not been respected. The Commission Services are therefore not allowed to apply Article 2(6)(a) and should apply Article 2(6)(b) or Article 2(6)(c).*
>
> *2.3 Even if the Commission Services insist on applying non-reliable profits as well as Article 2(6)(a), it is submitted that the provisions of Article 2(3) j° 2(6)(c) were not respected. The concept of a profit determined under a "reasonable" method is clearly defined in Article 2(6)(c) and no heed has been given to this provision*
>
> *It is observed by our client that the Commission Services in its current determination have in the construction of the normal values for four companies extrapolated an extra-ordinary profit of 18.65 per cent which was determined on the basis of the profitable sales only of Bombay Dyeing. Such unrealistic and unreasonable profit addition is due to a blind application of only Article 2(6)(a), without any consideration being given to the complete letter of the law and the entire structure of Article 2, most notably Articles 2(3) and Article 2(6)(c).*
>
> *Article 2(3) mandates that in a situation where the normal value is constructed, "a reasonable amount for . . . profits" [emphasis added] should be added. While Article 2(3) itself does not define the concept of 'reasonable', Article 2(6)(c) explicitly provides that a profit which is established under a reasonable method "shall not exceed the profit normally realized . . . in the same general category in the domestic market." Any reasonable profit as per Article 2(3) is therefore mandatorily limited to the profit normally realized in the same general category in the domestic market.*
>
> *The following table shows at a glance which profits are attained by the producers in the same general category of products:*

[31] Annex 27.

Name Company	*Overall*	*Same category domestic*
Anglo-French	*-14.99%*	*5.49%*
Bombay Dyeing	*4.66%*	*12.13%*
Madhu	*4.26%*	-
Omkar	*9.23%*	-
Prakash	*3.5%*	*3.5%*
Average:	*5.41%*	*7.04%*

These profits are the profits as per the P/L, and are therefore the profits which are "normally realized" in the domestic market [Article 2(6)(c)]. Clearly, the profit determined under Article 2(6)(a) is currently exceeding the profit normally realized. It is not allowed under Article 2(6)(c) to deem reasonable a method which applies a profit which exceeds the profit which is realized in the same general category. The profit determined under Article 2(6)(a) should still have undergone the reasonability test of Articles 2(3) j° 2(6)(c). In other words, the profit of 18.65 per cent should mandatorily have been limited to 7.04 per cent. The Commission has therefore acted ultra vires by applying a profit in excess of the maximum which is allowed under Article 2(6)(c).

In case Article 2(6)(b) were to be applied, the lower individual actual amounts [5.49%, 4.26%, 9.23%, 3.5%] as mentioned in the above table should have been applied.

Apart from the legal obligations provided in the basic Regulation it is clear from common sense that a profit of 18.65 per cent is excessive for the textile sector. The profit of 18.65 per cent has resulted from special circumstances, notably the inflatory effect of the 80-10 rule [whereby loss making transactions are excluded] as well as the particular circumstances under which Bombay Dyeing operates. Our client would like to highlight at this stage some of the abnormal, non-representative circumstances which may well have led to such abnormal profits realized by Bombay Dyeing on the domestic market. These facts will also underline as to why Article 2(6)(a) mandates that profits of one single producer alone can never be applied [see also point 2.2]. Bombay Dyeing is a solitary case with its own peculiarities:

- *Channel of sale: Bombay Dyeing sells its products through big chain stores covering the entire country. This contrasts with the normal sales channel through middlemen by other companies;*
- *Product range: Bombay Dyeing through the above-mentioned channel of sales sells a large variety of products which includes inter alia towels, fabric, ready-mades, curtain cloth, furnishing fabrics, bed linen, table linen, etc. This contrasts with the other sample companies which are exclusively dealing with bed linen or, at best, with fabrics;*
- *Brand name: Bombay Dyeing is the only company in India which sells its product under brand name, a brand name created by incurring huge expenditure on infrastructure, maintenance and publicity, resulting in additional profits realized for brand premium;*
- *Direct to end-users: Bombay Dyeing 87.18 per cent of the sales are to the end-user through these retail chain shops and institutional sales which is in contrast to the sales by any other producer whose almost entire sales would be through a number of middlemen.*

Indeed, as a result of the Commission's determination of a profit of 18.65 per cent, the average return on shareholders funds for the companies to which this profit has been applied is excessive, as the following table shows:[32]

[32] Footnote in original: For details we refer to the company-specific comments.

Anglo-French	*165.42%*
Madhu	*159.46%*
Omkar	*131.82%*
Prakash	*201.04%*

2.4 The profit determined is three times higher than the average profit determined for the other countries under investigation. As an alternative it is suggested that the Commission Services apply the w.a. profit margin determined for the other countries

Our client wishes to draw attention to the fact that the profit which is determined reasonable for the other countries under investigation is completely different than the "reasonable" profit determined for India. For comparison purposes we reproduce the profits that are considered "reasonable" in the case of the three other countries under investigation:

Country	*Profit*
Egypt:	*5.8*
Pakistan:	*7.4*
EC:	*5*
Average:	*6.06*

Thus, these facts clearly show that it cannot be reasonably be maintained that 18.64 per cent could be considered to constitute a "reasonable" profit in the sense of the basic Regulation. Indeed, no textile producer in the world would ever make a profit of 18.64 per cent. The current approach is therefore devoid of commercial reality and as shown above in fact violates an essential requirement of the basic Regulation.

It is therefore respectfully requested that the Commission Services seriously reconsider the exorbitant profit that has been applied. Instead, it is suggested that as a reasonable alternative, the average profit of 6.06 per cent be applied. This would also be in accordance with Article 2(6)(c), since 6.06 per cent does not exceed the profit realized in the same general category of profits [7.04%]."

3.27 Texprocil's legal representatives submitted the following comments on behalf of the company Anglo-French:[33]

"2. Dumping Margin

It is respectfully requested that the Commission Services take into account the fact that Anglo-French is a state-owned enterprise. This has important consequences for the amount of profit that is deemed "reasonable" to be added to COP in order to arrive at the constructed normal value.

2.1 The current profit margin that has been applied to Anglo-French cannot be considered "reasonable" for a State-owned enterprise operating in the Textile sector

When determining the "reasonable" profit margin it is respectfully requested that the Commission Services take into account that Anglo-French is a fully state-owned company perhaps the only one dealing in product concerned. It is not a private enterprise and the

[33] Annex 28.

primary aim of Anglo-French is not to make profits. Anglo-French has a social function. Its sole purpose is to provide work and a social safety-net to the people of Pondicherry. About 10,000 people of Pondicherry are dependent on Anglo-French. This amounts to about 5 per cent of the population. Taking into account the families as well, it can safely be assumed that roughly 25 per cent of Pondicherry depends on Anglo-French for a living.

It can also be easily inferred from the P/L that Anglo-French has a different cost and profit structure than the other companies. The labour costs alone represent 27 per cent of the COM since Anglo-French obligatory incurs high minimum wages [as against the usual 9 to 10 per cent for other companies]. The company also works with old machines and a low productivity ratio. The only reason for the existence of the company is to keep the people in Pondicherry employed, not to attain huge business profits.

Anglo-French is therefore completely different from the other companies in India. Nevertheless, the profits that have been applied to Anglo-French are inferred by reference to these other, completely different, privately run companies [through application of Article 2(6)(a)]. Since it is not mandatory to apply the profit by reference to the profit determined as per Article 2(6)(a), the other two options of determining profit are equally valid. In the case of Anglo-French the 18.65 per cent would seem out of line with reality for a Government owned enterprise, especially in the area of textiles.

It is therefore suggested that for Anglo-French, Article 2(6) should therefore be applied by reference to option (c): "any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin." Since Anglo-French is the only State-owned company in India, the most reasonable method would seem to be the profit realized on the domestic market for the product concerned by Anglo-French itself. As would be clear from Annex III 1.2.h.P.L. the profit of the total domestic turnover of the product concerned for Anglo-French is 5.49 per cent which, considering the application of Article 2(6)(c), could be a reasonable amount of profit earned by a State-Owned company. Further, in view of the Commission Services' own determination of a reasonable profit of 5 per cent for the EU, 5.8 per cent for Egypt, and 7.4 per cent for Pakistan, it would be grossly improper to apply a profit margin of 18.65 per cent drawn from a company which is dealing in entirely different types of products, different channels of sale [large retail chain stores], different customers [end-users and institutional] and under a brand name created over 40 years of huge investment and continuous publicity which obviously results in higher profit margins on their products.

Anglo-French also considers the profit margin of 18.65 per cent as unreasonable and beyond scope of Article 2(6) as this would result in a return on shareholders fund of 165.42 per cent during the investigation period as with a shareholders fund of Rs 12.3 crores and turnover of Rs 116.48 crores the resultant net profit margin of 18.65 per cent on turnover would bring 165.42 per cent return to shareholders [detailed calculation with supporting as per Annexure 2]. As such application of 5.49 per cent profit margin would seem to be "reasonable", allowed under Article 2(6)(c), and appropriate for the circumstances of a State-owned company and do justice to the people of Pondicherry."

3.28 The relevant part of the comments submitted by the legal representatives of Bombay Dyeing is as follows:[34]

[34] Annex 29.

"2. <u>The concept of a reasonable profit margin and SG&A</u>

The Commission Services have applied Articles 2(3) jº 2(4) jº 2(5) jº 2(6) in the computation of the constructed normal value.

In this regard our client wishes to emphasize the following points:

1. *Article 2(3) mandates the addition of a "reasonable" profit margin;*
2. *Article 2(3) itself does not provide a definition of "reasonable"; and*
3. *Article 2(6)(c) defines the notion of "reasonable".*

In the view of our client this third step has not been respected. Article 2(6)(c) explains that a "reasonable" method entails that "profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin." This argument will also be provided by Texprocil in further detail hence our client refers also to Texprocil's comments in this regard. However, our client wants to provide the following remarks which, in its view, explain why the profit currently determined is not reasonable:

In the domestic market Bombay Dyeing markets its products under a brand name and through exclusive chain stores thereby necessitating higher administrative and operational and substantial advertising costs exclusively for brand/trade creation incurred over a period of four decades and as such should not be included in the channel selection for profit determination. It is the view of our client that the only channel which is comparable to the export side is the wholesale channel. The industrial and RDS channel represent sales to end-users who buy the goods for own consumption and hence are prepared to pay for the brand name and therefore resulting into a higher profit realization. The fact remains that the institutional buyers, i.e. hotels, Air India, Indian Airlines, etc., are the actual users and they buy directly from the company on a payment of the market prices whereby the higher profits are realized. The middleman, i.e. the wholesaler and semi-wholesaler does not buy for own consumption and hence cannot be induced to pay an extra premium for the brand. This fact remains indisputable though on account of certain misinformation in the questionnaire there appears to be a misunderstanding with the Commission Services that this industrial channel is the one synonymous to the wholesaler and not to the end-user/customer. Bombay Dyeing hopes that <u>facts</u> cannot be changed by any amount of defective explanation or misunderstandings on either side.

The fact that the SGA percentages expressed as a percentage of T/O seem similar [EC's observation] is not completely correct since in the case of Bombay Dyeing these percentages are calculated first as a percentage of production cost. Only later these percentages are expressed as a percentage of turnover; our client refers to Annexure 2 with details in this regard. From Annexure 2 it is clear that the SGA for the RDS channel as a percentage of production cost is significantly higher [14.62%] than for the wholesale channel [6.26%].

We should further point out that in view of the mandatory reasonability requirement, the profit established for Bombay Dyeing is not reasonable when compared with the profit determined to be reasonable for other countries. While for Egypt, Pakistan, and the EU the Commission Services have determined profits of respectively 5.8 per cent, 7.4 per cent, 5 per cent to be reasonable, a profit of 18.65 per cent for Bombay Dyeing can impossibly be

considered "reasonable". 18.65 per cent is more than three times as high as the profit for the three other entities under investigation. Moreover, it should be pointed out that the "profit normally realized . . . on sales of products of the same general category in the domestic market" is 12.13 per cent [see P/L]. Again, this latter profit sharply contrasts with the 18.65 per cent determined to be reasonable by the Commission Services. It is respectfully requested that not only the letter, but also the spirit and structure of the law be applied when determining a "reasonable" profit margin. It is clear that it could never have been the intention of the legislator that excessive profits are determined, resulting from special circumstances on the domestic market [see above]. The current application of the 80-10 rule to all three channels has resulted in a highly artificial profit margin which is devoid from commercial reality.

. . .

3.d. Level of Trade

As for the statement that an allowance for level of trade could not be granted in view of the fact that this, compounded with the other allowances, would exceed the total SGA expenses would be somewhat unfair in view of the specific nature of a level of trade allowance. Level of trade can clearly be a factor in the difference in profit level incurred on domestic and export. We refer to the Ring binder mechanism proceeding where this fact was recognized and the level of trade allowance was linked to and quantified on the basis of the profit. On this basis, and in view of the excessive domestic profit that has been determined for Bombay Dyeing, an allowance for differences in level of trade would seem reasonable."

3.29 The following is an excerpt of the relevant comments made by the legal representatives on behalf of Omkar:[35]

"1. The addition of a 18.65 per cent profit margin cannot be considered "reasonable." The concept of a profit determined under a "reasonable" method is clearly defined in Article 2(3) (c) and no heed has been given to this Article. Moreover, the profit determined is three times higher than the average profit determined for the other countries under investigation

It is observed by our client that the Commission Services in its current determination have in the construction of the normal value extrapolated to Omkar an extra-ordinary profit which was determined for another company. It is clear from the P/L of Omkar that its profit normally realized is 9.23 per cent [Annex III-I.2.h]. Not disturbed by this observation the Commission Services have mechanically applied a profit margin which is five times higher than the 3.5 per cent profit which is normally realized. Such irrealistic and unreasonable profit addition is due to a blind application of Article 2(6)(a), without any consideration being given to the spirit and structure of the law, most notably Articles 2(3) and Article 2(6)(c).

Article 2(3) mandates that in a situation where the normal value is constructed, "a reasonable amount for . . . profits" [emphasis added] should be added. While Article 2(3) itself does not define the concept of reasonable, it is clear that Article 2(6)(c) explicitly provides that a profit which is established under a reasonable method "shall not exceed the profit normally realized . . . in the same general category in the domestic market." No

[35] Annex 30.

product could therefore be more reasonable than a profit which is in line with the overall profit of the P/L of the company itself. In the case of our client this is 9.23 per cent."

3.30 An excerpt of the comments on behalf of Madhu is as follows:[36]

"1. The addition of a 18.65 per cent profit margin cannot be considered "reasonable." The concept of a profit determined under a "reasonable" method is clearly defined in Article 2(3) (c) and no heed has been given to this Article. Moreover, the profit determined is three times higher than the average profit determined for the other countries under investigation

It is observed by our client that the Commission Services in its current determination have in the construction of the normal value extrapolated to Madhu an extra-ordinary profit which was determined for another company. It is clear from the P/L of Madhu that its profit normally realized is 4.26 per cent [Annex III-I.2.h]. Not disturbed by this observation the Commission Services have mechanically applied a profit margin which is four and one half times higher than the 4.26 per cent profit which is normally realized. Such irrealistic and unreasonable profit addition is due to a blind application of Article 2(6)(a), without any consideration being given to the spirit and structure of the law, most notably Articles 2(3) and Article 2(6)(c).

Article 2(3) mandates that in a situation where the normal value is constructed, "a reasonable amount for . . . profits" [emphasis added] should be added. While Article 2(3) itself does not define the concept of reasonable, it is clear that Article 2(6)(c) explicitly provides that a profit which is established under a reasonable method "shall not exceed the profit normally realized . . . in the same general category in the domestic market." No product could therefore be more reasonable than a profit which is in line with the overall profit of the P/L of the company itself. In the case of our client this is 4.26 per cent.

Apart from this legal admonition provided in the basic Regulation it is clear from common sense that a profit of 18.65 per cent is excessive for the textile sector. The profit of 18.65 per cent has resulted from special circumstances, notably the inflatory effect of the 80-10 rule [whereby loss making transactions are excluded] as well as the particular circumstances under which Bombay Dyeing operates."

3.31 On behalf of Prakash the following comments were submitted:[37]

"1. The addition of a 18.65 per cent profit margin cannot be considered "reasonable." The concept of a profit determined under a "reasonable" method is clearly defined in Article 2(3) (c) and no heed has been given to this Article. Moreover, the profit determined is three times higher than the average profit determined for the other countries under investigation

It is observed by our client that the Commission Services in its current determination have in the construction of the normal value extrapolated to Prakash an extra-ordinary profit which was determined for another company. It is clear from the P/L of Prakash that its profit normally realized is 3.5 per cent [Annex III-I.2.h]. Not disturbed by this observation the Commission Services have mechanically applied a profit margin which is five times higher

[36] Annex 31.
[37] Annex 32.

than the 3.5 per cent profit which is normally realized. Such irrealistic and unreasonable profit addition is due to a blind application of Article 2(6)(a), without any consideration being given to the spirit and structure of the law, most notably Articles 2(3) and Article 2(6)(c).

Article 2(3) mandates that in a situation where the normal value is constructed, "a reasonable amount for . . . profits" [emphasis added] should be added. While Article 2(3) itself does not define the concept of reasonable, it is clear that Article 2(6)(c) explicitly provides that a profit which is established under a reasonable method "shall not exceed the profit normally realized . . . in the same general category in the domestic market." No product could therefore be more reasonable than a profit which is in line with the overall profit of the P/L of the company itself. In the case of our client this is 3.5 per cent."

3.32 Hearings were held on 18 July 1997 during which the above arguments were explained orally.

3.33 In response to the above-cited comments submitted in writing and during the hearing, the Commission Services provided replies in the definitive disclosure documents of 3 October 1997.[38] With respect to the text of the general disclosure we refer to the definitive Regulation[39] which contains—as far as the dumping determination is concerned—the same text. With respect to the company-specific disclosures, the relevant excerpt is similar for each of the five sample companies:

"Please find set out below the essential elements that will assist you in understanding the dumping calculations we have made in this case . . . These explanations will complement the remarks contained in the general disclosure document . . .

2. Normal value

No changes.

. . .

— *SGA*
No changes.
— *Profit*
No changes . . ."

3.34 On 13 October 1997 all companies submitted final disclosure comments.[40] From these comments the following observations from Bombay Dyeing may be highlighted:

"2.2 The concept of a 'reasonable' profit: Article 2(3) provides that in CNV a reasonable amount of profit [and SGA] should be added to COM. It is respectfully submitted that even if such profit is inferred on the basis of the method of Article 2(6)(a), the qualification of reasonableness should still apply. In this regard Article 2(6)(c) provides sufficient qualification and explanation of when a profit can be considered 'reasonable.' Under this logic the current profit, although established under 2(6)(a), is not 'reasonable' as mandated by Article 2(3) and defined in Article 2(6)(c). It is respectfully requested that the Commission Services look into this matter."

[38] Annex 33.
[39] Please refer to Annex 9.
[40] Annex 34: Anglo-French; Annex 35: Bombay Dyeing; Annex 36: Omkar; Annex 37: Madhu; Annex 38: Prakash.

3.35 As far as this issue is concerned, the Commission Services in their reply of 17 October 1997 to Bombay Dyeing (Annex 39) merely referred to the definitive disclosure documents. Except for a correction for certain selling expenses previously not granted, the Commission Services made no changes to the dumping margin calculations.[41]

3.36 In the definitive Regulation[42] the EC provided the following comments on the issue:

"D. DUMPING

1. Normal value

(a) Methodology for the construction of normal value

. . .

(d) Domestic profit margin

(18) All Indian exporting producers contested the use of the actual profit margin realized by one Indian company on its representative profitable domestic sales in the construction of normal value for other Indian companies. They argued that this profit margin is exceptionally high because, to a great extent, it relates to domestic sales of branded products and that since export sales always concerned non-branded products, such domestic sales do not permit a proper comparison within the terms of Article 2(3) of the basic Regulation. Four of these exporting producers also argued that this profit is not calculated by reference to the weighted average profits of other exporters or producers as provided for in Article 2(6)(a) of the basic Regulation, but corresponds to only one exporting producer. It was further claimed in this respect that, in order to ensure that the amount for profits used is reasonable, the profits realised on sales of products of the same general category in India should in any event not be exceeded.

It should be noted that the profit margin used in constructing normal value corresponds to the weighted average profit realized on domestic sales of profitable types of branded and non-branded products by the Indian company concerned and that, had this claim been accepted, this would have been to the disadvantage of the producers, the profit margin used being lower than the profit margin realized by the same company solely on its domestic sales of non-branded products.

With regard to the use of the profit margin of only one company, it should be recalled that the investigation has been restricted to a sample of exporting producers in accordance with Article 17 of the basic Regulation and that the vast majority of the cooperating Indian companies are export oriented companies with no domestic sales of the like product. The Commission selected for the sample five Indian exporting producers two of which had declared at the time of the selection that they had made domestic sales of the like product. However, as indicated in recital 23 of the provisional Regulation, the investigation revealed that only one had representative domestic sales of the like product during the investigation period. Moreover, the reference in Article 2(6)(a) of the basic Regulation to a weighted

[41] See also recital (22) of the Regulation imposing definitive measures. As an example, the letter of the Commission Services of 17 October 1997 (reference 092870) to Prakash is attached as Annex 40.

[42] Please refer to Annex 9.

average amount for profits determined for other exporters or producers, does not exclude that such amount can be determined by reference to a weighted average of transactions and/or product types of a single exporter or producer. Consequently, it is not considered justified to establish the amount for profits in accordance with Article 2(6)(b) or 2(6)(c) of the basic Regulation, as claimed by the Indian companies concerned.

(19) One Indian exporting producer argued that its domestic profitability should have been assessed only on the basis of those types of the product concerned sold both domestically and on the Community market.

It should be noted however, that Article 2(2) of the basic Regulation provides that the sales of the like product intended for domestic consumption shall normally be used to determine normal value if such sales volume constitutes 5 per cent or more of the sales volume to the Community of the product under consideration. Therefore, all domestic sales of the like product intended for domestic consumption were, where appropriate, used to establish the domestic profit margin, whether or not particular product types were also exported to the Community.

It follows from the above that the methodology and the findings as set out in recitals 23 to 36 of the provisional Regulation are hereby confirmed.

. . .

3. Comparison

(21) One Indian exporting producer contested the Commission's refusal to grant an adjustment for level of trade.

Article 2(10) (d) of the basic Regulation requires that it has to be shown that the export price is at a different level of trade from the normal value and that the difference has affected price comparability, which is demonstrated by consistent and distinct differences in functions and prices of the seller for the different levels of trade in the domestic market of the exporting country. Therefore, in the absence of any substantiated evidence to this effect, the claim was rejected as already explained in recital 40 of the provisional Regulation.

(22) The same Indian company also contested the Commission's refusal to grant adjustments to normal value for certain selling expenses.

The request was provisionally rejected because the adjustments requested exceeded the expenses incorporated in the constructed normal value.

The company's renewed request showed the same shortcomings and could not, therefore, be accepted either.

However, it was finally decided to grant an adjustment limited to those expenses (e.g. commissions and freight) which could be identified in the allocation of SG&A expenses as submitted by the company in its response to the Commission's questionnaire and which were verified during the investigation and incorporated in the constructed normal value.

(23) This Indian company further challenged the Commission's refusal to grant an adjustment to normal value for credit costs.

As explained in recital 44 of the provisional Regulation, this claim had to be rejected given that the delivery of all goods sold in the domestic market by the company concerned took place only after payment. Thus, since the seller did not pass on to the buyer the use or the possession of the goods in question until the time of payment, it cannot be argued that there was any credit granted by the seller.

. . .

4. Dumping margins

(a) General methodology

(28) The representatives of the Indian and the Egyptian cooperating exporting producers, which were not included in the sample and, therefore, were not investigated, argued that the dumping margins established for investigated state-owned companies should not be taken into account when calculating the dumping margins to be allocated to private-owned companies not investigated.

As already explained above, the Commission cannot treat differently state and privately owned companies where all companies are operating in free market conditions. Therefore, the claim cannot be accepted and the provisions of recitals 46 to 48 of the provisional Regulation are confirmed.

(b) Dumping margins for companies in the sample

(29) The comparison between the normal value and the export price, in accordance with the methodology of the provisional Regulation and after revisions, where appropriate, following the arguments made by interested parties, showed the existence of dumping in respect of all companies investigated. The definitive dumping margins expressed as a percentage of the CIF import price at the Community frontier are as follows:

India

Anglo French Textiles 24.7 %
The Bombay Dyeing Manufacturing Co. Ltd 7.7 %
Nowrosjee Wadia Sons Ltd 7.7 %
Madhu Industries Ltd 17.0 %
Madhu International 17.0 %
Omkar Exports 14.2 %
Prakash Cotton Mills Ltd 2.6 %

. . .

(c) Dumping margin for cooperating companies not in the sample

(30) Cooperating companies not selected in the sample (see recitals 17 and 21 of the provisional Regulation and recitals 12 and 13 of this Regulation) were allocated the average

dumping margin of the companies in the sample, weighted on the basis of their export turnover to the Community. In accordance with Article 9 (6) of the basic Regulation, when calculating this average dumping margin de minimis margins established have been disregarded. Expressed as a percentage of the CIF import price at the Community frontier, these definitive dumping margins are as follows:

India 11.6 per cent

. . .

(d) Dumping margin for non-cooperating companies

(31) For non-cooperating companies a dumping margin was determined on the basis of the facts available in accordance with Article 18 of the basic Regulation. Since the level of cooperation was high, it was considered appropriate to set the dumping margin for non-cooperating companies in each country concerned at the level of the highest dumping margin established for a company in each sample because it would constitute a bonus for non-cooperation to assume that the dumping margin to be allocated to exporting producers which did not make themselves known is lower than that found for a cooperating exporting producer.

These definitive dumping margins expressed as a percentage of the CIF import price at the Community frontier, are the following:

India 24.7 per cent . . ."

Articles 2, 2.2, and 2.2.2 were also discussed in detail during the first round of consultations, of which the following is an excerpt:[43]

"*[EC]: On the issue of reasonableness of profit, indeed Article 2 speaks about a 'reasonable' amount of SGA and profits. Later on, in Article 2.2.2, the Agreement refers to this 2.2. If there are no actual data, then three options are given. Any of these options is an interpretation of 'reasonable' in 2.2* . . .

Bhargava: . . . *Article 2.2.2(ii) excludes the possibility of using one company's data, since it requires a 'weighted average', therewith presuming at least two companies. This is to avoid a determination strongly coloured by the peculiarities of one single company. The EC had all the necessary information to use any other method.*

[The EC] replies that there are several points in this presentation. . . . he cannot agree that Article 2.2 overrides 2.2.2. Rather, the concept of "reasonable" is explained in 2.2.2.

. . .

It is EC practice to follow in Article 2(6) of the basic Regulation as much as possible the product concerned, but there is no formal sequence in 2(6). The fact that the word 'exporters' in 2(6) is in plural does not necessarily mean that you need at least two companies.

[43] The verbatim report on the discussions during the first round of consultations is attached as Annex 11.

. . .

[EC]: We consider all three options in 2.2.2 reasonable. It depends, however, on the circumstances. The EC considered in this case that Article 2.2.2(ii) was the most reasonable.

. . .

Mr Seth: On the questions concerning the sequencing in 2.2.2 we reserve our rights.

[EC]: In principle all options are reasonable unless there is any factor rendering them unreasonable. This was not the case here . . ."

3.37 In its letter of 1 October 1998[44] the EC further answers pertaining to and relevant in the context of Articles 2, 2.2., and 2.2.2:

"Question 48

Would the EC agree that it is necessary to establish per Article 2.2 that the amounts for SGA and profit applied in the constructed value are reasonable?

It is evident that Article 2.2 of the WTO Anti-Dumping Agreement (the Agreement) requires that the investigating authorities establish reasonable amounts of selling, general and administrative costs (SGA), and profits, for use in all constructions of normal value.

Questions 49 to 57 and 61 to 71

Concerning the methodology to be used to establish the amounts of SGA and profits for constructing normal value.

For discussion in a new round of oral consultations.

Questions 58 to 60 and 72 to 74

Concerning the treatment of exporters' claims concerning the level of profit used in the construction of normal value.

Recitals (23) to (26) of Regulation (EC) No 1069/97 imposing a provisional anti-dumping duty specify which provisions of Regulation (EC) 384/96 (the Basic Regulation)—and thereby the WTO Anti-dumping Agreement—have been followed.

Recital (18) of Regulation (EC) No 2398/97 imposing a definitive anti-dumping duty replies to all claims raised by the Indian exporters in the course of the administrative procedure with regard to the profit used in the construction of the normal value."

3.38 Discussion on the subject also took place during the second round of consultations:[45]

[44] Please refer to Annex 12.

[45] The verbatim report on the discussions during the second round of consultations is attached as Annex 13.

" . . . Mr Seth: I will now turn to questions 49-57 and 61-71. As you will recall, these questions concerned the concept of "reasonable" profit in the context of Article 2.2 and 2.2.2. The EC in its letter of 1 October 1998 referred to a second round of consultations, during which it would reply to the questions 49-57 and 61-71 raised by India. We are at your disposal now.

[EC]: We are talking about alternative methods that the [Agreement] provides. Any of these methods are reasonable as long as the methods are stable and the elements for their application are present. 2.2.2(iii) only gives an alternative to 2.2.2 chapeau and (i)/(ii). So there are three methods plus an alternative in 2.2.2(iii). There is no preference between methods (i)-(iii). . . .

. . .

Mr Seth: Concerning us [question 50] there was a failure to check whether the result of 2.2.2(ii) was reasonable and that is inconsistent with 2.2.

[EC]: Our response is that the profit established was reasonable.

Mr Seth: Would the EC agree that Article 2.2.2(iii) suggesting that to apply a profit which does not exceed the profit normally realized by other exporters or producers on sales of the same general category of products is a reasonable method? [question 51]

[EC]: The use of any method is reasonable. That does answer your question. Even in this case it was reasonable. The WTO Agreement entitles a Member to develop a method that as long as it is followed consistently it is reasonable.

Mr Seth: Thank you. Would the EC agree that a profit applied in the constructed normal value which is three times higher than profits normally realized by other exporters or producers on sales of products of the same general category in the domestic market is not reasonable in the sense of Article 2.2.2(iii)?

[EC]: I just reiterate that the EC has developed a method such as existed in your case. We have followed the method in your case and we follow it. We do not change the method when the profit is very low and we also do not change it when the profit is very high.
. . .

4. Mr Seth: I refer to questions 60 and 61. Would the Community agree that the application of SGA and profits of one producer only is not allowed under the text of 2.2.2(ii) which mandates that a weighted average be used of exporters or producers.

[EC]: Is your position that the Agreement does not permit the use of the profit and SGA of one company?

Mr Seth: In Article 2.2.2(ii) it talks of the weighted average of companies.

[EC]: This is a very interesting interpretation. We do not read it like that.

. . ."

3.39 In its letter of 29 June 1999[46] the EC further provided the following answers in the context of Article 2.2.2:

> ***"Questions 49 to 57 and 61 to 71***
>
> ***Concerning the methodology to be used to establish the amounts of SGA and profits for constructing normal value.***
>
> *The answers repeat recitals (23) through (26) of the Regulation imposing provisional measures."*
>
> ***Questions 58 to 60 and 72 to 74***
>
> *Recitals (23) to (26) of the provisional duty Regulation specify which provisions of the basic Regulation have been followed and therefore the Community consider that its methodology has been justified and recital (18) of the definitive duty Regulation replies to all claims raised by the Indian exporters in the course of the administrative procedure with regard to the profit used in the construction of the normal value.*
>
> *As already mentioned above, the findings of the investigation, which relied on the responses to the questionnaires and the information obtained during the on-spot verifications of the Community investigators, showed that only one of the five companies selected in the sample had representative domestic sales of the like product. Domestic sales of that company were made through three channels: a) to exclusive wholesalers -- branded products, b) to other wholesalers -- non-branded products and c) to industrial users such as hotels, hospitals etc. -- non-branded products. The average profit margin realized by the company in question on profitable types of non-branded products in the domestic market was 39 per cent higher than the overall average profit realized on profitable branded and non-branded types of the like product in the same market. It should be noted that had the Community followed the request of the company itself and constructed normal value using the SG&A and profit realized only on non-branded products, instead of the overall SG&A and profit which it actually used, the normal value and consequently the dumping margin would have been higher than that calculated by the Community."*[47]

2. The text of Article 2.2.2

3.40 The relevant part of Article 2.2.2 of the ADA sets forth that:

> *"2.2 When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation*

[46] Annex 14.

[47] Note that the answer does not address the questions. For example, question 60: *"Would the EC agree that the application of amounts for SGA and profit inferred from one producer is not allowed as per Article 2.2.2(ii)?"* is not answered, nor is question 71. It is further noted that the recurring references to the dumping margin having been lower if the request of the company had been followed is only partially correct: while a comparison between the branded and the total of the non-branded sales reveals 4.02 per cent higher SG&A and profits for non-branded sales, the situation is the reverse when the (non-comparable) industrial channel is not considered in this comparison. A comparison between the branded and the similar normal non-branded sales channel (which both incur virtually similar SG&A expenses) reveals that the profit on non-branded sales is 5% lower [17.84 per cent vs. 12.21 per cent].

or the low volume of the sales in the domestic market of the exporting country[48], such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits . . .

> *2.2.2 For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:*
>
> . . .
>
> > *(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;"*

3.41 The 'corresponding'[49] provisions in the basic EC Anti-Dumping Regulation are Articles 2(3) and 2(6), which provide that:

> *"2(3) When there are no or insufficient sales of the like product in the ordinary course of trade, or where because of the particular market situation such sales do not permit a proper comparison, the normal value of the like product shall be calculated on the basis of the cost of production in the country of origin plus a reasonable amount for selling, general and administrative costs and for profits, or on the basis of export prices, in the ordinary course of trade, to an appropriate third country, provided that those prices are representative.*
> . . .
>
> *2(6). The amounts for selling, for general and administrative costs and for profits shall be based on actual data pertaining to production and sales, in the ordinary course of trade, of the like product, by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:*
>
> > *(a) the weighted average of the actual amounts determined for 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;"*

3.42 The last paragraph of Recital (18) of the Regulation imposing definitive measures makes clear that the EC in fact applied Article 2(6)(a) of its domestic legislation:

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[48] Footnote in original: Sales of the like product destined for consumption in the domestic market of the exporting country shall normally be considered a sufficient quantity for the determination of the normal value if such sales constitute 5 per cent or more of the sales of the product under consideration to the importing Member, provided that a lower ratio should be acceptable where the evidence demonstrates that domestic sales at such lower ratio are nonetheless of sufficient magnitude to provide for a proper comparison.

[49] This is not to say that the obligations laid down in Article 2(6) are identical to those of Article 2.2.2 of the ADA.

"Moreover, the reference in Article 2(6)(a) of the basic Regulation . . . Consequently, it is not considered justified to establish the amount for profits in accordance with Article 2(6)(b) or 2(6)(c) of the basic Regulation, as claimed by the Indian companies concerned"

3. Claims under Article 2.2.2 (Claims 1-6)

3.43 Six claims follow from the facts and legal text as described above.

3.44 First, the EC has acted inconsistently with Article 2.2.2 in its calculation of the dumping margins.

3.45 Second, the EC has acted inconsistently with Article 12.2.1, by failing to sufficiently explain why and how it applied Article 2.2.2.

3.46 Third, the EC has acted inconsistently with Article 12.2.2, by failing to sufficiently explain why and how it applied Article 2.2.2.

3.47 Fourth, the EC has acted inconsistently with Article 2.2 in its calculation of the dumping margins.

3.48 Fifth, the EC has acted inconsistently with Article 12.2.1, by failing to sufficiently explain why and how it applied Article 2.2.

3.49 Sixth, the EC has acted inconsistently with Article 12.2.2, by failing to sufficiently explain why and how it applied Article 2.2.

4. Claim 1: Inconsistency with Article 2.2.2

3.50 There are three arguments under the first claim as to why the EC has acted inconsistently with Article 2.2.2.

3.51 The first argument of the first claim is that while the EC has applied the calculation method as foreseen in Article 2.2.2(ii), this method was not open to it. This method could not be applied since its requirements for application were not met.

3.52 The second argument of the first claim is that even within the application of Article 2.2.2(ii), the EC has acted inconsistently with the provision. Instead of inferring the amounts from other producers or exporters which were '*incurred and realized*' (12.09 per cent), the EC inferred the amounts from other producers or exporters which were 'determined' (18.65 per cent).

3.53 The third argument of the first claim is that in the calculation of the dumping margins the EC has, in the Regulation imposing provisional measures, as confirmed by the Regulation imposing definitive measures, applied Article 2.2.2(ii) of the ADA. However, as noted above, the method foreseen in Article 2.2.2(ii) was not available to the EC since its requirements were not met. Moreover, this option was applied instead of Article 2.2.2(i), which *was* available to the investigating authorities. This is inconsistent with, and violates the spirit and structure of, Articles 2.2.2 and 2.2.

4.1 <u>The first argument of the first claim relating to Article 2.2.2: while the EC has applied the calculation method as foreseen in Article 2.2.2(ii), this method was not open to it. This method could not be applied since its requirements for application were not met</u>

3.54 As noted above, Article 2.2.2(ii) sets forth that, when amounts for SG&A and profits cannot be determined on the basis of the method foreseen in the chapeau of Article 2.2.2, the amounts in question may among others 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;"*

3.55 The wording of this option merits attention. First of all, the Article mandates the use of a 'weighted average'.

3.56 The *Oxford Concise Dictionary* defines 'average' as: *"an amount obtained by dividing the total of given amounts by the number of amounts in the set".*[50] Websters New Collegiate Dictionary defines 'average' a "a single value (as a mean, mode, or median) that summarises or represents the general significance of a set of unequal values."[51] *Oxford Student's Dictionary* defines 'average' as: *"the result of adding several quantities together and dividing the total by the number of quantities".*[52] *Webster's New World Dictionary* defines 'average' as *"the numerical result obtained by dividing the sum of two or more quantities by the number of quantities."* The common note in all these definitions is that the group (set) over which the average is to be taken, should consist of more than one unit.

3.57 The next word is 'weighted'. 'Weighted' is used as an adjective to 'average.' *Websters New Collegiate Dictionary* defines 'weighted' as: *"having a statistical weight attached".*[53]

3.58 The two words together, 'weighted average' could henceforth be described as an average that attributes statistical weight to (each of) the parameters that are being summarised into a single value. In the context of anti-dumping a 'weighted average' is often contrasted with a 'simple average.' A 'simple average' could be described as an average that does not attribute statistical weight to each of the parameters that need to be summarised into a single value.

3.59 In any event, it is clear that the word 'average' relates to the fact that more than one parameter needs to be summarised. The fact that such summarisation needs to take place by use of a statistical weight stresses the fact that more than one factor needs to be taken into account.

3.60 The question is then to what the 'weighted average' actually refers. In this regard, the text of Article 2.2.2(ii) explicitly refers to *"the actual amounts incurred and realized by other exporters or producers."* Clearly, the average should be of the amounts incurred and realised by other exporters or producers.

3.61 As a sub-question one may ask to what the word *'amounts'* refers. In this connection the chapeau of Article 2.2.2 provides sufficient clarity:

> *"2.2.2 For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:*

[50] Excerpt attached as Annex 41.
[51] Excerpt attached as Annex 42.
[52] Excerpt attached as Annex 43.
[53] Excerpt attached as Annex 44.

. . .

> *(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;"* [emphasis added]

3.62 The chapeau makes abundantly clear that amounts in Article 2.2.2(ii) relates to the amounts for *"administrative, selling and general costs and for profits"*. For example, the word *"such"* in the last sentence of the chapeau clearly refers to the words *"amounts for administrative, selling and general costs and for profits"* in the first sentence of the chapeau. In Article 2.2.2.(ii) it is therefore clearly the amounts *"for administrative, selling and general costs and for profits"* from *"other producers or exporters"* for which a 'weighted average' needs to be established.

3.63 Yet, despite the clear and explicit wording of the Article, the EC tersely mentioned in the definitive Regulation that:

> *"(18) . . . Moreover, the reference in Article 2(6)(a) of the basic Regulation to a weighted average* amount [sic] *for profits determined for other exporters or producers, does not exclude that such amount* [sic] *can be determined by reference to a weighted average of transactions and/or product types of a single exporter or producer . . . "*

3.64 First of all, the EC changes the word *"amounts"* to 'amount', thereby reducing the plural which needs to be averaged into one singular 'amount'. Second, the EC disconnected the explicit relation in the ADA between the *"weighted average"* and the *"amounts incurred and realized by other exporters or producers"*. Instead, the EC suddenly takes the view that when one amount itself is a weighted average, this would also serve the purpose of constituting a weighted average of amounts.

3.65 In other words, the EC blurs the distinction between more than one amount that needs to be averaged and one single amount that is based on a weighted average itself. Clearly, this is contrary to the explicit wording of the ADA, which mandates that amounts of other exporters or producers need to be averaged, and not that an amount itself (of one single exporter or producer) has to be established by means of using a method involving weighted averages.

3.66 Moreover, the exact wording of Article 2.2.2(ii) makes abundantly clear that more than one exporter or producer should be involved: *"other exporters or producers"* clearly refers to a plural. This text of the ADA makes sense since it would otherwise not be mathematically possible to establish a (weighted) average of such amounts. The concept of an average, as defined above, does by its nature not allow itself to be inferred from one parameter only, such as only one producer.

3.67 Nevertheless, the EC applied just one amount from one producer. It is clear that no average of amounts from more than one exporter or producer was ever applied. Instead, the EC purposely and purely used one amount (of 29.04 per cent) inferred from Bombay Dyeing.[54]

3.68 It is therefore indisputable that the explicit requirements of Article 2.2.2(ii) were simply not met. The EC has acted *ultra vires* by stating that the SG&A and profit data from a single producer is the same as the data from *"other exporters or producers"*. The EC's 'interpretation' of the text of Article 2.2.2(ii) has clearly trespassed the boundaries of a permissible use of Article 2.2.2(ii) and violates its plain meaning.

[54] See also the provisional disclosure documents for Anglo-French, Madhu, Omkar, and Prakash.

3.69 Indeed, this very case shows how the EC's logic perverts the text of Article 2.2.2(ii): The calculation of the constructed normal values for companies without domestic sales is coloured by factors unique to one sole producer whose SG&A and profits amounts were used, thereby artificially finding dumping for all where none for most in reality exists. One can imagine that it was precisely to avoid such extreme effects that the Agreement requires that the weighted average of data of at least two exporters or producers be used. This rationale can be clearly inferred from the main rule of the chapeau of Article 2.2, namely that the application of SG&A and profit should be *"reasonable"*. How can the SG&A and profit from one peculiar and extraordinary company be considered reasonable? Nevertheless, this is precisely what happened in Bed linen II: the company whose data were used for the determination of SG&A and profit (Bombay Dyeing) is wholly a-typical in India.[55] The specific reference in Article 2.2.2(ii) to amounts, exporters and producers in the plural is a specific application of the requirement of reasonableness in the chapeau of Article 2.2. It is a recognition of the fact that the method contained in Article 2.2.2(ii) is a substitute for the normal circumstance wherein SG&A and profit is determined by reference to actual data of the exporter or producer under investigation. As such, this substitute method is more prone to inaccuracies and distortion than the actual data, and it is precisely to minimize such possible distortion that Article 2.2.2(ii) requires the inclusion of at least two exporters or producers.

3.70 Despite the clear and explicit wording of the ADA, the EC did infer the data in question from only one sole producer. It follows that the EC, by determining the SG&A and profit for all Indian exporters on the basis of the data of one company only, has acted inconsistently with Article 2.2.2(ii) since the terms of this option were not met in the Bed linen II proceeding.[56]

3.71 Furthermore, the EC misleadingly stated the following in recital (18) of the definitive Regulation that:

> *"With regard to the use of the profit margin of only one company, it should be recalled that the investigation has been restricted to a sample of exporting producers in accordance with Article 17 of the basic Regulation and that the vast majority of the cooperating Indian companies are export oriented companies with no domestic sales of the like product. The Commission selected for the sample five Indian exporting producers two of which had declared at the time of the selection that they had made domestic sales of the like product. However, as indicated in recital 23 of the provisional Regulation, the investigation revealed that only one had representative domestic sales of the like product during the investigation period."*

3.72 This recital suggestively announces that at the time of the selection of the sample there were two companies that had declared to have domestic sales. However, when one looks at the actual sample selection process, as described in detail in section III.A.1 above, it is evident that the investigating authorities knew or could have known that there was only one company in the main sample for which there would be *representative* domestic sales: Bombay Dyeing.

3.73 With respect to the other company referred to in recital (18), Anglo-French, it was very clear at the moment of the selection of the sample that its domestic sales were insignificant if not

[55] For details as to why Bombay Dyeing is wholly a-typical for India we refer to the disclosure comments as submitted during the proceeding by Texprocil and by Anglo-French, Madhu, Omkar, and Prakash (please refer to Annexes 25-32).

[56] Except of course for Bombay Dyeing for whom its own data were used.

meaningless. It is recalled that Anglo-French itself had stated at the moment of the sample selection that:[57]

> *"1) For the period . . . we have exported 9,02,467 kgs of Cotton bed Linen to the European Community and the total invoice value of this quantity is Indian Rs 161.11 million.*
> *2) With respect to sales of Cotton Bed Linen in the Domestic market for the period . . . we wish to bring your kind attention that we are selling Bed Linen qualities only in the Export market, and that the value of Bed Linen sold in the domestic market will be less than 0.25 per cent of our total turnover of around Indian Rs.1,200 million, and hence our turnover for Cotton Bed Linen in the Domestic market will be less than Indian Rs.3.00 million. . . ."*

3.74 It was therefore abundantly clear from this moment (30 September 1996) that Anglo-French with Rs 3 million worth of domestic sales, and Rs 161.11 worth of export sales, would not have representative domestic sales in the sense that the 5 per cent threshold would not be met [it was only (3 ÷ 161.11) * 100 = 1.86%]. It was in fact also made clear in Anglo-French' questionnaire responses that the company did not have sufficient domestic sales.

3.75 It is further recalled that the company Standard Industries, which Texprocil at the time of the sample selection insisted upon having included in the sample, did have sufficient representative domestic sales (as declared at the time of sample selection).[58] However, the Commission refused to include Standard.

3.76 Moreover, during the investigation nothing would have prevented the EC to investigate one more company *with* representative domestic sales, namely Standard Industries. The questionnaire response of this company was readily available for investigation because of its selection in the reserve sample.[59]

3.77 The insinuation in recital (18) that it was the fault of the Indian exporters that there were not sufficient exporters with representative domestic sales in the main sample and that the EC somehow tried to select the main sample with sufficient domestic sales is therefore not borne out by the facts.[60]

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[57] Please refer to the declaration by Anglo-French attached in Annex 18.

[58] It is clear from the fact description that on two occasions in the final stage of the sample selection process Texprocil requested, in writing, to have Standard included in the sample. The Commission could plainly know from Standard's declaration that it was willing to be sampled that the company had sufficient domestic sales. This declaration, submitted well before the sample was negotiated, is attached as Annex 45. See also Annex 16.

[59] The fact that additional companies are sometimes included into the main sample and investigated is for example witnessed by the EC anti-dumping proceeding concerning Flat pallets of wood originating in Poland (published in Official Journal of the EC (year 1997) L-series Number 150 page 4, Regulation imposing provisional duties, at recitals (12) and (13)):

"(12) One Polish exporter selected for the sample did not reply to the questionnaire. Another Polish exporter, which did not produce pallets and did not sell on the domestic market, replied to the questionnaire; however its suppliers, whose cooperation was indispensable for establishing normal value, refused to cooperate. Accordingly, the Commission had to disregard the information submitted by the exporter concerned.

(13) In these circumstances, the Commission considered it appropriate to add to the initial sample two or more producers, in order to reinforce the representative of the sample, both in quantitative terms and in relation to the conditions of the Polish domestic market for pallets. . . ."

[60] Indeed, in this respect recital (18) contradicts the statement contained in the EC letter of 11 October 1996 (reference 060644; Annex 22) where it is stated that: *" . . . we insist on maintaining this company [Standard] in the reserve because of its significant domestic sales."* If it was so clear to the EC that Standard had significant domestic sales, and the Indian side insisted on having Standard in the main sample,

In any event, it follows from the argument above that it is not relevant for Article 2.2.2 whether the EC knew at the time of sample selection whether there was only one company with sufficient domestic sales.

4.2 The second argument of the first claim relating to Article 2.2.2: even within the application of Article 2.2.2(ii), the EC has acted inconsistent with the provision. Instead of using 'the actual amounts incurred and realised' by other producers or exporters the EC has used amounts for SG&A and profits that were restricted to sales in the 'ordinary course of trade'

3.78 The application by the EC of Article 2.2.2(ii) in Bed Linen II constitutes paramount inconsistency with the methodology set forth therein with respect to the calculation of amounts for SG&A and profits. It is recalled that the relevant part of Article 2.2.2(ii) provides that the amounts for SG&A and profits shall be based on: *" . . . the actual amounts incurred and realized by other producers or exporters. . . "* (Emphasis added). However, the EC did in fact not apply *"the actual amounts incurred and realized by other producers or exporters"*. Rather, the EC has resorted to applying amounts for SG&A and profits in the ordinary course of trade only. A summary table illustrates the difference:[61]

Item	The actual amounts *incurred and realized*:	Amounts in the ordinary course of trade:
SG&A	10.39%	10.39%
Actual profit amounts incurred as a % of turnover	*12.09%*	
Profit % pertaining to sales in the ordinary course of trade		*18.65%*
Total	22.48%	29.04%

Source: Table of DMprofit in disclosure document for Bombay Dyeing (excerpt attached as Annex 46)

3.79 Whilst it is not clear from the published determinations or otherwise as to why the EC has deviated from the text of Article 2.2.2(ii), several theories appear possible, all of which, however, are inconsistent with the mandatory nature of Article 2.2.2.

3.80 First of all, it could be possible that the EC, in application of Article 2(6)(a) of its domestic legislation, has used SG&A and profits that were *"determined"* for other producers and exporters.[62] This use of the word *"determined"* in the EC's domestic legislation could then have led to a discrepancy with the actual amounts that had in fact been *'incurred and realized'* by other exporters or producers.[63]

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then why does recital (18) suggest that is it the fault of the Indian exporters that there were not sufficient exporters with representative domestic sales?

[61] In short, the difference is that in the profit determination the sales below cost are systematically excluded, thus inflating the profit margin and therewith the constructed normal value.

[62] It is recalled that Article 2(6)(a) of the relevant EC legislation in question provides that:

"6. The amounts for selling, for general and administrative costs and for profits shall be based on actual data pertaining to production and sales, in the ordinary course of trade, of the like product, by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:

(a) the weighted average of the actual amounts determined for 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;

[63] This is also the view held by literature in the field.

3.81 In other words, the amounts of SG&A and profits for those producers for whom the method of the chapeau of Article 2.2.2 is followed, are merely transplanted' to Article 2.2.2(ii), since this was the amount that had been 'determined' under Article 2.2.2 chapeau. In doing so, there is failure to recognize that 'the actual amounts incurred and realized' by other producers in Article 2.2.2(ii) is in fact different from the 'amounts determined' in the chapeau of Article 2.2.2. *In casu*, this has lead to an overstatement of (29.04 per cent (amount determined) - 22.48 per cent (amount incurred and realized)) = 6.56 per cent.[64] Clearly, such EC application of Article 2.2.2(ii) would be incorrect since the factual deviation from the actual amounts incurred and realized, as mandated, is massive.

3.82 A second possibility would be that the EC has wrongly interjected within the provision of Article 2.2.2(ii) the requirement of the chapeau in that SG&A and profits shall be calculated based on sales 'in the ordinary course of trade'. The EC would therefore have only included profitable sales with respect to its calculation under Article 2.2.2(ii). While the method for calculating SG&A and profits in the chapeau of Article 2.2.2 does indeed include the restriction that SG&A and profits shall be based on data pertaining to sales 'in the ordinary course of trade', this requirement is excluded in the method contained in Article 2.2.2(ii). Indeed, Article 2.2.2(ii) makes no reference to any requirement that the amounts incurred and realized be restricted to those in the 'ordinary course of trade' only.

3.83 In order to agree with such EC's interpretation of Article 2.2.2(ii), *i.e.* that SG&A and profits under 2.2.2(ii) only includes amounts incurred or realized 'in the ordinary course of trade', it would be necessary to find that the wording of Article 2.2.2(ii) implicitly refers back to and incorporates the reference to 'ordinary course of trade' in the chapeau of Article 2.2.2. However, such an approach is demonstrably inconsistent with the express wording of Article 2.2.2(ii). The chapeau of Article 2.2.2 and Article 2.2.2(ii) provide that:

> *"2.2.2 [T]he amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:*
>
> . . .
>
> *(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"*

3.84 The first part of the first sentence of Article 2.2.2 defines the subject of what is to be calculated; namely *". . . the amounts for administrative, selling and general costs and for profits . . ."* The second part of the first sentence, introduced by the clause *". . . shall be based on . . ."* then provides the specific method by which the SG&A and profits shall be calculated under the chapeau of Article 2.2.2.

3.85 It is important to note that the word *"amounts"* in the chapeau refers only to the amounts for SG&A and profit; this word does not refer to amounts for SG&A and profits *". . . in the ordinary course of trade"*. Rather, the first sentence of the chapeau of Article 2.2.2 stipulates that, for the purposes of the method detailed there, the 'amounts' for SG&A and profits shall be 'based on' (actual

[64] In other words, the amounts that were 'incurred and realized' were overstated in the calculations by almost one-third: (6.56÷22.48)x100=29.18% of overstatement.

data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation). In other words, the basis, or factors which are to be used in order to arrive at the amounts for SG&A and profits under the specific method detailed in the chapeau are *"actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation."*

3.86 Websters' New Collegiate Dictionary defines the word 'basis' as: "Foundation. Something on which something else is constructed or established" (emphasis added). Similarly, the word 'base' is defined as "Foundation. The bottom of something considered as its support."[65] In other words, the "amounts for SGA and profits" constitute, in the context of the chapeau of Article 2.2.2 and sub-paragraph (ii), by definition 'something else' i.e., a value or amount that is conceptually distinct from the 'foundations' or 'basis' upon which it is constructed or established. The amounts for SG&A and profits is what is to be established; the "actual data . . . in the ordinary course of trade . . . investigation" is (one of) the means to establish it.

3.87 Therefore, when the second sentence of the chapeau of Article 2.2.2 states that when *"such amounts"* cannot be determined on the basis of the chapeau of Article 2.2.2, then the method in Article 2.2.2(ii) (among others) may be used; the words *"such amounts"* refer to *"amounts"* as described in the first sentence of the chapeau. Indeed the entire purpose of Article 2.2.2(ii) is to provide for a different and alternative basis upon which to establish SG&A and profits (from the basis contained in the chapeau of Article 2.2.2).

3.88 As has been noted, the definition of the words *"amounts for SG&A and profits"* in the first sentence of the chapeau does not include the words *"ordinary course of trade"*. Instead, since in the chapeau of Article 2.2.2 the words *"ordinary course of trade"* occur after the words *"based on"*, this requirement is clearly intended to form part of the specific basis or foundation for the specific method provided under the chapeau. Consequently, the words *"such amounts"* in the second sentence of the chapeau cannot logically be taken to refer back to SG&A and profits *"in the ordinary course of trade"*, but instead only to SG&A and profits. Thus, the word 'amounts' used for the purposes of Article 2.2.2(ii) do not include any requirement that the amounts be incurred or realised in the ordinary course of trade.

3.89 It is equally impossible to interpret Article 2.2.2(ii) as referring back to the remainder of the text of the chapeau of Article 2.2.2. As noted above, the words *"ordinary course of trade"* in the chapeau occur after the words *"based on"*. Consequently, if the EC is to argue that Article 2.2.2(ii) refers back to and includes the requirement of *"ordinary course of trade"*, it must argue that the basis provided in Article 2.2.2(ii) for calculating SG&A and profits refer back to and include the basis provided in Article 2.2.2 chapeau. Such an argument would be logically impossible and inherently contradictory. Again, the entire purpose of Article 2.2.2(ii) is to provide a different basis for calculating SG&A and profits from the basis provided under the chapeau. If the purpose of article 2.2.2(ii) is to provide for a different basis, or foundation, upon which to establish SG&A and profits than the basis provided under Art. 2.2.2 chapeau, it would of course be logically absurd to then argue that the foundations referred to under 2.2.2(ii) shall be interpreted as referring back to and implicitly including the same foundations that are present in the chapeau of 2.2.2. Indeed, the second sentence of Article 2.2.2 chapeau expressly states that one is only entitled to resort to the methodology under 2.2.2(ii) when the foundations under the chapeau of the 2.2.2 *"cannot"* be used. It is a clear 'either-or' situation.

[65] Excerpt attached as Annex 47.

3.90 Consequently, there is no basis for inferring a requirement under Article 2.2.2(ii) that only profitable sales shall be taken into account for the purposes of calculating SG&A and profits under the methodology provided therein.

3.91 This interpretation is further confirmed by specifically contrasting the wording of the method provided in the chapeau against the wording of the method contained in Article 2.2.2(ii). Under the method in Article 2.2.2 chapeau, SG&A and profits shall be calculated *". . . based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation . . ."* (emphasis added). Under the method in Article 2.2.2(ii) on the other hand, SG&A and profits shall be based on *"the weighted average of the actual amounts incurred or realized by other producers or exporters subject to investigation . . ."* (emphasis added). Article 2.2.2(ii) clearly stipulates that the data which is to be taken into account under this method are the weighted average of *". . . the actual amounts incurred and realized . . ."*

3.92 The context in which the word *"actual"* is used in this paragraph is important. The *Concise Oxford dictionary* defines the word *"actual"* as *"existing in fact; real (often as distinct from ideal)."* (Emphasis added). Likewise, *Websters' New Collegiate Dictionary* defines *"actual"* as *"Existing in fact . . . and not merely potentially."*[66]

3.93 In other words, if one refers to the *actual* amounts (for SG&A and profit), one is expressly referring to the complete amounts which in fact exist; nothing more and nothing less. It follows that this formulation expressly excludes any qualification or limitation of the amounts for SG&A and profit which are to be included in the calculation under this method (provided that these amounts are generated in respect of production and sales of the like product *etc*.). Consequently, the use of the word 'actual' in this context is intended to specifically clarify that it is the complete amounts which are to be taken into account under this method, as opposed to amounts which have been artificially qualified or limited in some way.

3.94 The wording of Article 2.2.2(ii) should be contrasted with the wording of the chapeau of Article 2.2.2. The word *"actual"* in this paragraph is used in an entirely different context. Article 2.2.2 chapeau does not provide that the relevant amounts should be determined on the basis of the *"actual amounts incurred and realized . . ."* Rather it states that the *"amounts"* shall be determined on the basis of *"actual data"*. The term data is immediately qualified and defined as *"data pertaining to production and sales in the ordinary course of trade."* Thus, Article 2.2.2 chapeau artificially qualifies and limits the *"actual data"* to be used (and thereby the 'amounts' which will be ascertained) to *". . . data pertaining to production and sales in the ordinary course of trade . . ."*

3.95 Therefore, given the fact that Article 2.2.2(ii) specifically refers to *"actual amounts incurred and realized"*, and the meaning of this formulation as demonstrated above, and given that the reference to *"ordinary course of trade"* is excluded from Article 2.2.2(ii), it is clear that this paragraph is expressly differentiated from Article 2.2.2 chapeau in that the 'ordinary course of trade' qualification does not apply.

3.96 It follows that the EC misapplied sub-paragraph 2.2.2(ii) and thus acted inconsistently with Article 2.2.2 of the ADA.

[66] Excerpts of both dictionaries attached as Annex 48.

4.3 The third argument of the first claim relating to Article 2.2.2: By switching the order of preference contained in Article 2.2.2 the EC has acted inconsistently with that Article

3.97 The EC has, instead of using the (available) alternative that Article 2.2.2(i) provides, used the alternative provided in Article 2.2.2(ii). It is recalled that Article 2.2.2 provides for four possible SG&A and profit calculation methods in Article 2.2 situations:

1. Actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation (Article 2.2.2 chapeau);

2. Actual amounts incurred and realized by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products (Article 2.2.2(i));

3. Weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production or sales of the like product in the domestic market of the country or origin (Article 2.2.2(ii));

4. Any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of the same general category in the domestic market of the country of origin (Article 2.2.2(iii)).

3.98 From the context of the Article and the very concept of dumping, it is clear that method 2 is both preferred and preferable over methods 3-4 (it being understood that method 1 is preferred over methods 2-4). Namely, method 2, being the first alternative mentioned to the main rule, relies on the specific situation of the producer concerned. Dumping being a highly producer-specific concept[67] should by its intrinsic nature be calculated as much as possible on the basis of the data of the producer whose behaviour is under scrutiny. In this regard the order of the Agreement makes sense, since it establishes a preference for producer-specific data. This preference for data of the producer is first reflected in the main rule of the chapeau of Article 2.2.2 and repeated in its first alternative. In context, the wording of Article 2.2.1.1 could be considered: in the context of the cost calculations all data are to be inferred from the producer/exporter under consideration (and not from other producers or exporters). Hence, when it comes to SG&A expenses and profits, it makes sense to follow this same preference and rely as much as possible on producer-specific data. Only where this is no longer possible could further alternatives be considered.

3.99 Indeed, the text of the Agreement reveals a gradually declining scale in the order of options as far as the relation with the producer is concerned: the first alternative of the chapeau being the actual dumping situation and the fourth option being the most alternative method. Recourse to methods 3-4 normally deprives an exporter not only of the possibility to check his own dumping margin calculation (because he does not have access to the SG&A and profit amounts of his competitors), at least in the EC system, it furthermore makes it impossible for him to prevent dumping because he will never know whether he is dumping in the first place.[68] It therefore makes all the more sense that these third and fourth options are ranked at a place where their use would be less easily available than the

[67] In one and the same country in the same proceeding in the same investigation period, one producer may found dumping while another producer may not be found dumping.

[68] In the absence of a system of disclosure of confidential information under administrative protective order, the EC's system precludes producers without sufficient domestic sales from checking or knowing their very own dumping margin calculations.

first option of the chapeau, or the second option of 2.2.2(i) which, respectively, have a direct or indirect link with the producer concerned.

3.100 Therefore, on the basis of the wording of Article 2.2.2 as well as a systemic interpretation of the concept of dumping and the ADA, the GOI believes that Article 2.2.2 establishes a preference for use of producer-specific data.

3.101 It is noted, however, that the EC basic Regulation turns around methods 2 and 3 and, to that extent, does not follow the order of the ADA. Thus, Article 2(6) of Regulation 384/96 of the EC domestic legislation provides as follows:

> *"The amounts for selling, for general and administrative costs and for profits shall be based on actual data pertaining to production and sales, in the ordinary course of trade, of the like product, by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:*
> *(a) the weighted average of the actual amounts determined for 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;*
> *(b) the actual amounts applicable to production and sales, in the ordinary course of trade, of the same general category of products for the exporter or producer in question in the domestic market of the country of origin;*
> *(c) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin."*

3.102 In other words, the options listed in Articles 2.2.2(i) and 2.2.2(ii) of the Agreement are switched around in Article 2(6) of Regulation 384/96. While the facts of the matter would appear clear-cut, a summary table may clarify the contradiction between the EC law and practice, vis-à-vis the relevant WTO provision:

Methods of inferring SG&A and profit	Article 2.2.2 ADA	Article 2(6) EC legislation
First option	From domestic sales of like product of exporter/producer in question	From domestic sales like product of exporter/producer in question
Second option	From domestic sales of same general category of products *of exporter/producer <u>in question</u>*	From weighted average of domestic sales of like product *of <u>other</u> exporters/producers*
Third option	From weighted average of domestic sales of like product of other exporters/producers	From domestic sales of same general category of products of exporter/producer in question
Fourth option	Any other reasonable method	Any other reasonable method

3.103 In fact, the explicit switching of the first two options in the basic EC Regulation would appear to suggest that the European Community implicitly does consider the order of the options to be relevant. Indeed, in recital (18) of the definitive Regulation it becomes clear that the EC does consider that Article 2(6)(a) has preference over 2(6)(b) and 2(6)(c). In this recital it is implicitly observed that Articles 2(6)(b) and 2(6)(c) could have been applied, but that such application was not justified in the circumstances of the situation, because Article 2(6)(a) was already applicable:

> *" . . . the reference in Article 2(6)(a) of the basic Regulation to a weighted average amount for profits determined for other exporters or producers does not exclude that such amount can be determined by reference to a weighted average of transactions and/or product types of a single exporter or producer. Consequently, it is not considered justified to establish the amount for profits in accordance with Article 2(6)(b) or 2(6)(c) of the basic Regulation, as claimed by the Indian companies concerned."*

3.104 The EC therefore did not even consider which option would be most reasonable, but only posited that Article 2(6)(a) applied and that for that reason Articles 2(6)(b) or (c) could not apply. The fact that Article 2(6)(b) could indeed have been applied is for example illustrated by the situation of (*inter alia*) Prakash Cotton Mills, which had domestic sales of other products in the same general category on the domestic market.[69] This is the first indication that the EC considers the order laid down in Article 2(6) of the basic Regulation, which differs from the order of the ADA, as mandatory. Incidentally, the EC method also led to the most disadvantageous result possible for the Indian industry.

3.105 It should further be noted that it has also been confirmed by case law of the European Court of Justice that the order in which the three alternatives must be considered is the order in which they are presented in the provision.[70] In fact, one may argue that where the European Court of Justice considers that the order of the Regulation is of a mandatory nature, the order of the ADA contains the same imperative character.

3.106 Finally, as far as the EC's domestic legislation is concerned, it is noted that recent EC literature on the subject confirms that in practice the order as set out in the Regulation is followed.[71] While there may therefore not be a *de jure* preference (apart from the Court judgements mentioned), there is certainly a practice which exists *de facto* as witnessed by the Bed Linen II proceeding. This *de facto* preference as established by the EC therefore establishes an inconsistency with the order of preference as established by the ADA.

3.107 In conclusion it may be summarised that the ADA contains thorough, solid, and logical rules with respect to the methods of determining SG&A and profits. The EC legislation deviates from these rules and moreover does so in a manner which makes it difficult, if not impossible, for a producer to predict his potential dumping exposure in certain instances where such possibility would have existed under the rules of the ADA. The EC's legislation on this point, as well as its practice in this regard is inconsistent with its WTO obligations.

5. Claim 2: inconsistency with Article 12.2.1

5.1 The text of Article 12.2.1

3.108 It is recalled that Articles 12.2 and 12.2.1 of the ADA provide in relevant part as follows:

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[69] *I.e.* the method as per Article 2.2.2(i) was available to at least for example Prakash, but it could also be considered to be applicable to Anglo-French and Madhu.

[70] Case C-105/90, *Goldstar Co. Ltd vs Council*, [1992] ECR I-677 (paragraph 35); Case C-69/89, *Nakajima All Precision Co. Ltd vs Council*, [1991] ECR I-2069 (paragraph 61).

[71] Muller, Khan, Neumann, *EC Anti-Dumping Law—A commentary on Regulation 384/96*, Wiley (1998) at 97: *"The Community legislation also falls short of imposing a strict legal hierarchy, but in practice, unless there are good reasons to the contrary, the order as set out in the Regulation is followed."*

"12.2 Public notice shall be given of any preliminary or final determination, whether affirmative or negative . . . of the termination of a definitive anti-dumping duty. Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities . . .

12.2.1 A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular: . . .

(iii) the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2; . . .

(v) the main reasons leading to the determination."

5.2 Legal arguments relating to the claims relating to Article 12.2.1

3.109 The second claim is that the EC has acted inconsistently with Article 12.2.1, by failing to sufficiently explain why and how it applied Article 2.2.2 in the provisional Regulation. This claim consists of three arguments:

3.110 The first argument of the second claim is that in contradiction to Article 12.2.1, the EC has not provided a sufficient explanation as to why it decided to apply an option for which the requirements were not fulfilled.

3.111 The second argument of the second claim is that in contradiction with Article 12.2.1 the EC did not explain why it resorted to the amounts 'determined' that only related to data based on profitable sales, instead of to the actual amounts incurred and realised.

3.112 The third argument of the second claim is that despite the fact that the EC's choice was heavily contested, the EC has nowhere provided a sufficient explanation in the public notice (or made available in a separate report) as to why it applied option 2.2.2(ii) instead of 2.2.2(i). This is inconsistent with the requirements of Article 12.2.1 of the ADA.

6. Claim 3: inconsistency with Article 12.2.2

6.1 The text of Article 12.2.2

3.113 It is recalled that Article 12.2.2 of the ADA provides in relevant part as follows:

"A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures . . ., due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information

described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers . . .”

6.2 Legal arguments relating to the claims relating to Article 12.2.2

3.114 The third claim is that the EC has acted inconsistently with Article 12.2.2 by failing to sufficiently explain why and how it applied Article 2.2.2 in the definitive determination.

3.115 As noted in section III.A.1, Indian exporters made very detailed arguments on these issues. Nevertheless, in the definitive Regulation the EC’s explanations of these arguments was little more than the statement in recital (18) that:

“Moreover, the reference in Article 2 (6) (a) of the basic Regulation to a weighted average amount for profits determined for other exporters or producers, does not exclude that such amount can be determined by reference to a weighted average of transactions and/or product types of a single exporter or producer. Consequently, it is not considered justified to establish the amount for profits in accordance with Article 2(6)(b) or 2(6)(c) of the basic Regulation, as claimed by the Indian companies concerned.”

3.116 This ‘justification’ for applying 2(6)(a) (corresponding to Article 2.2.2(ii)) was little more than noting that the conditions for its application were—in the eyes of the EC—fulfilled and application of other options was therefore out of the question. There are four reasons why this ‘explanation’ is inconsistent with Article 12.2.2:

3.117 The first argument is that contrary to Article 12.2.2, the EC has not provided a sufficient explanation as to why it decided to apply an option for which the requirements were not fulfilled.

3.118 The second argument is that contrary to Article 12.2.2 the EC did not explain why it resorted to the amounts ‘determined’ instead of to the amounts ‘incurred and realised’.

3.119 The third argument is that contrary to Article 12.2.2 the EC did not explain why it considered the profit so established reasonable as per Article 2.2.2(iii).

3.120 The fourth argument is that despite the fact that the EC’s choice was heavily contested, the EC has nowhere provided a sufficient explanation in the public notice or made available in a separate report as to why it applied option 2.2.2(ii) instead of 2.2.2(i). This contradicts the requirements of Article 12.2.2.

3.121 It follows that the EC acted inconsistently with Article 12.2.2 of the ADA.

7. Claim 4: inconsistency with Article 2.2

7.1 The text of Articles 2.2 and 2.2.2

3.122 It is recalled that Articles 2.2 and 2.2.2 provide in relevant part as follows:

“2 2 When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison

with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.

2.2.2 For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of: . . .

(iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin." (Emphasis added, footnote omitted)

3.123 As a first observation it is noted that Article 2.2.2 refers to 2.2 in its opening words (*"[f]or the purpose of paragraph 2"*). Furthermore, the distinction is noted between the phrase *"reasonable amount for administrative, selling and general costs and for profits"* in Article 2.2 and the phrase *"amounts for administrative, selling and general costs and for profits"* in Article 2.2.2. Read in combination and context, it follows that the *"amounts for administrative, selling and general costs and for profits"* of Article 2.2.2 are covered by Article 2.2 as well. Article 2.2 instructs Article 2.2.2, as re-confirmed by the very cross-reference in Article 2.2.2. It subsequently follows that the amounts in Article 2.2.2 must be *"reasonable"* as per the last sentence of the chapeau of Article 2.2.

7.2 Legal arguments relating to the claims relating to Article 2.2

3.124 The fourth claim is that the EC has acted inconsistently with Article 2.2 of the ADA by not adding a 'reasonable' amount of SG&A and for profits. The chapeau of Article 2.2 sets forth that:

"When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits." (Emphasis added)

3.125 A distinction must be made here between the procedural aspects (how are SG&A and profits determined?) and the substantive aspects (what are the limitations on the end result?).

3.126 How the *"amount for administrative, selling and general costs and for profits"* is to be determined is laid down in Article 2.2.2. It is noted that this latter provision does not contain exactly the same formula as 2.2. If 2.2.2 had read as follows: *"For the purpose of paragraph 2, the reasonable amounts for administrative, selling and general costs and for profits"*, then there was no question that the remainder of 2.2.2 elaborates the concept of *"reasonable"*. Then the four methods laid down in 2.2.2 could be considered to be the statement of what could be reasonable.

3.127 However, 2.2.2 does not explain how the reasonable amounts for SG&A and for profits are to be determined, but merely how *"the amounts for administrative, selling and general costs and for profits"* are to be established. It follows that the word *"reasonable"* in 2.2 has maintained its separate

function: the *"amount for administrative, selling and general costs and for profits"* in 2.2 are explained in 2.2.2, not the *"reasonable amount for administrative, selling and general costs and for profits"*. The 'reasonable' test in 2.2 is thus an over-arching requirement in addition to the requirements of 2.2.2, rather than a rule, concretized by Article 2.2.2. This is also in accordance with the plain meaning of Article 2.2 and the structure of the Article.

3.128 The next question then becomes what *"reasonable"* in 2.2 means. It cannot be a procedural requirement: the possible procedures for determining SG&A and profits are elaborated in 2.2.2. It follows that *"reasonable"* must be interpreted as a substantive requirement: whatever method under Article 2.2.2 is used, Article 2.2 requires that the result of the method used must be *"reasonable"*.

3.129 Contrary to what might be expected, the ADA does not at first sight appear to contain any explicit definition of the word 'reasonable'. However, upon closer reading of the three alternative options contained in Article 2.2.2, the third option does in fact contain an implicit definition of the notion of 'reasonable':

> *"(iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin."*

3.130 Thus, the text suggests that while any other method may be used to establish SG&A and profits, any such method may not lead to an addition of a profit that exceeds profits normally realised by other exporters or producers. In other words, if the profit under option three exceeds the profit that is normally realised by other exporters or producers on sales of products of the same general category in the domestic market, the method is not considered reasonable.

3.131 Accordingly, for a method—and therefore a profit—to be reasonable, it should not exceed profit normally realised by other exporters or producers (on sales of products of the same general category in the domestic market of the country of origin).

3.132 Nothing in the text of Article 2 would appear to suggest that this criterion for reasonableness as defined in the third option does not apply with respect to the rest of Article 2. Indeed, failing any indication to the contrary, the criterion in option (iii) is the only guideline as to the notion of 'reasonable' contained in Article 2.2 of the ADA. The third option refers not to a specific method but instead to a general, abstract, open-ended category of *"any other reasonable method."* It is therefore clear that the words that follow in the third option are intended to define reasonableness in terms of a general criterion which all reasonable methods must fulfil. Thus the wording of the third option expressly defines a reasonable method as one which does not result in excess profits as defined above.[72]

[72] This conclusion fits with the structure of Article 2.2.2. As noted earlier, Article 2.2.2 contains four alternative methods for determining SG&A and profits (namely, the normal method in the chapeau and the three alternative methods in sub-paragraphs (i)-(iii). Whatever one's views on the order of these alternatives, it seems evident from the wording that the method laid down in sub-paragraph (iii) is a residual one, so to speak, one of last recourse if all other methods fail. This would—apart from its place at the bottom of the provision—follow from the words *"any other"*. The ADA thus provides three reasonably accurately described methods for determining SG&A and profits, plus the residual 'any other' method of the third sub-paragraph. Contrary to the first three methods, sub-paragraph (iii) does not so much lay down the procedure to be used, but rather constrains the result. Since the term *"reasonable"* in Article 2.2 also is a substantive rather than a procedural requirement, there is a large degree of correspondence between the two words.

3.133 As noted, there seem to be no further indications in the text of the ADA which elaborate on the notion of 'reasonable.' As far as the literature on the subject is concerned one may note the observation of one internationally recognised scholar with respect to Article 2:4 of the 1979 Anti-Dumping Code: *"international obligations [mandate] . . . that a realistic method be used to compute the constructed cost and prices based on constructive cost."*[73] [emphasis added] As far as concrete percentages are concerned, it might be recalled that in the Panel Report concerning US—imposition of anti-dumping duties on Atlantic salmon from Norway[74], the EC observed as third party and therefore supposedly because of systemic reasons that:[75]

> *" . . . it had to be borne in mind that the Department of Commerce did not have access to data on domestic sales in Norway of fresh Atlantic salmon and that therefore a reasonable estimate had to be made of the amount for profit. In the absence of any other information, it did not seem unreasonable to use a figure which after all represented only about 5 per cent on turnover. In addition, the EEC considered these figures as not inappropriate for the Atlantic salmon industry."*

3.134 Turning to the factual situation of the Bed linen proceeding under consideration it is recalled that while not all producers had sales of the product concerned on the domestic market, some producers did have sales of other products in the same general category (textiles). As far as these other producers were concerned it is recalled that the following companies realised the following profits in their same general category of products and (especially for some companies, failing such categories) obtained the following overall profit:

Name Company	*Same category domestic*	*Overall*
Anglo-French	*5.49%*	*-14.99%*
Bombay Dyeing	*12.13%*	*4.66%*
Madhu	-	*4.26%*
Omkar	-	*9.23%*
Prakash	*3.5%*	*3.5%*
Average:	*7.04%*	*5.41%*

The Commission has never contested these figures.

3.135 It is further recalled that the profits obtained for Bed Linen were determined as follows for the other countries in the proceeding:

Country	*Profit*
Egypt:	*5.8*
Pakistan:	*7.4*
Average:	*6.1*

3.136 It is also recalled that the profit determined on the basis of the profitable sales of one Indian company and applied to all others was 18.65 per cent.

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[73] Jackson, *The World Trading System* (1989) at 235.

[74] United States—Imposition of anti-dumping duties on imports of fresh and chilled Atlantic Salmon from Norway, Report of the Panel adopted by the Committee on Anti-Dumping Practices on 27 April 1994 (ADP/87).

[75] Ibid., recital 323.

3.137 Last, it is recalled that the reasonable profit imputed to the EC industry was 5 per cent.

3.138 It is evident from the above that in comparison with all other amounts for profits that have been relevant in the context of the proceeding, 18.65 per cent stands out as a complete anomaly. This does not in any way reflect the profit actually realised by the Bed Linen producers inside and outside India. In fact, the particular profit is more than three times higher than the average profit determined for the other two countries involved in the investigation, as well as the EC's own Bed Linen industry.

3.139 If the word reasonable is defined by reference to the criteria indicated in the third option of Article 2.2.2, the inconsistency is equally obvious and paramount. The profit so established does not fit the definition of Article 2.2 since it is contrary to any perception of reasonableness that can and may exist in and outside the textile industry.

8. Claim 5: inconsistency with Article 12.2.1

8.1 The text of Article 12.2.1

3.140 Please refer to section III.A.5.1, above.

8.2 Legal arguments relating to the claims relating to Article 12.2.1

3.141 The provisional Regulation merely contained a brief statement on the calculation of SG&A and profit, which read in relevant part that:

> *"(26) . . . The constructed value was determined by adding to the cost of production of the exported types of each company, a reasonable amount for SG&A and a reasonable amount for profit.*
>
> *Since only one company had representative global domestic sales and the profitable domestic types represented less than 80 per cent but more than 10 per cent of total domestic sales, the amount for SG&A and profit used for the construction of normal value for all companies investigated were those respectively incurred and realised by this company, in accordance with Article 2(6) of the basic Regulation."*

3.142 The fifth claim is that the EC has acted inconsistently with Article 12.2.1 by failing to sufficiently explain in the provisional Regulation or the disclosure document why and how it applied Article 2.2, and especially, why it considered the uniquely established and exceptionally high profit margin 'reasonable'. This is inconsistent with Article 12.2.1.

9. Claim 6: inconsistency with Article 12.2.2

9.1 The text of Article 12.2.2

3.143 Please refer to section III.A.6.1, above.

9.2 Legal arguments relating to the claims relating to Article 12.2.2

3.144 The sixth claim is that the EC has acted inconsistently with Article 12.2.2 by failing to sufficiently explain why and how it applied Article 2.2. Despite extensive and detailed arguments

from exporters and Texprocil[76], the EC did not sufficiently explain in the public notice, or make available through separate a report, why it considered the uniquely established and exceptionally high profit margin 'reasonable'.

3.145 As noted in section III.A.1 above, following the provisional Regulation and provisional disclosure the Indian exporters made extensive arguments on the interpretation of 'reasonable'. Although the EC in recital (18) noted the issue of the interpretation of 'reasonable', it never replied to the claims by Indian exporters that the profit and SG&A determined were not reasonable as per Article 2(3) of the basic Regulation (Article 2.2 of the ADA). This is all the more serious in view of the very tangible impact of this issue on the dumping margins. The EC therewith acted inconsistently with Article 12.2.2.

B. CLAIM 7: ARTICLE 2.4.2: ZEROING OF NEGATIVE DUMPING AMOUNTS

3.146 Summary: the EC acted inconsistent with Article 2.4.2 by zeroing negative dumping amounts on a per-type basis (**claim 7**).

1. Facts

3.147 First, reference is made to the facts described above in section III.A, above. The following facts may be added to this description. It is recalled that during the first round of consultations, the following question was asked:[77]

> *"114. Would the EC indicate what the basis under the WTO Anti-Dumping Agreement is for the practice of per-type zeroing when weighted average normal values are compared to weighted average export prices as per Article 2.4.2? (In other words, why does the EC apply inter-type zeroing?)"*

3.148 In response, the EC answered at the time:

> *"[EC]: The basis for such practice is the requirement that prices be 'comparable'. We compare therefore, within one like product, on a type-by-type basis. Why zeroing? Because if we would not zero negative amounts, the requirement that we compare like with like would not be respected."*

3.149 During the second round of consultations this matter was again discussed in detail.[78]

3.150 In its letter of 29 June 1998[79] the EC provided the following answer with respect to question 114 regarding Article 2.4.2:

> *"**Question 114***
>
> ***Would the EC indicate what the basis under the WTO Anti-Dumping Agreement is for the practice of per-type zeroing when weighted average normal values are compared to weighted average export prices as per Article 2.4.2? (In other words, why does the EC apply inter-type zeroing?)***

[76] Please refer to section III.A.1, above.
[77] See Annex 11.
[78] For the verbatim report please refer to Annex 13.
[79] Annex 14.

It should be noted that the methodology described in recital (46) of the provisional duty Regulation for the calculation of dumping margins, i.e. weighted average constructed normal value by type compared to weighted average export price by type, was never disputed during the administrative procedure. Article 2 (11) of the basic Regulation, which deals with this aspect, is clearly restricted to sales within a particular type -- that does not address how the results found for each type are averaged which is dealt with in Article 2 (12). The latter is more a question of how findings are imposed in the form of measures of duties [sic] and in this case the Community as per consistent practice imposed an average rate of dumping to cover all types with non-dumped types given a zero margin for the quantity concerned."

2. The relevant part of the text of article 2.4.2

3.151 It is recalled that Article 2.4.2 of the ADA provides that:

" . . . the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison."

3. Claim relating to Article 2.4.2

3.152 Inconsistently with Article 2.4.2, the EC zeroed negative dumping incurred for certain types when comparing the overall weighted average per-type normal values with per-type weighted average export prices.

3.153 It appears that Article 2.4.2 provides for three possibilities to establish a dumping margin:

1. A comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions;

2. A comparison of normal value and export prices on a transaction-to-transaction basis; or

3. A normal value established on a weighted average basis may be compared to prices of individual export transactions

3.154 In the provisional Regulation the EC stated that *"(46) In general, weighted average constructed normal value by type was compared with weighted average export price by type."*

All six other dumping margins for India did not exceed 17 per cent. Clearly, any use of a 'reasonable' profit margin (*i.e.* any profit margin lower than the excessive 18.65 per cent), such as had been suggested countless times during the proceeding, would have led to lower dumping margins.

3.155 It would therefore appear that the EC opted to apply the first possibility of establishing a dumping margin as per Article 2.4.2. This view is also confirmed by the discussions that took place during the two rounds of consultations.

3.156 It appears therefore unquestionable that in its calculations of the dumping margins, the EC had decided to apply the 'first option' of establishing a dumping margin as per Article 2.4.2 which is to establish *" . . . a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions."*

3.157 As noted in the claim above, it is submitted that the EC has not *de facto* made such a comparison. Instead, it has zeroed the 'negative dumping' which was found for certain models. This has led to overstatement of the dumping margins for four companies. For one company this has even led the EC to find dumping where dumping did not exist. More precisely, the overstatement of the actual dumping margins has been as follows:

Name	CIF Value of Exports	Actual Dumping *Result*	Actual DM Percentage	Dumping Amount as per EC	EC DM Percentage
Anglo-French	126,464,037	30,820,812	24.37%	31,287,342	24.74%
Bombay Dyeing	100,924,637	5,612,587	5.56%	7,842,226	7.77%
Madhu	183,063,049	30,898,430	16.87%	31,169,522	17.03%
Omkar	212,877,521	28,025,198	13.16%	30,328,190	14.25%
Prakash	314,529,134	-1,328,119	-0.42%, *i.e.* 0	8,412,131	2.67%

Source: Based on Data provided in Disclosure documents

3.158 How this overstatement came about may be illustrated by the details of the calculations of Prakash:

	Data			
PRODUCT CONTROL NUMBER	Sum of CIF VALUE IN CURRENCY OF EXPORTING COUNTRY	Sum of DUMPING *RESULT*	DUMPING AMOUNT AS PER EC	%
1	54,595,034.24	2,444,661.168	2,444,661.17	4.48%
2	28,379,349.81	-840,871.6374	0.00	0.00%
3	35,119,956.8	787,797.5404	787,797.54	2.24%
4	26,940,135.47	-1,923,730.158	0.00	0.00%
5	21,859,280.04	-977,723.0105	0.00	0.00%
6	19,426,021.26	2,132,781.439	2,132,781.44	10.98%
7	15,915,117.53	-255,135.296	0.00	0.00%
8	14,604,200.8	156,272.4031	156,272.40	1.07%
9	12,526,247.49	225,785.7921	225,785.79	1.80%
10	10,064,340.52	391,620.1423	391,620.14	3.89%
11	9,195,177.3	-2,114,764.402	0.00	0.00%
12	7,182,757.11	1,195,525.219	1,195,525.22	16.64%
13	6,578,793.64	-921,095.2336	0.00	0.00%
14	7,783,783.55	73,158.60636	73,158.61	0.94%
15	7,355,982.32	435,593.6285	435,593.63	5.92%
16	7,968,378.95	-903,413.7129	0.00	0.00%
17	6,127,736.67	-691,408.4469	0.00	0.00%
18	4,812,847.04	-239,001.1542	0.00	0.00%
19	6,543,607.06	-567,224.405	0.00	0.00%
22	3,552,510.28	-188,257.2337	0.00	0.00%
25	4,164,049.29	327,548.0475	327,548.05	7.87%

46	1,510,123.95	-117,626.1048	0.00	0.00%
63	577,254.4	150,550.1243	150,550.12	26.08%
68	869,897.26	77,215.41208	77,215.41	8.88%
70	876,551.29	13,621.79908	13,621.80	1.55%
Grand total	31,452,9134.1	-1,328,119.472	8,412,131.32	**2.67%**

Source: Based on Data provided in Disclosure documents

3.159 Clearly, to models where negative dumping existed, the EC attributed a zero margin. The issue is material since in the absence of this peculiar practice no dumping for the largest exporter from India would have been found:

Total CIF Value	Actual Dumping Result	Actual Dumping Margin
314,529,134.1	-1,328,119.472	**-0.42%, *i.e.* 0**

Source: Based on Data provided in Disclosure documents

3.160 The fact that the practice as applied in the Bed Linen proceeding is not always followed by the EC may be illustrated by the attached disclosure of a calculation in another EC anti-dumping proceeding.[80] In that other case it may be clear from the tables that the negative dumping which existed for certain models was allowed to offset the dumping found for other models which were positively dumped.

3.161 Hence, it is first of all clear that Commission practice is not always consistent on this point.

3.162 Second, regard should be had to the exact wording of the text of Article 2.4.2. The text of this Article comprises the following elements:

1. a comparison of;
2. a weighted average normal value;
3. a weighted average of prices of all comparable export transactions.

3.163 The elements of 'comparison' and 'weighted average normal value' do not seem in dispute. A comparison has been made, and a weighted average normal value has been established for all models that were exported.

3.164 The question then becomes what exactly is meant by the *'weighted average of prices of all comparable export transactions.'* This third element comprises five notions:

1. weighted average
2. of prices
3. of all
4. comparable
5. export transactions.

3.165 Out of these five, the key notions are the notion of 'weighted average', the notion of 'all', and the notion of 'comparable.'

3.166 As noted in section III.A.4.1 above, the *Oxford Concise Dictionary* defines 'average' as *"an amount obtained by dividing the total of given amounts by the number of amounts in the set."*

[80] Annex 49.

3.167 Clearly, for establishing an average, there is no justification to exclude certain amounts. The definition of 'average' clearly relates to the total of given amounts and not to a number of given amounts from where a selection can then be made as to which ones are to be averaged.

3.168 This view on the notion of average is further underlined by the use of the word 'all' within the text of Article 2.4.2. By no stretch of imagination could it be understood that instead of 'all' one could also read 'some' or 'a number of', *etc.*

3.169 Finally the word 'comparable' merits attention. Clearly it is understood that in order for a comparison to be effectuated the comparable models will first have to be compared with each other. Assigning various product control numbers to the various models accomplish this: for each respective model the relevant normal value is compared with the appropriate export price. However, this does then not mean that for the eventual weighing of the overall dumping margins the negative dumping should be attributed a zero value. This latter practice is contrary to the concept of weighing and in fact distorts the process of actually weighing the dumping margin. The fact that the actual process of weighing is being distorted is clearly shown by the above-cited calculations with respect to Prakash that clearly showed a no dumping situation in case the weighted average of all comparable transactions was properly compared.

3.170 The EC, by suddenly inserting a new, unwritten, rule into the text of Article 2.4.2 has thereby acted inconsistently with the concept of a weighted average dumping margin. In fact, it is recalled that paragraph (349) of the (unadopted) ATC Panel report provides that *" . . . [i]n the view of the Panel, the issue of "zeroing" would not arise in cases where the comparison was made between an average normal value and an average export price."*

3.171 We note that, contrary to the ATC issue on negative dumping, the EC method always will lead to a higher dumping margin compared to the unqualified method envisaged by the ADA. [Except of course in the exceptional situation where all models are dumped, in which rare case the results would be the same (a situation which did not occur in the Bed Linen case)].

3.172 The EC, by unilaterally deviating from the text of the ADA, has therefore acted inconsistently with Article 2.4.2 of the ADA.

IV. CLAIMS RELATED TO THE INJURY DETERMINATION AND THE EXPLANATION THEREOF

A. ARTICLE 3.1: CONSIDERATION OF OTHER THAN 'DUMPED IMPORTS'

4.1 Summary: the EC considered, for the purposes of the injury determination, all imports from India to have been dumped, even though much bed linen from India exported during the investigation period was clearly found not to be dumped. By including such non-dumped imports for the injury determination, the EC acted inconsistently with Article 3.1 of the ADA (**claim 8**).
The EC further failed to properly explain its reasoning, and consequently acted inconsistently with Article 12.2.1 (**claim 9**) and 12.2.2 (**claim 10**).

1. Facts

4.2 The Indian exporters argued from the beginning that their exports of bed linen to the EC had not caused injury. Such arguments were made in the submission on injury (Annex 50), during their first injury hearing on 13 January 1997, and in the post-hearing brief submitted on 6 February 1997.

4.3 In its provisional Regulation the EC made a determination on Community industry and injury which for the convenience of the Panel is quoted here *in toto*:

> *"**E. COMMUNITY INDUSTRY***
>
> ***1. Definition of the Community industry***
>
> *(52) After elimination from the list of companies included in the complaint of seven of them found not to be complainants, the Commission found that the remaining companies represented a major proportion of Community production of bed linen and satisfied the requirements of Article 5(4) of the basic Regulation.*
>
> *After initiation of the proceeding, a number of organizations representing exporters and importers of bed linen from the countries concerned alleged that several of the producers which made up the Community industry were also importing the dumped product from the countries subject to the proceeding. In these circumstances, the Commission re-examined whether, in the light of the provisions of Article 4(1)(a) of the basic Regulation, these companies should be excluded from 'the Community industry'.*
>
> *(53) For the purposes of carrying out this re-examination, and in accordance with consistent practice of the Community institutions, it appeared appropriate to determine whether those companies were primarily producers in the Community with an additional activity based on imports and merely supplementing their Community production, in order to be able to offer a complete range of products, or whether they were importers with relatively limited additional production in the Community.*
>
> *(54) In all but one case, companies alleged to be importing bed linen from the countries concerned were among those selected in the sample of Community producers (see recitals (58) to (61)). The Commission was therefore able to examine the extent of these imports during the course of its on-the-spot verification visits. For all but one of these sampled companies, the investigation showed that the imports of dumped products from the countries concerned had accounted for less than 10 per cent of the turnover of the companies in question in the period examined. It is therefore the opinion of the Commission that these companies were not shielded from the effects of dumped imports and that for the purposes of Article 4 of the basic Regulation these companies may be considered along with the other cooperating producers, as belonging to the Community industry.*
>
> *In the case of the one other sampled company, it was found that a higher proportion of its bed linen sales in the investigation period were of Pakistani origin and also that only a minor part of its sales were of its own production. It appeared in addition that the company's future activity was likely to be further focused on imports. This company, whose core interests were deemed clearly not to be in the production of bed linen within the Community, was therefore eliminated from the Community industry.*
>
> *(55) Since all but one of the sampled companies alleged to be importing bed linen from the countries concerned were found, on examination, not to be doing so in quantities sufficient to warrant exclusion, it has been considered that the allegations made by the exporters in this regard were excessive and unreliable. Consequently, on the basis of the findings concerning the sample, no exclusion of the one non-sampled company is warranted. This company*

should, therefore, be retained in the definition of the Community industry. In any event, this issue has no substantial influence on the question of the representativity of the Community industry.

(56) Three other companies were eliminated. In one case the company was found no longer to produce bed linen. In two other cases the companies did not respond to the requests for information which were addressed, via Eurocoton and the national associations, to those complainants which were not selected in the sample of Community producers, in order to obtain information on the Community industry as a whole.

(57) The remaining 35 companies, which cooperated with the enquiry and are located in France, Germany, Italy, Spain, Portugal, Austria and Finland, represented a major proportion of total Community production in the investigation period. These companies were therefore deemed to make up the Community industry under the terms of Article 4 (1) of the basic Regulation.

2. Sampling

(58) Because of the number of companies in the Community industry it was decided to resort to sampling, in accordance with Article 17 of the basic Regulation.

(59) 27 of the 35 companies, representing 96.7 per cent of Community industry production and 32.5 per cent of total Community production in 1995, (the latest figures available at the time of sample selection) were situated in Germany, Italy, France and Portugal.

(60) As a general rule, Community producers sell a large proportion of their bed linen production in their own Member State, in part because of differences between Member States in standard products and sizes. This is true of Germany, France and Italy which are both the largest producers of bed linen in the Community and very important importers. The producers in these Member States were therefore clear candidates for assessing the impact of the imports on the Community industry.

Producers in Portugal, for their part, sell a large proportion of their production in other Member States and represent about one third of the production of complainant companies. Even though Portugal is not a significant importer, therefore, it was decided that the effect of the imports on the producers there should be assessed and that Portugal should be represented in the sample.

(61) In consultation with the complainant Eurocoton an initial list of 19 companies was arrived at (eight from France, six from Germany, four from Italy and one from Portugal).

In the course of the enquiry one of these companies was eliminated from the sample for failing to cooperate with the enquiry. As a result of this exclusion, and of the exclusion of the other company under Article 4(1)(a) of the basic Regulation (see recital (54)), in the following injury analysis information given for 'sampled producers` is based on information supplied by the remaining 17 producers which represented 20,7 per cent of total Community production and 61.6 per cent of the production of the Community industry. They included the largest Community industry companies in Germany, Italy and Portugal, and also smaller producers. The Commission therefore considered this sample to be representative of the Community industry.

F. INJURY

1. Collection of data

(62) Data for the examination of injury caused to the Community industry was collected and analysed at three different levels, as follows:

— *at the level of the entire Community (EU-15), for trends concerning production, consumption in the Community, imports, exports and market share. Data was obtained from Eurocoton and from recognized industry sources, notably the CITH (Centre d'Information Textile et Habillement) which produces a series of production figures across the Community for the whole of textile category 20. This category is very slightly broader than the definition of the product concerned in the present proceeding. However, the difference is very slight, as the extra products it includes are of very minor significance,*

— *at the level of the Community industry, as defined above, for trends concerning production, sales by value and employment,*

— *at the level of the sampled Community producers, for the factors mentioned above and also for trends concerning prices and profitability.*

2. Consumption

(63) Community consumption of the product concerned (as measured by production plus imports minus exports) decreased from 200 000 tonnes in 1992 to 186 000 tonnes in the investigation period, a decrease of 7 per cent.

3. Cumulative assessment of the effects of the dumped imports

(64) The Commission considered, in the light of Article 3(4) of the basic Regulation, whether cumulative assessment of injury caused by the three exporting countries was justified.

(65) With regard to the conditions laid down in Article 3(4)(a) the margin of dumping established in relation to the imports from each country is more than the minimis and the volume of imports from each country is not negligible. In this respect India and Pakistan are both subject to quotas on their exports of bed linen to the Community. Both countries used these quotas in full (at least 98 per cent) in each of the 1993, 1994 and 1995 quota years and increased the effective quotas by transferring quota allocation from other categories. In addition, it appears that in 1995, India exported to the Community a volume of bed linen 20 per cent higher than the amount licensed for the 1995 quota year.

All three exporting countries involved in this proceeding increased their exports of the product concerned between 1992 and the investigation period. The largest exporter, Pakistan, increased its exports by volume by 6 per cent, and the second largest, India, increased its exports by 56 per cent. Exports from Egypt, which are not subject to quotas, rose by 282 per cent between 1992 and the investigation period though remained well below the other two countries.

In accordance with the terms of Article 3(4)(b), the conditions of competition between imported products, and between imported products and the like Community products, were analysed. It was found that the imports compete directly with each other and with the like Community product, and that in particular a number of large purchasers of bed linen buy both from the Community industry and from the countries concerned. While there are variations in the proportions by type and destination of exports from each of the countries concerned, it was found that products from each exporting country were substitutable and competed with each other and with the products of Community producers on the Community market.

(66) It was therefore held that a cumulative assessment of the effects of the imports was appropriate in terms of Article 3(4) of the basic Regulation.

4. Volume and market share of dumped imports

(67) Dumped imports from the three countries concerned increased from 33 825 tonnes in 1992 to 46 656 tonnes during the investigation period i.e. an increase of 12 831 tonnes or 38 per cent. During the same period their market share increased from 16,9 per cent to 25,1 per cent.

5. Prices of the imports concerned

(68) The Commission examined whether the exporting producers' sales in the Community were at prices that undercut the prices of the sampled Community producers during the investigation period.

(69) Given the great diversity of products involved, the Commission defined certain reference products of particular importance in each of the principal markets analysed (France, Germany, Italy) for which price and cost data would be determined for the sampled Community producers. Because of different habits and traditions these products were different in each of the Member States examined.

For each of the reference products and for certain other bed linen products of particular interest in specific markets sold by the sampled Community producers the Commission established average prices during the investigation period using information obtained from the sampled Community producers. These prices were then compared with imported products of similar size, weaving construction and finish, where these were sold to clients in the Member State concerned.

(70) Certain exporters contended that even when products corresponded in size, weaving construction and finish they should not be regarded as comparable, in particular because the imported goods were of poorer quality. These quality differences were alleged to arise, for example, from lower weaving production technology.

(71) Differences in production technology do not of themselves, however, mean that there are physical differences between the articles produced. In addition, the Commission received evidence that exporters in the countries concerned produced bed linen using the most modern machinery.

It was also found that the products were often sold alongside each other, for example appearing on the same page of mail order catalogues without any indication of origin. In any event, no quality differences could be established.

The Commission therefore considered that there were no reasons not to compare the prices of products corresponding in size, weaving construction and finish, as envisaged in recital (69) above.

(72) Certain exporters also claimed that the imported and Community products were sold through different sales channels and were not therefore in competition. They alleged that while the exporters sold to large hypermarket chains, mail order companies etc, in particular for lower-priced 'promotion' sales, the European producers concentrated on branded goods sold through specialists or department stores etc.

On examination it was found that the mix of sales channels did indeed differ to the Community producers and for importers, and indeed differed between Community producers. However, large purchasers such as hypermarkets and mail order companies were also important to the majority of the sampled Community producers, and were sometimes their dominant clients. It was also found that selling to these clients for promotional sales was an important part of this output. It was therefore held that prices of imported and Community-produced goods could be compared.

(73) The Commission examined how quantities and prices of the imports concerned and of the sampled Community producers varied by sales channel. The results varied between Member States. In France and Germany, for example, Community producers made more than 80 per cent of their sales directly to retailers, and small quantities at relatively high prices to wholesalers and distributors. Imports were divided between retail and wholesalers and some exporters sold exclusively to wholesalers. In these circumstances the Commission considered that a comparison of prices by sales channel would not be appropriate: the prices of Community producers to wholesalers and distributors could not be considered to be representative ones with which the prices of imports sold in higher volumes could be compared.

(74) The comparison was therefore made between average prices of the imports, expressed duty paid cif Community frontier, and average ex- works prices of the Community producers for each reference product. The prices of the Community producers were adjusted downwards by a margin calculated to give the average price through the cheapest sales channel (eg. discount stores in Germany, hypermarkets in France). The resulting price was further adjusted to take account of importers' costs.

(75) Certain exporters observed that some product types (notably a particular quality called seersucker, and white (bleached) products which are often destined for use by institutions such as hotels and hospitals) were important in their exports but were not represented among the reference products. They claimed that this showed that the products they exported to the Community and the products sold by Community producers were not in competition with each other, that a valid undercutting analysis could not be carried out or that these types should be excluded from any measures imposed.

(76) The Commission considered these arguments but concluded that a difference of product mix did not invalidate the finding that there was competition between the products sold by the

exporters and the products sold by Community producers. The Commission found that the concentration by Community producers on other products was a reflection of the level of competition from the dumped imports, and decided that the analysis undertaken according to the methodology set out above was a valid measure of the degree of price undercutting practised by the exporters.

(77) The reference products used for the undercutting analysis, which in effect represent a product sample, were found to be represented among the Community sales of all the sampled exporters from the countries concerned except one Egyptian company, with a variable degree of importance among the rest. Where the degree of representativity was particularly low, the Commission examined the prices of other products (or a per kilo basis) to check that those used for the undercutting analysis were in line with the prices of the rest of their sales to the Community.

(78) The Egyptian company whose exports to the Community contained no reference products was one of the three State-owned producers. The company exported almost exclusively bleached articles to the Community in the investigation period. A calculation was made using the prices of these articles which matched reference products in all respects apart from the fact that they were bleached, adjusted upwards for dyeing costs.

(79) All the sampled exporters were found to be undercutting the prices of the reference products of the Community producers. In India, the level of undercutting ranged from 13.8 per cent to 40.8 per cent, in Pakistan from 11.9 per cent to 34.7 per cent and in Egypt from 23.8 per cent to 53.7 per cent, expressed as percentages of the adjusted average prices of the Community industry.

(80) The Commission assessed the development of the average prices of imports from the countries concerned. It was established that since 1992 the prices of Indian and Egyptian imports had fallen by up to 18 per cent. While the prices of Pakistani imports had risen in that period, the rise had been at a much slower rate than the very sharp increases in the world price of raw cotton.

6. Situation of the Community industry

(a) Production

(81) Total output of bed linen by producers in the Community fell by 9,6 per cent from 138,400 tonnes in 1992 to 125,100 tonnes in the investigation period. This fall in production arose essentially through the closure of enterprises or their cessation of bed linen production within the Community (see recital (91) below). It should also be noted that total exports by Community producers have increased by 50 per cent, from 14,027 tonnes in 1992 to 21,756 in the investigation period. Without this export performance, Community bed linen production would have suffered further than the figures given above.

The pattern observed for total Community production was not replicated at the level of the 35 producers of the Community industry, whose production rose by 8.7 per cent from 39,370 tonnes in 1992 to 42,781 tonnes in the investigation period. The Commission concluded that the Community industry represented those companies which were strong enough to survive the competition from dumped imports and which to a certain extent had benefited from the demise of those which had not so survived.

Indeed, in the course of its investigation the Commission acquired evidence of 29 companies other than the Community industry which ceased or reduced bedlinen production in the Community between 1992 and the investigation period. It is estimated that total loss of production amounted to at least 10,000 tonnes per annum.

The sales, employment and profits of companies which have since disappeared are not included in the aggregated data for the Community industry, thus artificially improving the apparent trends for the survivors.

(b) Sales by volume

(82) At the level of the total Community producers, sales by volume in the Community, as measured by production minus exports, fell by 17 per cent from 124,400 tonnes in 1992 to 103,350 tonnes in the investigation period.

Sales by the sampled producers of the Community industry also declined, from 23,706 to 23,347 tonnes, a decrease of 1.5 per cent.

(c) Sales by value

(83) 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 ECU 280.6 million in 1992 to ECU 285.3 million (a rise of 1.7 per cent). It should be noted that these rises in nominal terms do not take account of inflation and represent a fall in real terms, since consumer prices in ecus rose by 5.5 per cent over the same period for the EU-15 countries. It should also be noted that these rises were overtaken by rises in the price of raw cotton (see recital (88) below).

It should be noted that among the sampled producers it was observed that sales have been maintained by seeking higher value market niches as the lower value, mass market items are undercut by imports. This pattern is indicated by developments on prices (see recital (87) below).

(d) Market share

(84) The market share by volume of producers at the level of the entire Community fell from 62.2 per cent in 1992 to 55.6 per cent in the investigation period. In that period the sampled producers from the Community industry increased their market share slightly, from 10.7 per cent to 11.3 per cent. The reason why the market share of survivors has slightly increased is that they have taken over some of the sales of those which had not survived the competition from dumped imports, particularly the sales of higher value niche products.

(85) An estimated analysis was done of market share by value. The patterns observed were the same as for market share by volume: producers at the level of the entire Community lost market share (from 77.8 per cent in 1992 to 72.0 per cent in the investigation period), while the Community industry as a whole and sampled producers gained market share, from 22.4 per cent to 25.1 per cent and from 14.7 per cent to 16.0 per cent respectively.

(e) Price development

(86) The Commission examined the development in average prices achieved by the sampled Community producers for the defined reference products between 1993 and the investigation period, using a constant product mix of the reference products. This showed that prices, in index terms, fell from 100 in 1993 to 97.6 in 1994, recovering to 98.3 in 1995 and 99.2 in the investigation period. This represents a greater fall in real terms, since in the same period average consumer prices measured in ECUs rose by 5.5 per cent in the Community.

(87) The development in average prices per kilogram of the sampled producers was also measured. This measure showed an average price development from 100 in 1992 to 97.8 in 1993 to 103.2 in the investigation period. The fact that this measure has developed more positively than prices for the defined reference products further reflects the fact the sampled producers have been forced to move into niche markets and away from high volume, mass market products.

(88) The Commission also examined the development of the standard measure for prices of cotton, the principal raw material. This measure showed increases of 48 per cent from 1992 to the investigation period and of 59 per cent between 1993 and the investigation period. Since the raw material can represent typically 15 per cent of the costs of the finished product, it follows that the prices achieved by the sampled Community producers were far from reflecting the rises in the costs of that material.

(f) Profitability

(89) The profitability of the sampled companies declined by more than 50 per cent between 1992 and the investigation period, from a figure of 3.6 per cent to 1.6 per cent of sales. This is well below the figure of 5 per cent which can be regarded as a minimum level which was achieved by these companies in 1991 when the dumped imports concerned were 30 per cent lower than in the investigation period. It is also below profit levels achieved by importers, which explains why certain producers have ceased production and switched to importing.

(90) It should be recalled again that the sampled companies are among those which have been able to survive the competition of dumped imports. It should also be noted that the industry in question is not capital intensive and that it contains a large number of SMEs, which means that any move into loss-making can lead to immediate exit rather than remaining in business waiting for better times. This is why the companies that are left are those that are profitable or, as in this case, only just profitable.

(g) Employment

(91) Direct employment by the 35 companies of the Community industry on the product concerned declined by 5.3 per cent between 1992 and the investigation period, from around 7,000 jobs to 6,700.

In analysing data on the Community industry, account should be taken of the 29 companies other than the Community industry which ceased or reduced bed linen production in the Community between 1992 and the investigation period (see recital (81)). The associated job losses numbered over 2,400.

(h) Conclusion on injury

(92) The Commission took into account all the economic indicators mentioned above in determining whether or not the Community industry was suffering material injury. Account was taken of the fact that the number of companies making up the Community industry was reduced in comparison with the start of the injury investigation period. The production, sales, employment and profits of companies which have since disappeared are not included in the aggregated data for the Community industry, thus improving the apparent trends for the survivors.

(93) The Commission noted the decline in the total production and market share of Community producers. This background demonstrates the difficult conditions in which the remaining Community industry was operating. The fact that these surviving companies were able to maintain production and market share should not detract from the assessment of the overall situation. Above all, the remaining Community industry suffered declining and inadequate profitability, as further evidenced by prices which had not been able to reflect increases in the costs of raw cotton or to keep pace with inflation in prices of consumer goods.

(94) Accordingly the Commission reached the view that the Community industry had suffered material injury.

G. CAUSATION

1. Introduction

(95) The Commission examined the volume and prices of the dumped products from the exporting countries concerned and their consequent impact on the situation of the Community industry. As part of this examination the Commission also examined the effects of other factors in order to ensure that these effects were not incorrectly attributed to the dumped imports. This examination had to take into account the existence of quotas, which might have limited the potential for growth in sales on the Community market by the countries concerned and other third countries.

2. Effects of the dumped imports from the countries concerned

(96) The investigation of the Community industry showed as the main injury indicator the unsatisfactory development of sales prices and the consequent declining profitability. It was also established that the dumped imports were sold at prices which significantly undercut those of the Community producers and in substantial and increasing quantities, reaching 25 per cent market share in the investigation period.

(97) In order to assess the full impact of the dumped imports, it should be noted that the market for bed linen is characterised by product substitutability and transparency. Large retailers were found to sell the imported products and the Community-produced products alongside each other, without the ultimate consumer being informed of the product's origin. The transparency of the market was found not to be significantly affected by the differences in standard products among Member States: several sampled exporters in the countries concerned sold products in three or more Member States, in each case adapting their production to supply the standard products of the territory concerned. In view of the price sensitivity of the large purchasers it can be concluded that the consistently low prices of the

imports concerned, coupled with their substantial and increasing market share (see recitals (67) to (80)), have applied continuous downward pressure on prices on the Community market.

(98) It was observed among sampled producers that they had been obliged increasingly to shift production and sales to high value niche markets in order to maintain production and sales levels. The undercutting calculation provided evidence that this shift was caused by the imports concerned. Undercutting margins were lower in the lower value qualities, indicating that the imports significantly influence price levels in this market segment and have forced down Community producers' prices. Where higher value items were imported the undercutting margins were higher, indicating that imports of these qualities were not yet at sufficient volume to bring down Community prices to the same extent.

It is worth noting that the Commission has received indications from importers, from Community producers and from suppliers of textile machinery to the exporting countries to the effect that exporters in the countries concerned are increasingly moving to higher value items.

(99) Since price suppression and consequent decreasing profitability to inadequate levels were the main indicators on which the Commission's finding of injury was based, and in view of the coincidence in time between the deterioration of the situation of the Community industry and the significant increase of the dumped imports, it can be concluded that there was a direct causal link between these imports and the material injury found.

3. Effects of other factors

(a) Imports from third countries

(100) Imports from other third countries not covered by this proceeding fell between 1992 and the investigation period, both in absolute terms (from 41 600 tonnes to 35 800 tonnes) and in terms of market share (from 20.8 per cent in 1992, considerably above the total of the countries concerned in this proceeding, to 19.3 per cent in the investigation period, considerably below). These imports originate in a wide range of third countries outside the countries concerned by this investigation. The most significant in terms of volume was, with its 1995 market share, Turkey (3.6 per cent). However Eurostat statistics show that imports from Turkey declined between 1992 and 1995 and were imported at prices significantly above those of the countries concerned by this investigation. Countries with prices comparable to those of the countries concerned by this investigation include Romania, Slovakia and Estonia. However, their combined market share of 2.8 per cent in 1995 is just over 10 per cent of the combined share of the countries concerned by this investigation.

(101) It follows from the foregoing that imports from countries not concerned which undercut the Community industry's prices could also have contributed to the injury suffered by the Community industry. However, the Commission considered that the link between the dumped imports and the injury to the Community industry was sufficiently clear and direct as to consider that injury from these other sources, which had only a small market share, had not been wrongly attributed in the analysis. In this respect, there was shown to be a reasonable coincidence in timing between, on the one hand, the degree of the effects of low prices and rising volumes of the dumped imports and, on the other, the material injury attributed to the dumped imports.

(b) Increase in raw cotton prices

(102) 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.

(103) The Commission concluded that increases in raw material prices had caused injury. However, the extent of such injury depends on the ability of the producers 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.

(c) Developments in Community consumption and demand

(104) Certain exporters suggested that any injury being suffered by the Community industry could be ascribed to the steady decrease in total consumption of the product concerned, by 7 per cent between 1992 and the investigation period.

(105) It is clear that the decline in consumption between 1992 and the investigation period has contributed to the situation of the Community industry. However, the fall did not affect all operators equally. During this period the total volume of sales by Community producers fell by an amount 50 per cent higher than the total fall in consumption. While sales by the Community industry have remained relatively stable, benefiting from the disappearance of other Community producers, the dumped imports from the countries concerned increased by 48 per cent. Imports from other third countries decreased by 14 per cent. Because total sales by Community producers fell by 50 per cent more than the total fall in consumption and sales by other imports declined, it can be concluded that increased dumped imports through severe price undercutting gained at least one third of the sales volumes lost by Community producers. This clearly constitutes a cause of material injury not attributable to the decline in consumption.

(106) In addition, even if the decline in consumption contributed to some extent to the situation of the Community industry, in particular because it strengthened the position of large purchasers in price negotiations with Community producers, this strengthened position depended critically on the availability to these purchasers of the dumped imports undercutting the Community industry's prices.

(d) Competition from non-complainant producers in the Community

(107) The Community industry represents only a part of total Community production. It should therefore be examined whether competition from other producers within the Community affects the situation of the Community industry. Other producers of bed linen are known to include, in particular, a large number of 'converters', i.e. producers who make bed linen from grey cloth woven elsewhere, whereas the Community industry consists largely of integrated producers who weave most or all of their own grey cloth. As has been found, on a provisional basis, in the separate proceeding concerning imports of grey cloth from India,

Pakistan, Egypt, China, Indonesia and Turkey, important sources of supply of this product were imported into the Community at dumped prices which would have provided these producers with an unfair advantage over the Community industry in the present proceeding. It cannot therefore be ruled out that distorted competition from this source contributed to the situation of the Community industry.

(108) Nevertheless it should be noted that the production and market share of the non-complainant producers have fallen between 1992 and the investigation period. Indeed the fall in production across the Community has been due to reduction by the non-complainants rather than by complainants. Since the imports concerned have increased over this timescale, the Commission decided that competition by non- complainants did not invalidate the conclusion that the imports concerned caused the injury observed.

4. Conclusion on causation

(109) As has been shown above, there is a direct causal link between the increased volume and the price effect of the dumped imports and the material injury suffered by the Community industry. The direct link in this case is demonstrated by the existence of heavy undercutting which can reasonably explain the significant increase in market share of the dumped imports from 16.9 per cent in 1992 to 25.1 per cent in the investigation period and the corresponding negative consequences on volumes and prices of sales of Community producers. In terms of volumes, Community producers' market share decreased from 62.2 per cent in 1992 to 55.6 per cent in the investigation period. This fall was not reflected at the level of individual producers of the Community industry because they obtained sufficient benefit from the demise of other Community producers to keep their sales volume relatively stable. However, as far as the prices of the dumped imports are concerned, they have had an evident impact on the sampled producers, may of them being SMEs, whose profitability has fallen from 3.6 per cent to 1.6 per cent. In this respect, the Commission noted that such a situation can cause particular difficulty for SMEs given their lack of resources and the reluctance of banks to finance any losses.

(110) The consequent impact of the low-priced dumped imports has to be considered at two levels. Firstly, they have resulted in the exit of a significant number of firms with a considerable number of jobs lost. This is an on-going process which is likely to continue if dumping persists. Secondly, as to the surviving producers, they face continuing injury on two fronts. For low-value products the injury is very heavy since they are gradually pushed out of the corresponding market segment. For higher-value products, these producers have done considerably better but dumped imports are now progressively targeting this segment with the result that profitability is also falling in this respect.

In connection with this it should be noted that the larger Community industry producers, however, have a production capacity which cannot be utilized at a reasonable rate on the basis of high value items only. This capacity utilization can only be maintained through production of mass-market lower value items the market for which is now highly penetrated by imported goods.

(111) The analysis of the effects of other factors than the dumped imports on the state of the Community industry has in fact confirmed the above direct causal link. Imports from some countries not concerned, increases in raw material prices, contraction in demand and competition from non-complainant bed linen producers had or may have negatively affected

the Community industry. However, even the combined effect of these other factors could not break the direct causal link established since it can reasonably be concluded that the Community industry could, in the absence of the dumped imports, have adapted to these other factors without being materially injured. The dumped imports themselves were therefore determined to have caused material injury within the terms of Article 3(6) of the basic Regulation."

4.4 Texprocil made substantial arguments following this determination (Annex 51).

4.5 In the definitive Regulation the EC provided the following explanations on the state of the domestic industry:

"(40) Exporters from all the exporting countries claimed that the Commission's analysis of injury was defective in that it referred to the significant decline in total Community production of bed linen in assessing the situation of the Community industry. They claimed in particular that information concerning companies not included in the definition of the Community industry or which no longer produce bed linen cannot be used to construe a finding of material injury.

These claims were examined carefully. It should however be remarked that the principal basis for the finding of material injury was the reduced profitability and price suppression of the Community industry as observed among the sampled companies.

(41) In the assessment of injury pursuant to Article 3 of the basic Regulation, the Community institutions have to assess the economic situation of the Community industry. This assessment usually covers the analysis of a time period of four to five years as in the present case ('assessment period'). Such an assessment is commonly based on an analysis of the complaining industry and not necessarily on companies accounting for the totality of Community production on the ground that the situation of a major proportion of the Community production is representative for its totality. Such an assessment, however, also has to take into account the structure and the nature of the industry under consideration. In the present case this industry is characterized by a high number of operators, in many cases small- and medium-sized companies, and by the fact that it is a sector with relatively low barriers to exit. The latter is mainly due to the fact that machinery can be sold or used for other products relatively simply. This has the effect that material injury is likely to manifest itself through the exit of economic operators within the assessment period.

Consequently, to limit the assessment of injury only to companies which are still operational at the end of the assessment period (i.e. at the time of the lodging of the complaint) and thus able actively to support a complaint would mean that any injury caused to companies which have closed down before this point in time would go unconsidered in the analysis. Furthermore, it should be noted that this distortion could even be aggravated as the surviving complaining companies of the Community industry may have benefited, possibly only temporarily, from the disappearance of other companies, causing their positive development to be overestimated.

In the present case, it should be noted that 29 companies of the bed linen industry have closed down or ceased production: that is to say, that a substantial number of companies have ceased operation. Furthermore, given the substantial price undercutting established, the strong increase in the volumes of the imports concerned and their consequent rise in market

share, any relatively positive development of the complaining producers must be seen as threatened in the absence of anti-dumping measures." (Emphasis added)

4.6 During the first round of consultations, India raised its concern that imports other than dumped imports had been taken into account for the assessment of injury:[81]

"Mr Seth: Several provisions in Article 3 of the Agreement require that injury caused by dumped imports be determined. Article 3.1 requires that

'[a] determination of injury . . . shall . . . 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.'

Similarly, Articles 3.2, 3.4, 3.5, 3.6 and 3.7 refer to 'dumped imports' as opposed to 'all imports of the product concerned'. The European Community has in two different ways included non-dumped imports in its determination and this affects each and all of these provisions.

. . . it is clear from the disclosure documents that the EC in its injury determination implicitly considers all Indian exports to the EC during the investigation period to have been dumped, even though the case handlers in the dumping team have ascertained that not all Indian exports during the investigation period (1 July 1995 to 30 June 1996) were dumped.

India believes that, for these two reasons, the EC has determined injury and causality inconsistently with Articles 3.1, 3.2, 3.4 and 3.5.

. . .

[EC]: You recognise that this is normal practice. I cannot deny there is an assumption element. We make the dumping calculation over the like product. On this basis we found that the dumping determination covered all imports during the IP. We compensated for this by using WA-to-WA comparison in the dumping margins.

Mr Seth observes that no such compensation takes place due to the zeroing practice . . . "

4.7 During the second round of consultations the matter was raised again: [82]

"Mr Seth: I'll move on to a slightly different aspect now. Did the EC agree that it assumed for the injury analysis that all imports from India were dumped?

[EC]: Yes. This responds to your questions 19 to 24. Article 2.1 requires that dumping is established for a 'product'. On this basis, we put dumping results of types in an average form. Thus, the result is an average."

4.8 In its letter of 29 June 1999[83], the EC provided the following written answers:

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[81] The verbatim report of this first round is attached as Annex 11.
[82] The verbatim report of the second round is attached as Annex 13.
[83] Annex 14.

"Questions 19 to 24

Concerning dumped imports as opposed to all imports in the injury and causality determinations

In this case, the Community calculated dumping for the like product as a whole.

Dumping was investigated for a period of 1 year prior to the initiation of the proceeding. For injury, data was also examined for the investigation period though some factors were addressed for a longer period mainly to enable trends to be established."

2. EC practice

4.9 In EC practice, the injury determination consists of two elements. An injury [underselling (or sometimes undercutting)] margin is calculated per investigated exporter.[84] In Bed linen II the investigation period ["IP"] covered the period from 1 July 1995 to 30 June 1996.[85] This underselling margin is calculated over the investigation period.

4.10 Second, the investigating authorities make an assessment of the total imports and prices, and of the state of the domestic industry (the determinations required by Articles 3.1 through 3.6 ADA, inclusive). The remainder of this claim concentrates on the second determination, and notably on Article 3.1.

4.11 For the determination of the volume of *"dumped"* imports, the EC implicitly considers all Indian exports to the EC during the investigation to have been dumped. This is standard practice: *"The injury analysis concerning the examination of the volume and price effects of the dumped imports will also take into consideration imports with no or de minimis dumping margins . . . "*[86]

3. Claims

4.12 Several claims flow from the facts as described above.

4.13 First, India considers the EC determination to automatically assume that all imports of bed linen from India during the investigation period were dumped to lead to a finding inconsistent with Article 3.1.

4.14 Second, in the provisional Regulation the EC has insufficiently explained the basis for its consideration of all imports of bed linen from India as being *"dumped"*. (If the EC has not taken account of non-dumped imports, this is not evident from the provisional Regulation and the provisional disclosure document.) Consequently, the EC acted inconsistently with Article 12.2.1 of the ADA.

4.15 Third, in the definitive Regulation the EC has insufficiently explained the basis for its consideration of all imports of bed linen from India as being *"dumped"*. (If the EC has not taken account of non-dumped imports, this is not evident from the definitive Regulation and the definitive disclosure document.) Consequently, the EC acted inconsistently with Article 12.2.2 of the ADA.

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[84] On the basis of this, the sample injury margin and the residual injury margin are determined.

[85] Provisional Regulation at recital (9).

[86] See in this respect Müller, Khan, Neumann, *EC Anti-Dumping Law—A Commentary on Regulation 384/96*, Wiley (1998) at 189.

4. Claim 8: inconsistency with Article 3.1

4.1 The text of Article 3.1

4.16 Articles 3.1, 3.2, 3.4, 3.5, and 3.6 of the ADA require that injury caused by *"dumped"* imports be determined:

> *"Determination of Injury*[1]
>
> *3.1 A determination of injury for purposes of Article VI of GATT 1994 shall . . . 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. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree . . .*
>
> *3.4 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 . . .*
>
> *3.5 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*
>
> *3.6 The effect of the dumped imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers' sales and profits. If such separate identification of that production is not possible, the effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.*
>
> . . .
>
> *Footnote 1. Under this Agreement the term 'injury' shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article."*

(Emphasis added)

4.17 First, throughout Article 3 the language is consistent: the injury to the domestic industry must have been caused by *"dumped imports"*.[87] The first issue is thus what the meaning is of *"dumped imports"*.

4.18 Thus, the plain meaning of the provision is clear in as much as it refers to imports. In this context, Article 2.1 of the ADA is of relevance:

> *"For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if 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."* (Emphasis added)

4.19 Article 2.1 is not limited to *"for the purpose of this Article"*; rather the definition of *"dumped"* contained in it is also applicable to other Articles of the ADA. In other words, imports in Article 3 are only considered to be *"dumped"* if they have been introduced into the commerce of the EC at less than their normal value, if their export price is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

4.20 It may be observed that under Article 17.6(ii) of the ADA the Panel will 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."*

4.21 However, in the clear language (plain meaning) of the Agreement as interpreted in accordance with the customary rules of interpretation of public international law *"dumped imports"* means *"dumped imports"*, and not *"dumped and non-dumped imports of the like product"*. To consider *"dumped imports"* to include *"dumped and non-dumped imports"* is a leap in logic not authorized by the ADA. The issue of Article 17.6(ii) therefore does not arise in this context.

4.2 Legal arguments relating to the Article 3.1 claim

4.22 For its injury determination the EC cumulated the volume of imports from all three targeted countries. It is clear from page 13 of the provisional disclosure document[88] that the volume taken into account for the purposes of Article 3 is the total imports from these three countries, and not just the volume of *"dumped imports"*:

[87] It is noted that the main difference between Article 3.4 of the ADA and its predecessor, Article 3.3 of the 1979 Anti-Dumping Code is that in the ADA the words *"of the dumped imports"* were added to the opening words *"The examination of the impact on the industry concerned . . . "*

[88] Annex 23.

"4. Volume and market share of dumped imports (Annex 3)

Dumped imports from the three countries concerned increased from 33,825 tonnes in 1992 to 46,656 tonnes during the investigation period i.e. an increase of 12,831 tonnes or 38 per cent. During the same period their market share increased from 16.9 per cent to 25.1 per cent."

4.23 The amount of 46,656 tonnes can be found back on page 32 of the same document, if the total imports (total product concerned—tonnes) for the three targeted countries are added:

India:	18,428 tonnes
Pakistan:	21,514 tonnes
Egypt:	6,714 tonnes
Total:	46,656 tonnes

4.24 It follows from Annex 3 to the same document (page 33) that the market share of 25.1% mentioned by the European Commission also refers to this 46,656 tonnes (46,656 ÷ total apparent consumption of 185,825 = 25.1%).

4.25 A considerable amount of the exports by the sampled companies was found not to have been dumped. The percentages of sets found not to be dumped, on the basis of the disclosure documents of the European Commission, is as follows (disclosure calculation sheets attached as Annex 52):

Name company	Total q'ty non-dumped sets	Total q'ty exported sets	Percentage non-dumped out of total exported
Omkar	111,409	1,363,149	8.17%
Prakash	808,464	1,616,859	50.00%
Madhu	39,352	859,152	4.58%
Anglo-French	20,130	1,210,043	1.66%
Bombay Dyeing	209,254	620,655	33.71%
Total sample	1,188,609	5,669,858	20.96%

4.26 Moreover, if the EC had not zeroed negative dumping inconsistently with the ADA, the company Prakash would have been found not to be dumping at all. In view of the fact that this company accounted for 28.5 per cent[89] of the volume of all exports to the EC of bed linen of the sample, it is evident that the total amount of "*non-dumped imports*" accounted for more than one-third of India's exports [*i.e.* all exports of Prakash plus non-dumped sets of other companies].[90]

4.27 Due to the confidentiality rules in force, India cannot know the amount of non-dumped imports from Egypt and Pakistan that have similarly been taken into account. But if the percentage of these would be in the same order as for India, it would imply that the total market share of the "*dumped imports*" has been overstated with more than one-fifth, and should be [25.1% x (1-0.2096)=] 19.8 per cent instead. Additionally, if the errors in the dumping calculation are corrected, it would likely dwindle to only a fraction of this amount.

4.28 It is granted that the EC cannot review the overview of 'dumped imports' from the period preceding the investigation period up to the investigation period, simply because the EC has no information on the level of any 'dumped imports' in the years preceding the investigation period. This does not, however, imply a licence to consider all imports of bed linen during the investigation

[89] [1,616,859 ./.. 5,669,858]*100 = 28.5%.
[90] [1,188,609 + (1,616,859 - 808,464) ./.. 5,669,858]*100 = 35.2%

period as being dumped. Especially when the EC determines the investigation period market shares of EC producers and producers of the targeted countries, it should have referred to the market share during the investigation period of *"dumped imports"* only.[91] By considering the total volume and market share of imports during the investigation period rather than that of dumped imports, the EC grossly overstated their volume and market share.

4.29 In this context the *obiter dictum* of the Panel in EC—Imposition of anti-dumping duties on imports of cotton yarn from Brazil is noted:[92]

> *". . . the Panel noted that in responding to a question by the Panel the EC had stated 'Regarding the volume to be considered for injury purposes, the Community took into account all imports, whether dumped or non-dumped, for the reasons mentioned above.' Articles 3:2 and 3:4 of the Agreement required that the investigating authorities examine the volume and effects of the 'dumped' imports. The Panel noted that the EC stated in its response that it had, for the purposes of its injury analysis, taken into account the effects of all imports from Brazil, whether dumped or non-dumped. As Brazil had not made a claim that the EC had thereby acted inconsistently with the Agreement, the Panel could not pronounce itself on any such claim."* (Single underlined emphasis in original; Double underlined emphasis added)

4.30 Unlike Brazil in the above-mentioned GATT panel proceeding, India does claim that the EC's determination is inconsistent with Article 3 of the Agreement.

4.31 The EC indicated during the consultations that it could legitimately consider the total amount of imports to have been dumped, since per company it had averaged the dumping results of non-dumped and dumped products. This argument, in India's view, is incorrect. To begin with, it negates the clear wording of Article 3 and imputes injury where the clear wording of the ADA will have none.

4.32 Additionally, in Article 2.1 *"a product is to be considered as being dumped"* if *"the export price of the product . . . is less than the comparable price . . . for the like product when destined for consumption in the exporting country"*. In EC practice (as applied in the Bed linen II proceeding) the EC first compares normal value and export prices on a per-type basis. Then the total dumping amount is calculated, and this is divided by the total CIF border price. The oft-stated reason for this calculation method, in which the total dumping amount is 'spread' over all types, appears to be that it would be impractical to impose an anti-dumping duty on a per-type basis. However, that does not automatically imply that the types for which no dumping is found then suddenly become *"dumped"* for purposes of the injury determination: These are two completely different issues. If on average for a type the export price was not less than the comparable price for the like product sold in India[93], then that type was not *"dumped"*; and it does not become *"dumped"* in retrospect merely because the EC averages the dumping margin calculated at the very end of the dumping margin calculation.

4.33 Furthermore, in EC practice, even if one or more companies of the sample would have been found not to be dumping, and only some other companies were, the EC would still consider all

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[91] Without prejudice to India's views on the appropriateness of the sample chosen, the EC could have calculated the amount of non-dumped imports by reference to the total amount of non-dumped exports of the sample during the IP, as a percentage of the total exports of the sample.

[92] EC—Imposition of anti-dumping duties on imports of cotton yarn from Brazil, ADP/137 of 4 July 1995 at § 525.

[93] Or, in case of comparisons between a weighted average normal value with export transactions on a transaction-by-transaction basis: if in no case the export price of a transaction of the type concerned was less than the comparable price of the like product sold in India.

imports of the product concerned from all companies for the purposes of Article 3.1. If the EC had not made the errors in the dumping calculation noted in Part III of this submission, this would have been directly relevant for the situation of at least the company Prakash.

4.34 Last, the conceptual consequence of the EC's practice should be considered in its extreme application: if just one model out of a hundred models under investigation causes a weighted average dumping margin slightly over the *de minimis* threshold, dumping will be found overall and all imports will be considered dumped for the injury analysis.

4.35 India considers that the failure of the EC to examine dumped transactions only for the purpose of the injury determination in the Bed linen II proceeding is inconsistent with Articles 3.1, 3.2, 3.4, 3.5, and 3.6 ADA.

5. Claim 9: inconsistency with Article 12.2.1

5.1 The text of Article 12.2.1

4.36 It is recalled that Articles 12.2 and 12.2.1 of the ADA provide in relevant part as follows:

> *"12.2 Public notice shall be given of any preliminary or final determination, whether affirmative or negative . . . Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities . . .*
>
> *12.2.1 A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular . . .*
> *(iv) considerations relevant to the injury determination as set out in Article 3;*
> *(v) the main reasons leading to the determination."*

5.2 Legal arguments relating to the claims relating to Article 12.2.1

4.37 In anti-dumping proceedings the investigating authorities have a very dominant position as far as knowledge of the facts is concerned. This is especially so in the EC, where contrary to the AD systems in the United States and Canada, the European Commission is the only entity having access to all facts relating to the investigation. Article 12 fulfils the crucial rôle of ensuring a certain minimum degree of transparency. In this context the dictum of the Panel in Korea—Anti-dumping duties on imports of polyacetal resins from the United States is recalled:[94]

> *"In the view of the Panel, the purpose of this provision would be frustrated if in a dispute settlement proceeding . . . a Party were allowed to defend a challenged . . . determination by reference to alleged reasons for such determination which were not part of a public statement of reasons accompanying that determination . . ."*

[94] Korea—Anti-dumping duties on imports of polyacetal resins from the United States, Report of the Panel, ADP/92 and Corr.1 of 2 April 1993 at § 209.

4.38 If the EC took account for the purposes of Article 3 in any way of only the dumped imports, there is nothing in the published Regulations or the non-confidential file to show for it. The volume and market share of *"dumped imports"* would seem to be a matter of vital importance to any injury determination. Under these circumstances, the EC can hardly claim that the provisional Regulation or the provisional disclosure explained *"in sufficient detail the findings and conclusions reached on all issues of fact and law considered material"*. Nor can it claim that these documents properly explained the "*considerations relevant to the injury determination as set out in Article 3"*.

4.39 For the above reasons India considers that the EC, even if it did consider only the impact of the *"dumped imports"* for the purpose of Article 3, acted inconsistently with Article 12.2.1.

6. Claim 10: inconsistency with Article 12.2.2

6.1 The text of Article 12.2.2

4.40 The text of Article 12.2.2 differs somewhat from that of Article 12.2.1:

> *"A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures . . . In particular, the notice or report shall contain the information described in subparagraph 2.1 . . ."* (Emphasis added)

6.2 Legal arguments relating to the claims relating to Article 12.2.2

4.41 Reference is made to the logic in section 5.2, above. India believes that neither the definitive Regulation nor the definitive disclosure or the non-confidential file explained the EC's determination on Article 3 in the light of its use of all imports from India rather than only *"dumped imports"*. The Regulation thus suffers from the same defect under Article 12.2.2 as it does under Article 12.2..1

B. ARTICLE 3.4: THE EC FAILED TO EVALUATE ALL RELEVANT ECONOMIC FACTORS AND INDICES HAVING A BEARING ON THE STATE OF THE DOMESTIC INDUSTRY

4.42 Summary: for the purpose of the determination required under Article 3.4 the EC failed to evaluate all relevant factors and indices having a bearing on the state of the domestic industry (**claim 11**). The EC further failed to properly explain its reasoning, and consequently acted inconsistently with Article 12.2.1 (**claim 12**) and 12.2.2 (**claim 13**). This also violates the rights of defence as contained in Article 6 (**claim 14**).

1. Facts

4.43 After the initiation of the Bed linen II proceeding, the European Commission selected a sample from the companies determined to constitute the domestic industry.[95] This sample was asked to complete questionnaires.[96]

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[95] The determination and use of the domestic industry are issues addressed in separate claims (see notably section IV.C of this submission).

[96] India believes that the EC has acted inconsistently with Article 3.4 in several ways. This section (IV.B) discusses the EC's failure to evaluate all relevant factors and indices listed in Article 3.4. Section IV.C

4.44 On 25 October 1996 Texprocil filed a brief concerning injury issues (Annex 50) in which it provided comments on the information (such as it was) available on return on investments, capacity and capacity utilisation, cash flow, inventories, wages, growth, and investments.

4.45 After the non-confidential summaries of the questionnaire responses of the EC sample (Annex 53) were filed[97], the Indian exporters were able to provide more detailed comments on these factors. During their first injury hearing on 13 January 1997 Texprocil argued in detail why the non-confidential questionnaire responses (as far as any had been made available by that time) did not indicate material injury caused to the domestic industry. This was followed up by the post-hearing brief filed on 6 February 1997 (Annex 54), which noted amongst others the following:

> *"4.7 Capacity and capacity utilisation*
>
> *The complainant acknowledges that it has no statistics on the capacity or capacity utilisation of bed linen because such statistics are 'far too specific.' This statement does not make sense: one of the criteria called in support of the like product definition mentioned by the complaint is 'the equipment used' for the production of bed linen. It is hard to see why EC producers of bed linen would be unable to supply information on the development of their capacity utilisation.*
>
> *The allegation that capacity utilisation followed the trend in production is little more than a simple assertion, unsubstantiated by relevant evidence and should therefore be ignored . . .*
>
> *Since there is no other evidence on capacity utilisation pointing towards injury, it follows that there is nothing on capacity utilisation indicating that imports of bed linen from India caused material injury to the Community industry.*
>
> *4.8 Cash flow*
>
> *No information on cash flow whatsoever has been provided suggesting that imports of bed linen from India caused material injury to the Community industry.*
>
> *If such information has been provided in the confidential questionnaire responses of the EC sample, it has not been summarised in non-confidential form and should be left without consideration by the Commission.*
>
> *4.9 Inventories*
>
> *No information whatsoever has been provided in the non-confidential version of the complaint suggesting that imports of bed linen from India caused material injury to the Community industry.*

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discusses the EC's failure to correctly determine whether the 'domestic industry' has suffered material injury. Section IV.D discusses the EC's determination concerning imports from before the investigation period.

[97] Under the EC's practice of confidentiality producers have to submit—next to the confidential versions of their questionnaire responses and briefs—non-confidential summaries thereof. Especially in cases where the complainants are (generally) not stock-listed, such non-confidential summaries are often the major source of relevant information available to the exporters. This footnote is not intended as criticism of the EC's rules on confidentiality per se.

If such information has been provided in the confidential questionnaire responses of the EC sample, it has not been summarised in non-confidential form and should be left without consideration by the Commission . . .

4.11 Wages

No information whatsoever has been provided in the non-confidential version of the complaint suggesting that imports of bed linen from India caused material injury to the Community industry.

4.12 Growth

No information whatsoever has been provided in the non-confidential version of the complaint suggesting that imports of bed linen from India caused material injury to the Community industry.

4.13 Investments

No information whatsoever has been provided in the non-confidential version of the complaint suggesting that imports of bed linen from India caused material injury to the Community industry.

If such information has been provided in the confidential questionnaire responses of the EC sample, it has not been summarised in non-confidential form and should be left without consideration by the Commission." (Footnotes omitted)

4.46 In the provisional Regulation and the provisional disclosure document the European Commission discussed the following factors and indices listed in Article 3.4:

(a) production: recital (81);
(b) sales by volume: recital (82);
(c) sales by value: recital (83);
(d) market share: recitals (84) and (85);
(e) prices: recitals (86)-(88);
(f) profitability: recitals (89) and (90); and
(g) employment: recital (91).

4.47 Specifically, the EC did not comment in the provisional disclosure or the provisional Regulation on

— productivity;
— return on investments;
— capacity and capacity utilisation;
— factors affecting domestic prices;
— actual and potential negative effects on cash flow;
— inventories;
— wages;
— growth; and
— investments.

4.48 In the definitive disclosure document and definitive Regulation the EC confirmed its provisional assessment of the factors and indices having a bearing on the state of the domestic industry (recitals (40)-(42)), again without further mentioning or explaining the following factors and indices:

— productivity;
— return on investments;
— capacity and capacity utilisation;
— factors affecting domestic prices;
— actual and potential negative effects on cash flow;
— inventories;
— wages;
— growth; and
— investments.

4.49 During the first round of consultations between India and the EC the failure of the EC to evaluate some of the injury factors and indices listed in Article 3.4 was discussed:[98]

> *"Mr Seth: . . . The following issue again concerns Article 3.4.*
>
> *In the provisional duties Regulation the EC discussed the following factors affecting the domestic industry: production, sales by volume, sales by value, market share by volume, market share by value, price development, and profitability and employment. In the definitive duties Regulation these determinations were not altered.*
>
> *Neither in the provisional, nor in the definitive duties Regulation did the EC discuss or consider the following factors listed in Article 3.4:*
> — *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, wages, growth, ability to raise capital or investments.*
>
> *It is recognised that Article 3.4 provides that '[t]his list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.' In other words, if the investigating authorities find that not all factors listed in Article 3.4 point towards an injury finding, they may nevertheless conclude that material injury exists if a sufficiently good case can be made.*
>
> *However, it follows from this, and from the literal wording of Article 3.4, that the investigating authorities first must discuss the factors listed in Article 3.4. In casu this has not happened for the factors indicated above. The EC thus acted inconsistently with Article 3.4. . . .*
>
> *[EC]: Which point has not been dealt with? We believe all points are covered. Moreover, Article 3.4 is not exhaustive, the phrase 'not . . . guidance' means 'not relevant'."*

4.50 In its letter of 1 October 1998 the EC provided an answer in writing on this issue (Annex 12):

[98] The verbatim report of the first round of consultations is attached as Annex 11.

*"**Ouestion 45***

Would the EC agree that it did not discuss or consider the following injury factors listed in Article 3.4?
— productivity, return on investments, or utilisation of capacity;
— factors affecting domestic prices;
— the magnitude of the margin of dumping;
— actual and potential negative effects on cash flow, inventories, wages, growth, ability to raise capital or investments.

It is the general practice of the European Community to consider all possible injury factors. In this proceeding, the following injury indicators were considered particularly relevant for the purpose of assessing injury to the Community industry:

(a) -Production	*-recital (81) of provisional duty Regulation*
(b) -sales by volume	*-recital (82)*
(c) -sales by value	*-recital (83)*
(d) -market share	*-recital (84) and (85)*
(e) -price development	*-recital (86) to (88)*
(f) -profitability	*-recital (89) and (90)*
(g) -employment	*-recital (91)*

In recitals (93) to (94) of the provisional duty Regulation as well as in recital (40) of the definitive duty Regulation, it was concluded that the decisive injury indicators which led to the conclusion of material injury suffered by the Community industry were its declining and inadequate profitability, price suppression and the low level of its sales prices in the Community market."

4.51 The EC therefore clearly acknowledged that it did not discuss all Article 3.4 factors. Despite this acknowledgement in its answer to question 45, the EC in its letter of 29 June 1999[99] stated that:

"Question 46

Would the EC agree that the text of Article 3.4 -- while recognising that "[t]his list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance" -- does require at least discussion of each of the factors?

As stated in the answer to Q 45 above, it is the practice of the European Community to consider all possible factors in the overall assessment of injury as well as to identify the most important aspects as regards injury.

Question 47

Could the EC indicate where in the provisional and definitive Regulations (or elsewhere) it has done so?

See reply to Q 46 above."

[99] See Annex 14.

2. Claims

4.52 Three claims flow from the facts described above.

4.53 First, the EC's failure to evaluate all relevant economic factors and indices having a bearing on the state of the industry is inconsistent with Article 3.4 of the ADA.

4.54 Second, even if the EC did make an evaluation of all factors and indices having a bearing on the state of the industry, it failed to properly explain this in a sufficiently detailed manner in the provisional Regulation or in the provisional disclosure document. This is inconsistent with Article 12.2.1.

4.55 Third, even if the EC did make an evaluation of all factors and indices having a bearing on the state of the industry, it failed to properly explain this in a sufficiently detailed manner in the definitive Regulation or in the definitive disclosure document. This is inconsistent with Article 12.2.2.

3. Claim 11: inconsistency with Article 3.4

3.1 The text of Article 3.4

4.56 It is recalled that Article 3.4 provides as follows:

> *"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."* (Emphasis added)

4.57 The first key word would seem to be *"shall"*. In the words of the Appellate Body:[100]

> *"The chapeau of Article 5.5 clearly states that the schedule in the body of that provision is mandatory. The word used in the chapeau is 'shall', not 'may'. There is no qualifying language, and there is no language that permits any method other than that set out in the schedule in Article 5.5 as a basis for the calculation of additional duties."*

4.58 There is no reason why this logic would be any different in the context of Article 3.4 of the ADA.[101] It follows that the evaluation mentioned in Article 3.4 *"shall"* by necessity include *"all relevant . . . factors"*. The word *"all"* indicates that all relevant factors must be included in this *"evaluation"*. The word *"evaluation"* implies an assessment or weighing of these factors: in Korea—

[100] European Communities—Measures affecting the importation of certain poultry products, AB-1998-3, WT/DS69/AB/R of 13 July 1998 at § 165.

[101] It is noted that the interpretative standard in Article 17.6(ii), last sentence only comes into play if the interpretation *"in accordance with customary rules of interpretation of public international law"* would lead to more than one result. *In casu*, however, the interpretation of the ordinary meaning to be given to the terms of Article 3.4 in their context and in the light of its object and purpose supports only the interpretation of the Appellate Body quoted above.

Anti-dumping duties on imports of polyacetal resins[102] the Panel noted (in the context of the 1979 Anti-Dumping Code) that:

> *"While the relative weight to be accorded to each of [the] factors [in Article 3.3 of the 1979 Anti-Dumping Code] depended upon the circumstances of each particular case, the overall context of an analysis of the specific factors mentioned in Article 3:3 was that of 'an evaluation of all relevant economic factors and indices having a bearing on the state of the industry' . . ."*

4.59 In order for this assessment or weighing to lead to a correct result, it is by necessity imperative that all relevant factors and indices are considered.

4.60 The word *"all"* is given further meaning by the word *"including"*. It follows from this term that at a minimum the factors and indices listed in the remainder of the sentence must be considered (evaluated). The last sentence adds that there may in fact be additional factors and indices which, if relevant to the state of the domestic industry, should also be evaluated; but this does not mean that the factors and indices explicitly mentioned in the first sentence should not all be evaluated.[103]

3.2 Legal arguments relating to the claim relating to Article 3.4

4.61 There are two issues involved.

4.62 First, the wording of Article 3.4 is not specific to the ADA. Similar or identical wording featured in Article 3.3 of the 1979 Anti-Dumping Code[104], Article 6(3) of the 1979 Agreement on interpretation and application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade[105]; and in Article 15.4 of the Agreement on Subsidies and Countervailing Measures.[106]

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[102] Korea—Anti-dumping duties on imports of polyacetal resins from the United States, Report of the Panel, ADP/92 and Corr.1 of 2 April 1993 at § 276.

[103] This interpretation was recently confirmed in the Panel Report on Mexico—Anti-dumping investigation of high fructose corn syrup (HFCS) from the United States, WT/DS132/R of 28 January 2000. Regarding the interpretation of Article 3.4, the Panel stated at § 7.218 that:

"In our view, [the language of Article 3.4] makes it clear that the listed factors in Article 3.4 must be considered in all cases. There may be other relevant economic factors in the circumstances of a particular case, consideration of which would also be required. In a threat of injury case, for instance, the AD Agreement itself establishes that consideration of the Article 3.7 factors is also required. But consideration of the Article 3.4 factors is required in every case, even though such consideration may lead the investigating authority to conclude that a particular factor is not probative in the circumstances of a particular industry or a particular case, and therefore is not relevant to the actual determination. Moreover, the consideration of each of the Article 3.4 factors must be apparent in the final determination of the investigating authority."

[104] *"The examination of the impact on the industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry such as actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; 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."*

[105] *"The examination of the impact 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 such as actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investment and, in the case of agriculture, whether there has been an increased burden on Government support programmes. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance."*

4.63 In the context of these Agreements there has been consistent Panel jurisprudence on the necessity to examine 'all' relevant factors and indices. In Brazil—countervailing duties on milk the Panel made such an analysis:[107]

> *"333. The Panel noted that the list of factors mentioned in Article 6:3 in this provision was illustrative in nature, and the last sentence made it clear that the provision did not prejudge the weight to be given to any particular factor mentioned in the provision. At the same time, Article 6:3 clearly required investigating authorities to conduct in each case a comprehensive analysis of 'all relevant economic factors and indices having a bearing on the state of the industry'. The Panel was of the view that to consider only the stagnation of domestic production in the analysis of the impact of imports on the domestic industry was inconsistent with this comprehensive character of the examination required under Article 6:3.*
>
> . . .
>
> *340. In light of the foregoing considerations, the Panel concluded that the analysis and findings of the Brazilian authorities regarding the impact of the imports of milk powder from the EEC were inconsistent with the requirements of Article 6:3 because . . . the considerations in Administrative Order No. 569 did not permit the Panel to find that the Brazilian authorities had carried out a comprehensive analysis of 'all relevant economic factors and indices having a bearing on the state of the industry'." (Emphasis added)*

4.64 The Panel in Korea—Anti-dumping duties on resins went along a similar route:[108]

> *"For the reasons set forth in the preceding paragraphs, the Panel was of the view that it was unable to ascertain from the text of the determination on what factual basis the KTC had found that the level of net profit in 1989 was insufficient to enable the industry 'to maintain normal operations and development.' While there might have been relevant information before the KTC in this regard, the determination did not enable the Panel to determine how this information had been evaluated by the KTC in making this finding. The Panel recalled its statement in paragraphs 227 and 228 regarding the considerations by which it was guided in reviewing whether the KTC's determination was based on positive evidence. The Panel concluded that the KTC's finding that the level of net profit in 1989 was not sufficient to permit the industry 'to maintain normal operations and development' was not adequately substantiated by positive evidence and was thereby inconsistent with Korea's obligations under Article 3:1 of the Agreement."*

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[106] *"The examination of the impact of the subsidized imports on the domestic industry 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 output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments and, in the case of agriculture, whether there has been an increased burden on government support programmes. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance."*

[107] Brazil—Imposition of provisional and definitive countervailing duties on milk powder and certain types of milk from the EEC, Report of the Panel adopted on 28 April 1994, SCM/179, and Corr.1 at §§ 333 and 340.

[108] Korea—Anti-dumping duties on imports of polyacetal resins from the United States, Report of the Panel, ADP/92 and Corr.1 of 2 April 1993 at § 254.

4.65 In the context of Article 3.3 of the 1979 Anti-Dumping Code the Panel in United States—Salmon noted that:[109]

> *"an essential element of a review of whether a determination of material injury was in conformity with Article 3 was an examination of whether the factors set forth in Articles 3:2 and 3:3 had been properly considered by the investigating authorities."*

4.66 This was also the EC's own view:[110]

> *"420. . . . Specifically, the EC while continuing to assert that Article 3 imposed purely 'procedural' requirements, had stated that:*
>
> *'[I]t is inconceivable on the other hand that injury could be found, where the consideration or evaluation of the factors and indices did not yield a positive result; the consideration or evaluation must make clear that for each of the elements (volume, price and consequent impact on the domestic industry) all the factors or indices have been considered . . .'"* [emphasis added]

4.67 One may also recall that in the recent Panel Proceeding concerning Argentina—Safeguard Measures the EC argued that:[111]

> ***"Argument of the European Communities***
>
> *5.217 The European Communities notes that Article 4.2(a) of the Agreement on Safeguards requires that the investigation of serious injury, or the threat thereof, evaluate "all relevant factors of an objective and quantifiable nature having a bearing on the situation of the domestic industry, in particular the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilisation, profits and losses, and employment." According to the European Communities, this provision lays down the principle that an injury investigation must be complete ("all relevant factors") and reliable ("factors of an objective and quantifiable nature having a bearing on the situation of that industry"). Furthermore, an investigation must be consistent, adequate, complete, clear and precise for its conclusions to be sufficiently motivated and transparent. The European Communities notes that this position finds support in two recent Panel reports[112] which dealt with the standard of "serious damage" set forth in Article 6.3 of the Agreement on Textiles and Clothing (ATC)[113]. Both Panel Reports stressed the obligation to examine each of the*

[109] United States—Imposition of anti-dumping duties on imports of fresh and chilled Atlantic salmon from Norway, Report of the Panel adopted on 27 April 1994, ADP/87 on § 493.

[110] EC—Anti-dumping duties on audio tapes in cassettes originating in Japan, not adopted.

[111] Argentina—Safeguard Measures on Imports of Footwear, Report of the Panel adopted on 25 June 1999, WT/DS121/R.

[112] [Footnote 208 in original]: *"See Panel Report on 'United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India', 6 January 1997, WT/DS33/R; and Panel Report on 'United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear', WT/DS24/R, 8 November 1996. Both Panel Reports were subject to review by the Appellate Body which did not, however, rule on the standard of serious damage."*

[113] [Footnote 209 in original]: *"Article 6:3 ATC reads: "In making a determination of serious damage, […] the Member shall examine the effect of those imports on the state of the particular industry, as reflected in changes in such relevant economic variables as output, productivity, utilization of capacity, inventories, market*

> *enumerated injury factors in detail. In United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*[114]*, the Panel criticised the US for providing inconsistent and inadequate information. The Panel in United States – Measure Affecting Woven Wool Shirts and Blouses from India stated*[115] *that, "[a]t a minimum, the importing Member must be able to demonstrate that it has considered the relevance or otherwise of each of the factors listed […]". Since the United States examined only eight out of eleven listed factors, while some of the information provided by the United States was either incomplete, vague or imprecise, the Panel ruled that the requirements of Article 6.3 of the Agreement on Textiles and Clothing had not been respected.*[116]
>
> *5.218 The European Communities argues that even though the wording of Article 6.3 of the Agreement on Textiles and Clothing is slightly different from Article 4.2(a) of the Agreement on Safeguards, both provisions nevertheless contain a list of injury factors which must be evaluated properly by the investigating authority. Therefore, in accordance with the rationale stated in the above-mentioned Panel Reports, the European Communities submits that, at a minimum, a "serious injury" determination under the Agreement on Safeguards must demonstrate that the relevance or otherwise of each of the factors listed in Article 4.2(a) of the Agreement on Safeguards was considered. The European Communities further submits that that provision requires each injury factor to be properly analysed. All listed factors have to be investigated completely and in full. The result of the analysis cannot be inconsistent, inadequate, incomplete, vague or imprecise. Therefore, in the EC view, if Argentina investigates five separate sectors of the footwear industry, but fails – as mentioned earlier – to investigate import trends, market share, profits and losses and employment for each market segment, it violates its obligations under the Agreement on Safeguards."* [Emphasis in original and emphasis added]

4.68 Even though the wording of Article 4.2(a) of the Agreement on Safeguards is slightly different from Article 3.4 ADA, both provisions nevertheless contain a list of injury factors which must be evaluated properly by the investigating authority. *All* listed factors have to be investigated completely and in full. The result of the analysis cannot be inconsistent, inadequate, incomplete, vague or imprecise.

4.69 It is recalled that the Panel agreed with this argument:[117]

> *"8.123 We note, first, that the text of Article 4.2(a) of the Safeguards Agreement explicitly requires the evaluation of "all relevant factors", in particular those listed in that article. Second, Article 6.4 of the ATC*[118] *contains no such express requirement and recognises that*

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share, exports, wages, employment, domestic prices, profits and investments; none of which, either alone or combined with other factors, can necessarily give decisive guidance." (emphasis added)."

[114] [Footnote 210 in original]: *"Panel Report on 'United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear', WT/DS24/R, 8 November 1996, at paragraph 7.45."*

[115] [Footnote 211 in original]: *"See Panel Report on 'United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India', 6 January 1997, WT/DS33/R, at paragraph 7.26."*

[116] [Footnote 212 in original]: *"Idem, at paragraph 7.51."*

[117] Argentina—Safeguard Measures on Imports of Footwear, Report of the Panel adopted on 25 June 1999, WT/DS121/R.

[118] [Footnote 510 in original]: *"Article 6.4 of the ATC: "… The Member or Members to whom serious damage, or actual threat thereof … is attributed, shall be determined on the basis of a sharp and substantial increase in imports, actual or imminent, from such a Member or Members individually, and on the basis of the level of imports as compared with imports from other commercial transaction; none of these factors, either alone or combined with other factors, can necessarily give decisive guidance. …"."*

> *"none of these factors … can necessarily give decisive guidance. Nonetheless, the panels on United States - Underwear and United States - Shirts and Blouses ruled that each and every injury factor mentioned in Article 6.4 of the ATC has to be considered by the national authority. With regard to the obligation to evaluate "all relevant factors" we consider these past panel reports relevant. Consequently, in accordance with the text of the Safeguards Agreement and past practice, we consider that an evaluation of all factors listed in Article 4.2(a) is required."* [Emphasis added]

It is further recalled that the Appellate Body confirmed the view of the Panel on this issue:[119]

> *"136. We agree with the Panel's interpretation that Article 4.2(a) of the Agreement on Safeguards requires a demonstration that the competent authorities evaluated, at a minimum, each of the factors listed in Article 4.2(a) as well as all other factors that are relevant to the situation of the industry concerned."*

4.70 It is further recalled that the EC raised the same argument, and the Panel was of the same view, in the Proceeding concerning Korean Safeguard measures on Dairy products:[120]

> *"Failure to examine correctly all relevant factors of an objective and quantifiable nature having a bearing on the situation of the domestic industry*
>
> *4.296 Article 4.2.(a) of the Agreement on Safeguards requires that the serious injury investigation evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of the domestic industry, in particular the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.*
>
> *4.297 This provision lays down the principle that an injury investigation must be complete ("all relevant factors"). Only factors that are not relevant, or not objective or quantifiable, or do not have a bearing on the situation, may be excluded. Clearly, it is necessary to examine a factor before it can be considered that it is not relevant, or not objective or quantifiable, or does not have a bearing on the situation. The European Communities note that this position has been supported in two recent Panel reports[121] which dealt with the standard of "serious damage" set forth in Article 6.3 of the ATC.[122] Both Panel reports stressed the obligation to examine each of the enumerated injury factors. In the US - Underwear case, the Panel criticized the United States for providing inconsistent and inadequate information. The Panel in the US - Shirts and Blouses case stated that "at a minimum, the importing Member must be able to demonstrate that it has considered the*

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[119] Argentina—Safeguard Measures on Imports of Footwear, Report of the Appelate Body adopted on 14 December 1999, WT/DS121/AB/R

[120] Korea—Safeguard Measures on Imports of Dairy Products, Report of the Panel adopted on 21 June 1999, WT/DS98/R.

[121] *See,* Panel report in *US - Shirts and Blouses*, 6 January 1997, WT/DS33/R; *US - Underwear*, WT/DS24/6, 8 November 1996. Both Panel reports were subject to review by the Appellate Body that did, however, not rule on the standard of serious damage.

[122] "In making a determination of serious damage, [...] the Member *shall examine* the effect of those imports on the state of the particular industry, as reflected in *changes in such relevant economic variables as* output, productivity, utilization of capacity, inventories, market share, exports, wages, employment, domestic prices, profits and investments; none of which, either alone or combined with other factors, can necessarily give decisive guidance." (emphasis added)

relevance or otherwise of each of the factors listed [...]".[123] *Since the United States did not examine eight of these factors in the context of the particular industry without giving any explanation for not doing so, the requirements of Article 6 of the Agreement on Textiles and Clothing were not respected.*[124]

4.298 Even though the wording of Article 6.3 of the Agreement on Textiles and Clothing is slightly different from Article 4.2 (a) of the Agreement on Safeguards, both provisions nevertheless contain a list of injury factors which shall be evaluated by the investigating authority. Therefore, in accordance with the rationale stated in the above Panel reports, the European Communities submit that, at a minimum, a serious injury determination under the Agreement on Safeguards must demonstrate that the relevance or otherwise of each of the factors listed in Article 4.2(a) of the Agreement on Safeguards was considered. The European Communities would further submit that that provision requires each injury factor to be properly analysed unless it is explained for what reason the injury factor may be disregarded."

The Panel agreed:

"7.58 . . . In assessing the serious injury to the whole domestic industry, . . . all factors listed in Article 4.2 must be addressed. . . ."

The Appellate Body did not overturn this view.

4.71 The interpretative standard in Article 17.6(ii), last sentence does not come into play since the interpretation of the ordinary meaning to be given to the terms of Article 3.4 in their context and in the light of its object and purpose leaves no doubt on their interpretation.

4.72 As noted in the description of the facts, the EC has failed to take account of several factors and indices mentioned in Article 3.4 of the ADA, and especially the following factors and indices:

— productivity;
— return on investments;
— capacity and capacity utilisation;[125]
— factors affecting domestic prices;
— actual and potential negative effects on cash flow;
— inventories;
— wages;
— growth; and
— investments.

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[123] *See, US - Shirts and Blouses*, para. 7.26.

[124] *See, id.* at para. 7.52.

[125] § 110 of the provisional Regulation states that:

"In connection with this it should be noted that the larger Community industry producers, however, have a production capacity which cannot be utilized at a reasonable rate on the basis of high value items only. This capacity utilization can only be maintained through production of mass-market lower value items the market for which is now highly penetrated by imported goods."

This reference in passing to capacity utilisation—not in the section dealing with the determination but in the section on causality—, without any further substantiation, can hardly count as a determination on capacity utilisation, or a proper explanation of such determination.

4.73 The investigating authorities thus failed to make a proper evaluation of all relevant economic factors and indices[126], and consequently acted inconsistently with Article 3.4 of the ADA.

4.74 Second, without prejudice to the argument presented above, it is recalled that the Indian exporters had made specific arguments relating to the available information on

— capacity and capacity utilisation;
— cash flow;
— inventories;
— wages;
— growth; and
— investments.

4.75 Admittedly, in view of the paucity of the non-confidential summaries made available by the complainants, it was not possible for Indian exporters to make a meaningful analysis of these factors. Nonetheless, India believes that the failure of the sampled domestic industry producers to provide meaningful non-confidential summaries of the data concerning these factors cannot shield the investigating authorities from their obligations under Article 3.4. It would rather seem that, in view of the failure of the domestic industry to provide meaningful non-confidential data on these factors, the investigating authorities had, if anything, an additional responsibility to investigate and evaluate these matters. Otherwise it would be very easy for a domestic industry to manipulate an injury determination by providing information only on negative factors and not on positive factors.

4.76 In summary, the EC has acted inconsistently with Article 3.4 by not evaluating all relevant economic factors and indices mentioned in Article 3.4 of the ADA.

4. Claim 12: inconsistency with Article 12.2.1

4.1 The text of Article 12.2.1

4.77 It is recalled that Articles 12.2 and 12.2.1 of the ADA provide in relevant part as follows:

> *"12.2 Public notice shall be given of any preliminary or final determination, whether affirmative or negative . . . Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities . . .*
>
> *12.2.1 A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular . . .*
> *(iv) considerations relevant to the injury determination as set out in Article 3;*
> *(v) the main reasons leading to the determination."*

[126] Even though India does not believe that it would have made a difference, it is noted that the EC at no point during the administrative proceeding has indicated or recorded anywhere in the file that these factors and indices would not be "*relevant*", or explained why this would be so.

4.2 Legal arguments relating to the claims relating to Article 12.2.1

4.78 As stated, the European Commission is the only entity having access to all facts relating to the initiation. Article 12 fulfils in this context a crucial rôle to ensure a certain degree of transparency.[127]

4.79 If the EC took account of productivity, return on investments, capacity and capacity utilisation, factors affecting domestic prices, actual and potential negative effects on cash flow, inventories, wages, growth, and investments, there is nothing in the published Regulations, the disclosure documents or elsewhere to attest to it.

4.80 First, it would seem that the Article 3.4 determination, which is required under Article 3.1, letter (b) of the ADA, is by definition an issue *"of fact and law considered material"* as implied by Article 12.2.

4.81 Second, in any event, the determination required by Article 3.4 would be (an important) part of the *"considerations relevant to the injury determination as set out in Article 3"* as intended by Article 12.2.1(iv). The wording of Article 12.2.1 is mandatory (*"shall . . . contain in particular"*).

4.82 Third, India believes that a proper determination on the state of the domestic industry belongs to *"the main reasons leading to the determination"* as per Article 12.2.1(v).

4.83 In summary, if the EC did in fact include in its evaluation all relevant economic factors and indices having a bearing on the state of the industry, it acted inconsistently with Article 12.2.1 by failing to properly explain its determination.

5. Claim 13: inconsistency with Article 12.2.2

5.1 The text of Article 12.2.2

4.84 It is recalled that Article 12.2.2 requires that:

> *"[a] public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures . . . In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers . . ."* (Emphasis added)

5.2 Legal arguments relating to the claims relating to Article 12.2.2

4.85 First, Article 12.2.2 refers back to subparagraph 2.1 of Article 12.2. Since the EC made no further explanations available in the definitive Regulation or elsewhere on productivity, return on

[127] In this context the dictum of the Panel in Korea—Anti-dumping duties on imports of polyacetal resins from the United States, Report of the Panel, ADP/92 and Corr.1 of 2 April 1993 at § 209 is recalled:

"In the view of the Panel, the purpose of this provision would be frustrated if in a dispute settlement proceeding . . . a Party were allowed to defend a challenged . . . determination by reference to alleged reasons for such determination which were not part of a public statement of reasons accompanying that determination . . ."

investments, capacity and capacity utilisation, factors affecting domestic prices, actual and potential negative effects on cash flow, inventories, wages, growth, and investments, the infringement of Article 12.2.1 noted in the second claim is by the same token an infringement of Article 12.2.2.

4.86 Moreover, in view of the arguments made by the Indian exporters the EC was under an additional obligation to provide explanations on the evaluation of these factors and indices (*"as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers"*). Its failure to do so implies in itself an inconsistency with Article 12.2.2.

6. Claim 14: inconsistency with Article 6

4.87 To the extent that the EC were to argue that it has fulfilled its obligations under Article 12, the Indian exporters were not aware of this. Accordingly the EC has, in addition to acting contrary to Article 12, also acted inconsistently with the right of defence, as set forth in Article 6 of the ADA.

6.1 The text of Article 6

4.88 It is recalled that the relevant parts of Article 6 require that:

> *Article 6: Evidence*
>
> *6.2 Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests.*
>
> . . .
>
> *6.4 The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.*
>
> . . .
>
> *6.9 The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests."*

6.2 Legal Arguments pertaining to Article 6

4.89 In view of the failure of the EC to disclose to the Indian exporters *that* and *how* it has in fact considered all factors in Article 3.4, it has also acted inconsistently with Article 6.2, 6.4, and 6.9.

4.90 Article 6.2 requires that throughout the investigation all interested parties shall have a full opportunity for the defence of their interest. To the extent that information on numerous relevant factors in Article 3.4 were never divulged, this has not been the case and the EC has acted inconsistently with Article 6.1.

4.91 Article 6.4 requires that the authorities shall provide the opportunity to see all information that is relevant. This has never happened in view of the absence on information on numerous relevant factors in Article 3.4.

4.92 Article 6.9 requires that interested parties shall be informed of the essential facts under consideration. Clearly this has never happened with respect to numerous relevant factors mentioned in Article 3.4.

C. ARTICLE 3.4: THE EC FAILED TO MAKE A CONSISTENT DETERMINATION OF THE STATE OF THE 'DOMESTIC INDUSTRY'

4.93 **Claim 15**: The EC has chosen a sample from the domestic industry, but did not consistently base its injury determination on this sample. In addition, the EC has explicitly determined that the domestic industry consists of 35 companies, but relied in its injury determination on companies outside this group in order to determine injury. Last, the EC chose to rely on different 'levels' of industry for different injury indices without any apparent reason other than goal-oriented 'picking and choosing' of injury. For each of these three reasons the EC acted inconsistently with Article 3.4. Moreover, the claim that the sample was representative is mathematically incorrect and therefore inconsistent with Article 6.10 (**claim 16**).
The EC further failed to properly explain its reasoning, and consequently acted inconsistently with Article 12.2.1 (**claim 17**) and 12.2.2 (**claim 18**).

1. Facts

4.94 It is recalled that under EC law, the 'domestic industry' is defined by reference to the standing determination. The relevant provisions are Articles 4(1) and 5(4) of the EC basic anti-dumping Regulation:

> Article 4(1): *"For the purposes of this Regulation, the term 'Community industry' shall be interpreted as referring to the Community producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion, as defined in Article 5(4), of the total Community production of those products, except that: . . ."*
>
> Article 5(4): *"An investigation shall not be initiated pursuant to paragraph 1 unless it has been determined, on the basis of an examination as to the degree of support for, or opposition to, the complaint expressed by Community producers of the like product, that the complaint has been made by or on behalf of the Community industry. The complaint shall be considered to have been made by or on behalf of the Community industry if it is supported by those Community producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the Community industry expressing either support for or opposition to the complaint. However, no investigation shall be initiated when Community producers expressly supporting the complaint account for less than 25 per cent of total production of the like product produced by the Community industry."* (Emphasis added)

4.95 Apart from the emphasised text, the provisions seem materially similar to the Articles 4.1 and 5.4 of the ADA. It follows (and has not been and could not be denied) that the concept of 'Community industry' in EC law for all practical purposes corresponds to that of 'domestic industry' in the ADA.

4.96 Article 3 of the basic Regulation follows the ADA in requiring that the injury determination be made for the domestic industry ('Community industry').[128] For example, Article 3(1) provides that:

> *"Pursuant to this Regulation, the term `injury' shall, unless otherwise specified, be taken to mean material injury to the Community industry, threat of material injury to the Community industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article."*

4.97 Similarly, Article 3(5) of the basic Regulation (which largely mirrors Article 3.4 of the ADA) requires that the state of the *"Community industry"* be ascertained:

> *"The examination of the impact of the dumped imports on the Community industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including: the fact that an industry is still in the process of recovering from the effects of past dumping or subsidization, the magnitude of the actual margin of dumping, actual and potential decline in sales, profits, output, market share, productivity, return on investments, utilization of capacity; factors affecting Community prices; 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 any one or more of these factors necessarily give decisive guidance."*

4.98 At maximum, the domestic industry (*"Community industry"*) whose injury must be determined can thus consist of the domestic industry defined for standing purposes. Under EC practice it is possible that, after the initiation, the investigating authorities determine that one or more companies have been wrongly included in the Community industry. Such companies are then excluded. Indeed, this happened in the Bed linen II proceeding before the provisional anti-dumping measures were imposed, as is evident from the quotation from the provisional Regulation below.

4.99 In the Bed linen II proceeding, the European Commission made an explicit determination on the domestic industry:

> *"**1. Definition of the Community industry***
>
> *(52) After elimination from the list of companies included in the complaint of seven of them found not to be complainants, the Commission found that the remaining companies represented a major proportion of Community production of bed linen and satisfied the requirements of Article 5(4) of the basic Regulation.*
>
> . . .
>
> *(54) In all but one case, companies alleged to be importing bed linen from the countries concerned were among those selected in the sample of Community producers (see recitals (58) to (61)). The Commission was therefore able to examine the extent of these imports during the course of its on-the-spot verification visits. For all but one of these sampled companies, the investigation showed that the imports of dumped products from the countries concerned had accounted for less than 10 per cent of the turnover of the companies in question in the period examined. It is therefore the opinion of the Commission that these*

[128] In the ADA Article 4.1 defines the domestic industry whose injury must be determined under Article 3.

companies were not shielded from the effects of dumped imports and that for the purposes of Article 4 of the basic Regulation these companies may be considered along with the other cooperating producers, as belonging to the Community industry.

In the case of the one other sampled company, it was found that a higher proportion of its bed linen sales in the investigation period were of Pakistani origin and also that only a minor part of its sales were of its own production. It appeared in addition that the company's future activity was likely to be further focused on imports. This company, whose core interests were deemed clearly not to be in the production of bed linen within the Community, was therefore eliminated from the Community industry.

(55) Since all but one of the sampled companies alleged to be importing bed linen from the countries concerned were found, on examination, not to be doing so in quantities sufficient to warrant exclusion, it has been considered that the allegations made by the exporters in this regard were excessive and unreliable. Consequently, on the basis of the findings concerning the sample, no exclusion of the one non-sampled company is warranted. This company should, therefore, be retained in the definition of the Community industry. In any event, this issue has no substantial influence on the question of the representativity of the Community industry.

(56) Three other companies were eliminated. In one case the company was found no longer to produce bed linen. In two other cases the companies did not respond to the requests for information which were addressed, via Eurocoton and the national associations, to those complainants which were not selected in the sample of Community producers, in order to obtain information on the Community industry as a whole.

(57) The remaining 35 companies, which cooperated with the enquiry and are located in France, Germany, Italy, Spain, Portugal, Austria and Finland, represented a major proportion of total Community production in the investigation period. These companies were therefore deemed to make up the Community industry under the terms of Article 4(1) of the basic Regulation."

4.100 According to the EC, these 35 companies represented approximately 34 per cent of total production in the EC. These 35 remaining companies were basically the complainants in the case.

4.101 For its injury determination, the European Commission took a sample from these 35 companies; thus, the provisional determination states:

"(58) Because of the number of companies in the Community industry it was decided to resort to sampling, in accordance with Article 17 of the basic Regulation.

(59) 27 of the 35 companies, representing 96.7 per cent of Community industry production and 32.5 per cent of total Community production in 1995, (the latest figures available at the time of sample selection) were situated in Germany, Italy, France and Portugal.

(60) As a general rule, Community producers sell a large proportion of their bed linen production in their own Member State, in part because of differences between Member States in standard products and sizes. This is true of Germany, France and Italy which are both the largest producers of bed linen in the Community and very important importers. The

producers in these Member States were therefore clear candidates for assessing the impact of the imports on the Community industry.

Producers in Portugal, for their part, sell a large proportion of their production in other Member States and represent about one third of the production of complainant companies. Even though Portugal is not a significant importer, therefore, it was decided that the effect of the imports on the producers there should be assessed and that Portugal should be represented in the sample.

(61) In consultation with the complainant Eurocoton an initial list of 19 companies was arrived at (eight from France, six from Germany, four from Italy and one from Portugal).

In the course of the enquiry one of these companies was eliminated from the sample for failing to cooperate with the enquiry. As a result of this exclusion, and of the exclusion of the other company under Article 4(1)(a) of the basic Regulation (see recital (54)), in the following injury analysis information given for 'sampled producers' is based on information supplied by the remaining 17 producers which represented 20.7 per cent of total Community production and 61.6 per cent of the production of the Community industry. They included the largest Community industry companies in Germany, Italy and Portugal, and also smaller producers. The Commission therefore considered this sample to be representative of the Community industry."

4.102 Subsequently, the provisional Regulation set out that

"(62) Data for the examination of injury caused to the Community industry was collected and analysed at three different levels, as follows:

— *at the level of the entire Community (EU-15), for trends concerning production, consumption in the Community, imports, exports and market share. Data was obtained from Eurocoton and from recognized industry sources, notably the CITH (Centre d'Information Textile et Habillement) which produces a series of production figures across the Community for the whole of textile category 20. This category is very slightly broader than the definition of the product concerned in the present proceeding. However, the difference is very slight, as the extra products it includes are of very minor significance,*

— *at the level of the Community industry, as defined above, for trends concerning production, sales by value and employment,*

— *at the level of the sampled Community producers, for the factors mentioned above and also for trends concerning prices and profitability."*

4.103 The provisional Regulation then sets out the determination on the state of the domestic industry:

*"**(a) Production***

(81) Total output of bed linen by producers in the Community fell by 9.6 per cent from 138,400 tonnes in 1992 to 125,100 tonnes in the investigation period. This fall in production arose essentially through the closure of enterprises or their cessation of bed linen production

within the Community (see recital (91) below). It should also be noted that total exports by Community producers have increased by 50 per cent, from 14,027 tonnes in 1992 to 21,756 in the investigation period. Without this export performance, Community bed linen production would have suffered further than the figures given above.

The pattern observed for total Community production was not replicated at the level of the 35 producers of the Community industry, whose production rose by 8.7 per cent from 39,370 tonnes in 1992 to 42,781 tonnes in the investigation period. The Commission concluded that the Community industry represented those companies which were strong enough to survive the competition from dumped imports and which to a certain extent had benefited from the demise of those which had not so survived.

Indeed, in the course of its investigation the Commission acquired evidence of 29 companies other than the Community industry which ceased or reduced bedlinen production in the Community between 1992 and the investigation period. It is estimated that total loss of production amounted to at least 10,000 tonnes per annum.

The sales, employment and profits of companies which have since disappeared are not included in the aggregated data for the Community industry, thus artificially improving the apparent trends for the survivors.

(b) Sales by volume

(82) At the level of the total Community producers, sales by volume in the Community, as measured by production minus exports, fell by 17 per cent from 124,400 tonnes in 1992 to 103,350 tonnes in the investigation period.

Sales by the sampled producers of the Community industry also declined, from 23,706 to 23,347 tonnes, a decrease of 1.5 per cent.

(c) Sales by value

(83) 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 ECU 280.6 million in 1992 to ECU 285.3 million (a rise of 1.7 per cent) . . .

It should be noted that among the sampled producers it was observed that sales have been maintained by seeking higher value market niches . . .

(d) Market share

(84) The market share by volume of producers at the level of the entire Community fell from 62.2 per cent in 1992 to 55.6 per cent in the investigation period. In that period the sampled producers from the Community industry increased their market share slightly, from 10.7 per cent to 11.3 per cent. The reason why the market share of survivors has slightly increased is that they have taken over some of the sales of those which had not survived the competition from dumped imports, particularly the sales of higher value niche products.

(85) An estimated analysis was done of market share by value. The patterns observed were the same as for market share by volume: producers at the level of the entire Community lost

market share (from 77.8 per cent in 1992 to 72.0 per cent in the investigation period), while the Community industry as a whole and sampled producers gained market share, from 22.4 per cent to 25.1 per cent and from 14.7 per cent to 16.0 per cent respectively.

(e) Price development

(86) The Commission examined the development in average prices achieved by the sampled Community producers for the defined reference products between 1993 and the investigation period, using a constant product mix of the reference products . . .

(87) The development in average prices per kilogram of the sampled producers was also measured. This measure showed an average price development from 100 in 1992 to 97.8 in 1993 to 103.2 in the investigation period. The fact that this measure has developed more positively than prices for the defined reference products further reflects the fact the sampled producers have been forced to move into niche markets and away from high volume, mass market products.

. . .

(f) Profitability

(89) The profitability of the sampled companies declined by more than 50 per cent between 1992 and the investigation period, from a figure of 3.6 per cent to 1.6 per cent of sales . . .

(90) It should be recalled again that the sampled companies are among those which have been able to survive the competition of dumped imports. It should also be noted that the industry in question is not capital intensive and that it contains a large number of SMEs, which means that any move into loss-making can lead to immediate exit rather than remaining in business waiting for better times. This is why the companies that are left are those that are profitable or, as in this case, only just profitable.

(g) Employment

(91) Direct employment by the 35 companies of the Community industry on the product concerned declined by 5.3 per cent between 1992 and the investigation period, from around 7,000 jobs to 6, 700.

In analysing data on the Community industry, account should be taken of the 29 companies other than the Community industry which ceased or reduced bed linen production in the Community between 1992 and the investigation period (see recital (81)). The associated job losses numbered over 2,400.

(h) Conclusion on injury

(92) The Commission took into account all the economic indicators mentioned above in determining whether or not the Community industry was suffering material injury. Account was taken of the fact that the number of companies making up the Community industry was reduced in comparison with the start of the injury investigation period. The production, sales, employment and profits of companies which have since disappeared are not included in the

aggregated data for the Community industry, thus improving the apparent trends for the survivors.

(93) The Commission noted the decline in the total production and market share of Community producers. This background demonstrates the difficult conditions in which the remaining Community industry was operating. The fact that these surviving companies were able to maintain production and market share should not detract from the assessment of the overall situation. Above all, the remaining Community industry suffered declining and inadequate profitability, as further evidenced by prices which had not been able to reflect increases in the costs of raw cotton or to keep pace with inflation in prices of consumer goods.

(94) Accordingly the Commission reached the view that the Community industry had suffered material injury.

G. CAUSATION

. . .

2. Effects of the dumped imports from the countries concerned

(96) The investigation of the Community industry showed as the main injury indicator the unsatisfactory development of sales prices and the consequent declining profitability. It was also established that the dumped imports were sold at prices which significantly undercut those of the Community producers . . .

(98) It was observed among sampled producers that they had been obliged increasingly to shift production and sales to high value niche markets in order to maintain production and sales levels . . .

(99) Since price suppression and consequent decreasing profitability to inadequate levels were the main indicators on which the Commission's finding of injury was based, and in view of the coincidence in time between the deterioration of the situation of the Community industry and the significant increase of the dumped imports, it can be concluded that there was a direct causal link between these imports and the material injury found.

. . .

(105) It is clear that the decline in consumption between 1992 and the investigation period has contributed to the situation of the Community industry. However, the fall did not affect all operators equally. During this period the total volume of sales by Community producers fell by an amount 50 per cent higher than the total fall in consumption. While sales by the Community industry have remained relatively stable, benefiting from the disappearance of other Community producers, the dumped imports from the countries concerned increased by 48 per cent. Imports from other third countries decreased by 14 per cent. Because total sales by Community producers fell by 50 per cent more than the total fall in consumption and sales by other imports declined, it can be concluded that increased dumped imports through severe price undercutting gained at least one third of the sales volumes lost by Community producers. This clearly constitutes a cause of material injury not attributable to the decline in consumption . . .

(d) Competition from non-complainant producers in the Community

(107) The Community industry represents only a part of total Community production. It should therefore be examined whether competition from other producers within the Community affects the situation of the Community industry. Other producers of bed linen are known to include, in particular, a large number of 'converters', i.e. producers who make bed linen from grey cloth woven elsewhere, whereas the Community industry consists largely of integrated producers who weave most or all of their own grey cloth. As has been found, on a provisional basis, in the separate proceeding concerning imports of grey cloth from India, Pakistan, Egypt, China, Indonesia and Turkey, important sources of supply of this product were imported into the Community at dumped prices which would have provided these producers with an unfair advantage over the Community industry in the present proceeding. It cannot therefore be ruled out that distorted competition from this source contributed to the situation of the Community industry.

(108) Nevertheless it should be noted that the production and market share of the non-complainant producers have fallen between 1992 and the investigation period. Indeed the fall in production across the Community has been due to reduction by the non-complainants rather than by complainants. Since the imports concerned have increased over this timescale, the Commission decided that competition by non-complainants did not invalidate the conclusion that the imports concerned caused the injury observed.

4. Conclusion on causation

(109) As has been shown above, there is a direct causal link between the increased volume and the price effect of the dumped imports and the material injury suffered by the Community industry. The direct link in this case is demonstrated by the existence of heavy undercutting which can reasonably explain the significant increase in market share of the dumped imports from 16.9 per cent in 1992 to 25.1 per cent in the investigation period and the corresponding negative consequences on volumes and prices of sales of Community producers. In terms of volumes, Community producers' market share decreased from 62.2 per cent in 1992 to 55.6 per cent in the investigation period. This fall was not reflected at the level of individual producers of the Community industry because they obtained sufficient benefit from the demise of other Community producers to keep their sales volume relatively stable. However, as far as the prices of the dumped imports are concerned, they have had an evident impact on the sampled producers, many of them being SMEs, whose profitability has fallen from 3.6 per cent to 1.6 per cent. In this respect, the Commission noted that such a situation can cause particular difficulty for SMEs given their lack of resources and the reluctance of banks to finance any losses . . ." (Emphasis added)

4.104 In their comments to the provisional disclosure[129], the Indian exporters argued in detail that this determination was incorrect, since it was based on a 'pick and choose' method inconsistent with Article 3:

"2.2 Definition of Community industry

The European Commission explains in Recital 62 of the provisional duties Regulation that the injury assessment has been made at three levels, to wit:

[129] Annex 51.

— *at the level of the entire Community (EC-15);*
— *at the level of the Community industry; and*
— *at the level of the sampled producers.*

As a general point, Texprocil wishes to disagree with the Commission's double injury determination. In this proceeding many producers chose not to support the complaint. Even Eurocoton admits in its complaint that about one half of the EC producers did not support it.[130]

The Commission subsequently determined in the provisional duties Regulation that:

"The remaining 35 companies, which cooperated with the enquiry and are located in France, Germany, Italy, Spain, Portugal, Austria and Finland, represented a major part of total Community production in the investigation period. These companies were therefore deemed to make up the Community industry under the terms of Article 4(1) of the basic Regulation." (Recital 57)

Texprocil does not contest the right of the Commission to limit the Community industry to those companies supporting the complaint. Indeed, in past proceedings the Commission has repeatedly excluded companies from the Community industry because these companies where related to exporters, or for other reasons[131] *. . .*

. . . Article 3(1) of the basic Regulation restricts the injury determination to 'the Community industry'. This is a term of art, defined in Article 4(1). The Commission has in fact in the Bed linen Regulation determined that the 'Community industry' consists of the co-operating 35 companies.

It follows that the Commission cannot eat the cake and have it too by on the one hand restricting the Community industry to 35 companies for price undercutting purposes, and on the other hand looking at data covering all producers for the state of the Community industry determination.[132]

Texprocil notes that any injury determination which is based on data of producers explicitly not part of the Community industry contravenes Article 3(1) of the basic Regulation.

The Commission's reasoning in Recitals 84 and 96 et seq. that the Community industry is only taking over the business of companies which went out of business is fallacious and strained, since it is based on the assumption that exactly and only these 35 companies are economically viable and able to compete, whereas the two-thirds of EC producers who do not co-operate were unable to take over market share from such allegedly disappeared firms. This raises the question why economically viable companies would complain about alleged dumping, while allegedly not-viable companies do not support this complaint.

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[130] Footnote in original: Non-confidential complaint at 3.
[131] Footnote omitted.
[132] Footnote in original: Moreover, it is submitted that the sample of the Community industry should be considered representative for *all* injury factors, just as the sample of the co-operating Indian industry is considered representative for that industry.

In summary, the Commission cannot make a legally valid injury determination including other companies than those constituting the Community industry as defined in Recital 57 of the provisional duties Regulation."

4.105 Texprocil then argued that the available data on the state of the 'Community industry' (domestic industry) clearly did not point toward injury. These arguments were repeated during the second injury hearing and in the second post-hearing brief[133] of 17 July 1997 (Annex 55).

4.106 In the definitive disclosure document (Annex 56) the EC made the following comments on the issue:

"3. Situation of the Community industry

Exporters from all the exporting countries claimed that the Commission's analysis of injury was defective in that it referred to data concerning total Community production of bed linen in assessing the situation of the Community industry. They claimed in particular that information concerning companies not included in the definition of the Community industry or which no longer produce bed linen cannot be used to construe a finding of material injury.

The Commission services examined these claims carefully. It should however be remarked that the principal basis for the finding of material injury was the reduced profitability and price suppression of the Community industry as observed among the sampled companies.

The Commission services nevertheless consider that data concerning total Community production of bed linen provide indicators of the conditions in which the Community industry was operating during the period considered. The suggestion that such data cannot be used ignores the nature of the industry under consideration. In capital- intensive sectors with high barriers to market entry and exit, material injury is less likely to manifest itself through the disappearance of economic operators In a sector such as textiles, by contrast, difficult trading conditions will more quickly force market exit. To ignore the disappearance of significant numbers of economic operators would therefore distort the analysis of material injury between different sectors.

The Commission's finding of material injury is therefore confirmed.

H. CAUSATION

Exporters from all three countries concerned claimed that any material injury could be ascribed to the fall in consumption of 7 per cent between 1992 and the investigation period. However, as noted in recital (105) of the provisional Regulation, the total fall in sales by all Community producers significantly exceeded the total falI in consumption. As to the exporters' argument that data concerning the totality of Community production were not relevant to the determination of whether the dumped imports caused material injury, the Commission services reject this suggestion (see above, G.3) and therefore confirm the finding that the fall in consumption does not contradict the finding that the dumped imports, taken in isolation, have caused material injury to the Community industry."

[133] See section 4.2 and further of that document.

4.107 In their comments on the definitive disclosure, the Indian exporters again argued that the EC's determination of the state of the domestic industry relied on companies outside the domestic industry, inconsistently with Article 3:

> *"4.2.1 Multi-layered injury determination*
>
> *Texprocil argued during its second hearing and in its comments on the provisional disclosure that the Commission is obliged to determine whether the Community industry has suffered injury. It was argued that, apart from the question whether the Commission should take account of the 66 per cent of EC producers who explicitly are not part of the Community industry, the Commission, by taking recourse to sampling, was obliged to base its determination on the results found for the sample. In the definitive disclosure the Commission apparently did not quite understand the argument and merely noted that:* [quote from definitive disclosure document]
>
> *This ignores several relevant factors. First, an injury determination is a legal assessment. The European Community agreed in the GATT/WTO context to certain rules giving guidance as to how such assessment must be made.*
>
> *The EC producers can be distinguished in the following groups:*
> *(1) the Community industry, which represent (roughly) 34 per cent or less of existing producers;*
> *(2) other EC producers, who represent over 66 per cent of EC production;*
> *(3) producers who have disappeared before the IP.*
>
> *The argument made by Texprocil was that the Commission cannot legally base its injury determination on data including group (2). Moreover, the Commission's reliance on the 'disappearance' of group (3) companies does not explain why over 66 per cent, i.e., well over two-thirds of still existing producers, does not support this proceeding.*
>
> *Last, there is another falsifying factor. As the Commission will undoubtedly know, the EC textile industry has gone through a major restructurization process in the past years. This involved, among others, the merger of many smaller companies in more viable units.*
>
> *If, four years ago, company A was purchased by company B, the Commission's logic seems to be as follows: company A has disappeared, which is a sign of injury, notwithstanding the fact that company B has expanded its production. Such 'logic', however, does not withstand scrutiny.*
>
> *Texprocil notes that the Commission, apart from the observation on pages 13-14 of the disclosure documents, has not further addressed the legal concerns of the Indian exporters.*
>
> *It is submitted that this creative and highly original manner of explaining away the natural consolidation processes in the EC textile industry is not supported by letter or spirit of Articles 3 and 4 of the WTO Anti-Dumping Agreement. Texprocil regrets that the Commission's three-level injury determination could create the unfortunate impression of a 'pick-and-choose' injury assessment. In order to avoid any such impression, the Commission is again invited to explain its position vis-à-vis Texprocil's arguments in a meaningful manner, in accordance with Article 12 of the WTO Anti-Dumping Agreement."*

4.108 In the definitive Regulation the EC changed the statements in the definitive disclosure document somewhat:

> ***"E. COMMUNITY INDUSTRY***
>
> . . .
>
> *(34) . . . the finding that the 35 complainant companies represent a major proportion of total Community production within the meaning of Article 5(4) of the basic Regulation and that they therefore constitute the Community industry within the meaning of Article 4(1) of the basic Regulation is confirmed.*
>
> ***F. INJURY***
>
> . . .
>
> ***3. Situation of the Community industry***
>
> *(40) Exporters from all the exporting countries claimed that the Commission's analysis of injury was defective in that it referred to the significant decline in total Community production of bed linen in assessing the situation of the Community industry. They claimed in particular that information concerning companies not included in the definition of the Community industry or which no longer produce bed linen cannot be used to construe a finding of material injury.*
>
> *These claims were examined carefully. It should however be remarked that the principal basis for the finding of material injury was the reduced profitability and price suppression of the Community industry as observed among the sampled companies.*
>
> *(41) In the assessment of injury pursuant to Article 3 of the basic Regulation, the Community institutions have to assess the economic situation of the Community industry. This assessment usually covers the analysis of a time period of four to five years as in the present case ('assessment period`). Such an assessment is commonly based on an analysis of the complaining industry and not necessarily on companies accounting for the totality of Community production on the ground that the situation of a major proportion of the Community production is representative for its totality. Such an assessment, however, also has to take into account the structure and the nature of the industry under consideration. In the present case this industry is characterized by a high number of operators, in many cases small- and medium-sized companies, and by the fact that it is a sector with relatively low barriers to exit. The latter is mainly due to the fact that machinery can be sold or used for other products relatively simply. This has the effect that material injury is likely to manifest itself through the exit of economic operators within the assessment period.*
>
> *Consequently, to limit the assessment of injury only to companies which are still operational at the end of the assessment period (i.e. at the time of the lodging of the complaint) and thus able actively to support a complaint would mean that any injury caused to companies which have closed down before this point in time would go unconsidered in the analysis. Furthermore, it should be noted that this distortion could even be aggravated as the surviving complaining companies of the Community industry may have benefited, possibly only*

temporarily, from the disappearance of other companies, causing their positive development to be overestimated.

In the present case, it should be noted that 29 companies of the bed linen industry have closed down or ceased production: that is to say, that a substantial number of companies have ceased operation. Furthermore, given the substantial price undercutting established, the strong increase in the volumes of the imports concerned and their consequent rise in market share, any relatively positive development of the complaining producers must be seen as threatened in the absence of anti-dumping measures.

4. Conclusion

(42) The finding of material injury, within the meaning of Article 3 (1) of the basic Regulation, is therefore confirmed."

4.109 During the consultations India expressed its concern that the EC's determination of the state of the 'Community industry' was inconsistent with Article 3.4 (Annex 11):

"Mr Seth: . . . the EC concluded in Recital (57) of the provisional duties Regulation that a certain group of 35 companies constituted 'the Community industry under the terms of Article 4(1) of the basic Regulation.' In the definitive duties Regulation the EC confirmed this finding.

It thus follows that injury must be determined with respect to this domestic industry.

Notwithstanding this conclusion, the EC determined injury data at three levels as explained in Recital (62) of the provisional duties Regulation:

1) *at the level of all EC producers (i.e., domestic industry + the almost two-thirds of EC producers not reckoned to be part of the domestic industry);*
2) *at the level of the domestic industry (i.e., the 35 companies determined to be part of the Community industry); and*
3) *at the sample level (i.e., on the basis of the sample taken from the domestic industry).*

Only as a result of occasionally including the almost two-thirds of Community producers who did not support the complaint and who patently do not belong to the 'domestic industry', the European Community was able to 'determine' that imports of bed linen from India, Pakistan and Egypt caused injury.

India believes such determination to be inconsistent with Article 3, and notably with Articles 3.1, 3.4 and 3.5.

In this respect we would like to raise the following questions 25 – 32 [see Annex 11 for details]:

[EC]: I will make some general comments. I could say that the wording of the provisional Regulation is not the best. We confirm that the 'domestic industry' in Article 3 is the same as that of Article 4.1. It is not true that we established injury for a larger group. For example for market share we need data from all producers in order to be able to determine the market share of the domestic industry. Therefore we have to collect data for all producers. It is

normal that, when we sample the EC industry, not all data can be obtained from the sample. Therefore, we do not see any incompatibility.

[The Indian delegation] clarifies the issue: this is factually not quite correct. For example, in Rec. 82 of the provisional Regulation the EC clearly seems to rely for other injury factors than market share on the producers not part of the domestic industry.

[EC]: No single factor is decisive. Some factors are not clearly negative. In such cases we have provided additional explanations by comparing with other competitors. This should not be confused with making an injury determination for extra-domestic industry companies. Admittedly, the Regulation is not a literary masterpiece.

. . .

2.3 The European Community acted inconsistently with Article 3.1 of the Agreement by not respecting the result of the EC sample

Mr Seth: There is another issue pertaining to the 'layered' injury determination.

On the EC side, the Commission selected a sample of 17 companies from the 35 companies making up the 'domestic industry'. It is noted that, as far as India is aware, the EC sample has been selected by the European Commission investigators in collaboration with and with the approval of the complainant, Eurocoton. It may be expected that the sample thus reflects the companies where the Commission is most likely to find data suggesting injury. In this sense, the sample is likely to be skewed and to present a more negative picture of the domestic industry than the domestic industry as a whole.

. . .

While it is acknowledged that the European Community is not obliged to sample the Community industry, it appears that, if the European Community investigators decide to limit their investigation of Indian exporters by taking recourse to sampling in accordance with Article 6.10 of the Agreement, and the result of such sample is applied to all other co-operating Indian exporters, then the result of the domestic industry sample must equally be fully applied to the whole domestic industry. Disregard of EC sample data in favour for more 'favourable' data of another group of EC producers would imply that 'the authorities' establishment of the facts' could hardly be said to be 'proper'; nor would 'their evaluation of those facts [be] unbiased and objective' as required by implication by Article 17.6 of the Agreement.

By not basing the determination whether material injury had been caused solely on the data of the Community industry sample, the European Community has acted inconsistently with Articles 3.1 and 3.4 of the Agreement. Consequently, the European Community has acted also inconsistent with Article 1 of the Agreement.

The EC sample is not 'statistically valid'

There is a third issue here. Article 6.10 of the Agreement lays down that the EC may sample 'interested parties' provided such sample is 'statistically valid'. Article 6.11 defines as an 'interested party' among others, 'a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in

the territory of the importing Member.' This implies that the sample must be chosen from the 'producer[s] of the like product in the importing Member' (sampling of associations is not at play here).

Whatever the meaning of 'statistically valid', it would seem certain that it excludes the possibility of taking a sample from only producers supporting the application. The EC sample is therefore statistically not valid and the injury determination based on it, vitiated by errors of facts and law. India believes that the EC has acted inconsistently with Article 6.10.

. . .

[EC]: as far as the sample from the Community industry is concerned: we have to take the information from the Community industry. We could not include companies not part of the domestic industry. There is no clear definition of 'statistically valid'. The main characteristics relevant to the dumping determination of the universe concerned should be reflected in the sample. These are:

— *the volume of production,*
— *the location of the company,*
— *the integration of the producer, and*
— *the range of products.*

. . .

If Eurocoton agreed to the Community industry sample suggestion (we worked on the basis of information from the EC), there was agreement . . ."

4.110 The EC, in its letter of 1 October (Annex 12), provided the following additional answers:

*"**Question 27***

Would the EC agree that the domestic industry was determined by the investigating authorities to consist of 35 companies, apparently representing around 34 per cent of EC production?

As indicated in recital (57) of the provisional duty Regulation, 35 companies were deemed to make up the Community industry. In recital (32) of the definitive duty Regulation, it is stated that all exporters from all three exporting countries observed that the complainant Community producers taken to be the Community industry made up just 34 per cent of total Community production.

Question 28

Would the EC agree that in Bed linen II it made the injury assessment on three levels, namely at?

1) the level of all EC producers (i.e., domestic industry + the almost two-thirds of EC producers not reckoned to be part of the domestic industry);
2) the level of the domestic industry (i.e., the 35 companies determined to be part of the Community industry); and
3) the sample level (i.e., on the basis of the sample taken from the domestic industry).

The injury assessment has been made for the domestic (Community) industry only. In order to put this assessment into the adequate economic framework, as specified in recital (62) of the provisional duty Regulation, data was collected and analysed at the level of the entire Community, the level of the Community industry and at the level of the sampled Community producers depending on the economic indicators concerned.

Question 29

Can the EC explain how the inclusion of companies not belonging to the domestic industry and not supporting the proceeding is compatible with Article 3 (footnote), Article 3.4, 3.5 and 4.1?

No companies not belonging to the domestic (Community) industry have been included in the injury assessment. As is indicated in recital (93) and (94) of the provisional duty Regulation, the Community reached the view that the domestic industry (Community industry) had suffered material injury.

This approach was confirmed in recital (40) of the definitive duty Regulation.

Question 31

Would the EC agree that in the Regulation imposing provisional duties it did not even comment on sales by volume by the Community industry (domestic industry), but merely looked at data concerning all producers and the sample of 17 companies taken from the Community producers?

In recital (82) of the provisional duty Regulation, the Community has defined the framework of the Community market as far as the total sales volume of the product under investigation is concerned.

As far as the injury analysis is concerned, the Community has considered the sales volume pertaining to the sample of complaining Community producers. As set out in recitals (58) to (61) of the provisional duty Regulation, this sample was considered representative of the domestic industry (Community industry).

Question 32

Would the EC agree that in recitals (84) and (85) of the provisional duties Regulation, the injury finding hinges very strongly on the data concerning all producers, since the data concerning the Community industry do not point towards injury (increasing market share of the 'domestic industry')?

As already mentioned in the reply to your questions No. 28 and 29, the findings which led to the conclusion of material injury to the Community industry were based on injury indicators pertaining to this industry. The injury indicators which led to the conclusion of material injury to the Community industry are set out in recitals (93) and (94) of the provisional duty Regulation.

As far as the question concerning the positive developments in market share is concerned, as is rightly pointed out in your question 46 and Article 3.2 of the Agreement, one or several injury factors cannot necessarily give decisive guidance in the determination of injury.

. . .

Ouestion 34

Would the EC agree that the EC sample, which has been taken entirely from companies supporting the complaint, was agreed between the EC and the complainant Eurocoton?

The sample representative of the Community industry was determined 'in consultation' with the complainant as indicated in recital (61) of the Provisional duty Regulation.

The exporters had the opportunity to comment on the selection of the sample but they did not choose to do so."

2. Claims

4.111 Three claims flow from the facts as described above:[134]

4.112 First, the determination on the state of the domestic industry is inconsistent with Article 3.4 of the ADA, since

— the EC has chosen a sample from the domestic industry, but did not consistently base its injury determination on this sample;
— the EC has explicitly determined that the domestic industry consists of 35 companies, but relied in its injury determination on companies outside this group in order to determine injury;
— the EC chose to rely on different 'levels' of industry for different injury indices without any apparent other reason than goal-oriented 'picking and choosing' of injury.

4.113 Second, even if the determination on the state of the domestic industry would not have been made inconsistently with Article 3.4, the EC failed to properly explain it in the provisional Regulation and the provisional disclosure. This would entail an inconsistency with Article 12.2.1 of the ADA.

4.114 Third, even if the determination on the state of the domestic industry would not have been made inconsistently with Article 3.4, the EC failed to properly explain it in the definitive Regulation and the definitive disclosure. This would entail an inconsistency with Article 12.2.2 of the ADA.

3. Claim 15: inconsistency with Article 3.4

3.1 The text of Article 3.4

4.115 Article 3.4 ADA requires that:

"[t]he 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 . . ." (Emphasis added)

[134] It is recalled that other claims pertaining to article 3.4 are discussed separately in this submission (sections IV.B and IV.D).

4.116 As noted above, 'domestic industry' is defined in Article 4.1 as:

> *"the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products."*[135]

4.117 As noted earlier in this submission[136], there have been and are provisions in GATT/WTO law with similar or identical wording to that of Article 3.4. In the context of those provisions, the concept of "*domestic industry*" has been scrutinized by GATT panels on prior occasions. Notably, in United States—Definition of industry concerning wine and grape products, in the context of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade:[137]

> *". . . the Panel held the view that Article VI of the GATT and the corresponding Code provision should, because they permitted action of a non-m.f.n. nature otherwise prohibited by Article I, be interpreted in a narrow way.*
>
> *Article 6:5 of the Code gave a precise definition of a 'domestic industry', a definition which in the view of the Panel could not be interpreted extensively . . ."*

4.118 In the same case the European Community delegation observed that:

> *"the EEC delegation based its views on the provisions of the Code with respect to the definition of industry. It considered the language of the Code to be precise and unequivocal in that it stipulated that countervailing duties could only be imposed if subsidized imports were causing injury to a domestic industry in the importing country as defined in Article 6:5 of the Code and the footnote to Article 6:1."*[138] (Emphasis added)

4.119 This—commendable—narrow interpretation of Article VI has thus been the standard view of the EC itself. In Canada—countervailing duty proceeding against EEC exports of boneless manufacturing beef:[139]

> *"[t]he EEC noted that Article 6:5 of the Code defined domestic industry as domestic producers of the like product. The EEC argued that the use of the word 'shall' made this definition mandatory . . . The concept of 'domestic industry' as defined in Article 6:5 also determined the interpretation of the term 'industry affected' in Article 2:1. This precise definition did not allow for a creative interpretation which would upset the delicate balance of rights and obligations which was the result of laborious negotiations during the Tokyo Round."*[140] (Emphasis added)

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[135] The exceptions in sub-paragraphs (i) and (ii) of Article 4.1 are not at play in this claim.

[136] See footnote 104 and following in section IV.B of this submission, above.

[137] Doc. SCM/71 of 24 March 1986 at § 4.5-4.6.

[138] United States—Definition of industry concerning wine and grape products, doc. SCM/71 of 24 March 1986 at § 3.10.

[139] Canada—countervailing duty proceeding against EEC exports of boneless manufacturing beef, SCM/85 (unadopted), distributed on 13 October 1987 at § 3.6.

[140] Ibid. at § 3.4.

4.120 Quite apart from the fact that the text of Articles 3.4 and 4.1 is crystal clear, these statements are perfectly correct and do not allow for any expansive interpretation of the 'domestic industry'.

3.2 Legal arguments relating to the claims relating to Article 3.4

4.121 Within the context of the 'domestic industry' issue, there are three main arguments why the EC acted inconsistently with Article 3.4. First, the EC did rely on companies outside the domestic industry in order to find injury (section 3.2.1 of this claim). Second, the EC, once it selected a sample from among the domestic industry, was not entitled to subsequently deviate from that sample in order to find injury (section 3.2.2). Third, the EC has at no point indicated or made clear why exactly it relied on which industry level for each injury factor (section 3.2.3).

3.2.1 The EC did in fact rely on companies outside the domestic industry to find injury

4.122 It transpires from the EC's replies given during and after the oral consultations that it considers that injury was in fact determined for the 'domestic industry' and that it did not rely on companies outside the domestic industry to find injury (see, for example, the written reply to question 29). This, however, is not corroborated by a careful analysis of the EC's published provisional determination (which was confirmed by the definitive Regulation). All further references in this sub-section are to the provisional Regulation, as quoted above in section 1. Notably, India would like to draw attention to the following five points:

4.123 a. Production. If the EC did not rely on the production data for the EU-15 producers[141], the first sub-paragraph of recital (81) is, to put it mildly, pointless. Moreover, that sub-paragraph refers to recital (91):

> *"(81) Total output of bed linen by producers in the Community fell by 9,6 per cent from 138 400 tonnes in 1992 to 125 100 tonnes in the investigation period. This fall in production arose essentially through the closure of enterprises or their cessation of bed linen production within the Community (see recital (91) below) . . ."*

4.124 Recital (91) in turn, states in relevant part that:

> *"(91) . . . In analysing data on the Community industry, account should be taken of the 29 companies other than the Community industry which ceased or reduced bed linen production in the Community between 1992 and the investigation period (see recital (81)). The associated job losses numbered over 2 400."*

4.125 In other words, the EC *"took account"* of the companies *"other than the Community industry"* for the injury determination. Took account for what? Logically, for the *"evaluation of all relevant economic factors and indices having a bearing on the state of the industry"* as required by Article 3.4.

4.126 The word *"evaluation"* would seem to denote that the investigating authorities have *"to judge or determine the worth or quality of; appraise"*.[142] Some factors may point towards a no-injury finding, whereas other factors might point towards a positive finding. The investigating authorities

[141] Following the language of provisional Regulation at § (62) *"EU-15"* denotes all producers of the like product in the EC.

[142] Similarly *Webster's New World Dictionary*, 3rd College Edition, 1994, excerpt attached as Annex 57.

will have to weigh these factors. The metaphor springing to mind is that of a weighing scale, where the factors and indices concerning the domestic industry are weighted. Some factors will be negative and draw the scales toward an injury finding. Some other factors will be positive, and may militate towards a no-injury finding. Thus, in the final analysis not all factors will have to point towards injury, as long as, objectively seen, the investigating authorities could reasonably conclude that on the whole material injury existed and was caused by the *"dumped imports"*. That would imply that, in order to make an objective appraisal of the different injury factors, the determinations on each of these factors must have been relevant, objective, and in conformity with the ADA. On balance, the evaluation should point toward injury or no-injury, whereby no single factor will necessarily be decisive. However, what the EC did in recital (81) is to use the 'injury' allegedly and unprovably suffered by non-domestic industry producers to somehow 'justify' or 'support' the injury finding as far as production data are concerned. The image that evokes is of weighing scales where, besides the product to be weighed, the grocer performing the weighing secretly pushes a scale with his finger.

4.127 It is further noted that the production increase of 8.7 per cent for the domestic industry mentioned in the second paragraph of recital (81)[143] hardly counts as a factor indicating injury, in view of the substantial consumption decrease during the same period. Thus, it becomes clear that the Commission included non-complaining producers in order to find a decline in output.

4.128 The EC further noted that:

> *"the Community industry represented those companies which were strong enough to survive the competition from dumped imports and which to a certain extent had benefited from the demise of those which had not so survived."*

4.129 It would seem that every time one Community producer took over the activities of another, the Commission counted one disappeared company (attributed to dumped imports), whatever the reason for the take-over, and whatever the consequences for total production. In the climate of re-organisation of the textile industry in the EC in the beginning of the 1990s, this premise is, to use a charitable word, dubious.

4.130 This determination raises another fundamental question: how could the EC properly conclude that *"the Community industry represented those companies which were strong enough to survive the competition from dumped imports"*? The data in the Regulation point in a totally different direction, namely, that the Community industry companies thrived and took over considerable business and market share from their EC competitors. Under such circumstances, even if the Commission's data were accepted, it is patently clear that, as far as production data are concerned, the domestic industry, *i.e.*, the 35 companies, did very well. The reply by the Commission to question 29 thus appears incongruous with the published determination.

4.131 b. Sales. Under the heading *"[s]ales by volume"* recital (82) provides data on EU-15 level, and on the level of the sampled producers. No information is provided on the domestic industry. During the consultations India asked why the EC included the first sentence of recital (on the EU-15 producers) when it did not base its decision on it. The EC answered in its written replies that:

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[143] It is recalled that the second paragraph of Recital (81) reads: *"The pattern observed for total Community production was not replicated at the level of the 35 producers of the Community industry, whose production rose by 8.7 per cent from 39,370 tonnes in 1992 to 42,781 tonnes in the investigation period. The Commission concluded that the Community industry represented those companies which were strong enough to survive the competition from dumped imports and which to a certain extent had benefited from the demise of those which had not so survived."*

> *"In recital (82) of the provisional duties Regulation, the Community has defined the framework of the Community market as far as the total sales volume of the product under investigation is concerned.*
>
> *As far as the injury analysis is concerned, the Community has considered the sales volume pertaining to the sample of complaining Community producers . . ."*

4.132 This, however, does not seem to correspond with the text of the Regulation: recital (92) clearly notes that

> *"[t]he Commission took into account all the economic indicators mentioned above in determining whether or not the Community industry was suffering material injury. Account was taken of the fact that the number of companies making up the Community industry was reduced in comparison with the start of the injury investigation period. The production, sales, employment and profits of companies which have since disappeared are not included in the aggregated data for the Community industry, thus improving the apparent trends for the survivors."* (Emphasis added)

4.133 In other words, the Commission did base itself on *"all"* the economic factors *"above"*, *i.e.*, also on the first paragraph of recital (82). *"All"* the economic factors *"above"* thus implies that the Commission did base itself on the EU-15 production data. Again, this would appear to contradict the reply to question 29. Moreover, in view of the close linkage between market share data and sales data, the reply is—to put it diplomatically—unlikely.

4.134 c. Market share. Recital (84) gives information on market share by volume, which may be summarised as follows: the market share of the EU-15 producers allegedly fell, while the market share of the domestic producers increased. The Commission notes that *"[t]he reason why the market share of survivors has slightly increased is that they have taken over some of the sales of those which had not survived the competition from dumped imports"*. The EC does not explain or proffer its evidence for the unproven assumptions that (1) imports from the targeted countries destroyed EC producers, while (2) subsequently the market share of these was taken over by the domestic industry.

4.135 More important in the context of question 29 is that the Commission mentions in recital (93) that *"[t]he Commission noted the decline in the total production and market share of Community producers"*. Whose market share? Not that of the Community industry: that increased. The market share, which the Commission specifically *"noted"* in recital (93), is that of the EU-15 producers. The *"patterns observed"* for market share by value *"were the same"* (recital (85)). Here too, it was only the market share of the EU-15 producers that allegedly decreased, while the market shares of the domestic industry and of the sample increased! The Commission's reply to question 29 is again irreconcilable with the text of the Regulation.

4.136 India believes to have understood the oral reply of the Commission during the first round of consultations as implying that the market share data for the EU-15 producers were only included in the Regulation since such data are necessary for making a finding on market share of the domestic industry. If this is indeed the EC's view, it is clearly contradicted by the wording of recital (93), where the Commission placed special emphasis on the decline of the market share of the EU-15 producers.

4.137 d. Employment. In recital (91) the Commission noted that

> *"[i]n analysing data on the Community industry, account should be taken of the 29 companies other than the Community industry which ceased or reduced bed linen production in the Community between 1992 and the investigation period . . . The associated job losses numbered over 2 400."*

4.138 Recital (41) of the definitive duties Regulation further dealt with this issue:

> *"to limit the assessment of injury only to companies which are still operational at the end of the assessment period (i.e. at the time of the lodging of the complaint) and thus able actively to support a complaint would mean that any injury caused to companies which have closed down before this point in time would go unconsidered in the analysis."*

4.139 The question is begged how the EC can know that these companies would have been complainants and thus part of the Community industry if they still had existed at the time of the complaint. Even in the Commission's determination, only 34% of EU-15 production existing at the time of the complaint supported the complainant and thus were included in the domestic industry. The Commission's gratuitous and full inclusion of companies that disappeared well before the investigation period for the determination of employment factors clearly implies the inclusion of companies outside the 35 that make up the domestic industry. Furthermore, how can the Commission, without any evidence whatsoever, attribute such disappearance to imports that occurred in years with respect to which dumping was never established?

4.140 e. Allegedly disappeared companies. Recital (105) is noted:

> *"sales by the Community industry have remained relatively stable . . . Because total sales by Community producers fell by 50 per cent more than the total fall in consumption and sales by other imports declined, it can be concluded that increased dumped imports through severe price undercutting gained at least one third of the sales volumes lost by Community producers. This clearly constitutes a cause of material injury not attributable to the decline in consumption."* (Emphasis added)

4.141 The EC's causality analysis here hinges very strongly on the sales volume of the EU-15 producers, especially since sales by the domestic industry actually increased with 4.2 per cent.[144]

4.142 We further point to recital (92) of the provisional duties Regulation, in which the Commission clarifies that *"[a]ccount was taken of the fact that the number of companies making up the Community industry was reduced in comparison with the start of the injury investigation period."* In other words, the Commission did not only base itself on the 35 companies which constituted the domestic (Community) industry, but also took *"account"* of other companies not belonging to the Community industry, some of which were no longer existing during the investigation period.

4.143 In summary on this argument, during the first round of consultations the Commission delegation noted that not one single factor can be decisive for an injury finding. This is, of course, correct. But that is not the issue here. Virtually the whole injury determination in the provisional Regulation is—explicitly or implicitly—based on EU-15 data. Recitals (92) and (93) indicate which factors were specifically important for the Commission to come to its finding. The Commission

[144] As per recital (83) of the provisional Regulation.

specially mentions production, sales, employment and profits. Of these four factors, three (production, sales and employment) were clearly based on EU-15 data.

4.144 The provisional Regulation, and consequently the definitive Regulation confirming it, is thus vitiated by an inconsistency with Article 3.4 of the ADA.

3.2.2 The EC, once it selected a sample from among the domestic industry, was not entitled to subsequently deviate from that sample in order to find injury

4.145 India takes no issue with the EC's right to resort to sampling of the domestic industry for the injury determination. This would seem evident if Articles 6.10 and 6.11 are read together:

> *"6.10 . . . 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 . . . by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection . . .*
>
> *6.11 For the purposes of this Agreement, 'interested parties' shall include: . . .*
> *(iii) a producer of the like product in the importing Member . . ."* (Emphasis added)

4.146 As a first observation it is noted that the sample is drawn from the domestic industry (i.e., the 35 companies that supported the complaint), and not from the universe of EU production (therefore including the 66 per cent of EC producers that did not complain). India takes no issue with that per se: the sample should reflect the domestic industry, not total EU production. Moreover, it may be impractical to try to obtain the co-operation of the 66 per cent of EU production that did not support the complaint to start with. The point to be taken, however, is that the sample thus established is taken exclusively from companies supporting the complaint and thus, by the natural course of things, is already tilted in comparison with total EU-15 production.

4.147 As a second observation India would like to compare the treatment of the EC sample with that of the Indian sample. As discussed earlier in this submission, in this proceeding, the Indian industry was sampled, too.[145] Cooperation of Indian companies with the EC was 82 per cent[146], which compares with only 34 per cent co-operation by EC producers. Unlike the Bed linen I proceeding, the investigating authorities in Bed linen II no longer required all Indian producers to submit a full questionnaire response before selecting the sample; this time five companies were selected, as may be recalled, without agreement being obtained between Texprocil and the European Commission. Notwithstanding this lack of agreement, the EC applied the resulting sample dumping margin rigorously and mechanically to all cooperating Indian exporters[147] and subjected the remainder to a high residual anti-dumping duty:

> *"because it would constitute a bonus for non-cooperation to assume that the dumping margin attributable to exporters/producers which did not make themselves known is lower than the highest found for a cooperating exporter/producer."*[148]

[145] Please refer to section III.A.1, above.
[146] Recital (16) of the provisional Regulation.
[147] With the exception, of course, of the investigated companies who got their individual dumping margins.
[148] Recital (51) of the provisional Regulation.

4.148 The treatment of the Indian sample contrasts with that accorded the EC sample. First, unlike the Indian sample, the European Commission obtained the agreement from the industry concerned for the EC sample. Then, the EC did not stick to the results of the sample, but rather made a determination of the state of the industry where for some factors it relied on the sample, but for many others not. For a number of factors, sample data are not even mentioned, even though such data would normally be available to the investigating authorities in the confidential versions of the questionnaire responses of the sample. It transpires from the determination that the EC especially did not rely on the sample for those factors where the data for the domestic industry or the EU-15 producers pointed to 'more injury' than the data for the sample.

4.149 In India's view, the EC was free to make its determination of the state of the domestic industry by resorting to sampling of the domestic industry. However, when it decided to do so, it should have relied on the results for that sample, and not reverted to other levels of industry when these were better suited for an injury determination.

4.150 Indeed, the EC's failure to stick to the results of the sample, especially when compared with the rigorous and mechanical application of the results of the Indian sample to India, cannot be considered an 'unbiased and objective' evaluation of the factors and indices listed in Article 3.4, within the meaning of Article 17.6(i). It follows that the EC's determination of the state of the domestic industry is inconsistent with Article 3.4 of the ADA.

3.2.3 The EC has at no point indicated or made clear why exactly it relied on which industry level for each injury factor

4.151 The provisional determination in the relevant part may be summarised as follows:

Recital	Factor or index	Industry level	Tendency
(81)	Production	EU-15 Domestic industry	Decrease of 9.6% Increase of 8.7%
(82)	Sales by volume	EU-15 Sample	Decrease of 17% Decrease of 1.5%
(83)	Sales by value	Domestic industry Sample	Increase of 4.2% Increase of 1.7%
(84)	Market share by volume	EU-15 Sample	Decrease from 62.2 to 55.6% Increase from 10.7 to 11.3%
(85)	Market share by value	EU-15 Domestic industry Sample	Decrease from 77.8 to 72% Increase from 22.4 to 25.1% Increase from 14.7 to 16%
(86)-(88)	Price development	EU-15 Sample	Decrease of 0.8% Increase of 3.2%
(89)-(90)	Profitability	Sample	Decrease from 3.6 to 1.6%
(91)	Employment	Domestic industry	Decrease of 5.3%

4.152 Even if the EC's replies to India's questions 28-32 on the 'levels of industry'[149] issue would be correct (*quod non*) this does not explain on what basis the EC took which factor as predominant. The EC did not indicate why it failed to even mention production by the sample; sales (volume) by the domestic industry; the market share (volume) of the domestic industry; employment of the sample; or failed to provide any information or indications on the price developments and profitability situation of the domestic industry.

4.153 There is no apparent logic as to why the EC mentioned which industry level with which injury factor. For example, why did the Commission base its conclusions for sales by volume on data concerning EC-15 production and the sample, while data on sales by value were based on the Community industry and sampled producers? Why is there no indication of the market share by volume for the domestic industry?

[149] The term 'industry level' is used merely as shorthand for the three levels of industry investigated by the EC, namely, the EU-15 producers, the domestic industry (the 35 producers), and the sample from the domestic industry (17 producers).

4.154 The Commission has in its written answer No 32 relied on Article 3.2 of the Agreement, which provides that *"[n]o one or several of these factors can necessarily give decisive guidance"*. This is true. But it cannot mean that the EC, when making an injury determination, can 'pick and choose' for each factor in Article 3.4, without providing any reasonable basis thereof, which industry level it will rely on to arrive at an injury finding.

4.155 The EC's failure to indicate any basis on which it determined which element should be appropriately considered at which level, implies that the evaluation of the factors and indices was not unbiased and objective. Consequently, this determination is inconsistent with Article 3.4 of the ADA.

4.156 In summary, for the reasons indicated in IV.C.3.2.1, IV.C.3.2.2 and IV.C.3.2.3 the EC acted inconsistently with Article 3.4.

4.157 As an additional observation India notes that these infringements are not 'repaired' by the special rule of interpretation laid down in the second sentence of Article 17.6(ii). That rule only comes into play where the provisions of the Agreement allow for more than one interpretation. That, however, is not an issue in this case.

4. Claim 16: Inconsistency with Articles 6.10 and 6.11

4.1 The text of Articles 6.10 and 6.11

4.158 The relevant of Article 6.10 and 6.11 provides in the relevant part that:

> *" . . . 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.*
>
> *6.11 For the purposes of this Agreement, 'interested parties' shall include:*
>
> . . .
>
> *(iii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.*
>
> *This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties."*

4.2 Legal argument relating to Article 6.10 and 6.11

4.159 In recital (61) of the Regulation imposing provisional duties it is clear that the EC deemed its sample to be statistically valid: *"The Commission therefore considered this sample to be representative of the Community industry."*

4.160 However, one does not have to be a mathematician or statistician to understand that the sample as drawn could never ever be representative and therefore not statistically valid. Article 6.11

defines as an 'interested party' among others, 'a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.' This implies that the sample must be chosen from the 'producer[s] of the like product in the importing Member' (sampling of associations is not at play here).

4.161 Whatever the exact meaning of 'statistically valid', it would seem certain that it excludes the possibility of taking a sample from *only* producers supporting the application. The EC sample was therefore statistically not valid and the injury determination based on it, vitiated by errors of facts and law. India believes that the EC has acted inconsistently with Article 6.10 and 6.11.

5. Claim 17: inconsistency with Article 12.2.1

5.1 The text of Article 12.2.1

4.162 It is recalled that Articles 12.2 and 12.2.1 of the ADA provide in relevant part as follows:

> *"12.2 Public notice shall be given of any preliminary or final determination, whether affirmative or negative . . . Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities . . .*
>
> *12.2.1 A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular . . .*
> *(iv) considerations relevant to the injury determination as set out in Article 3;*
> *(v) the main reasons leading to the determination."*

5.2 Legal arguments relating to the claims relating to Article 12.2.1

4.163 Earlier in this submission, the argument was already made in the context of Article 12.2.1 that India should be able to rely on the published determinations and disclosure documents to ascertain what the basis was for the EC's determinations.[150] This is equally true in the context of the issue here. There are three issues here:

4.164 First, if the EC did not rely on companies outside the domestic industry in order to determine injury, it did not explain this clearly in the provisional disclosure document or in the provisional Regulation.

4.165 Second, the EC failed to explain why for many injury factors it did not rely on the sample which it had selected in agreement with the complainant, but reverted to the domestic industry or the EU-15 producers instead.

4.166 Third, the EC has at no point indicated or made clear why it relied on which industry level for each injury factor. If there was any logical or proper motive behind this choice, it has not been made known to the Indian exporters.

[150] See section IV.A.5.2, above.

4.167 Fourth, the EC has at no point explained why it considered the selected sample representative (statistically valid).

4.168 In view of the importance of these issues for the Article 3.4 determination, India believes that the EC failed to explain *"in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities"* as required by Article 12.2 of the ADA. Moreover, the EC's provisional Regulation and the provisional disclosure document thus do not contain *"sufficiently detailed explanations for the preliminary determination on injury"* as required by Article 12.2.1.

4.169 Additionally, during Texprocil's first injury hearing and in the subsequent post-hearing brief filed by Texprocil[151], detailed comments were made on behalf of the Indian exporters on, e.g., production data and employment data for the sample. However, the EC did not mention or comment on the production and employment data for the sample. It follows that the EC failed to *"refer to the matters of fact and law which have led to arguments being accepted or rejected"* as required by Article 12.2.1.

4.170 In summary, the EC acted inconsistently with Article 12.2.1 of the ADA.

6. Claim 18: inconsistency with Article 12.2.2

6.1 The text of Article 12.2.2

4.171 Article 12.2.2 provides in relevant part that:

> *"A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty . . . shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures . . . In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers . . ."* (Emphasis added)

6.2 Legal arguments relating to the claims relating to Article 12.2.2

4.172 Reference is made to section IV.C.5.2, above. The three issues which were mentioned there were similarly present during the definitive stage:

4.173 First, if the EC did not rely on companies outside the domestic industry in order to determine injury, it did not explain this clearly in the definitive disclosure document or in the definitive Regulation.

4.174 Second, the EC failed to explain why for many injury factors it did not rely on the sample which it had selected in agreement with the complainant, but reverted to the domestic industry or the EU-15 producers instead.

[151] Annex 54.

4.175 Third, the EC has at no point indicated or made clear why it relied on which industry level for each injury factor. If there was any logical or proper motive behind this choice, it has not been made known to the Indian exporters.

4.176 Fourth, the EC has never explained, made clear or indicated why it considered the sample that was drawn representative.

4.177 India therefore believes that the EC failed to explain *"the matters of fact and law and reasons which have led to the imposition of final measures"*. It further failed to properly explain the *"information described in subparagraph 2.1"*; and failed to provide *"the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters"*. In each case, it acted inconsistently with Article 12.2.2 of the ADA.

D. ARTICLES 3.4 AND 3.5: FOR THE INJURY AND CAUSALITY DETERMINATIONS THE EC TOOK INTO ACCOUNT OTHER THAN "DUMPED IMPORTS"

4.178 **Claims 19 and 20**: for the purpose of the determinations required under Articles 3.4 and 3.5 the EC considered all imports of bed linen from India in the years preceding the investigation period as 'dumped', even though no dumping was ever determined for these imports. This led to an incorrect finding that 'dumped imports' from India caused material injury to the domestic industry.
The EC further failed to properly explain its reasoning, and consequently acted inconsistently with Article 12.2.1 (**claim 21**) and 12.2.2 (**claim 22**).

1. Facts

4.179 It is recalled that the complaint[152] contained an Annex 2 entitled *"List of company closures"*:

> ***"COMPANY CLOSURES AND JOB LOSSES IN SIMPLE MAKING-UP OF BED LINEN***
>
> ***GERMANY***
>
> *1992*
> *ERBA AG 681 jobs in total*
> *8500 ERLANGEN* *(1 part in bed linen)*
>
> *1993*
> *Spinnerei und Weberei Pfersee* *423 jobs*
> *Augsburgerstrasse 9*
> *D - 86157 AUGSBURG*
>
> *Carl HECKING GmbH & Co* *169 jobs*
> *Up de Hacke 15-17*
> *D - 48691 VREDEN*
>
> *1994*
> *Arnold KOCK GmbH & Co* *39 jobs*
> *Arnold-Kock-Strasse 2* *has closed down its*
> *D - 47565 STEINFURT* *department of bed linen production*

[152] Please refer to Annex 6.

Spinnerel und Weberelen ZELL-SCHÖNAU AG *Teichstrasse 4* *7863 ZELL*	*Stopped bed linen production*
TOTAL	*1.312 jobs*

GREECE

June 1992 *PIRAIKI - PATRAIKI S.A*	*234 losses estimated in the bed linen production.*

During the year 1992, 5 other companies had to reduce their operations with, as a result, the loss of about 2,730 jobs.

1995 *FILIATES Textiles*	*n.a.*

FRANCE

1990 *HERITIERS DE GEORGES PERRIN*	*20 jobs*
R.N.V.T.	*33 jobs*
SOLAXEN	*45 jobs*
(approx. 1.094 tons of production lost in bed linen)	
1991 *ETS. GERMAIN FRERES*	*17 jobs*
TISSAGE ET FILATURE D'AUCHEL	*43 jobs*
HERITIERS GEORGES PERRIN	*33 jobs*
(approx. 1.348 tons of production lost in bed linen)	
1992 *WALTER SEITZ PRODUCTION* *SONEP S.A. in Baisieux (makers-up)* *BRUNER VILLENBACHER in Cernay (makers-up)*	*38 jobs*
1993 *CLAEYS et Fils in Houplines (makers-up)* *DESFONGES OLIVIER in Marcq en Baroeul (makers-up)* *CANONNE in Saint-Aubert (makers-up)* *SOMACO in Riorges (weavers)* *WALTER-SEITZ (weavers)*	

1994
CEDE SARL in Vitry-le-François (makers-up)
HARLE in Tergnier (makers-up)

1995
MDT DEVELOTTE in La Baule (converters)

1996
SAVOIR FAIRE TEXTILE (converters)
CUSTOMAGIC in Halluin (converters)

TOTAL OF JOB LOSSES IN FRANCE: 448 (19 firmes)

ITALY

1991	
TESSITURA GIORI	*94 jobs*
1992	
CUSINI TOMMASO	*53 jobs*
SAPONARO	*}*
ROSSI SIMEONE	*}* *101 jobs lost*
CARMINATI	*)* *in these 4 companies*
MAURI	*}*

Companies having given up bed linen production

CLERICI E PASTORELLI

PIAZZA

The following company has suffered 30 job losses over the last years: ELIOLONA

TOTAL	*279 jobs*

UNITED KINGDOM

1990	
TAYLOR & HARTLEY FABRICS Ltd	*60 jobs*
EMBSEY (COURTAULDS)	*89 jobs*
1991	
SMITH & NEPHEW TEXTILES Ltd - CHATBURN	*87 jobs*
TOTAL	*184 jobs*

1988/1991
8 finishing and simple making-up mills of the COATS VIYELLA HOME FURMSHING Group (among which 5 in HEMMING) - about 600 job losses.

PORTUGAL

1991	
About 702 job losses in	
different activity reductions.	*}*
	}
1992	*} TOTAL: 1.365 jobs*
COELIMA : restructuring with 663 job losses	*}*

BELGIUM

N.V. SOLINTEX
Kortrijksestraat 387 - PB 134
B - 8500 KORTRIJK

This company first closed down the weaving mill, becoming a converter and later had to stop also this unprofitable activity.
Production tonnage lost : 1.300 tons
179 job losses" (Emphasis in original)

4.180 The Indian exporters argued from the beginning of the proceeding that their exports of bed linen to the EC had not caused injury. Such arguments were made in the submission on injury[153], during their first injury hearing on 13 January 1997, and in the post-hearing brief submitted on 6 February 1997.[154]

4.181 In its provisional Regulation the EC made a determination on injury and causality which in relevant part reads as follows:

*"**F. INJURY***

. . .

6. Situation of the Community industry

(a) Production

(81) Total output of bed linen by producers in the Community fell by 9.6 per cent from 138,400 tonnes in 1992 to 125,100 tonnes in the investigation period. This fall in production arose essentially through the closure of enterprises or their cessation of bed linen production within the Community (see recital (91) below) . . .

Indeed, in the course of its investigation the Commission acquired evidence of 29 companies other than the Community industry which ceased or reduced bedlinen production in the

[153] Annex 50.
[154] Annex 54.

Community between 1992 and the investigation period. It is estimated that total loss of production amounted to at least 10,000 tonnes per annum.

The sales, employment and profits of companies which have since disappeared are not included in the aggregated data for the Community industry, thus artificially improving the apparent trends for the survivors.

(b) Sales by volume

(82) At the level of the total Community producers, sales by volume in the Community, as measured by production minus exports, fell by 17 per cent from 124,400 tonnes in 1992 to 103,350 tonnes in the investigation period.

Sales by the sampled producers of the Community industry also declined, from 23,706 to 23,347 tonnes, a decrease of 1.5 per cent.

(c) Sales by value

(83) 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 ECU 280.6 million in 1992 to ECU 285.3 million (a rise of 1.7 per cent). It should be noted that these rises in nominal terms do not take account of inflation and represent a fall in real terms, since consumer prices in ecus rose by 5.5 per cent over the same period for the EU-15 countries. It should also be noted that these rises were overtaken by rises in the price of raw cotton (see recital (88) below).

It should be noted that among the sampled producers it was observed that sales have been maintained by seeking higher value market niches as the lower value, mass market items are undercut by imports. This pattern is indicated by developments on prices (see recital (87) below).

(d) Market share

(84) The market share by volume of producers at the level of the entire Community fell from 62.2 per cent in 1992 to 55.6 per cent in the investigation period. In that period the sampled producers from the Community industry increased their market share slightly, from 10.7 per cent to 11.3 per cent. The reason why the market share of survivors has slightly increased is that they have taken over some of the sales of those which had not survived the competition from dumped imports, particularly the sales of higher value niche products.

(85) An estimated analysis was done of market share by value. The patterns observed were the same as for market share by volume: producers at the level of the entire Community lost market share (from 77.8 per cent in 1992 to 72.0 per cent in the investigation period), while the Community industry as a whole and sampled producers gained market share, from 22.4 per cent to 25.1 per cent and from 14.7 per cent to 16.0 per cent respectively.

. . .

(h) Conclusion on injury

(92) The Commission took into account all the economic indicators mentioned above in determining whether or not the Community industry was suffering material injury. Account was taken of the fact that the number of companies making up the Community industry was reduced in comparison with the start of the injury investigation period. The production, sales, employment and profits of companies which have since disappeared are not included in the aggregated data for the Community industry, thus improving the apparent trends for the survivors.

. . .

G. CAUSATION

. . .

2. Effects of the dumped imports from the countries concerned

(96) The investigation of the Community industry showed as the main injury indicator the unsatisfactory development of sales prices and the consequent declining profitability. It was also established that the dumped imports were sold at prices which significantly undercut those of the Community producers and in substantial and increasing quantities, reaching 25 per cent market share in the investigation period.

. . .

(98) It was observed among sampled producers that they had been obliged increasingly to shift production and sales to high value niche markets in order to maintain production and sales levels. The undercutting calculation provided evidence that this shift was caused by the imports concerned. Undercutting margins were lower in the lower value qualities, indicating that the imports significantly influence price levels in this market segment and have forced down Community producers' prices. Where higher value items were imported the undercutting margins were higher, indicating that imports of these qualities were not yet at sufficient volume to bring down Community prices to the same extent.

It is worth noting that the Commission has received indications from importers, from Community producers and from suppliers of textile machinery to the exporting countries to the effect that exporters in the countries concerned are increasingly moving to higher value items.

(99) Since price suppression and consequent decreasing profitability to inadequate levels were the main indicators on which the Commission's finding of injury was based, and in view of the coincidence in time between the deterioration of the situation of the Community industry and the significant increase of the dumped imports, it can be concluded that there was a direct causal link between these imports and the material injury found.

. . .

4. Conclusion on causation

(109) As has been shown above, there is a direct causal link between the increased volume and the price effect of the dumped imports and the material injury suffered by the Community

industry. The direct link in this case is demonstrated by the existence of heavy undercutting which can reasonably explain the significant increase in market share of the dumped imports from 16.9 per cent in 1992 to 25.1 per cent in the investigation period and the corresponding negative consequences on volumes and prices of sales of Community producers. In terms of volumes, Community producers' market share decreased from 62.2 per cent in 1992 to 55.6 per cent in the investigation period. This fall was not reflected at the level of individual producers of the Community industry because they obtained sufficient benefit from the demise of other Community producers to keep their sales volume relatively stable. However, as far as the prices of the dumped imports are concerned, they have had an evident impact on the sampled producers, may of them being SMEs, whose profitability has fallen from 3.6 per cent to 1.6 per cent. In this respect, the Commission noted that such a situation can cause particular difficulty for SMEs given their lack of resources and the reluctance of banks to finance any losses.

(110) The consequent impact of the low-priced dumped imports has to be considered at two levels. Firstly, they have resulted in the exit of a significant number of firms with a considerable number of jobs lost. This is an on-going process which is likely to continue if dumping persists. Secondly, as to the surviving producers, they face continuing injury on two fronts. For low-value products the injury is very heavy since they are gradually pushed out of the corresponding market segment. For higher-value products, these producers have done considerably better but dumped imports are now progressively targeting this segment with the result that profitability is also falling in this respect . . .” (Emphasis added)

4.182 The Indian exporters made substantial arguments following this determination.[155]

4.183 In the definitive Regulation the EC provided the following explanations on the state of the domestic industry:

“(40) Exporters from all the exporting countries claimed that the Commission's analysis of injury was defective in that it referred to the significant decline in total Community production of bed linen in assessing the situation of the Community industry. They claimed in particular that information concerning companies not included in the definition of the Community industry or which no longer produce bed linen cannot be used to construe a finding of material injury.

These claims were examined carefully. It should however be remarked that the principal basis for the finding of material injury was the reduced profitability and price suppression of the Community industry as observed among the sampled companies.

(41) In the assessment of injury pursuant to Article 3 of the basic Regulation, the Community institutions have to assess the economic situation of the Community industry. This assessment usually covers the analysis of a time period of four to five years as in the present case ('assessment period’). Such an assessment is commonly based on an analysis of the complaining industry and not necessarily on companies accounting for the totality of Community production on the ground that the situation of a major proportion of the Community production is representative for its totality. Such an assessment, however, also has to take into account the structure and the nature of the industry under consideration. In the present case this industry is characterized by a high number of operators, in many cases small- and medium-sized companies, and by the fact that it is a sector with relatively low

[155] Annexes 51 and 55.

barriers to exit. The latter is mainly due to the fact that machinery can be sold or used for other products relatively simply. This has the effect that material injury is likely to manifest itself through the exit of economic operators within the assessment period.

Consequently, to limit the assessment of injury only to companies which are still operational at the end of the assessment period (i.e. at the time of the lodging of the complaint) and thus able actively to support a complaint would mean that any injury caused to companies which have closed down before this point in time would go unconsidered in the analysis. Furthermore, it should be noted that this distortion could even be aggravated as the surviving complaining companies of the Community industry may have benefited, possibly only temporarily, from the disappearance of other companies, causing their positive development to be overestimated.

In the present case, it should be noted that 29 companies of the bed linen industry have closed down or ceased production: that is to say, that a substantial number of companies have ceased operation. Furthermore, given the substantial price undercutting established, the strong increase in the volumes of the imports concerned and their consequent rise in market share, any relatively positive development of the complaining producers must be seen as threatened in the absence of anti-dumping measures." (Emphasis added)

4.184 During the consultations, India raised its concern that imports other than dumped imports had been taken into account for the assessment of injury:[156]

"Mr Seth: Several provisions in Article 3 of the Agreement require that injury caused by dumped imports be determined. Article 3.1 requires that

'[a] determination of injury . . . shall . . . 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.'

Similarly, Articles 3.2, 3.4, 3.5, 3.6 and 3.7 refer to 'dumped imports' as opposed to 'all imports of the product concerned'. The European Community has . . . included non-dumped imports in its determination and this affects each and all of these provisions.

. . ."

4.185 During the second round of consultations the matter was raised again [see Annex 13].

2. EC practice

4.186 In EC practice, the injury determination consists of two elements. An injury (underselling (or undercutting)) margin is calculated per investigated exporter. In Bed linen II the investigation period ["IP"] covered the period from 1 July 1995 to 30 June 1996.[157] This underselling margin is calculated over the investigation period.

4.187 Second, for the determination of the impact of the *"dumped imports"* on the domestic industry, normally a reference is made to a 4-5 year period, ending with and including the

[156] The verbatim report of the first round of consultations is attached as Annex 11.
[157] Provisional Regulation at recital (9).

investigation period. In the Bed linen II proceeding this period lasted from 1992 up to the end of the investigation period.[158]

4.188 The EC implicitly considers all Indian exports to the EC during the investigation to have been dumped. This is standard practice: "*The injury analysis concerning the examination of the volume and price effects of the dumped imports will also take into consideration imports with no or de minimis dumping margins . . .*"[159]

4.189 The EC further assumes that all imports of the like product in the years immediately preceding the investigation period were dumped. This also appears to be standard practice:

> "*[The Indian delegation] clarifies that India takes no issue with the EC practice to look at a longer period. India's problem is that the EC seems to automatically assume when assessing the impact of 'dumped imports' on the domestic industry that all imports in the preceding years are considered as dumped. Our second problem is that there were a number of product types exported from India during the investigation period which were clearly not dumped. The EC could not automatically without explanation consider these as dumped.*
>
> *[EC]: You recognise that this is normal practice. I cannot deny there is an assumption element. We make the dumping over the like product. On this basis we found that the dumping determination covered all imports during the IP. We compensated for this by using WA-to-WA comparison in the dumping margins.*"

4.190 During the second round of consultations, the EC explained the 'logic' behind this practice:

> "*[EC]: The investigation showed that there was dumping and injury for exactly the same twelve-month period. Of course, a longer period was used to compare data. This is a safeguard for the parties involved, because you then have a proper picture.*"

4.191 In effect, however, the EC considers the whole period starting in 1992 and ending with the investigation period, and essentially looked at the differences between the situation in 1992 and the IP. Rather than putting the data on the situation of the domestic industry in the IP relief, the determination on the state of the EC industry is made for the whole period 1992-IP.

4.192 In this context it is illustrative that in recital (92) of the provisional Regulation the EC refers to this period as the "*injury investigation period*", implying that the determination on the Community industry was made over the period 1992-IP rather than over the IP.

3. Claims

4.193 Several claims follow from the facts as described above.[160]

4.194 First, India believes that the EC practice to automatically consider as "*dumped*" all imports of bed linen from India in the years preceding the investigation period, is inconsistent with Article 3.4.
4.195 Second, India believes that the same set of facts also leads to a causality finding inconsistent with Article 3.5.

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[158] Ibid.
[159] Müller, Khan, Neumann, *EC Anti-Dumping Law—A Commentary on Regulation 384/96* at 189.
[160] Claims pertaining to other issues involving Article 3.4 are discussed in sections IV.B and IV.C, respectively.

4.196 Third, in the provisional Regulation the EC has insufficiently explained the basis for its finding that imports of bed linen from India 'caused' material injury to the domestic industry. This is inconsistent with Article 12.2.1.

4.197 Fourth, in the definitive Regulation the EC has insufficiently explained the basis for its finding that imports of bed linen from India *"caused"* material injury to the domestic industry. This is inconsistent with Article 12.2.2.

4. Claim 19: inconsistency with Article 3.4

4.1 The text of Article 3.4

4.198 Articles 3.1 to 3.5 of the ADA require that injury caused by dumped imports be determined. Article 3.4 provides in relevant part 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 . . ."* (Emphasis added)

4.199 Throughout Article 3 the language is consistent: the injury to the domestic industry must have been caused by *"dumped imports"*. India already took issue with the EC's practice to consider all imports of bed linen from India during the investigation period as dumped (please refer to the claims on Article 3.1, above). The question now is whether *"dumped imports"* include imports in the period 1992 up to, but not including the investigation period.

4.200 In the view of India, the plain meaning of the words *"dumped imports"* is unequivocal: imports determined to have been dumped. In this context, Article 2.1 of the ADA is of relevance:

> *"For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if 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."* (Emphasis added)

4.201 Article 2.1 is not limited to *"for the purpose of this Article"*; rather, the definition of *"dumped"* contained in it is also applicable to other Articles of the ADA. In other words, imports in Article 3 are only considered to be *"dumped"* if they have been introduced into the commerce of the EC at less than their normal value, if their export price is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in India.

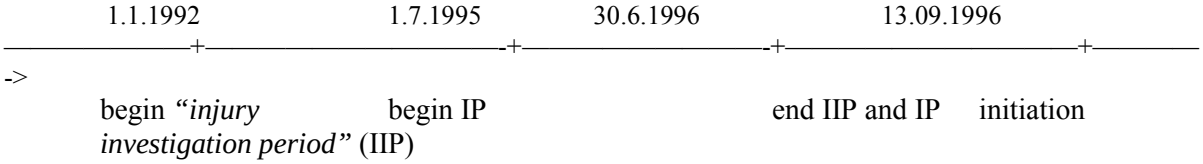
4.202 Under Article 17.6(ii) of the ADA the Panel will interpret:

> *"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."*

4.203 However, in the clear language of the Agreement as interpreted in accordance with the customary rules of interpretation of public international law *"dumped imports"* would seem to mean *"dumped imports"*, and *not "dumped and non-dumped imports of the like product"*. The issue of the second sentence of Article 17.6(ii) therefore does not arise in this context.

4.2 Legal arguments relating to the claims relating to Article 3.4

4.204 For the convenience of the Panel, the time flow of the events relevant for this claim is set out as follows:



4.205 From the outset it must be made clear that no issue is taken with the practice of the EC to consider the years immediately preceding the investigating period. Indeed, in order to make a meaningful injury and causality determination, it will be necessary for the EC to do so.

4.206 This is not the same thing as making one assessment for the whole *"injury investigation period"*. For example, the allegations contained in Annex 2 of the complaint (quoted above) virtually all concerned companies which (as far as India can discern) terminated business or laid off staff in the period 1988 up to the investigation period. It is not excluded that such allegations may have a certain role in the context of prima facie evidence and the standard of Article 5.2.[161] However, even if proven true, they would not be evidence of injury caused by *"dumped imports"* (*i.e.*, by imports taking place during the investigation period of 1 July 1995 to 30 June 1996.

4.207 In the injury determination the EC at several instances puts great emphasis on companies allegedly disappeared from the EC market in the period 1992-IP. Recital (81) of the provisional Regulation mentions:

> *"evidence of 29 companies other than the Community industry which ceased or reduced bedlinen production in the Community between 1992 and the investigation period. It is estimated that total loss of production amounted to at least 10,000 tonnes per annum."*

4.208 The closest thing to 'evidence' (if such a distinguished word may be used) in the non-confidential file indicative of this statement were precisely the allegations contained in Annex 2 of the complaint, and one letter from Eurocoton with further unproven allegations.[162] The Commission subsequently noted that:

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[161] This statement is not intended as recognising in any way that these allegations were correct, factually true, or in any way relevant.

[162] If the companies allegedly affected before 1992 as well as the pure weavers are discounted, this leaves the following list of companies in the complaint that allegedly went (partially or totally) out of business:

1. Erba AG; 2. Spinnerei und Weberei Pfersee; 3. Carl HECKING GmbH & Co; 4. Arnold KOCK GmbH & Co; 5. Spinnerei und Webereien Zell-Schönau AG; 6. Piraiki-Patraiki S.A.; 7. Filiates Textiles; 8. Walter Seitz Production; 9. Sonep S.A. in Baisieux (makers-up); 10. Bruner Villenbacher in Cernay (makers-up); 11. Claeys et Fils in Houplines (makers-up); 12. Desfonges Olivier in Marcq en Baroeul (makers-up); 13. Canonne in Saint-Aubert (makers-up); 14. Cede SARL in Vitry-le-François (makers-up); 15. Harle in Tergnier (makers-up); 16. MDT Develotte in La Baule (converters); 17. Savoir Faire Textile (converters); 18. Customagic in Halluin (converters); 19. Cusini Tommaso; 20. Saponaro; 21. Rossi Simeone; 22. Carminati; 23.

"[t]he sales, employment and profits of companies which have since disappeared are not included in the aggregated data for the Community industry, thus artificially improving the apparent trends for the survivors."

4.209 This particular statement, if it is at all intelligible, would appear to imply that the Commission has taken account of these 29 companies when making the evaluation of the state of the domestic industry. This is very clear in recital (91) of the provisional Regulation:

". . . In analysing data on the Community industry, account should be taken of the 29 companies other than the Community industry which ceased or reduced bed linen production in the Community between 1992 and the investigation period (see recital (81)). The associated job losses numbered over 2 400." (Emphasis added)

4.210 And in recital (92) ("*Conclusion on injury"*):

"The Commission took into account all the economic indicators mentioned above in determining whether or not the Community industry was suffering material injury. Account was taken of the fact that the number of companies making up the Community industry was reduced in comparison with the start of the injury investigation period. The production, sales, employment and profits of companies which have since disappeared are not included in the aggregated data for the Community industry, thus improving the apparent trends for the survivors." (Emphasis added)

4.211 This conclusion leaves no doubt that the alleged disappearance of the 29 companies was a factor taken on board for the evaluation required under Article 3.4.

4.212 This line of reasoning was maintained in the definitive Regulation:

"(40) Exporters from all the exporting countries claimed that the Commission's analysis of injury was defective in that it referred to the significant decline in total Community production of bed linen in assessing the situation of the Community industry. They claimed in particular that information concerning companies not included in the definition of the

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Mauri; 24. Clerici e Pastorelli; 25. Piazza; 26. Eliolona; 27. Coelima; 28. N.V. Solintex, as well as the further unexplained mention of *"5 other companies had to reduce their operations with, as a result, the loss of about 2.730 jobs"*. However, it must be noted that this summary is partially speculative, since the EC did not make further evidence available on the matter and India thus does not know exactly which companies belonged to the 29.

In this context India notes the dictum in Korea—Anti-dumping duties on imports of polyacetal resins from the United States, Report of the Panel, ADP/92 and Corr.1 of 2 April 1993 at § 254:

"For the reasons set forth in the preceding paragraphs, the Panel was of the view that it was unable to ascertain from the text of the determination on what factual basis the KTC had found that the level of net profit in 1989 was insufficient to enable the industry 'to maintain normal operations and development.' While there might have been relevant information before the KTC in this regard, the determination did not enable the Panel to determine how this information had been evaluated by the KTC in making this finding. The Panel recalled its statement in paragraphs 227 and 228 regarding the considerations by which it was guided in reviewing whether the KTC's determination was based on positive evidence. The Panel concluded that the KTC's finding that the level of net profit in 1989 was not sufficient to permit the industry 'to maintain normal operations and development' was not adequately substantiated by positive evidence and was thereby inconsistent with Korea's obligations under Article 3:1 of the Agreement.

The letter from Eurocoton is attached as Annex 80.

> *Community industry or which no longer produce bed linen cannot be used to construe a finding of material injury.*

These claims were examined carefully. It should however be remarked that the principal basis for the finding of material injury was the reduced profitability and price suppression of the Community industry as observed among the sampled companies.

> *(41) In the assessment of injury pursuant to Article 3 of the basic Regulation, the Community institutions have to assess the economic situation of the Community industry. This assessment usually covers the analysis of a time period of four to five years as in the present case ('assessment period'). Such an assessment is commonly based on an analysis of the complaining industry and not necessarily on companies accounting for the totality of Community production on the ground that the situation of a major proportion of the Community production is representative for its totality. Such an assessment, however, also has to take into account the structure and the nature of the industry under consideration. In the present case this industry is characterized by a high number of operators, in many cases small- and medium-sized companies, and by the fact that it is a sector with relatively low barriers to exit. The latter is mainly due to the fact that machinery can be sold or used for other products relatively simply. This has the effect that material injury is likely to manifest itself through the exit of economic operators within the assessment period.*
>
> *Consequently, to limit the assessment of injury only to companies which are still operational at the end of the assessment period (i.e. at the time of the lodging of the complaint) and thus able actively to support a complaint would mean that any injury caused to companies which have closed down before this point in time would go unconsidered in the analysis. Furthermore, it should be noted that this distortion could even be aggravated as the surviving complaining companies of the Community industry may have benefited, possibly only temporarily, from the disappearance of other companies, causing their positive development to be overestimated.*
>
> *In the present case, it should be noted that 29 companies of the bed linen industry have closed down or ceased production: that is to say, that a substantial number of companies have ceased operation. Furthermore, given the substantial price undercutting established, the strong increase in the volumes of the imports concerned and their consequent rise in market share, any relatively positive development of the complaining producers must be seen as threatened in the absence of anti-dumping measures." (Emphasis added)*

4.213 As a preliminary remark, it would follow from previous GATT jurisprudence that India may rely on the published notice to ascertain what factors led the EC to impose anti-dumping duties.[163]

[163] In Korea—Anti-dumping duties on imports of polyacetal resins from the United States, Report of the Panel, ADP/92 and Corr.1 of 2 April 1993 at § 209 the Panel noted (in the context of the 1979 Anti-Dumping Code) that:

". . . Article 3 of the Agreement required investigating authorities to consider certain factors and to make a determination based on positive evidence with regard to these factors. In the view of the Panel, effective review under Article 15 of an injury determination against the standards set forth in Article 3 required an adequate explanation by the investigating authorities of how they had considered and evaluated the evidence with regard to the factors provided for in that Article. Interpreted in conjunction with Article 8:5, such an explanation had to be provided in a public notice. An explanation of how in a given case investigating authorities had evaluated the factual evidence before them pertaining to the factors to be considered under Article 3 clearly fell within the scope of the requirement in Article 8:5 that authorities articulate in a public notice "the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities, and the reasons and basis

4.214 The EC seems to assume without further comment that less companies implies less production.[164] No further evidence has been provided that the alleged demise of these 29 companies did in fact imply in each case a reduction of production.

4.215 The injury determination should not have taken account of injury allegedly caused by Indian imports before the investigation period. No dumping finding was ever made pertaining to imports of Indian bed linen in the period from 1992 up to the investigation period; indeed, the first anti-dumping proceeding concerning Bed linen was terminated and never led to such dumping (or injury) finding. There was therefore no basis in the ADA to consider such imports as having been *"dumped"*. The EC could not attribute the alleged closures and dismissals of the 29 companies in the period from 1992 up to the IP to the *"dumped imports"* during the IP, since these imports only occurred after the alleged company closures. The authorities' establishment of the facts for the Article 3.4 determination was thus not proper and the evaluation of those facts was not unbiased and objective.

4.216 For these reasons India believes that the EC acted inconsistently with Article 3.4.

5. Claim 20: inconsistency with Article 3.5

4.217 Article 3.5 provides that the material injury determined on the basis of Article 3 must be caused by the *"dumped imports"*:

> *"3.5 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 . . ."*
> (Emphasis added)

4.218 The reasoning developed in section 4, above, on the meaning of *"dumped imports"* is equally applicable for Article 3.5: India believes that the term *"dumped imports"* in 3.5 has no meaning differently from its equivalent in Article 3.4. For the analysis of that term reference is thus made to section 4, above.

4.219 There is, however, an additional element which must be noted: the words *"through the effects of dumping"* in Article 3.5 leave no doubt as to the emphasis on the dumped character of the imports. Under EC practice as applied in the Bed linen II proceeding, this provision is robbed of its meaning.

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therefor." This provision served the important purpose of transparency by requiring duly motivated public decisions as the basis for the imposition of anti-dumping duties. In the view of the Panel, the purpose of this provision would be frustrated if in a dispute settlement proceeding under Article 15 of the Agreement a Party were allowed to defend a challenged injury determination by reference to alleged reasons for such determination which were not part of a public statement of reasons accompanying that determination . . ."

[164] It would seem under the Commission's logic that two companies merging but retaining their total production quality would imply the loss of one company and thus a sign of injury. Although Indian exporters protested against the automatic and unproven assumptions underlying the EC's logic, this issue was merely met with the quote from the definitive Regulation discussed above.

4.220 India believes on this basis that the EC acted inconsistently with Article 3.5 by automatically considering all imports of bed linen from India in the period 1992-30 June 1995 as *"dumped"*.

6. Claim 21: inconsistency with Article 12.2.1

6.1 The text of Article 12.2.1

4.221 Article 12.2.1 was already discussed in the context of India's claim concerning Article 3.1.

6.2 Legal arguments relating to the claims relating to Article 12.2.1

4.222 It is recalled that in anti-dumping proceedings the investigating authorities have a very dominant position as far as knowledge of the facts is concerned. This is even more so in the EC, where the European Commission is the only entity having access to all facts relating to the initiation. Only the EC authorities know what 29 companies were intended in the Regulation.

4.223 Article 12 fulfils in this context a crucial rôle to ensure a certain degree of transparency. In this context the *dictum* of the Panel in Korea—Anti-dumping duties on imports of polyacetal resins from the United States is recalled:[165]

> *"In the view of the Panel, the purpose of this provision would be frustrated if in a dispute settlement proceeding . . . a Party were allowed to defend a challenged . . . determination by reference to alleged reasons for such determination which were not part of a public statement of reasons accompanying that determination . . ."*

4.224 India may rely on the published Regulations and the disclosure documents to reflect the EC's determinations accurately.

4.225 There are two arguments why the EC failed to properly explain its determination.

4.226 First, if the EC for the purposes of Articles 3.4 and 3.5 made its determination of material injury only concerning the *"dumped"* imports, there is nothing in the published Regulations or the non-confidential file to show for it. On the contrary, the Regulations seem to be clearly (partially) based on injury caused before the investigation period (e.g., by imports not determined to have been dumped). If the EC did not rely on imports during the period 1992-30 June 1995 for its injury and causality finding, this has not been explained in any comprehensible manner in the provisional Regulation.

4.227 It follows that the EC, assuming *arguendo* that it did not rely on imports not determined to have been dumped, has failed to explain this properly in the provisional Regulation or the provisional disclosure, and therewith acted inconsistently with Article 12.2.1.

4.228 Second, in recital (89) of the provisional Regulation the EC observes that:

> *"The profitability of the sampled companies declined by more than 50 per cent between 1992 and the investigation period, from a figure of 3.6 per cent to 1.6 per cent of sales. This is well below the figure of 5 per cent which can be regarded as a minimum level which was achieved*

[165] Korea—Anti-dumping duties on imports of polyacetal resins from the United States, Report of the Panel, ADP/92 and Corr.1 of 2 April 1993 at § 209.

by these companies in 1991 when the dumped imports concerned were 30 per cent lower than in the investigation period. It is also below profit levels achieved by importers, which explains why certain producers have ceased production and switched to importing."

4.229 There has never been any determination or even allegation that imports of bed linen from India in 1991 were *"dumped"* as defined in Article 2.1 of the ADA. Consequently, this statement is suggestive but totally unproven, and does not meet the standards laid down in Article 12.2.1.

7. Claim 22: inconsistency with Article 12.2.2

7.1 The text of Article 12.2.2

4.230 India recalls the text of Article 12.2.2:

"A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty . . . shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers . . ." (Emphasis added)

7.2 Legal arguments relating to the claims relating to Article 12.2.2

4.231 In their definitive disclosure comments the Indian exporters commented on the provisional Regulation and disclosure document that:

"there is another falsifying factor. As the Commission will undoubtedly know, the EC textile industry has gone through a major restructurisation process in the past years. This involved, among others, the merger of many smaller companies in more viable units.

If, four years ago, company A was purchased by company B, the Commission's logic seems to be as follows: company A has disappeared, which is a sign of injury, notwithstanding the fact that company B has expanded its production. Such 'logic', however, does not withstand scrutiny."

4.232 The reply in the definitive Regulation to this argument stressed that:

"(41) In the assessment of injury pursuant to Article 3 of the basic Regulation, the Community institutions have to assess the economic situation of the Community industry. This assessment usually covers the analysis of a time period of four to five years as in the present case ('assessment period'). Such an assessment is commonly based on an analysis of the complaining industry and not necessarily on companies accounting for the totality of Community production on the ground that the situation of a major proportion of the Community production is representative for its totality. Such an assessment, however, also has to take into account the structure and the nature of the industry under consideration. In the present case this industry is characterized by a high number of operators, in many cases small- and medium-sized companies, and by the fact that it is a sector with relatively low barriers to exit. The latter is mainly due to the fact that machinery can be sold or used for

other products relatively simply. This has the effect that material injury is likely to manifest itself through the exit of economic operators within the assessment period.

Consequently, to limit the assessment of injury only to companies which are still operational at the end of the assessment period (i.e. at the time of the lodging of the complaint) and thus able actively to support a complaint would mean that any injury caused to companies which have closed down before this point in time would go unconsidered in the analysis. Furthermore, it should be noted that this distortion could even be aggravated as the surviving complaining companies of the Community industry may have benefited, possibly only temporarily, from the disappearance of other companies, causing their positive development to be overestimated.

In the present case, it should be noted that 29 companies of the bed linen industry have closed down or ceased production: that is to say, that a substantial number of companies have ceased operation. Furthermore, given the substantial price undercutting established, the strong increase in the volumes of the imports concerned and their consequent rise in market share, any relatively positive development of the complaining producers must be seen as threatened in the absence of anti-dumping measures."

4.233 The EC at no point addressed Texprocil's point made in the comments[166] to the definitive disclosure that the restructuring of the EC textile industry[167] influenced the injury situation.

4.234 Moreover, the EC appeared to continue to consider imports of bed linen from India in the period 1992-30 June 1995 as "*dumped*" without elaborating on what basis it did so. This is inconsistent with Article 12.2.2 of the ADA since the EC did not explain how injury caused in the period 1992-30 June 1995 could have been caused by imports (allegedly) "*dumped*" during the investigation period.

[166] Please refer to Annex 60 at section 4.2.1.

[167] It is further recalled that in its first submission on injury (Annex 50) Texprocil argued that:

". . . the EC industry is in a state of change. Many companies have had to restructure themselves in the last years as a result of increasing globalisation of production. A central factor in this process is the problem of the relatively high wages in Europe.

The restructuring had serious consequences for Europe. Commissioners Bangemann and Brittan argued in their 1995 Communication on the impact of international developments on the Community's Textile and Clothing Sector that 'in textiles the rise in productivity . . . has been the main factor for the loss in employment.' That study strongly argued that labour costs are of fundamental importance for the competitiveness of the EC industry. For instance, in 1993 the average hourly wages in EC Member States varied from 3.03 to 17.29 US$, while in India it was merely 0.27 US$ . . ."

The EC authorities never reacted to these comments.

V. CLAIMS RELATING TO PROCEDURAL ISSUES

A. ARTICLE 5.3: THE EC DID NOT EXAMINE THE ALLEGATIONS IN THE COMPLAINT BEFORE INITIATING THE ANTI-DUMPING PROCEEDING. SUCH EXAMINATION WAS EVEN MORE IMPORTANT IN THE LIGHT OF EXISTING COUNTER-EVIDENCE

5.1 Summary: Article 5.3 requires the EC to examine the accuracy and adequacy of the allegations in the complaint before initiating the anti-dumping investigation. There is nothing on record to show that such examination was indeed performed (**claim 23**). Moreover, the available evidence from the Bed linen I anti-dumping proceeding made such examination even more important. Even though detailed arguments were presented by the Indian exporters on these issues, the EC failed to properly explain its actions and reasoning, and consequently acted inconsistently with Article 12.2.1 (**claim 24**) and 12.2.2 (**claim 25**).

1. Facts

5.2 In part I of this submission it was recalled that the Bed linen II proceeding had been preceded by an earlier one, concerning the same product and also targeting (*inter alia*) India. It is further recalled that in the Bed linen I proceeding the EC industry virtually refused to co-operate with the investigating authorities (at least, virtually no non-confidential summaries of their questionnaire responses have been made available in the non-confidential file of that proceeding).

5.3 The time flow of events may be summarised as follows:

25 January 1994		Initiation Bed linen I
March 1994		Submission of 41 questionnaire responses by Indian exporters
10 July 1996		Termination of the Bed linen I proceeding because *"[t]he complainant Community producers formally withdrew the complaint concerning imports of certain types of bedlinen originating in India, Pakistan, Thailand and Turkey"*[168]
30 July 1996	(a)	Complaint by the original complainant, Eurocoton,
13 September 1996		leading to the Bed linen II proceeding Initiation of Bed linen II

5.4 The notice of initiation of the Bed linen II proceeding contained a rather terse statement on the alleged dumping and injury:

> ***"4. Allegation of injury***
>
> *The complainant alleges and has provided evidence that imports from Egypt, India and Pakistan have increased significantly in absolute terms and in terms of market share, during a period where the apparent consumption in the Community has decreased.*

[168] Commission Decision of 9 July 1996 terminating the anti-dumping proceeding concerning imports of certain types of bedlinen originating in India, Pakistan, Thailand and Turkey, OJ (1996) L 171/27 (Annex 5) at recital (4).

It is further alleged that the volume and prices of the imported products have, among other consequences, had a negative impact on the quantities sold and the prices charged by the Community producers, resulting in substantial adverse effects on employment and the financial situation of the Community industry."

5.5 It may be noted that at no point in the notice of initiation (or indeed, in the published Regulations or elsewhere) did the EC as much as mention that there had been a Bed linen I proceeding. Similarly, the complaint leading to the Bed linen II proceeding[169] conveniently 'forgot' that an anti-dumping proceeding covering the same product and largely the same countries on the basis of a complaint by the same entity had been terminated only twenty days before.

5.6 In their first submission on injury (Annex 50) the Indian exporters expressed their concerns on the issue of prima facie evidence and the compatibility of the initiation with Article 5:

*"1.2 The Commission should have taken into account **all** available evidence when deciding on the initiation of the proceeding*

Eurocoton appears to consider that the obligations under Articles 5.2, 5.3 and 5.8 of the Agreement are fulfilled if the Commission allegations on dumping and injury in the complaint [sic]. *Such a view, if shared by the Commission, seems formalistic and contrary to letter and spirit of the Agreement.*

A logical and literal reading of [Articles 5.2, 5.3 and 5.8 of the ADA] *leads to the following conclusions:*

1. The complainant must adduce evidence of (inter alia) injury in its complaint. This evidence should relate to the matters summed up in points (i) through (iv) of Article 5.2. However, it is not necessary that the evidence in the complaint be 'court-proof'; it must be, so to speak, prima facie evidence.

2. The purpose of Articles 5.2, 5.3 and 5.8 is to avoid frivolous complaints. The Commission is under an obligation, before the initiation of the proceeding, to investigate whether the facts alleged are more than '[s]imple assertion, unsubstantiated by relevant evidence.'

In order to avoid unnecessary harassment of exporters, it is mandatory that such investigation takes place by the Commission, before the initiation.

3. If the Commission is informed by some other source than the complaint of facts related to the injury question, it must take these into account: Article 5.3 provides that '[t]he authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation.'

Article 5.8 adds in relevant part that '[a]n application . . . shall be rejected . . . as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case.' If, in other words, the

[169] The non-confidential summary thereof was made available in the non-confidential file at the time of initiation. No other relevant evidence on the alleged injury was made available in the non-confidential file during the time of initiation.

Commission is satisfied, either before or during the proceeding, that there is no factual basis to pursue the matter, it may not continue the initiation or pursuit of the proceeding. Article 5.8 does not specify that the Commission should only take into account such evidence as has been presented in the complaint; on the contrary, if the Commission has obtained information from other sources, it is under an obligation to take this into account.

4. This means that, in such cases, the evidence requirement for the complaint logically is a relative one: if strong counter evidence exists, the evidence in the complaint becomes 'simple assertion, unsubstantiated by relevant evidence', if the Commission does not further check it before the initiation.

The question now arises, whether in the present case counter evidence or indications existed, which obliged the Commission to check the allegations in the complaint. Texprocil is convinced that such counter evidence was indeed available.

On 25 January 1994 the Commission initiated an anti-dumping proceeding concerning bed linen from India, Pakistan, Thailand and Turkey. The complaint had been submitted by Eurocoton.

The cooperation of Indian exporters was overwhelming; in contrast, the Community industry refused to submit questionnaire responses, as a result of which Eurocoton had to withdraw the complaint. The first bed linen proceeding was terminated on 10 July 1996.

As the Commission will be aware, even though the formal reason for the termination was the withdrawal of the complaint, the actual cause of the termination was the non-cooperation of the Community industry.

It follows that, at least during the period starting from 25 January 1994 (initiation of the first proceeding) up to the date of termination (10 July 1996) the Community industry did not consider itself injured; at least, the absolute non-cooperation of the EC producers is a very strong indication to that effect.

The fact that the second complaint was formally submitted after the termination, on 30 July 1996 cannot change this. The 'data' or allegations in the complaint do not refer to events after the termination of the first proceeding; since there is a very strong indication that, up to 10 July 1996 the Community industry did not suffer material injury from imports of bed linen from India, all allegations in the complaint already appear disproved from the outset. Under these circumstances, the Commission was under an obligation to carefully check, ***before*** *initiating the second proceeding, whether there was any serious evidence of injury (as opposed to mere assertions in the second complaint).*

There is no evidence in either the notice of initiation or the non-confidential [file] showing that the Commission did in fact make this a priori check. It follows that the Commission violated Articles 5.2, 5.3 and 5.8 of the Agreement as well as Articles 5(2) jo 5(3) and 5(7) of the basic anti-dumping Regulation. Texprocil therefore respectfully requests the Commission to terminate this proceeding since it is tainted with a procedural error which cannot be repaired retroactively."

> ***2. <u>The complaint does not contain prima facie evidence of dumping and injury caused thereby</u>***
>
> . . .
>
> *The complaint has been based on little more than unsubstantiated allegations. First, the complainant notes that '[i]t is worth noting that these countries have access to domestically grown raw cotton . . .' This, however, ignores that Indian producers have suffered from an acute shortage of raw cotton through much of 1995, as is well-known.*
>
> *Second, the non-confidential version of the complaint merely alleged price details in the 'dumping calculation', without giving any evidence. Since the complainant alleges that it has obtained its information from publicly available sources, there is no reason why no non-confidential version thereof (photocopies of the pages, etc., concerned) has been provided. Failure to do so makes the statements concerning the alleged dumping little more than 'simple assertion, <u>unsubstantiated by relevant evidence</u>.'*
>
> *Alternatively, in the event Eurocoton did submit such information in the confidential version of the complaint, Texprocil considers that this should have been ignored by the Commission in accordance with Article 19 of the basic anti-dumping Regulation.*
>
> *It follows that, apart from the violation of Article 5.2 of the Agreement in the context of the previous proceeding (see above), that provision is also violated since no prima facie evidence has been submitted in the complaint."*

5.7 The issue of prima facie evidence and the EC's obligations under Articles 5.1, 5.2, 5.3 and 5.8 was subsequently raised during the injury hearing of 13 January 1997 but no answer was provided by the EC authorities. The post-hearing brief[170] which was subsequently filed therefore again put the Indian exporters' concerns on the record:

> "*The Commission should have taken into account **<u>all</u>** available evidence when deciding on the initiation of the proceeding*
>
> *Eurocoton appears to consider that the obligations under Articles 5.2, 5.3 and 5.8 of the Agreement are fulfilled if the Commission checks the allegations on dumping and injury in the complaint. Such a view, if shared by the Commission, seems formalistic and contrary to letter and spirit of the Agreement . . .*
>
> *1. The complainant must adduce evidence of (inter alia) injury in its complaint. This evidence should relate to the matters summed up in points (i) through (iv) of Article 5.2. However, it is not necessary that the evidence in the complaint be 'court-proof'; it must be, so to speak, prima facie evidence.*
>
> *2. The purpose of Articles 5.2, 5.3 and 5.8 is to avoid frivolous complaints. The Commission is under an obligation, before the initiation of the proceeding, to investigate whether the facts alleged are more than '[s]imple assertion, unsubstantiated by relevant evidence.'*

[170] Annex 54.

In order to avoid unnecessary harassment of exporters, it is mandatory that such investigation takes place by the Commission, before the initiation.

3. *If the Commission is informed by some other source than the complaint of facts related to the injury question, it must take these into account: Article 5.3 provides that '[t]he authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation.'*

   Article 5.8 adds in relevant part that '[a]n application . . . shall be rejected . . . as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case.' If, in other words, the Commission is satisfied, either before or during the proceeding, that there is no factual basis to pursue the matter, it may not continue the initiation or pursuit of the proceeding. Article 5.8 does not specify that the Commission should only take into account of such evidence as has been presented in the complaint; on the contrary, if the Commission has obtained information from other sources, it is under an obligation to take this into account.

4. *This means that, in such cases, the evidence requirement for the complaint logically is a relative one: if strong counter evidence exists, the evidence in the complaint becomes 'simple assertion, unsubstantiated by relevant evidence', if the Commission does not further check it before the initiation.*

The question now arises, whether in the present case counter evidence or indications existed, which obliged the Commission to check the allegations in the complaint with more care than usual. Texprocil is convinced that such counter evidence was indeed available.

On 25 January 1994 the Commission initiated an anti-dumping proceeding concerning bed linen from India, Pakistan, Thailand and Turkey. The complaint had been submitted by Eurocoton. The product scope was identical to that of the current proceeding.

The co-operation of Indian exporters was overwhelming; in contrast, the Community industry refused to submit questionnaire responses, as a result of which Eurocoton had to withdraw the complaint. The first bed linen proceeding was terminated on 10 July 1996.

As the Commission will be aware, even though the formal reason for the termination was the withdrawal of the complaint, the actual cause of the termination was the non-cooperation of the Community industry.

It follows that, at least during the period starting on 25 January 1994 (initiation of the first proceeding) up to the date of termination (10 July 1996) the Community industry did not consider itself injured; at least, the absolute non-cooperation of the EC producers is a very strong indication to that effect.

The fact that the second complaint was formally submitted after the termination, on 30 July 1996 cannot change this. The 'data' or allegations in the complaint do not refer to events after the termination of the first proceeding; since there is a very strong indication that, up to 10 July 1996 the Community industry did not suffer material injury from imports of bed linen from India, all allegations in the complaint already appear disproved from the outset. Under

*these circumstances, the Commission was under an obligation to carefully check, **before** initiating the second proceeding, whether there was any serious evidence of injury (as opposed to mere assertions in the second complaint).*

There is no evidence in either the notice of initiation or the non-confidential file showing that the Commission did in fact make this a priori check. It follows that the Commission violated Articles 5.2, 5.3 and 5.8 of the Agreement as well as Articles 5(2) j° 5(3) and 5(7) of the basic anti-dumping Regulation. Texprocil therefore respectfully requests the Commission to terminate this proceeding since it is tainted with a procedural error which cannot be repaired retroactively.

1.3 The complaint does not contain prima facie evidence of dumping and injury caused thereby

Article 5.2 of the Agreement provides in relevant part that a complaint must contain prima facie evidence on, inter alia, dumping and injury.

The complaint has been based on little more than unsubstantiated allegations. First, the complainant notes that '[i]t is worth noting that these countries have access to domestically grown raw cotton . . .' This, however, ignores that Indian producers have suffered from an acute shortage of raw cotton through much of 1995, as is well-known.

Second, the non-confidential version of the complaint merely alleged price details in the 'dumping calculation', without giving any evidence. Since the complainant alleges that it has obtained its information from publicly available sources, there is no reason why no non-confidential version thereof (photocopies of the pages, etc., concerned) has been provided. Failure to do so makes the statements concerning the alleged dumping little more than 'simple assertion, unsubstantiated by relevant evidence.'

Alternatively, in the event Eurocoton did submit such information in the confidential version of the complaint, Texprocil considers that this should have been ignored by the Commission in accordance with Article 19 of the basic anti-dumping Regulation.

It follows that, apart from the violation of Article 5.2 of the Agreement in the context of the previous proceeding, that provision is also violated since no prima facie evidence has been submitted in the complaint."
(Emphasis in original, footnotes omitted)

5.8 Again, the Indian exporters received no reply to any of these arguments from the European Commission. The provisional Regulation contained merely a curt standard formula[171] stating that:

"The proceeding was initiated as a result of a complaint lodged on 30 July 1996 by the Committee of the Cotton and allied Textile Industries of the European Communities (Eurocoton), on behalf of Community producers representing a major proportion of Community production of cotton-type bed linen. The complaint contained evidence of dumping of the said product and of material injury resulting therefrom, which was considered sufficient to justify the initiation of a proceeding."[172]

[171] That this formula is included as a matter of standard reply can be seen if the examples of EC determinations from the period 1996-1998 are compared. Fifteen such examples are attached as Annex 73.

[172] Provisional Regulation at recital (2); emphasis added.

5.9 Since in the view of the Indian exporters this standard formula did not reply to the specific arguments and claims they had made, they repeated these at the next opportunity, in Texprocil's comments to the provisional disclosure.[173] Texprocil further noted that:

> *"The Indian exporters have consistently argued that the anti-dumping proceeding suffered from irreparable procedural deficiencies. The European Commission has not reacted to these motivated concerns in either the disclosure document or the provisional duties Regulation.*
>
> *In view of these facts, the failure of the Commission to even mention, motivate or discuss in either the disclosure document or in the Regulation imposing provisional anti-dumping measures their decision not to terminate the Bed linen proceeding for the reasons set out above, is inconsistent with Article 12.2 of the Agreement."*

5.10 Neither in the definitive Regulation nor in the definitive disclosure document did the EC institutions react or comment on these observations.

5.11 During the first round of consultations India again raised the matter:[174]

> *"**1.3 Prima facie evidence***
>
> *India believes that the initiation has taken place inconsistently with Article 5. Notably, India believes Articles 5.2, 5.3 and 5.8 to be relevant . . .*
>
> *In other words, before initiating the complaint, the investigating authorities must make a proper determination as to the information before them, in order to determine whether sufficient grounds exist for the initiation of an anti-dumping proceeding.*
>
> *The requirements in Article 5.2, 5.3 and 5.8 are intended to avoid the initiation of anti-dumping proceedings on the basis of frivolous complaints . . .*
>
> *Let us consider the facts available to the EC at the time of initiation of Bed Linen II. The Bed linen II proceeding was preceded by the Bed linen I proceeding, which covered exactly the same product and largely the same countries. This first proceeding had been terminated after the Community industry generally refused to co-operate with the European Commission. Under these circumstances the complainant was forced to withdraw the complaint, after which Bed linen I was duly terminated.*
>
> *Very shortly after the termination of Bed linen I the complainant brought a new complaint. This was filed 20 days after the termination of the Bed linen I proceeding. As argued before, in the Bed linen I proceeding the domestic industry had failed and continuously failed to co-operate with the administrative authorities. This fact was well-known to the European Commission investigators, and is evidenced by the paucity of EC questionnaire responses in the non-confidential file of the Bed linen I proceeding.*
>
> *On 30 July 1996 the European Commission therefore had at least the following information:*
> *— the complaint;*

[173] Annex 51 at sections 1.2 and 2.
[174] Annex 11.

— *the knowledge that in the period starting on 25 January 1994 (the date of initiation of the Bed linen I proceeding) up to 20 days before the submission of the second complaint, the Community industry en masse had refused to co-operate with the complainant.*

The Commission chose to simply ignore that there ever had been a Bed linen I proceeding and initiated the second proceeding on that basis.

The fact that the second complaint was formally submitted after the termination, on 30 July 1996 cannot change this. The 'data' or allegations in the complaint do not refer to events after the termination of the first proceeding; indeed, the complaint alleges that injury was suffered exactly in the period when the EC industry refused to co-operate in an anti-dumping proceeding concerning the same product from India. Since there is a very strong indication that, up to 10 July 1996, the industry did not suffer material injury from imports of bed linen from India, these allegations in the complaint already appear disproved from the outset.

Under these circumstances, the hard fact of the non-cooperation of the Community industry in the first proceeding did at least throw doubts upon the complainant's allegations. The European Commission should at least have considered whether the known facts from the previous proceeding affected the quality of the prima facie 'evidence' in the complaint; however, there is no evidence whatsoever in either the notice of initiation, the non-confidential file, the Regulations imposing provisional and definitive anti-dumping duties, or elsewhere that this issue has even been considered.

India would like to stress that it is not taking issue today with the EC's determination in the first Bed linen proceeding. The point we are making is, that at the time of the initiation of the second case, the investigating authorities could not simply ignore there had been a first proceeding covering exactly the period for which now injury was alleged. There is no evidence in either the notice of initiation or elsewhere suggesting that the EC even considered the previous proceeding, and why they—in spite of all evidence available—nevertheless wished to continue with the initiation.

It follows that the European Community acted inconsistently with Articles 5.2, 5.3 and 5.8 of the Agreement by initiating the anti-dumping proceeding on the basis of mere assertion, unsubstantiated by relevant evidence.

This leads to our following questions:

14. Would the EC agree that Article 5.3 (and, possible, Article 5.8) of the Agreement requires the EC to take account of all information available to, or in possession of, the investigating authorities in order to determine whether a prima facie case for an initiation exists?

15. Would the EC agree that the non-confidential file of the first Bed linen proceeding, which was terminated only shortly before the Bed linen II proceeding was initiated, was still available to the investigating authorities?

16. Would the EC agree that the one and a half year period immediately preceding the submission of the second complaint was roughly the period during which the first Bed linen investigation was on-going?

17. Would the EC agree that in Bed linen I the EC industry in large majority refused to co-operate with the investigating authorities? Would the EC agree that this was a factor which gave an importation indication whether the bed linen industry in the EC considered itself injured? Could the EC indicate which role the previous proceeding has played when deciding to initiate the second Bed linen proceeding?

[EC]: the EC will make detailed comments. In general, [the EC] cannot admit that the EC industry did not co-operate in Bed linen I, rather there was a withdrawal of the complaint. In any event [the EC] would admit that no co-operation would not necessarily mean no injury; there may be many reasons why producers do not co-operate, even if there is injury. In the first Bed linen case no injury determination was made. The EC meticulously checked the prima facie evidence.

[The EC] further notes that India received a copy of the non-confidential version of the complaint.

1.4 Motivation of this issue

Mr Seth: Texprocil raised the procedural concerns discussed in 2.3, above, at every occasion and stage of the proceeding.

India believes that this is not consistent with Article 12.2.1 (as far as the provisional duties Regulation is concerned) and with Article 12.2.2 of the Agreement (as far as the definitive duties Regulation is concerned).

18. Can the EC indicate where in the Regulations imposing provisional and definitive anti-dumping duties it has responded to the concerns of the Indian exporters in this regard, which were expressed at several occasions throughout the administrative proceeding?

[EC]: Logically, once the case had been initiated, the issue of prima facie evidence no longer was relevant."

5.12 No further explanation on this issue has been given by the EC.

2. Claims

5.13 Three claims result from the events and facts described above.

5.14 First, the EC acted inconsistently with Article 5.3 of the ADA by not examining the allegations in the complaint before the anti-dumping proceeding was initiated. Especially in the light of the events taking place before this proceeding was initiated this inconsistency becomes even more pronounced.

5.15 Second, the EC acted inconsistently with Article 12.2.1 of the ADA by failing to explain its determination in the provisional Regulation even though Texprocil had made very elaborate arguments on this matter.

5.16 Third, the EC acted inconsistently with Article 12.2.2 by failing to provide in either the definitive Regulation or elsewhere the matters of fact and reasons which have led the EC to reject Texprocil's arguments and claims.

3. Claim 23: inconsistency with Article 5.3

3.1 The text of Article 5.3

5.17 Article 5.3 of the ADA provides as follows:

> *"The authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation."*

5.18 The word *"shall"* is obligatory and not qualified in any manner. In the context of another covered agreement the Appellate Body provided a clear interpretation of such mandatory language:[175]

> *"In our view, the ordinary meaning of the text of Article 5.5 is clear. The chapeau of Article 5.5 clearly states that the schedule in the body of that provision is mandatory. The word used in the chapeau is 'shall', not 'may'. There is no qualifying language, and there is no language that permits any method other than that set out in the schedule in Article 5.5 as a basis for the calculation of additional duties."*[176]

5.19 The same logic applies to Article 5.3 of the ADA. Moreover, any other interpretation would make the provision largely redundant.

5.20 The next word is *"examine"*. This would imply *action* on behalf of the investigating authorities. Since it is the *"evidence provided in the application"* which must be examined, it would seem that such evidence can in itself never be the only element *"to justify the initiation of an investigation"*[177]

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[175] Compare further EC—Measures Concerning Meat and Meat Products (Hormones)(complaint by Canada), Report of the Panel, WT/DS48/R/CAN of 18 August 1997 at § 8.169:

[176] EC-Measures affecting the importation of certain poultry products, Appellate Body report 1998/3, WT/DS69/AB/R of 13 July 1998, at § 165.

[177] See in this respect also Guatemala—Anti-dumping investigation regarding portland cement from Mexico, Report of the Panel of 19 June 1998:

"7.47 Guatemala's position on this issue is clear: if the information supplied in the application is all that is reasonably available to the applicant as required by Article 5.2, the investigating authority is justified in initiating the investigation . . .

7.49 We cannot accept Guatemala's arguments in this regard. In our view, the fact that the applicant has provided, in the application, all the information that is 'reasonably available' to it on the factors set forth in Article 5.2(i) - (iv) is not determinative of whether there is sufficient evidence to justify initiation. Rather, Article 5.3 establishes an obligation that extends beyond a determination that the requirements of Article 5.2 are satisfied.

7.50 . . . Article 5.3 . . . sets forth what the investigating authority is to do when confronted with an application; it must examine the accuracy and adequacy of the evidence in the application 'to determine whether there is sufficient evidence to justify the initiation of an investigation'. Thus, Article 5.3 is a requirement imposed on the ***investigating authority*** *. . . If the investigating authority were to determine that the evidence and information in the application was not accurate, or that it was not adequate to support a conclusion that there was sufficient evidence to justify initiation of an investigation, the investigating authority would be precluded from initiating an investigation."* (Footnotes omitted).

The Appellate Body did not overturn the Panel report on this issue.

5.21 Last, it follows from the words *"to justify the initiation of an investigation"* that the examination and determination required by Article 5.3 should occur before the initiation of the proceeding. This follows logically from the text; it follows equally from the logic of the anti-dumping proceeding. To hold otherwise would deprive Article 5.3 of any meaning. This does not mean that the examination of the *prima facie* evidence will be as thorough as the investigation after initiation. For the purposes of Article 5.3 it is not necessary that the evidence in the complaint be found 'court proof'; but at least an examination, within the limits of what is reasonably possible, would seem necessary.

3.2 Legal arguments relating to the claims relating to Article 5.3

5.22 There are two major relevant arguments here.

5.23 First, the investigating authorities, according to their own published statements, did not 'examine' the allegations in the complaint on the state of the domestic industry before initiating the anti-dumping investigation. It is recalled that the notice of initiation stated that:

> *"The complainant alleges and has provided evidence that imports from Egypt, India and Pakistan have increased significantly in absolute terms and in terms of market share, during a period where the apparent consumption in the Community has decreased.*
>
> *It is further alleged that the volume and prices of the imported products have, among other consequences, had a negative impact on the quantities sold and the prices charged by the Community producers, resulting in substantial adverse effects on employment and the financial situation of the Community industry.*
>
> ***5. Procedure for determination of dumping and injury***
>
> *Having determined, after consulting the Advisory Committee, that the complaint has been lodged by or on behalf of the Community industry and that there is sufficient evidence to justify the initiation of proceedings, the Commission has commenced an investigation pursuant to Article 5 of Regulation (EC) No 384/96."* (Emphasis added)

5.24 The complaint *"alleged"* that *"the volume and prices of the imported products have, among other consequences, had a negative impact on the quantities sold and the prices charged by the Community producers, resulting in substantial adverse effects on employment and the financial situation of the Community industry"*. Contrary to the statements in the complaint on imported volumes, where the complainant according to the notice of initiation *"provided evidence"*, there is nothing on record suggesting that the European Commission has received, or indeed sought, evidence on the state of the Community industry prior to initiation.

5.25 It transpires from the notice of initiation that the European Commission considered the information (allegations) in the complaint *"sufficient evidence to justify the initiation of proceedings"*. In any case, there is no indication that the investigating authorities *"examine[d]" "the accuracy and adequacy of the evidence provided in the application"*.

5.26 It is submitted that, even if the EC *did* examine the evidence contained in the complaint (as opposed to accepting Eurocoton's allegations at face value as sufficient for initiation), then there is no record published or in the file which suggests so. In this respect, the panel report in Korea—Anti-

dumping duties on imports of polyacetal resins from the United States provides useful guidance on the necessity of transparency:[178]

> *"[t]he legal question raised by the references made by Korea to statements in the transcript of the KTC's meeting was . . . whether the Panel could properly review the injury determination of the KTC by reference to considerations in the transcript which were not included or referred to in the public statement of reasons given by the Korean authorities at the time of imposition of the anti-dumping duties . . .*
>
> *In the view of the Panel, effective review . . . of an injury determination . . . required an adequate explanation by the investigating authorities of how they had considered and evaluated the evidence with regard to the factors provided for in that article. Interpreted in conjunction with Article 8:5, such an explanation had to be provided in a public notice . . . This provision served the important purpose of transparency by requiring duly motivated public decisions as the basis for the imposition of anti-dumping duties. In the view of the Panel, the purpose of this provision would be frustrated if in a dispute settlement proceeding . . . a Party were allowed to defend a challenged . . . determination by reference to alleged reasons for such determination which were not part of a public statement of reasons accompanying that determination . . . Furthermore, for a Panel to review a determination by reference to considerations not actually reflected in a public statement of reasons accompanying such determination would also be inconsistent with the requirements of an orderly and efficient conduct of the dispute settlement process . . .*
>
> *Korea had also argued that, since the transcript was part of the administrative record of this investigation, the Panel was under an obligation to consider it. However, the question of whether the transcript was part of the administrative record of the investigation was not decisive of whether the Panel was bound to take account of the transcript for purposes of reviewing the reasons upon which the KTC had based its determination. The task of the Panel was to review the consistency with the Agreement of the KTC's injury determination in Decision 91-6, not the administrative record upon which that determination was based. While an examination of elements of the administrative record might be appropriate in order for a Panel to determine whether certain findings of fact made by investigating authorities were based on positive evidence of record, it was only the public notice issued pursuant to Article 8:5, not the administrative record per se, which was relevant as a statement of reasons. In the case before the Panel, Korea had relied on the transcript not to provide evidence in support of specific statements of a factual nature in the KTC's injury determination but to further explain the reasons for that determination."* (Emphasis added)

5.27 These principles are of no less value in the Bed linen II proceeding. If the EC would have made a prima facie examination of the allegations on the state of the domestic industry contained in the complaint, it would be up to the EC to notify this, either in a published notice or through a report made available to the Indian exporters separately. The EC did neither, and India may thus rely on this failure to conclude that, inconsistent with that provision, in fact no examination required by Article 5.3 was carried out.

5.28 Second, immediately before the initiation, the investigating authorities did have more information at their disposal than merely the complaint. Notably but not exclusively, the European Commission could not have been unaware of the fact that an anti-dumping proceeding concerning the

[178] Korea—Anti-dumping duties on imports of polyacetal resins from the United States, ADP/92 of 2 April 1993 at §§ 199-213.

same product scope and, to a large extent, the same targeted countries, on the basis of a complaint by the same complainant had been terminated only twenty days before the submission of the complaint. The investigating authorities could not have been unaware that in that proceeding, which ran during most of the investigation period of the Bed linen II proceeding, co-operation by EC producers was absolutely minimal.[179]

5.29 That the first proceeding was formally terminated because the complaint was withdrawn, is besides the point—as the investigating authorities know or could know, that the complaint was only withdrawn after it transpired that it would be impossible to make an injury finding since the EC industry largely refused to co-operate.

5.30 It follows that, at least during the period starting on 25 January 1994 (initiation of the first proceeding) up to the date of termination (10 July 1996), there was a strong indication that the EC industry might not be considered injured since it even refused to support an initiated anti-dumping proceeding.[180] The allegations of the EC industry in the second complaint largely covered the period during which that same industry refused to co-operate. While it is granted that this is not in itself a fool-proof indication that no injury could exist, it is at least a strong indication which would have warranted a further examination before the initiation of the Bed linen II proceeding.

5.31 India believes that, under these circumstances, the EC could not initiate the Bed linen II anti-dumping proceeding without examining the prima facie evidence. By failing to do so, the EC acted inconsistently with Article 5.3 of the ADA.

4. Claim 24: inconsistency with Article 12.2.1

4.1 The text of Article 12.2.1

5.32 It is recalled that Articles 12.2 and 12.2.1 of the ADA provide in relevant part as follows:

> *"12.2 Public notice shall be given of any preliminary or final determination, whether affirmative or negative . . . Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities . . .*
>
> *12.2.1 A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular:*
> *(i) the names of the suppliers, or when this is impracticable, the supplying countries involved;*
> *(ii) a description of the product which is sufficient for customs purposes;*

[179] This is evident from the non-confidential file (or rather, the lack of non-confidential questionnaire responses submitted by the EC industry).

[180] It may be noted that the notice of initiation of the Bed linen I proceeding provided that:

"If the required information and argumentation is not received in adequate form within the time limit specified above, the Community authorities may make preliminary or final findings on the basis of the facts available in accordance with Article 7 (7) (b) of Regulation (EEC) No 2423/88."

(OJ (1994) C 21/9, attached as Annex 2).

(iii) the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2;
(iv) considerations relevant to the injury determination as set out in Article 3;
(v) the main reasons leading to the determination."
(Emphasis added)

5.33 First, it is noted that *"determination"* in sub-paragraph (v) is in singular, in contrast to the *"preliminary determinations"* in the chapeau of the provision. That would suggest that *"determination"* in sub-paragraph (v) should not be read as *"preliminary determinations on dumping and injury"*; had that been the intention of the drafters, then they would have used the plural form in sub-paragraph (v) as well.

5.34 It would seem that *"determination"* in sub-paragraph (v) refers to *"preliminary or final determination"* in Article 12.2. In other words, under Article 12.2.1 the investigating authorities must set out in the provisional and definitive Regulations *"the main reasons leading"* to *"the preliminary or final determination"*.

5.35 Logically, sub-paragraph (v) does not (only) aim at the dumping determination and the injury determination. If this were different, then the sub-paragraph would add nothing to sub-paragraphs (iii) and (iv) of the same provision. That would imply that sub-paragraph, in such an interpretation, would be without meaning. In this context the *ut res magis valeat quam pereat* principle is recalled, which the Appellate Body defined as follows: *"[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."*[181]

5.36 It would follow that sub-paragraph (v) aims (at least) at those determinations which are essential for the investigating authorities in order to impose anti-dumping measures. That includes the determination required under Article 5.3.

5.37 In this context it is further noted that—following the notice of initiation—the provisional Regulation (and the disclosure document issued around the same time) is the first document in which the EC authorities could have explained their position on Article 5.3, and where the exporters had expected to receive a reply to the arguments raised by them in this respect. If the investigating authorities would not be under any obligation to explain their Article 5.3 determination at the time of the imposition of provisional anti-dumping measures, it would impair the effective possibilities for exporting countries to raise such issues under Article 17.4, second sentence.[182]

5.38 Second, the word *"and"* in the chapeau of 12.2.1 must be noted between *"sufficiently detailed explanations for the preliminary determinations on dumping and injury"* and *"shall refer to the matters of fact and law which have led to arguments being accepted or rejected"*. In other words, the limitation to preliminary determinations on dumping and injury would not appear to be applicable to the second part *"shall refer to the matters of fact and law which have led to arguments being*

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[181] United States—Standards for Reformulated and Conventional Gasoline, AB–1996/1 of 29 April 1996, section IV. See further *Yearbook of the International Law Commission* (1966), Vol. II at 219:
"When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted."

[182] *"When a provisional measure has a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7, that Member may also refer such matter to the DSB."*

accepted or rejected". As argued above, Article 12.2.1 as a whole, and especially in view of its sub-paragraph (v), does apply to the Article 5.3 determination as well. A correct reading of Article 12.2.1 would thus seem to be that the provisional Regulation (or some other disclosed provisional document) must refer to *"the matters of fact and law which have led to arguments being accepted or rejected"* in the context of Article 5.3 as well.

4.2 Legal arguments relating to the claims relating to Article 12.2.1

5.39 In anti-dumping proceedings the investigating authorities have a very dominant position as far as knowledge of the facts is concerned. This is even more so in the EC, where the European Commission is the only entity having access to all facts relating to the initiation. Article 12 fulfils in this context a crucial rôle to ensure a certain degree of transparency.[183]

5.40 As noted above, virtually no information has been provided by the EC on the Article 5.3 determination, if there was one.

5.41 Even though the Indian exporters brought Article 5.3 objections to the EC's attention throughout the proceeding repeatedly and in detail, the provisional Regulation merely contained the standard formula stating that:

> *"The proceeding was initiated as a result of a complaint lodged on 30 July 1996 by the Committee of the Cotton and allied Textile Industries of the European Communities (Eurocoton), on behalf of Community producers representing a major proportion of Community production of cotton-type bed linen. The complaint contained evidence of dumping of the said product and of material injury resulting therefrom, which was considered sufficient to justify the initiation of a proceeding."*[184]

5.42 As is clear from the evidence in Annex 73, this formula is not a reply to specific concerns and arguments raised by Indian exporters, but rather a standard formula inserted as a matter of course in virtually all EC determinations.

5.43 There was no way for the Indian exporters to further check the veracity of the conclusions of the investigating authorities. Under such circumstances, the EC can hardly claim that it referred *"to the matters of fact and law which have led to arguments being accepted or rejected"* or that the provisional Regulation or the provisional disclosure contained *"the main reasons leading to the determination"*.

5.44 In summary, India believes that neither in the provisional Regulation nor in any other document made available to the Indian exporters around the time of the provisional anti-dumping measures the EC met the standards laid down in Article 12.2.1.

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[183] In this context the dictum of the Panel in Korea—Anti-dumping duties on imports of polyacetal resins from the United States, Report of the Panel, ADP/92 and Corr.1 of 2 April 1993 at § 209 is recalled:

"In the view of the Panel, the purpose of this provision would be frustrated if in a dispute settlement proceeding . . . a Party were allowed to defend a challenged . . . determination by reference to alleged reasons for such determination which were not part of a public statement of reasons accompanying that determination . . ."

[184] Provisional Regulation at recital (2); emphasis added.

5. Claim 25: inconsistency with Article 12.2.2

5.1 The text of Article 12.2.2

5.45 The text of Article 12.2.2 differs somewhat from that of Article 12.2.1:

> *"A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6."* (Emphasis added)

5.2 Legal arguments relating to the claims relating to Article 12.2.2

5.46 Even if the EC did not agree with the Indian exporters, it was still obliged to provide in the definitive Regulation *"the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers"*.

5.47 As noted in the facts' description above, the EC did not react to the comments made by the Indian exporters in connection with Article 5.3. The EC thus failed to explain its definitive finding consistently with Article 12.2.2.

B. ARTICLE 5.4: THE INVESTIGATING AUTHORITIES FAILED TO MAKE A STANDING DETERMINATION IN CONFORMITY WITH ARTICLE 5.4

5.48 Summary: the EC acted inconsistently with Article 5.4 of the ADA by not making a proper standing determination before the anti-dumping proceeding was initiated (**claim 26**).
Even though detailed arguments were presented by the Indian exporters on these issues, the EC failed to properly explain its reasoning, and consequently acted inconsistently with Article 12.2.1 (**claim 27**) and 12.2.2 (**claim 28**).

1. Facts

5.49 As discussed in section I, the complainant Eurocoton brought the complaint leading to the Bed linen II proceeding on 30 July 1996.[185] Eurocoton is an association of producers' associations. In its complaint, Eurocoton noted that:

> *"[t]his complaint is submitted by EUROCOTON . . . on behalf of E.U. manufacturers which accounted for 38 per cent on [sic] the 1995 total EUR 15 production of cotton-type woven bed linen.*
>
> *It should nevertheless be underlined that EUROCOTON represents producers weavers-makers-up of woven cotton-type bed linen, accounting for 53 per cent of the total EUR 15 cotton-type woven bed linen production. Producers representing 38 per cent of the total E.U.*

[185] Please refer to Annex 6.

production declared to be active complainants while 15 per cent are supporting the complaint, but are not ready to cooperate actively to [sic] the inquiry. This means that member companies of EUROCOTON accounting for 53 per cent of the total E.U. production concerned are standing by the complaint. It is consequently quite impossible that producers accounting for more than 50 per cent of the total E.U. production declare themselves against the complaint. Indeed, EUROCOTON made an inquiry among its member Associations (see enclosure 1 a) in order to evaluate the rate of effective support for this complaint. At the date of completion of the inquiry, Member Associations which answered, supported all [sic] this complaint and no one objected to the lodging of this complaint.

EUROCOTON attests that for this complaint, it represents 38 per cent of the above referred EUR 15 production (see enclosure 1 b).

EUROCOTON' statutes (see enclosure 1 c) entitle it to represent the complainant producers.

Consequently, EUROCOTON complies with representativity conditions provided for in Article 5.4. of Council Regulation EC. 384/96 of 22/12/95 on protection against imports countries not members of the European Community."

5.50 The non-confidential version of the complaint made available to the Indian exporters contained enclosures 1a and 1b, but not 1c.

5.51 Enclosure 1a ("*National associations members of Eurocoton"*) contained a list of the member associations of Eurocoton. Enclosure 1b ("*Producers of the product in question represented by Eurocoton (complainants)"*) contained a list of the following companies and associations:

Portugal (9 companies):

1. Coelima-Industrias Texteis, SA
2. Lameirinho-Industria Textil, SA
3. Foncar-Org. Ind. Comercial Textil, SA
4. Antonio de Almeida & Filhos, LDA
5. Incotex-Ind. E com. De Texteis, LDA
6. Jocaritex-Industrias Texteis, LDA
7. Maria Helena Dantas
8. Ribeiro, Fernandes & Rocha, LDA
9. Texteis Atma, SA;

Germany (11 companies):

10. Bierbaum Textilwerke GmbH & Co. KG
11. Luxorette Haustextilien GmbH
12. Günter Meckenholt Weberei und Ausrüstung GmbH
13. Wilh. Wülfing GmbH & Co. KG
14. Irisette GmbH
15. Erbelle GmbH
16. Hch. Kettelhack GmbH & Co.
17. Curt Bauer GmbH
18. Damino GmbH
19. RZ Dyckhoff GmbH

20. Fränkische Bettwarenfabrik GmbH;

Belgium (1 company):

21. Uco NV-Huishoudlinnen;

France (10 companies):

22. Ets Fremaux
23. Ets Hacot et Colombier
24. Hacot (Joseph et Cie)
25. Jalla SA-Nieppe
26. Mulliez Freres SA au Longeron
27. Vanderschooten
28. Valrupt
29. Ets Claude
30. Ets Bera
31. Ets Gisele le Chayoux;

Italy (5 companies):

32. Bassetti SpA
33. Bossi SpA
34. Gabel Industria Tessile SpA
35. Valman Srl
36. Zucchi SpA;

Spain (3 companies):

37. Estebanell y Pahisa SA
38. Hilados y Tejidos Puignero SA
39. Textil Cano Segura (Texca Sesa);

Finland (4 companies):

40. Finlayson Sisustustekstiili Oy
41. Finnpile Oy
42. Marimekko Oy
43. Reikälevy Oy;

Austria (no companies):

44. Vereinigung Textilindustrie (Austrian Textile Industry Association)

5.52 The last entity, Vereinigung Textilindustrie, is not a producer itself but merely the association of Austrian producers.

5.53 The notice of initiation with which the anti-dumping proceeding was initiated[186] noted on the issue of standing only that:

[186] Please refer to Annex 7.

"The Commission has received a complaint pursuant to Article 5 of Council Regulation (EC) No 384/96 [footnote omitted]*, alleging that imports of cotton-type bed linen originating in Egypt, India and Pakistan are being dumped and are thereby causing injury to the Community industry.*

1. Complaint

The complaint was lodged on 30 July 1996 by the Committee of the Cotton and Allied Textile Industries of the European Union (Eurocoton).

. . .

5. Procedure for determination of dumping and injury

Having determined, after consulting the Advisory Committee, that the complaint has been lodged by or on behalf of the Community industry and that there is sufficient evidence to justify the initiation of proceedings, the Commission has commenced an investigation pursuant to Article 5 of Regulation (EC) No 384/96 . . ."[187]

5.54 In its first submission on injury and procedural matters[188], Texprocil noted among others that:

"Eurocoton alleges that 38 per cent of EC producers support its complaint. However, among this 38 per cent features the Vereinigung Textilindustrie, based in Vienna.[189] *This organisation is an association of producers and does not itself produce bed linen. It follows that it should not be included in the tests of Article 5(4) of the basic anti-dumping Regulation, which clearly refers to producers and not to producers' associations.*

. . . the opinion of producers' associations is irrelevant for the Article 5(4) test since this provision explicitly refers to 'Community producers'. It is not certain whether Eurocoton has checked its standing with individual producers or with associations.

Second, even when Eurocoton alleges to have checked its standing with producers, it is up to the Commission to verify this. It follows from Article 5(4) that the Commission is under an obligation to check, before initiation of this proceeding, whether indeed Eurocoton's allegation that it represents at least 25 per cent of the EC industry, is founded . . ."

5.55 Texprocil requested the Commission to make evidence available in the non-confidential file attesting that the Commission did indeed check, prior to initiation of this proceeding, that the 25 per cent test of Article 5(4) was reached, and in particular:

— how many companies in the Community produce bed linen other than Eurocoton members;
— whether companies alleged to support the complaint have indeed given a written statement to this effect.

[187] Notice of initiation of anti-dumping proceedings concerning imports of cotton-type bed linen originating in Egypt, India and Pakistan, OJ (1996) C 266/2.
[188] Annex 50.
[189] Complaint, non-confidential version, Annex 1b at 10.

5.56 Well over two months after the submission of this brief (or nearly four months after the initiation), Texprocil's legal representatives were granted access to the non-confidential file at the Commission's unit dealing with complaints (letter from the European Commission attached as Annex 58). One day later the standing file was inspected (contents of that file attached as Annex 59). The time flow of the events can thus be summarized as follows:



5.57 That file consisted of declarations of support for the complaint emanating from the following entities:[190]

Portugal:

1. Lameirinho-Industria Textil, SA;
2. Incotex-Ind. E com. De Texteis, LDA;
3. Foncar-Org. Ind. Comercial Textil, SA;
4. Coelima-Industrias Texteis, SA;
5. Antonio de Almeida & Filhos, LDA;

Germany:

6. Bierbaum Textilwerke GmbH & Co. KG;
7. Günter Meckenholt Weberei und Ausrüstung GmbH;
8. Hch. Kettelhack GmbH & Co.;
9. Erbelle GmbH;
10. Luxorette Haustextilien GmbH;
11. Wilh. Wülfing GmbH & Co. KG;
12. Curt Bauer GmbH;
13. Estella Ateliers (Fränkische Bettwarenfabrik GmbH);
14. Irisette GmbH;
15. Damino GmbH;
16. RZ Dyckhoff GmbH;

France:

17. Syndicat Général de l'Industrie Cotonnière Française (*General syndicate of the French Cotton Industry*), allegedly on behalf of:
    — a company indicated as *"K.F."*;
18. Fédération française de l'Industry Cotonnière (*French Federation of the Cotton Industry)*, allegedly on behalf of:
    — Ets Claude,
    — Jalla SA-Nieppe,

[190] The European Commission later made a letter available from the Spanish Asociacion de impresarios textiles de la Comunidad Valenciana (ATEVAL) to Eurocoton, alleging that five more Spanish companies *"do not explicitly oppose"* the proceeding (Annex 79). This letter to Eurocoton is dated 18 September 1996 (*i.e.*, five days after the initiation). There is no indication when it was submitted to the EC.

— Hacot (Joseph et Cie),
— Ets Hacot et Colombier,
— Ets Fremaux,
— Vanderschooten,
— Mulliez Freres SA au Longeron,
— Ets Bera;

Italy:

19. Bossi SpA;
20. Zucchi SpA;
21. Gabel Industria Tessile SpA;
22. Valman Srl;
23. Bassetti SpA;

Spain:

24. Asociacion Industrial Textil de Proceso Algodonero (*Industrial Association of Cotton Process Textile*), allegedly on behalf of:
— Estebanell y Pahisa SA,
— Hilados y Tejidos Puignero SA,
— Textil Cano Segura (Texca Sesa);

Austria:

25. Vereinigung Textilindustrie (*Austrian Textile Industry Association*), apparently on behalf of itself. It did, however, provide information on the total production of two of its members;

Finland:

26. Reikälevy Oy;
27. Marimekko Oy;
28. Finlayson Sisustustekstiili Oy.

5.58 Although the above declarations had clearly been faxed the fax headers had unfortunately been removed from all of them.

5.59 The non-confidential standing file further contained the statutes of Eurocoton, but not the statutes of its national member associations.

5.60 The Commission did not argue and has never argued that Texprocil had 'missed' declarations of support in the non-confidential file.

5.61 On 13 January 1997 Texprocil had a hearing on procedural, injury and miscellaneous issues. During this hearing, Texprocil explained its concerns in great detail. Notably, Texprocil argued that the mere allegation by a producers' association could not, in its view, replace the standing determination of Article 5.4. Subsequent to the hearing, the post-hearing brief of 6 February 1997[192] set out in writing the arguments made by Texprocil during the hearing. Notably, Texprocil argued in

[192] Annex 54.

that submission several points of relevance to the standing determination, which are briefly summarised as follows:

— First, the declaration of Reikalevy Oy of Finland, made available over two months after the date of initiation, is undated and consequently ought to be left aside as evidence that it had come forth as supporting the complaint before the proceeding was initiated;

— Moreover, the Commission had provided no evidence whatsoever that it had made before initiating the proceeding a determination of total EC production of bed linen (which determination is logically necessary in order to perform the 25% test in Article 5.4);

— Texprocil further repeated its argument that Article 5.4 *"clearly refers to producers and not to producers' associations"*. Texprocil believed that producers associations did not have the right to bring complaints in their own right. Moreover, declarations from such associations would—in Texprocil's view—not be an acceptable surrogate of producers' support declarations, as had been shown so clearly in the Bed linen I proceeding;

— Texprocil noted further that a large number of companies listed by Eurocoton as complainants had not submitted a declaration of support before the initiation of the case.[193] In fact a number of companies listed in the complaint as supporting the complaint had not provided any evidence of their support nor had been included in the declaration of any producers association. It was therefore not clear whether the 25 per cent threshold laid down in Article 5.4 had been met;

— Furthermore, Texprocil took issue with the statements in the complaint that Eurocoton had apparently relied on the opinion of its member associations rather than assessing the support among producers;

— Then, Texprocil argued that a large number of complainants were not producers at all but rather converters using outward processing arrangements in Asia or Central Europe. Texprocil explicitly requested the Commission to check this point.

5.62 In the provisional Regulation the European Commission made the following comments:[194]

*"**E. COMMUNITY INDUSTRY***

1. Definition of the Community industry

(52) After elimination from the list of companies included in the complaint of seven of them found not to be complainants, the Commission found that the remaining companies represented a major proportion of Community production of bed linen and satisfied the requirements of Article 5 (4) of the basic Regulation.

[193] Nor was any other evidence made available indicating such support.

[194] It is recalled that Article 4(1) of the basic Regulation is worded almost identically to Article 4.1 of the ADA. However, one big difference exists: in the basic Regulation, the domestic industry ("Community industry") is linked with Article 5(4) (which largely corresponds to Article 5.4 of the ADA):

"For the purposes of this Regulation, the term 'Community industry' shall be interpreted as referring to the Community producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion, as defined in Article 5(4), of the total Community production of those products . . ." (Emphasis added)

After initiation of the proceeding, a number of organizations representing exporters and importers of bed linen from the countries concerned alleged that several of the producers which made up the Community industry were also importing the dumped product from the countries subject to the proceeding. In these circumstances, the Commission re-examined whether, in the light of the provisions of Article 4(1)(a) of the basic Regulation, these companies should be excluded from 'the Community industry.

(53) For the purposes of carrying out this reexamination, and in accordance with consistent practice of the Community institutions, it appeared appropriate to determine whether those companies were primarily producers in the Community with an additional activity based on imports and merely supplementing their Community production, in order to be able to offer a complete range of products, or whether they were importers with relatively limited additional production in the Community.

(54) In all but one case, companies alleged to be importing bed linen from the countries concerned were among those selected in the sample of Community producers (see recitals (58) to (61)). The Commission was therefore able to examine the extent of these imports during the course of its on-the-spot verification visits. For all but one of these sampled companies, the investigation showed that the imports of dumped products from the countries concerned had accounted for less than 10 per cent of the turnover of the companies in question in the period examined. It is therefore the opinion of the Commission that these companies were not shielded from the effects of dumped imports and that for the purposes of Article 4 of the basic Regulation these companies may be considered along with the other cooperating producers, as belonging to the Community industry.

In the case of the one other sampled company, it was found that a higher proportion of its bed linen sales in the investigation period were of Pakistani origin and also that only a minor part of its sales were of its own production. It appeared in addition that the company's future activity was likely to be further focused on imports. This company, whose core interests were deemed clearly not to be in the production of bed linen within the Community, was therefore eliminated from the Community industry.

(55) Since all but one of the sampled companies alleged to be importing bed linen from the countries concerned were found, on examination, not to be doing so in quantities sufficient to warrant exclusion, it has been considered that the allegations made by the exporters in this regard were excessive and unreliable. Consequently, on the basis of the findings concerning the sample, no exclusion of the one non-sampled company is warranted. This company should, therefore, be retained in the definition of the Community industry. In any event, this issue has no substantial influence on the question of the representativity of the Community industry.

(56) Three other companies were eliminated. In one case the company was found no longer to produce bed linen. In two other cases the companies did not respond to the requests for information which were addressed, via Eurocoton and the national associations, to those complainants which were not selected in the sample of Community producers, in order to obtain information on the Community industry as a whole.

(57) The remaining 35 companies, which cooperated with the enquiry and are located in France, Germany, Italy, Spain, Portugal, Austria and Finland, represented a major

proportion of total Community production in the investigation period. These companies were therefore deemed to make up the Community industry under the terms of Article 4(1) of the basic Regulation." (footnotes omitted)

5.63 The Commission did not further address Texprocil's concerns beyond these remarks. Specifically, the Commission did not address the questions:

— whether undated declarations made available nearly four months after the initiation could serve as evidence that the company concerned had indicated its support for the complaint *before* initiation;

— whether producers' associations had the right to support a complaint in their own name;

— whether producers' associations have the right to support a complaint on behalf of producers, but without providing evidence that they have checked with such producers;

— whether the complainants mentioned by Texprocil were producers or rather converters using outward processing arrangements in Asia or Central Europe.

5.64 Texprocil filed comments on the provisional disclosure and the provisional Regulation.[195] It also had a second hearing at the Commission.[196] At every occasion Texprocil argued that the evidence in the file did not suggest that a proper standing determination had been made before the proceeding was initiated, and largely repeated the arguments on the unanswered issues mentioned above.

5.65 In the ensuing definitive disclosure document[197], the European Commission provided the following comments on the standing issue:

"Exporters from all three exporting countries observed that the complainant Community producers taken to be the Community industry made up just 34 per cent of total Community production. They claimed that this showed that a majority of bed linen producers in the Community did not support the complaint and should therefore be assumed not to be injured, and that the Community industry was not therefore representative of total Community production.

However, in response to the provisional measures only two Community producers expressed opposition to the duties. The combined production of these two producers was less than one third of the total production of the complainants. The Commission services therefore confirm the finding that the 35 complainant companies represented a major proportion of total Community production within the meaning of Article 5(4) of the Basic Regulation.

Pakistani exporters also claimed that the Commission had not used the correct test in determining whether Community producers which also import bed linen from the countries concerned should be excluded from the Community industry (recitals (52) to (55) of the provisional Regulation). By way of clarification, the Commission services confirm that the test used in recital (54) was whether bed linen imported from the countries concerned

[195] Annex 51.
[196] Post-hearing brief attached as Annex 55.
[197] Attached as Annex 56.

accounted for 10 per cent of the turnover in bed linen of the companies in question, rather than 10 per cent of total company turnover.

. . .

In conclusion, the Commission services confirm both the finding that the 35 complainant companies constitute the Community industry within the meaning of Article 4(1) of the Basic Regulation and the sampling methodology applied."

5.66 Texprocil filed comments on the definitive disclosure.[198] At this occasion it again brought forward its concerns as to the standing determination, concerns which had not been allayed by the text of the definitive disclosure document.

5.67 The definitive Regulation repeated the wording of the definitive disclosure document in largely similar terms, with the exception of the second paragraph quoted above:

"(32) . . .

However, in response to the provisional measures only two non-complainant Community producers, which originally expressed no opinion to the Commission on the complaint, expressed opposition to the duties. The combined production of these two producers was less than one-third of the total production of the complainants. Throughout the proceeding, therefore, the complainants represented considerably more than 50 per cent of the collective output of those producers expressing either support for or opposition to the complaint."

5.68 For the remainder Texprocil's comments did not evoke any further response or reply from the EC side.

5.69 The matter of standing was taken up and discussed at great length during both rounds of consultations between India and the EC. During the first round of consultations the Indian delegation made a major effort in trying to understand how exactly the EC had proceeded in its standing determination. For this purpose, India submitted a list of detailed questions to the EC delegation.[199] The questions with relevance to the standing determination are numbers 1-13. The spokesman for the EC made the following observations:[200]

"[EC]: the EC will of course try to provide a detailed answer, but will have to get back to the file. In this case the complaint was lodged by Eurocoton, representing national associations. The EC was reasonably satisfied by the voting within Eurocoton. We will go through your points and will give you a precise answer . . .

[T]he EC will answer question 4 later. As far as question 5 is concerned, it is his personal view that it depends on the voting rules of the association. [The EC] is confident the Commission checked these rules at the time . . .

[The EC] refers to the footnote to Article 5.4. He adds that, by the time of the injury assessment, the EC should be certain of standing. Excluding a company can only happen after the opening of the investigation.

[198] Attached as Annex 60.
[199] Attached as Annex 10.
[200] Verbatim report attached as Annex 11.

. . .

Mr Seth: Third, one company –the Finnish company Reikälevy Oy-- submitted a declaration of support which was undated. This means that, by the time the Indian exporters got access to the non-confidential standing file, which was months after the initiation, they could not ascertain when the declaration was filed. This leads to our following question:

6. Does the EC agree that undated declaration of support made available in the public file some four months after the initiation cannot be considered as valid evidence in accordance with Article 5.4 that the company expressed its support before the proceeding was initiated?

[EC]: I do not agree. I do not exclude that company. The internal rules of the association to which this company belongs may make this matter irrelevant. . . . We used the data of output on basis of the data obtained from the associations. The role played by the associations is on behalf of the producers by virtue of their internal rules. . . [The EC] replies re question 11 that India is entitled to information enabling her to satisfy that the standing determination has been duly made before initiation. On question 12 he says he thinks that such information was provided, but he will check this. On question 13, he would not deny this.

The EC adds that it would appear from the wording of the Regulation that the standing determination was made before initiation. This follows from the word 're-examination'. The concerns of India, which are matters of fact and law, have been fully addressed."[201]

5.70 The European Commission promised to provide a written definitive reply to India's questions within reasonable time. Such reply was received on 1 October 1998. The combined reply to questions 1-18 was: *"For discussion in a new round of oral consultations."*

5.71 During the second round of consultations the Indian delegation requested the EC to provide a definitive answer to its queries. The EC's spokesman replied as follows:[202]

"[EC]: I will set out our answer in one response. Standing rules must be met prior to the initiation. We established that there was standing. We asked associations and companies, who provided us with evidence that approximately 35 or 34 percent of the Community producers supported the proceeding. We did not consider it necessary to obtain further support since we already met the criteria.

As to our standing practice: either the associations or companies can come forth. The associations can do it since they are acting on behalf of their members. Clearly, in case of large numbers of companies it is not practical to obtain the support from each single company. I note further that the Agreement itself allows sampling . . . All I can say about the timing is that it was before the initiation. The names of the companies are named in the complaint. There was obviously a process of contacts, but this went on before the initiation.

[T]he support from these companies was deduced from a combination of association and individual declarations. We think this is a reasonable process to establish support.

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[201] As an explanatory note on the voting within Eurocoton, as is evident from the statutes of this organisation, its members are producers associations. In other words, it would seem that the EC argued here that they relied on the support from producers' associations.

[202] Please refer to the verbatim report of the second round of consultations, attached as Annex 13.

Mr Seth: You think that an association declaration can represent its members?

[EC]: Yes. A representative can act on behalf of companies."

5.72 India received during the second round of consultations finally a sheet confirming which were the seven companies listed in recital (52), and which were the 35 companies constituting the Community industry (domestic industry). This sheet is attached as Annex 61.

2. Commission practice

5.73 Contrary to some other jurisdictions such as Australia, Canada and the United States, the EC does not describe in its published determinations or elsewhere how it goes about determining standing in cases with a large number of producers in the EC. The notice of initiation contains at most a standard phrase.[203] This is regrettable, but perhaps not necessarily in violation of the ADA. Some indication about the process may be obtained from a European Commission draft document entitled *Guide on how to draft an anti-dumping complaint* with instructions to prospective complainants on how to draft a complaint.[204] This document explains that:

"21. Standard forms for expressing support can be delivered to the complainant, upon request.

22. You may also comment on known producers, which do not support the complaint, describing, where possible, how many there are, their names, their contact data and their importance in Community production, and the reasons why they do not support the complaint.

23. It should be noted that the Commission verifies the representativeness of the Complainant prior to the initiation of the proceeding."

5.74 Before discussing the fact pattern in Bed linen II in detail, it may be noted by way of background information that the support of EC producers for complaints filed by Eurocoton (the EC industry association representing the complainants) was a problem in Bed linen I, in the Cotton fabrics-I and the Synthetic fabrics proceedings. All these proceedings were initiated in 1994 pursuant to complaints by Eurocoton; all of which targeted—among others—India; in all of them co-operation of EC producers with the Commission was minimal.

5.75 It appears from the complaint (quoted above) that Eurocoton:

"made an inquiry among its member Associations . . . in order to evaluate the rate of effective support for this complaint. At the date of completion of the inquiry, Member Associations which answered, supported all this complaint and no one objected to the lodging of this complaint."

5.76 The non-confidential standing file contained a number of declarations of support from companies and from producers' associations, which in total mentioned 35 companies.

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[203] By way of example, copies of the relevant part of notices of initiation from other proceedings opened around the same time as the Bed linen II proceeding are attached as Annex 74.

[204] Annex 62. Although this document has existed formally as a 'draft', it appears to be used by the Commission Services, or to India's best knowledge at least reflect EC practice.

5.77 During the consultations, two different replies were given by the EC. During the first round, the EC stressed that Eurocoton had determined the support for the complaint among its member associations. The only 'evidence' made available in the non-confidential file was the statement in the complaint itself.

5.78 During the second round of consultations, the EC appeared to indicate that it had checked standing by relying on the declarations in the non-confidential file. Although this point was raised at every occasion, the EC has never denied or contradicted that some of these declarations were made by producers' associations. Indeed, as noted above, the EC clarified during the second round of consultations that *"either the associations or companies can come forth. The associations can do it since they are acting on behalf of their members."* The EC delegation likened the submission of support by a producers' association to the representation of companies by lawyers.

3. Claims

5.79 Three claims flow from the events and facts described above.

5.80 First, the EC acted inconsistently with Article 5.4 of the ADA by not making a proper standing determination before the anti-dumping proceeding was initiated.

5.81 Second, the EC acted inconsistently with Article 12.2.1 of the ADA by failing to explain its provisional determination on standing, even though Texprocil had made very elaborate arguments on this matter.

5.82 Third, the EC acted inconsistently with Article 12.2.2 by failing to provide in either the definitive Regulation or elsewhere the matters of fact and reasons which have led the EC to reject Texprocil's arguments and claims.

4. Claim 26: inconsistency with Article 5.4

4.1 The text of Article 5.4

5.83 Before proceeding with the analysis of the arguments, an analysis of the obligations contained in Article 5.4 of the ADA would seem in order. Article 5.4 of the ADA provides as follows:

> *"An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed[13] by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry.[14] The application shall be considered to have been made 'by or on behalf of the domestic industry' if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.*
>
> ---
>
> *13. In the case of fragmented industries involving an exceptionally large number of producers, authorities may determine support and opposition by using statistically valid sampling techniques.*

14. Members are aware that in the territory of certain Members employees of domestic producers of the like product or representatives of those employees may make or support an application for an investigation under paragraph 1."[205]

5.84 Article 5.4 lays down a number of clear rules on how the investigating authorities must determine whether standing exists.

5.85 As a first note, Article 5.4 essentially lays down two tests which may be paraphrased as follows:

— a test whether at least 25 per cent of domestic producers expressly support the complaint [hereinafter: "25 per cent test"]; and

— a test whether at least 50 per cent of all producers who made themselves known to the investigating authorities support the complaint [hereinafter: "50 per cent test"].

No issue is taken in this proceeding with the 50 per cent test.

5.86 Article 5.4 lays down very clear procedural requirements. First, it notes that *"[a]n investigation shall not be initiated"* unless the authorities have *"determined"* representativeness (also referred to as standing determination). India believes that the word *"shall"* has an imperative element.[206] It does not permit an interpretation as 'should', 'could' or 'may'. Second, the word *"determined"* would seem to require an explicit determination.

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[205] For easy reference, we recall also the text of Article 5(4) of the basic Regulation:

"An investigation shall not be initiated pursuant to paragraph 1 unless it has been determined, on the basis of an examination as to the degree of support for, or opposition to, the complaint expressed by Community producers of the like product, that the complaint has been made by or on behalf of the Community industry. The complaint shall be considered to have been made by or on behalf of the Community industry if it is supported by those Community producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the Community industry expressing either support for or opposition to the complaint. However, no investigation shall be initiated when Community producers expressly supporting the complaint account for less than 25 per cent of total production of the like product produced by the Community industry.

[206] In this context India recalls the Appellate Body's dictum in EC-Measures affecting the importation of certain poultry products, Appellate Body report 1998/3, WT/DS69/AB/R of 13 July 1998, at § 165:

"In our view, the ordinary meaning of the text of Article 5.5 is clear. The chapeau of Article 5.5 clearly states that the schedule in the body of that provision is mandatory. The word used in the chapeau is 'shall', not 'may'. There is no qualifying language, and there is no language that permits any method other than that set out in the schedule in Article 5.5 as a basis for the calculation of additional duties. Likewise, Article 5.5 clearly identifies the c.i.f. import price of the shipment as the sole element to be compared with the trigger price in the calculation of the additional duties. Article 5.5 stipulates that the amount of additional duties 'shall be set' on the basis of the comparison of the c.i.f. import price of the shipment concerned with the trigger price. Thus, the ordinary meaning of the c.i.f. import price of the shipment is precisely that: the c.i.f. import price of the shipment . . . There is no authority in the text of Article 5.5 for a Member to use any alternative to the c.i.f. import price, shipment-by-shipment, in the calculation of the additional duties imposed under this special safeguard mechanism."

Compare further EC Measures Concerning Meat and Meat Products (Hormones)(complaint by Canada), Report of the Panel, WT/DS48/R/CAN of 18 August 1997 at § 8.169:

"Guided by the wording of Article 5.4, in particular the words 'should' (not 'shall') and 'objective', we consider that this provision of the SPS Agreement does not impose an obligation."

Similar Hormones (complaint by USA), WT/DS26/R/USA of 18 August 1997 at 8.167.

5.87 Second, it is evident that the determination must be made by the investigating authorities (*"unless the authorities have determined"*).

5.88 Third, Article 5.4 indicates how a determination of representativeness is to be made: *". . . on the basis of an examination of the degree of support for, or opposition to, the application expressed by domestic producers of the like product"*. This requires foremost an examination. The determination is to be made *following* this examination. This follows from the words *"on the basis of"* in *"have determined, on the basis of an examination"*.

5.89 Fourth, the examination must be made of *"the degree of support for, or opposition to, the application expressed"*. The support or opposition must have been *"expressed"*. This implies, in other words, a deliberate act on behalf of the entity whose support is examined (the footnote to Article 5.4 is discussed below).

5.90 Fifth, Article 5.4 contains clear language *whose* support is to be taken into account: *"the degree of support for, or opposition to, the application expressed by domestic producers of the like product . . ."* The only entities whose support counts are domestic producers.[207] In this context the difference in language may be noted within the first sentence of Article 5.4: in order to determine whether the application has been filed *"by or on behalf of"* the domestic industry, an examination of the support or opposition expressed by domestic producers is required.[208] In other words, Article 5.4 foresees two actions from the side of the industry:

1) the filing of the complaint, which may be done by any entity; and

2) the expression of the support for the complaint, which must come from "*the domestic producers of the like product"*.

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[207] It is true that the footnote to Article 5.4 provides that: "*Members are aware that in the territory of certain Members employees of domestic producers of the like product or representatives of those employees may make or support an application for an investigation under paragraph 1."*

This, however, deals with a situation not found in the EC but rather with the specific domestic legislation of another WTO Member. This would consequently not seem to be relevant for the *Bed linen II* case.

[208] In this context India would follow the analysis of the words "*on behalf of*" in *United States—Imposition of anti-dumping duties on imports of seamless stainless steel hollow products from Sweden*, Report of the Panel (unadopted) of 20 August 1990, ADP/47 at § 5.9 (even though that analysis was made in the context of the 1979 Anti-Dumping Code):

"5.9 The Panel noted the views expressed by Sweden and the United States regarding the meaning of the term 'on behalf of' in the first sentence of Article 5:1 of the Agreement . . . The Panel considered that in its ordinary meaning this term was used to refer to a situation where a person or entity acted on the part of another involving the notion of agency or representation. Nothing in the text of Article 5:1 suggested that the drafters of the Agreement had wished to attach a different meaning to this term; on the contrary, the fact that the term 'on behalf of' appears in Article 5:1 as an alternative to 'by' underlines that this term must be interpreted in accordance with its ordinary meaning. In the view of the Panel, the alternative for the requirement that a petition be filed 'by' the domestic industry affected cannot be a requirement so loose as to allow a request to be filed by some members of an industry simply claiming to be acting 'on behalf of' the rest of the industry. The Panel concluded that 'a written request . . . on behalf of the industry affected' implies that such a request must have the authorization or approval of the industry affected before the initiation of an investigation."

This line of reasoning in the interpretation of "*on behalf of*" was followed by the Panel in United States—Anti-dumping duties on gray portland cement and cement clinker from Mexico, Report of the Panel (unadopted) of 7 September 1992, ADP/82 at § 5.18-5.19.

These two actions may take place at the same point in time. For example, if a complaint is issued *"by"* companies clearly accounting for more than one-quarter of the total of EC producers, the EC authorities could reasonably conclude that the 25 per cent test is met.[209] That factual situation, however, did not occur in the Bed linen II proceeding.

5.91 The provision does not preclude that an entity other than a producer files a complaint *"on behalf of"* the domestic industry—but in such a situation an examination of the support or opposition expressed by domestic *producers* nevertheless remains called for. Indeed, although it is possible that the complete domestic industry supports an anti-dumping proceeding (a situation which will normally mostly occur in cases where the number of domestic producers is very limited), in most anti-dumping proceedings the entity filing the complaint will not itself constitute the complete domestic industry. At least in EC practice, most anti-dumping complaints tend to be filed by trade organisations, (allegedly) on behalf of the domestic industry. The second and third sentences of Article 5.4 deal with the concept *"by or on behalf of the domestic industry"* by providing for the 50% test and the 25%, respectively. In both cases, the support for the complaint must come from domestic producers rather than from trade organisations or other entities not producing the like product.

5.92 Also, it is not argued in this context that a written declaration is the only method allowed by the ADA in which a producer could express its support for the anti-dumping complaint. It follows from the file, however, that the EC in the Bed linen II proceeding has relied on such written declarations. Moreover, the EC authorities have not argued that they sought or obtained the support from producers in any other manner.

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[209] In this respect the Panel report must be noted in United States—Imposition of anti-dumping duties on imports of fresh and chilled Atlantic salmon from Norway, Report of the Panel adopted on 27 April 1994, ADP/87:

"358. The Panel then turned to the question of the duty incumbent on investigating authorities to ensure that their actions with regard to the treatment of written requests for the initiation of anti-dumping investigations were consistent with their obligations under Article 5:1. The Panel considered that, in light of the requirement in Article 5:1 that a written request be by or on behalf of the industry affected and contain certain evidence, the investigating authorities could not, consistently with Article 5:1, initiate investigations automatically in response to any written request received. The requirements of Article 5:1 clearly implied a duty for the authorities to evaluate each such written request to ascertain whether it contained the required information, and to screen out those requests that failed to provide it. The investigating authorities therefore had to evaluate whether a written request for the initiation of an investigation was made "on behalf of" the industry affected . . .

360. The Panel noted that the Agreement did not provide precise guidance as to the procedural steps to be taken for such an evaluation, and considered that the question of how this requirement is to be met depends on the circumstances of each particular case. In the Panel's view, this question, or in this case the steps the United States was required to take as a prerequisite to initiating an investigation, had to be evaluated on the basis of the information before the investigating authorities at the time of the initiation decision. The Panel examined whether in the case before it the United States had taken such steps as could reasonably be considered sufficient to ensure that the written request for initiation of an investigation had been made with the authorization or approval of the industry affected.

361. . . . The written request for the initiation of an anti-dumping investigation had been made with a legal certification as to its accuracy and completeness. It had been submitted by twenty-one firms representing well over the majority of all domestic production of Atlantic salmon . . ."

In this case, the complainant did provide a legal certification guaranteeing that the information on standing was correct." (Emphasis added, footnotes omitted)

In this respect it is further relevant that the language of Article 5.4 of the ADA is considerably more stringent than the language of Article 5.1 of the 1979 (*"An investigation to determine the existence, degree and effect of any alleged dumping shall normally be initiated upon a written request by or on behalf of the industry (as defined in Article 4) affected"*), which was at issue in Salmon.

4.2 Legal arguments relating to the claims relating to Article 5.4

5.93 India has a number of arguments why the determination of representativeness made by the EC does not meet the requirements laid down in Article 5.4, as analysed above.

5.94 First, it appears from the file that the EC has accepted a statement from at least one producers' association (the Austrian association Vereinigung Textilindustrie) that it supported the complaint in its own name, and has added the production volume of the members of this association to that of the complainants. Indeed, it is not certain whether the 25% test would still be met if the output of the members of the Austrian association were deducted.

5.95 If there has been any further check of the veracity of this statement, no record of it has been made available. The only response by the EC on the concerns raised by Texprocil in this regard was the curt statement in the provisional Regulation that *"the remaining companies represented a major proportion of Community production of bed linen and satisfied the requirements of Article 5(4) of the basic Regulation."*[210] At the definitive stage the EC institutions simply ignored Texprocil's arguments. During the consultations the EC indicated orally that a declaration by a producers' association was valid in its opinion for the purposes of expressing support for the application.

5.96 India believes that, while it is possible for an association of producers to file a complaint, it would not be possible for a producers' association to substitute its support for that of its member companies. While acknowledging that Article 17.6(ii) of the ADA provides a certain space for different interpretations, this space only exists if *"a relevant provision of the Agreement admits of more than one permissible interpretation"*. In the case of Article 5.4, however, the interpretation according to customary rules of interpretation is perfectly clear. In an interpretation *"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"*[211] *"domestic producers"* are to be interpreted as 'domestic producers'.

5.97 The argument used by the EC during the consultations that the rôle of the association in expressing support is comparable to that of a lawyer representing a company is instructive in this regard, in that it is false. At least in EC anti-dumping practice (and probably in most jurisdictions) for each new anti-dumping proceeding lawyers have to show a power of attorney from the company (on the company's letterhead, dated and signed) they purport to represent—no matter how longstanding the relation between the company and the lawyer. Indeed, the Commission will often insist on receiving the original (as opposed to a faxed copy) document for its files.

5.98 India believes that the procedural error of accepting and relying on a declaration of support *"on behalf of"* a producers' association without further checking whether the member companies of the association did indeed support the complaint[212], cannot be repaired retroactively.[213]

5.99 Second, it appears from the file that the EC accepted producers' associations' declarations *"on behalf of"* producers, without these producers having ever confirmed their support to the

[210] Recital (52).

[211] Article 31(1) of the 1969 Vienna Convention on the Law of Treaties.

[212] It has never been alleged by the EC during either the administrative proceeding or during the consultations that such a check was ever made. Even if it was, no record has been made available from which such a check would transpire.

[213] In this context guidance may be found in the GATT panel report on United States—Imposition of anti-dumping duties on imports of seamless stainless steel hollow products from Sweden, Report of the Panel (unadopted) of 20 August 1990, ADP/47 at § 5.20.

investigating authorities before the initiation of the proceeding.[214],[215] This concerns the French and Spanish producers' association declarations, and the (alleged) expressed support of the following companies:

France:

— Ets Claude,
— Jalla SA-Nieppe,
— Hacot (Joseph et Cie),
— Ets Hacot et Colombier,
— Ets Fremaux,
— Vanderschooten,
— Mulliez Freres SA au Longeron,
— Ets Bera;

Spain:

— Estebanell y Pahisa SA,
— Hilados y Tejidos Puignero SA,
— Textil Cano Segura (Texca Sesa).

5.100 As far as the EC has argued that the statutes of the producers' associations allow them to represent their members, it is believed that this misses the point. As argued above, a producers' association may surely file a complaint. The issue here, however, is not whether such an association has the right to file a complaint, but rather whether it can replace individual producers in expressing support for it. It follows from the analysis above that it cannot. In the terms of the analogy noted before by the Commission during the consultations: a lawyer cannot represent his client in issuing on behalf of that client a power of attorney to himself.

5.101 Moreover, as far as the EC would mean with its argumentation that it could trust that the producers' associations or Eurocoton have checked standing, this would in effect imply the 'catering out' of the standing determination to the complainant. It would seem that this would be hard to reconcile with the wording of Article 5.4, which clearly requires *"the authorities"* to determine representativeness. Eurocoton, its member associations or any other private party do not constitute *"the authorities"*.

5.102 The EC's acceptance of declarations from associations without further verifying these is not excused by the large number of exporters. The ADA foresees for a clear procedure in cases where the number of exporters is large. If the EC considered that the number of alleged EC complainants was too large to make it practical to examine the expressed support of each individual producer, it could have resorted to the option contained in the footnote to Article 5.4:

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[214] Even if they would have, no record has ever been made available nor has it been alleged in any way by the EC in the administrative proceeding or during the consultations. Furthermore, India believes that it is entitled to rely on the non-confidential file made available by the investigating authorities.

[215] The notice of initiation is not even clear whether the complaint was submitted *"by"* the domestic industry or *"on behalf of"* the domestic industry:

"Having determined, after consulting the Advisory Committee, that the complaint has been lodged by or on behalf of the Community industry and that there is sufficient evidence to justify the initiation of proceedings, the Commission has commenced an investigation pursuant to Article 5 of Regulation (EC) No 384/96." (Emphasis added) (OJ (1996) C 266/2 at 5).

> *"In the case of fragmented industries involving an exceptionally large number of producers, authorities may determine support and opposition by using statistically valid sampling techniques."*

5.103 As a factual matter, it is noted that during the administrative proceeding the EC authorities have never argued that this footnote was applied in the Bed linen II proceeding. Only during the second round of consultations the EC delegation referred to it briefly, apparently as an indication that the EC's practice in the Bed linen II proceeding might be covered by it.

5.104 In this respect it must be noted that the footnote refers to *"statistically valid sampling techniques"*. Quite apart from no evidence being on file of any sampling technique ever having been used by the EC for the determination of representativeness, it would seem that a sample taken from the membership of the member associations of Eurocoton would not give a statistically valid picture of the domestic producers of bed linen in the EC. This is all the more so now that the standing for this proceeding according to the EC was at best little over 34 per cent (rather less than the 53 per cent alleged by Eurocoton in its complaint) of Community producers. Consequently, a large number of producers would thus seem to have never been asked their opinion on the complaint.

5.105 As a last issue, the question arises whether the procedural error committed before the initiation has been repaired retroactively by French and Spanish companies co-operating with the EC. We believe it has not. The wording of Article 5.4, as analysed above, would seem to be quite clear. We further note the text of Article 1 of the ADA:

> *"An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated[1] and conducted in accordance with the provisions of this Agreement. The following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations.*
>
> ———
>
> *Footnote 1. The term 'initiated' as used in this Agreement means the procedural action by which a Member formally commences an investigation as provided in Article 5."*
> (Emphasis added)

5.106 An anti-dumping duty may only be imposed if the investigation has been initiated and conducted in accordance with the ADA. The footnote to Article 1 even specifically clarifies that Article 5 (and thus 5.4) is very much relevant in this context. Since the standing determinations in the *Bed linen II* proceeding were made inconsistently with Article 5.4 of the ADA, the anti-dumping duty has been imposed inconsistently with Article 1 (and, for that matter, Article VI of GATT 1994). The language of Article 1 is imperative: *"shall be applied only"*.[216] There is no qualifying language in Article 5.4 of the ADA. Procedural defects at the time of initiation cannot be repaired retroactively.[217]

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[216] In this context the Panel's conclusions in Korea—Anti-dumping duties on imports of polyacetal resins from the United States may be noted (Report of the Panel, ADP/92 and Corr.1 of 2 April 1993 at § 210):

". . . for a panel to review a determination by reference to considerations not actually reflected in a public statement of reasons accompanying such determination would also be inconsistent with the requirements of an orderly and efficient conduct of the dispute settlement process . . . A full and public statement of reasons underlying an affirmative determination at the time of that determination enabled Parties to the Agreement to assess whether recourse to the dispute settlement mechanism . . . was appropriate and provided a basis for a delimitation of the object of such dispute settlement proceedings. In this connection the Panel noted that, in light of the wording of the public notice given by the Korean authorities at the time of the imposition of the anti-dumping

5.107 Additionally, the purpose of Article 5.4 is to avoid undue harassment of exporters by frivolous initiations (such as, for example, occurred by the initiation of the first Bed linen proceeding). This purpose would be defeated if the investigating authorities would be allowed to initiate an anti-dumping proceeding without making a proper determination of representativeness in order to subsequently attempt to obtain the necessary support for the proceeding. In this context, India can only concur with the EC's assessment in Brazil—Imposition of provisional and definitive countervailing duties on milk powder and certain types of milk from the EEC:[218]

> *"The EEC disagreed with Brazil's position that this dispute involved only procedural issues and that any procedural errors committed by Brazil were harmless. The EEC considered that substantive rights under the Agreement could not be effectively guaranteed if minimum procedural requirements were not respected. Moreover, the EEC pointed out that its complaint also related to Brazil's non-compliance with substantive requirements in Article 6 of the Agreement regarding the determination of the existence of material injury."* (Emphasis added)

5.108 Last, it may be noted that Article 3(8) of the Dispute Settlement Understanding provides a strong presumption that an infringement of a covered agreement implies a case of nullification or impairment. India believes that the standing determination in the Bed linen II proceeding does not meet the criteria of Article 5.4 and as such, impaired or nullified India's rights under the WTO Agreement.

5. Claim 27: inconsistency with Article 12.2.1

5.1 The text of Article 12.2.1

5.109 *Mutatis mutandis* the same logic applies as noted in section V.A.4.1, above: *"determination"* in sub-paragraph 12.2.1(v) is in singular, in contrast to the *"preliminary determinations"* in the chapeau of the provision. That would suggest that *"determination"* in sub-paragraph (v) refers to *"preliminary or final determination"* in Article 12.2. In other words, under Article 12.2.1 the investigating authorities must set out in the provisional and definitive Regulations *"the main reasons leading"* to *"the preliminary or final determination"*. Logically, sub-paragraph (v) aims also at those determinations essential for the investigating authorities in order to impose anti-dumping measures, including the determinations on representativeness required under Article 5.4.

5.110 Since the provisional Regulation (and the provisional disclosure document) is the first document in which the EC authorities explain their position on standing, the exporters may expect to receive a reply there to any arguments raised by them in this respect. If the investigating authorities would not be under any obligation to explain their standing determination at the time of the

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duties, Parties to the Agreement and exporters affected by these measures had no reason to believe that the injury determination of the KTC was based on considerations not reflected in that notice." (footnote omitted)
Again reference is made to the Appellate Body's dictum in EC—Measures affecting the importation of certain poultry products, AB-1998-3, WT/DS69/AB/R of 13 July 1998 at § 165:

"The chapeau of Article 5.5 clearly states that the schedule in the body of that provision is mandatory. The word used in the chapeau is 'shall', not 'may'. There is no qualifying language, and there is no language that permits any method other than that set out in the schedule in Article 5.5 as a basis for the calculation of additional duties."

[217] Similar logic (in the context of the 1979 Anti-Dumping Code) in United States—Imposition of anti-dumping duties on imports of seamless stainless steel hollow products from Sweden, Report of the Panel (unadopted) of 20 August 1990, ADP/47 at § 5.20.

[218] Report of the Panel adopted on 28 April 1994, SCM/179 and Corr.1 at § 205.

imposition of provisional anti-dumping measures, it would impair the effective possibilities for exporting countries to raise such issues under Article 17.4, second sentence.[219]

5.111 Second, the word *"and"* in the chapeau of 12.2.1 must be noted between *"sufficiently detailed explanations for the preliminary determinations on dumping and injury"* and *"shall refer to the matters of fact and law which have led to arguments being accepted or rejected"*. In other words, the limitation to preliminary determinations on dumping and injury would not appear to be applicable to the second part *"shall refer to the matters of fact and law which have led to arguments being accepted or rejected"*. As argued above, Article 12.2.1 as a whole, and especially in view of its sub-paragraph (v), does apply to the standing determination as well. A correct reading of Article 12.2.1 would thus seem to be that the provisional Regulation (or some other disclosed provisional document) must refer to *the matters of fact and law which have led to arguments being accepted or rejected"* in the context of standing as well.

5.2 Legal arguments relating to the claims relating to Article 12.2.1

5.112 In anti-dumping proceedings the investigating authorities have a very dominant position as far as knowledge of the facts is concerned. This is even more so in the EC, where the European Commission is the only entity having access to all facts relating to standing. Article 12 fulfils in this context a crucial rôle to ensure a certain degree of transparency. In this context the *dictum* of the Panel in Korea—Anti-dumping duties on imports of polyacetal resins from the United States is of relevance:[220]

> *"In the view of the Panel, the purpose of this provision would be frustrated if in a dispute settlement proceeding . . . a Party were allowed to defend a challenged . . . determination by reference to alleged reasons for such determination which were not part of a public statement of reasons accompanying that determination . . ."*

5.113 In the provisional Regulation imposing anti-dumping duties on Indian bed linen the explanation on the determination of representativeness was, to put it charitably, brief:

> *"(52) After elimination from the list of companies included in the complaint of seven of them found not to be complainants, the Commission found that the remaining companies represented a major proportion of Community production of bed linen and satisfied the requirements of Article 5(4) of the basic Regulation."*

5.114 No word was spent in the provisional Regulation or the provisional disclosure document on the issues raised above—even though the Indian exporters had brought them to the EC's attention throughout the proceeding repeatedly and in detail.

5.115 Apart from the information made available in the non-confidential file, there was no way for the Indian exporters to further check the veracity of the conclusions of the investigating authorities. Under such circumstances, the EC can hardly claim that it referred *"to the matters of fact and law*

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[219] *"When a provisional measure has a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7, that Member may also refer such matter to the DSB."*

Article 7.1 explicitly refers to Article 5, which includes Article 5.4.

[220] Korea—Anti-dumping duties on imports of polyacetal resins from the United States, Report of the Panel, ADP/92 and Corr.1 of 2 April 1993 at § 209.

which have led to arguments being accepted or rejected" or that the provisional Regulation or the provisional disclosure contained *"the main reasons leading to the determination"*.

5.116 In summary, India believes that neither in the provisional Regulation nor in any other document made available to the Indian exporters around the time of the provisional anti-dumping measures the EC met the standards laid down in Article 12.2.1.

6. Claim 28: inconsistency with Article 12.2.2

6.1 The text of Article 12.2.2

5.117 The text of Article 12.2.2 differs somewhat from that of Article 12.2.1:

> *"A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6."*

6.2 Legal arguments relating to the claims relating to Article 12.2.2

5.118 Even if the EC did not agree with the Indian exporters, it was still obliged to provide in the definitive Regulation *"the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers"*.

5.119 As noted in the facts' description above, the EC did react on issues raised in the connection with the scope of the domestic industry.

5.120 However, even though the Indian exporters again filed arguments in response to the provisional disclosure and the provisional Regulation, there was absolutely no reaction to or even a denial of the arguments and claims made by Indian exporters in connection with Article 5.4. The EC thus failed to explain its definitive finding consistently with Article 12.2.2.

VI. CLAIMS RELATING TO INDIA'S STATUS AS A DEVELOPING COUNTRY

A. ARTICLE 15: THE INVESTIGATING AUTHORITIES FAILED TO CONSIDER POSSIBILITIES OF A CONSTRUCTIVE REMEDY EVEN THOUGH INDIAN EXPORTERS HAD STRESSED THE IMPORTANCE OF THE BED LINEN INDUSTRY TO INDIA

6.1 Summary: the EC acted inconsistently with Article 15 of the ADA by not exploring possibilities of a constructive remedy and by not even reacting to arguments from Indian exporters pertaining to Article 15 (**claim 29**).
Even though detailed arguments were presented by the Indian exporters on these issues, the EC failed to properly explain its reasoning, and consequently acted inconsistently with Article 12.2.1 (**claim 30**) and 12.2.2 (**claim 31**).

1. Facts

6.2 In its injury submission[221] Texprocil drew attention to India's status as a developing country:

"Among all the countries targeted by this proceeding, India has by far the lowest per-capita income. GDP per capita is one of the three criteria used by the United Nations in determining the Least Developed Country (LDC) status. In 1971 the UN General Assembly established the list of LDCs. Lower and upper cut-off points of per-capita GDP were established at US$356 and US$427 respectively, and then manufacturing share of GDP and literacy rate for the country were factored into the formula.

While Texprocil realises that India is not listed as an LDC, India's 1993 per capita GDP of US$270 was not only below the lower cut-off point for LDCs, but was also much lower than the per capita GDP of all countries in this proceeding, as shown by table 7:

Table 7: GNP per capita (US$, estimates)

India	***Egypt***	***Pakistan***
270 (1993)	*730 (1992)*	*410 (1992)*

Source: CIA World Factbook

Article 15 of the Agreement provides that:

'[i]t 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.'

The textile industry is one of the most important economic engines of the Indian economy. The country is highly dependent on the textile industry as a source of employment and development.

Texprocil respectfully requests that the Commission takes into account the spirit behind these special considerations while determining any injury caused by the allegedly dumped imports, and in any subsequent action it may take or suggest."

6.3 During the first injury hearing the importance of the bed linen industry to the Indian economy was stressed and in the subsequent post-hearing brief[222] the point was repeated.

6.4 Notwithstanding India's request on the basis of Article 15, the EC did not once in the provisional Regulation, the provisional disclosure or anywhere else in the file even mention India's status as a developing country, let alone consider or comment on possibilities of constructive remedies. Even though Indian exporters had repeatedly stressed the great importance of the bed linen and textile industry to India's economy, the EC did not once contact the Indian exporters or the Indian government to explore the possibilities of constructive remedies before applying the provisional anti-dumping duties.

[221] Attached as Annex 50.
[222] Attached as Annex 54.

6.5 In its comments to the provisional disclosure, Texprocil therefore reminded the EC:[223]

> *"Texprocil recalls for the record its arguments concerning India's status as a developing country as presented to the Commission. Texprocil notes that both in the disclosure document and in the provisional duties Regulation the Commission has failed to address these issues."*

6.6 The EC was similarly reminded during the second injury hearing and in the second post-hearing brief.[224]

6.7 Nevertheless, the definitive disclosure document and the definitive Regulation also failed to even mention India's status as a developing country, let alone make any determination or any consideration on the issue of Article 15. The EC again failed to contact the Indian exporters or the Indian government to explore the possibilities of constructive remedies.

6.8 During the first round of consultations India raised the issue and the following discussion took place:

> *"Mr Seth: The words 'must be given' in Article 15 would seem to be mandatory. While Article 15 does not per se require the EC to make special concessions to developing countries such as India in each case, it does lay down an obligation at least to consider ('special regard') the 'special situation of developing country Members'. It is accepted that such special regard does not affect the calculation of dumping and injury per se. Nevertheless, the words 'when considering' would imply that the EC, after having determined that dumping and injury caused thereby are present, must make a separate determination on the effects of anti-dumping measures to India's situation as a developing country.*
>
> . . .
>
> *[EC]: The EC is convinced that special regard has been given. . . ."*

6.9 The EC did not elaborate on its answer in its letter of 1 October 1998.

6.10 During the second round of consultations India reverted to the issue:

> *"Mr Seth: I move now on to question 115. Let me recall our conviction that the words 'special regard must be given . . . to the special situation of developing country Members' in Article 15 of the Agreement would seem to be mandatory. While Article 15 does not per se require the EC to make special concessions to developing countries such as India in each case, it does lay down an obligation at least to consider ('special regard') the 'special situation of developing country Members'.*
>
> . . .
>
> *[EC]: We maintain that the requirement was respected. . . . Article 15 is a difficult piece, particularly in the Anti-Dumping Agreement."*

6.11 In its letter of 29 June 1999[225] the EC provided the following written answer to question 115:

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[223] Attached as Annex 51.
[224] Attached as Annex 55.

*"**Question 115***

Can the EC indicate where in the provisional or definitive Regulations it has considered giving special regard to the special situation of India as a developing country Member?

It was pointed out that while specific concessions made to Indian firms in view of their location in a developing country were not spelled out in the published Regulations, the firms concerned were granted special treatment in a number of ways. The preparation of simplified questionnaires for exporters, the acceptance of responses beyond the stated deadline and consequent granting of co-operator status, and the individual treatment of newcomers despite the case having been based on sampling, are all examples of special consideration.

Last but not least, discussions on undertaking [sic] took place and this has to be considered as complying with obligations even if these did not result in measures in the form of undertakings."

2. Claims

6.12 Three claims flow from the events and facts described above.

6.13 First, the EC acted inconsistently with Article 15 by failing to explore possibilities of constructive remedies before imposing anti-dumping duties, even though India had clearly argued that the textile industry, and with it the bed linen industry, is of essential interest to the Indian economy.

6.14 Second, the EC acted inconsistently with Article 12.2.1 of the ADA by failing to indicate in the provisional Regulation or in any other report made available to the Indian exporters at the time of the imposition of provisional measures why it refused any constructive remedy based on Article 15, or how it responded to its obligations under the second sentence of Article 15.

6.15 Third, the EC acted inconsistently with Article 12.2.2 of the ADA by failing to indicate in the definitive Regulation or in any other report made available to the Indian exporters at the time of the imposition of definitive measures why it refused any constructive remedy based on Article 15, or how it responded to its obligations under the second sentence of Article 15.

3. Claim 29: inconsistency with Article 15

3.1 The text of Article 15

6.16 Article 15 provides that:

"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."

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[225] Attached as Annex 14.

6.17 Article 15 provides for two different issues:

> 1. The first sentence of this provision concerns the appropriateness of the *"application of anti-dumping measures"* in view of the fact that the targeted country is a developing country Member. The issue is here that, once dumping and injury have been determined, when deciding whether anti-dumping measures should be imposed, developed countries should take into account the developing country status of the targeted country.
>
> 2. The second sentence deals with the case where *"essential interests"* of developing countries are at issue. The language here is more direct.

6.18 As a first observation, the two sentences are not linked (*e.g.*, *". . . under this Agreement and possibilities of constructive . . ."*); this is logically so. In other words, the words *"It is recognized that"* of the first sentence do not refer to the second sentence. This is clear since otherwise the second sentence would read as follows:

> *"It is recognized 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."*

6.19 This, however, would not make much sense, among others because of the word *"shall"* which would have read 'should' if the permissive meaning implied in *"It is recognised that"* was applicable to the second sentence.

6.20 Let us then look at the meaning of each of the two sentences.

6.21 First the first sentence. The key words here are *"special regard"* and *"when considering"*. It transpires from the text that the relevant moment when the first sentence comes into play is when there is a determination of dumping and injury caused thereby. The importing country authorities then have to determine whether these findings, as well as any other elements relative to the case[226], would militate in favour of imposition of anti-dumping measures or not. The first sentence of Article 15 states a preference that the special situation of developing countries should be an element to be weighted when making that evaluation.

6.22 The first sentence does not seem to create a rock-solid legal obligation. This follows from the opening words "*It is recognized that . . .*" and the wording *"special regard must be given"*. The first sentence thus contains a statement of preferred policy. This conclusion would seem reinforced by Article 17.6(ii) second sentence, of the ADA. [227]

6.23 The text and spirit of the second sentence differs considerably from that of the first sentence. To start with, the object of the sentence (*"essential interests of developing country Members")* would seem to be more direct than the—rather vague—*"special situation"* of developing country members mentioned in the first sentence.

6.24 The obligations in the second sentence are accordingly stricter: *"Possibilities . . . shall be explored . . ."*. There is no *"It is recognized that"* here—the second sentence contains very clear

[226] For example, under EC anti-dumping law, the investigating authorities must make a separate determination whether the imposition of anti-dumping measures would be in the Community interest.

[227] Similar the EC in Cotton yarn at § 576. Note that the EC—correctly—limited the qualification to the first sentence, not to the whole provision.

language. The logic of the Appellate Body, developed in the context of another covered agreement, similarly applies here:

> *"The word used . . . is 'shall', not 'may'. There is no qualifying language, and there is no language that permits any method other than that set out in the schedule in Article 5.5 as a basis for the calculation of additional duties."*

6.25 It follows that the second sentence, when regarded in the context of the Agreement, lays down clear obligations. First, there must *ipso facto* be a determination (or assessment) whether the essential interests of the developing country concerned may be involved. This determination must have been made *"before applying anti-dumping duties"*, *i.e.*, after a determination of dumping and injury caused thereby have been made, but before the imposition of (provisional) anti-dumping duties.

6.26 Then the investigating authorities are required to explore possibilities of constructive remedies *"provided for by this Agreement"*. These last words would seem to indicate that the remedy may consist of, among others, the non-imposition of anti-dumping measures, or an undertaking.

6.27 As to the timing of the 'exploration of possibilities of constructive remedies', these *"shall"* be explored *"before applying anti-dumping duties"*. In the EC context this means before provisional anti-dumping duties are imposed.

3.2 Legal arguments relating to the claims relating to Article 15

6.28 The first issue is whether the EC did in fact give special regard to India, and whether this alleged special treatment—even if factually correct—is relevant under Article 15 (section 3.2.1). The next issue is what the EC should have done under Article 15 (3.2.2).

3.2.1 The alleged special treatment granted by the EC

6.29 During the two rounds of consultations between India and the EC, the latter pointed to the following issues it believed to be applications of Article 15:

(a) the questionnaires used were allegedly more simple than those used in other proceedings;

(b) the EC was supposedly more flexible with India when accepting submissions outside the deadline;

(c) a special newcomers' provision was adopted in the definitive Regulation allowing newcomers to obtain the sample duty even though such a newcomers' provision is not foreseen in the EC basic anti-dumping Regulation;

(d) handloom products were excluded from the scope of anti-dumping duties.

6.30 (a) the questionnaires used: the questionnaire for exporters used in the Bed linen II proceeding is attached as Annex 63. It can be seen that it is *mutatis mutandis* similar to a recent questionnaire used for anti-dumping proceedings against OECD Members (Hungary, Poland, Mexico; see Annex 64). It can also be seen that it is very similar to a questionnaire as used against Taiwan (see Annex 65), clearly a very developed country. Although there are some minor differences between the questionnaires (in some cases caused by the different product and trade channels involved), it requires imagination to consider the Bed linen II questionnaire as less exacting than the questionnaires used for developed

countries. This is easily demonstrated by comparing the Bed linen II questionnaire with the other questionnaires mentioned. Indeed, if one compares the questionnaire for *Bed Linen* with one used in a recent proceeding against Taiwan (Annex 66), it would appear that in fact the latter one is more straightforward, and not *vice versa*. In summary, the EC's argument is factually incorrect.

6.31 Even if the EC's reply during the consultations were factually true, it would be an interpretation that is, to put it mildly, surprising in view of the EC's argumentation before the Cotton yarn panel:[228]

> *"The EC argued that any obligation contained in the first sentence of Article 13 only arose at the time of consideration of imposition of measures. The word 'measures' clearly limited the obligation to the stage following conclusion of an investigation. Article 10 of the Agreement referred to 'Provisional measures'. The first sentence of Article 10:1 confirmed that the obligation under Article 13 only arose after an investigation. Article 10:2 defined what provisional measures could consist of."*

6.32 Moreover, the Panel in EC—Cotton yarn essentially followed the interpretation propagated by India in this case:

> *"585. The Panel was of the view that Article 1 of the Agreement provided the context for Article 13. Article 1 provided that anti-dumping duties could not be applied prior to determination of dumping, material injury and a causal link between the two. In addition, the words 'where they would affect the essential interests of developing countries' establish the condition under which this obligation becomes operative. Clearly this condition could only be ascertained subsequent to the determination of the amount of the anti-dumping duty to be applied in order to know whether the imposition of the anti-dumping duty would affect the essential interests of developing countries. This made clear that the second sentence of Article 13 gave rise to an obligation to consider the possibility of adopting constructive remedies after determination of dumping, material injury and a causal link between the two."*

6.33 India believes the reasoning of the Cotton yarn Panel on the timing aspect to be convincing. In other words, Article 15 does not have regard to treatment during the determination of dumping and injury, but rather comes into play once the investigating authorities have determined that dumping and injury exist. Logically, the issue of allegedly 'simplified' questionnaires could not even arise under Article 15, since the questionnaires are issued and replied to before dumping can be determined.

6.34 (b) alleged flexibility with deadlines: To begin with, India is not aware of any (special) flexibility with deadlines in the Bed linen proceeding, and the Commission's statements during the consultations thus appear to be factually incorrect.

6.35 The two cases where companies (Giraffe International and Nidhi Exports) made themselves known to the Commission somewhat after the deadline clearly disprove the allegation. The Commission informed both companies that the Commission's services were unable to consider both companies as co-operating exporters,

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[228] EC—imposition of anti-dumping duties on imports of cotton yarn from Brazil, ADP/137 of 4 July 1995 at § 579. It is noted that the text of Article 13 of the 1979 Anti-Dumping Code is almost identical to that of Article 15 of the ADA:

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

> *"[a]s the deadline relating to sampling provided for in the notice of initiation has already passed and the companies to be included in the sample have been both selected and informed"*[229]

6.36 Although India acknowledges the right of the investigating authorities to ignore information submitted after reasonable deadlines, by the same token it is noted that the EC, by availing of this right, cannot claim it has shown special consideration for the Indian companies concerned.

6.37 The sampled companies requested an extension of the deadline on the basis of Article 6.1.1 because the companies had shown good cause and such an extension was practicable for the investigation authorities. The extension was not granted because the companies concerned are located in a developing country (relevant correspondence attached as Annex 68) but on the condition that the companies would make an effort to submit the questionnaire responses as soon as possible. As far as India is aware, all sampled companies submitted their questionnaire responses within the—revised—deadline. It is thus hard to see how the investigating authorities in the Bed linen II proceeding would have been more flexible, and clear that the EC's claims that it was exceptionally flexible with deadlines is not borne out by the factual situation.

6.38 Moreover, similarly to the point argued under *(a)*, even if the EC's argument would be factually correct (*quod non*), it would be irrelevant since the issue of deadlines arises only before dumping is determined, not at the stage of the application of anti-dumping measures.

6.39 (c) special newcomers' provision: Under EC anti-dumping law, the possibility of a newcomer review is not foreseen in cases where the exporters have been sampled.[230] This leads to patently unfair situations for companies commencing exporting after the investigation period, since they are subjected beyond their will to the (high) residual anti-dumping duty. In recent years, in Regulations in proceedings involving sampling the EC therefore includes as a matter of standard practice a clause on the following lines:

> *"Where any new exporting producer from the countries concerned provides sufficient evidence to the Commission that*
> — *it did not export to the Community the products described in Article 1(1) during the investigation period . . .,*
> — *it is not related to any of the exporters or producers in the exporting country which are subject to the anti-dumping measures imposed by this Regulation,*
> — *it has actually exported to the Community the products concerned after the investigation period on which the measures are based, or it has entered into an irrevocable contractual obligation to export a significant quantity to the Community,*
>
> *then the Council, acting by simple majority on a proposal submitted by the Commission after consulting the Advisory Committee, may amend Article 1(3) by adding that new exporting producer to the list in Annex I." (Article 3 of the definitive Bed linen Regulation)*

6.40 Three well-informed authors further confirm the logic behind the clause: [231]

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[229] Letters to both companies attached as Annex 67.

[230] Article 11(4), last sentence, of the EC basic anti-dumping Regulation.

[231] Müller, Khan, Neumann, *EC Anti-Dumping Law—A Commentary on Regulation 384-96*, Wiley 1998, page 354 at § 11.74.

> *". . . the unavailability of both Article 11(3) and (4) could lead to injustices. In order to deal with such situation, the Council adopted an amendment to a regulation imposing definitive anti-dumping duties in a case where sampling had been used, the effect of which is to allow the regulation to be amended after the Commission has verified the applicant's newcomer status, so as to add the newcomer to the list of parties subject to the average duty."*[232]

6.41 Moreover, the special newcomer clause is not only used in cases of developing countries. For example, a similar provision was used in *Flat wooden pallets from Poland* (where the provisional Regulation was even especially amended for it after its adoption)[233] and—in a slightly different form—in *Farmed Atlantic salmon from Norway*.[234] The Commission's reply would thus seem to be factually incorrect—unless Norway qualifies as a developing country.

6.42 (d) handloom products: the argument that the exclusion of handloom was based on developing country considerations is factually incorrect and not supported by the published definitive determination:

> ***"B. PRODUCT UNDER CONSIDERATION AND LIKE PRODUCT***
>
> ***1. Requests for exclusion from the proceeding***
>
> . . .
>
> *(7) As regards the request to exclude handloom products, while the use of different production methods is not in itself a reason relevant to the definition of the like product, it was found that handloom items had physical characteristics different from those of other bed linen, notably through a less regular and looser weave. This difference led to a different consumer perception of handloom products which was reinforced by the fact that handloom products are often sold through particular sales channels such as charity shops which are not available to Community producers.*
>
> *Consequently it was concluded that handloom products should be excluded from the scope of the proceeding and, therefore, these products should be exempted from the payment of the duties if accompanied by a certificate of handloom origin (see Annex II to this Regulation) issued by the appropriate authorities of the exporting country."*

6.43 The issue of handloom exclusion was discussed under the heading 'like product'—as indeed, the European Commission did during the investigation.

6.44 The reason given by the Commission for the exclusion is that handloom items *"had physical characteristics different from those of other bed linen"*. The Regulation does not even once mention India's status of a developing country, let alone discuss it in the context of handloom products.

6.45 In summary, neither the provisional nor the definitive Regulation, nor the disclosure documents or any other report made available to the Indian exporters contains any determination, examination or consideration on India's special status as a developing country, on the importance of

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[232] Footnote in original: *"OJ No L 48, 19.2.97, p. 1—cotton yarn from Brazil and Turkey/ newcomer (Council) and OJ No L 50, 20.2.97, p. 1—cotton yarn from Brazil and Turkey/ newcomer (Commission)."*

[233] See OJ (1997) L 225/11-12 and OJ (1997) L 324/6, respectively (attached as Annex 75).

[234] OJ (1997) L 267/15 (relevant excerpt attached as Annex 76).

the bed linen and textile industry to the Indian economy and India's special interests in the matter (even though arguments pertaining to this had been made), or on any possible special remedies to take account of such situation.

3.2.2 The EC's obligations under Article 15 in the Bed linen II proceeding

6.46 The applicability of Article 15 arises once the investigating authorities have determined that dumping and injury caused thereby exist, and before they apply provisional anti-dumping measures (*"before applying anti-dumping duties"*).

6.47 Indian exporters had clearly argued that the textile industry, and the bed linen industry, is of vital importance to its economy. In its injury submission Texprocil noted that "*[t]he textile industry is one of the most important economic engines of the Indian economy. The country is highly dependent on the textile industry as a source of employment and development."* This point was further stressed during Texprocil's first injury hearing.

6.48 In this context the conclusions of the Cotton yarn Panel may be recalled:

> *"583. The Panel noted that a precondition for the obligation in the second sentence was that the application of anti-dumping measures 'would affect the essential interests of developing countries'. Brazil had argued that cotton yarn was a strategic industry for Brazil, and that, therefore, application of anti-dumping duties would be of immense importance to its economy. The Panel was of the view that 'essential interests' was defined by its context, like the phrase 'special situation of developing countries' in the first sentence of Article 13. The Panel considered that the essential interests of a developing country which could be affected by the imposition of anti-dumping duties could include a strategic industry dependent on export trade. If cotton yarn was such an industry in Brazil, the essential precondition to the activation of the particular obligation contained in the second sentence of Article 13 was satisfied."*

6.49 Similarly, the bed linen industry was thus an essential interest for India. Nevertheless, there is no record that the EC even tried to determine whether this was so.

6.50 Once they had determined that dumping and injury caused thereby existed, the EC authorities were then under an obligation (*"shall be"*) to 'explore' the possibilities of constructive remedies. To 'explore' means *"to search through or into"*[235], *"to investigate in a systematic way; to examine"*[236], to *"inquire into; investigate thoroughly"*.[237] This would require positive action by the EC authorities, and presume a genuine and demonstrated willingness to consider the possibilities of constructive remedies.

6.51 The constructive remedies must be *"provided for by this Agreement"*. That would seem to imply a possible constructive remedy—apart from a decision not to impose any anti-dumping duties—would be an undertaking as provided by Article 8 of the ADA. The Indian exporters were only informed that dumped imports causing injury had been found after the imposition of provisional anti-dumping measures. Since the Indian exporters could only be aware of the dumping and injury findings after the imposition of anti-dumping measures, it is not reasonable to interpret the second sentence of Article 15 as requiring Indian exporters to take the initiative for an undertaking, to the

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[235] *Webster's New Collegiate Dictionary*, 1975, attached as Annex 69.
[236] *Webster's II New Riverside Dictionary*, 1984, attached as Annex 70.
[237] *The Concise Oxford Dictionary of Current English*, ninth edition, 1995, attached as Annex 71.

extent that an undertaking would have been a possibility of a constructive remedy. Logically, it follows that in accordance with Article 8.5, an undertaking (or any other constructive remedy provided by the ADA) should have been suggested by the EC authorities before the imposition of provisional anti-dumping duties, or at least, that the EC should have investigated the possibilities for such constructive remedy. However, there is nothing on file suggesting that the EC authorities even remotely considered, investigated or explored an undertaking or any other constructive remedy at the time.

6.52 It is noted here that the Indian exporters, after the provisional anti-dumping measures were imposed, did in fact sound out the Commission Services on their willingness to negotiate an undertaking.[238] The Commission's immediate reaction was negative, in view of the large number of product types.[239] No serious discussion ever took place on the subject of the organisation or feasibility of an undertaking, nor was such discussion ever initiated, promoted, or stimulated by the EC authorities. In view of this reaction, the Indian exporters abandoned their efforts to work out an undertaking proposal.

6.53 It follows that the EC, by patently failing to explore the possibilities for a constructive remedy provided by the ADA before imposing provisional anti-dumping measures, and/or by even failing to make any determination whether the Indian bed linen industry was an essential interest to India, acted inconsistently with Article 15 of the ADA.

4. Claim 30: inconsistency with Article 12.2.1

4.1 The text of Article 12.2.1

6.54 It is recalled that Articles 12.2 and 12.2.1 of the ADA provide in relevant part as follows:

> *"12.2 Public notice shall be given of any preliminary or final determination, whether affirmative or negative . . . Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities . . .*
>
> *12.2.1 A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular: . . .*
> *(v) the main reasons leading to the determination."*

6.55 As noted in section 1, the Indian exporters made arguments on the issue of Article 15. These arguments were completely ignored by the EC in the provisional Regulation as well as in the provisional disclosure.

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[238] Relevant correspondence attached as Annex 72.

[239] That concern compares oddly with the EC's eagerness one year later in the second Unbleached cotton fabrics proceeding, in which the EC made great efforts to try to conclude a minimum price undertaking with Texprocil on unbleached cotton fabrics—even though the number of product types and exporters was far greater in that proceeding than in Bed linen II. The relevant pages from the amendment to the definitive disclosure document as well as a fax from the European Commissioin regretting Texprocil's inability to conclude undertakings in the Unbleached cotton fabrics II proceeding are attached as Annex 77.

4.2 Legal arguments relating to the claims relating to Article 12.2.1

6.56 The EC has nowhere in the provisional Regulation or elsewhere in the file referred to or commented on its obligations under Article 15. The EC either did not consider its obligations under Article 15 material, or failed to explain in any detail its findings and conclusions thereon.

6.57 Although the Indian exporters made arguments on the issue of Article 15, the EC nowhere referred to *"the matters of fact and law which have led to arguments being accepted or rejected"*.

6.58 It follows that the EC acted inconsistently with Article 12.2.1 of the ADA.

5. Claim 31: inconsistency with Article 12.2.2

5.1 The text of Article 12.2.2

6.59 Article 12.2.2 provides in relevant part that:

> *"A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty . . . shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1 . . ."*

5.2 Legal arguments relating to the claims relating to Article 12.2.2

6.60 The EC continued to fail to react to the Indian exporters' arguments concerning Article 15, even though Texprocil had raised the matter again in its comments to the provisional disclosure. For the same reasons as indicated in section VI.A.4.2 the EC acted inconsistently with Article 12.2.2 of the ADA.

VII. CONCLUSIONS AND REQUESTS

A. CONCLUSIONS

7.1 The claims set forth in Parts III, IV, V and VI, above, affect the anti-dumping measure from different angles. India believes that the anti-dumping proceeding leading up to the definitive anti-dumping duties on bed linen from India should never have been initiated to begin with (initiation claims). After the initiation, the EC authorities acted inconsistently with the rules on procedure, on the dumping determination, and on the injury determination. Finally, when the EC imposed provisional anti-dumping measures, it further tainted the proceeding by acting inconsistently with Article 15 of the ADA. The Regulations imposing provisional and definitive anti-dumping duties on bed linen from India are thus irretrievably tainted with violations of the ADA and should never have been imposed.

7.2 As a second note the seriousness of these anti-dumping duties may be considered. Notably, the EC's interpretation and application of Articles 2.2 and 2.2.2[240] led to dumping margins where

[240] This is without prejudice to the other claims made by India in this submission.

there either should have been none, or only very moderate ones. All dumping margins for India except one[241] can be fully attributed to the excessive and for Bed Linen completely unreasonable profit margin of over 18 per cent that was used in the constructed normal values.[242] The high dumping margins led to anti-dumping duties up to 24.7 per cent for the sampled companies and 24.7 per cent for non-co-operating companies.

B. REQUESTS

7.3 For the above reasons India respectfully requests the Panel to:

1) find that the EC has acted inconsistently with the ADA as per the claims above and which can be summarised as follows:

- The initiation of the proceeding against Bed Linen from India by the EC is inconsistent with Articles 5.3 and 5.4 of the ADA;

- The initiation of the proceeding against Bed Linen from India by the EC is inconsistent with Article 12.1 of the ADA;

- The EC neither initiated nor conducted its anti-dumping proceeding against Bed Linen from India in accordance with the provisions of the ADA and therefore the initiation and the consequent application of a definitive anti-dumping measure violates Article 1 of the ADA;

- The imposition of provisional and definitive anti-dumping measures by the EC on Bed Linen from India is inconsistent with Articles 2, 2.2, 2.2.2, 2.2.2(ii), and 2.4.2 of the ADA;

- The imposition of provisional and definitive anti-dumping measures by the EC on Bed Linen from India was inconsistent with Articles 3, 3.1, 3.4, 3.5, 3.6, and 6 of the ADA;

- The imposition of provisional and definitive anti-dumping measures on Bed Linen from India by the EC was inconsistent with Articles 12.2, 12.2.1, and 12.2.2 of the ADA.

- The imposition of provisional and definitive anti-dumping measures on Bed Linen from India by the EC was inconsistent with Article 15 of the ADA.

7.4 Accordingly, India respectfully requests that the Panel

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[241] The dumping margin for Anglo-French.

[242] All six other dumping margins for India did not exceed 17 per cent. Clearly, any use of a 'reasonable' profit margin (*i.e.* any profit margin lower than the excessive 18.65 per cent), such as had been suggested countless times during the proceeding, would have led to lower dumping margins.

2) Recommend that the EC bring Regulation No 2398/97 of 28 November 1997 imposing a definitive anti-dumping duty on imports of cotton-type bed linen originating in, *inter alia*, India into conformity with the ADA and GATT 1994; and

3) Suggest that, in the light of the numerous outcome-decisive violations of the ADA, the EC immediately repeal the Regulation imposing definitive anti-dumping duties and refund anti-dumping duties paid thus far.

ANNEX 1-2

REQUEST FOR A PRELIMINARY RULING BY INDIA

(11 April 2000)

India herewith respectfully requests a preliminary ruling of the Panel with respect to certain purported documentary evidence provided by the European Communities (EC) in its First Written Submission. India refers to Exhibit EC-4 of the submission of EC: the document titled ***"Summary of declarations of support (per country) to industry complaint in EC anti-dumping proceeding."***

India wishes to note, for the record, that this document has never been made available to India, or otherwise referred to, at any stage prior to this point in time. In particular, the EC has never mentioned or referred to this document during the course of the anti-dumping investigation, nor during the consultation phase preceding the request for establishment of the present Panel.

India recalls that the standing has been a central issue throughout the anti-dumping investigation leading to the imposition of anti-dumping duties on cotton-type bed linen from India, and later, during this dispute settlement proceeding. At each stage the Indian exporters, and later the Indian Government, have requested clarifications from the EC as to how the standing requirements of the Anti-Dumping Agreement (ADA) had been met. Despite this, the EC has never before produced Exhibit EC-4, nor made any reference to its existence, nor produced the "*number of exchanges in the process of verification of standing*" to which footnote 1 of Exhibit EC-4 refers. In addition, Exhibit EC-4 appears to contradict some of the (written) information provided by the EC in the course of the administrative proceeding and in the context of this dispute settlement proceeding.

For these reasons, India respectfully requests that the exact status of Exhibit EC-4 be established, namely: when it was finalized, for what purpose. In the light of the above, India considers that it has good cause, in accordance with paragraph 13, to request this preliminary ruling at this stage.

ANNEX 1-3

RESPONSE OF INDIA TO PRELIMINARY RULINGS
REQUESTED BY THE EUROPEAN COMMUNITIES

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2. "That India's claim regarding Article 3.4 is dismissed because India has failed to clearly identify this issue in the request for the establishment of the Panel in violation of Article 6.2 DSU" 277

3. "That India's Claims 2, 5, 8 (in part), 9, 11 (in part), 12, 15 (in part), 17, 19 (in part), 21, 24, 27, 29 (in part), and 30 are excluded from the scope of the proceedings." 278

4. "That the verbatim reports of the consultations submitted as evidence by India are inadmissible and will be disregarded" 279

5. "That the document submitted by India as Annex 49 is not part of these proceedings" 279

India understands that the EC is seeking five preliminary rulings in paragraph 46 of its first submission. In accordance with point 13 of the working procedures India would like to respond as follows to the EC's request for preliminary rulings:

1. "That India's claims regarding Article 1, Article 3.6 and Article 6 are dismissed"

1.1 As regards Article 1 of the Anti-Dumping Agreement (ADA), India accepts that it has not made any separate claims. Article 1 is a general provision requiring Members to abide by the provisions of the ADA while applying GATT Article VI and in conducting anti-dumping investigations. Therefore, India considers that a finding of violation of Article 1 of the ADA automatically follows from the inconsistencies with the other Articles of the ADA and Article VI of the GATT 1994. In India's view Article 1 of ADA does not therefore need to be mentioned separately in the request for consultations since the rights of defense of the EC have in no way been prejudiced;

1.2 As regards Article 3.6, India has included the entire Article 3 in its request for establishment of the Panel. Therefore, Article 3.6 is within the terms of reference of the Panel. However, in a spirit of co-operation India does not seek a ruling from the Panel on Article 3.6;

1.3 As regards Article 6, India assumes that the EC is referring to claim 14 and claim 16.

1.3.1 As far as claim 16 is concerned, India does not agree that this claim be dismissed. According to India it has been absolutely clear ever since the administrative procedure, the request for consultations, the discussions during the consultations, and the written procedure during the consultations, that India has been concerned with the EC's actions as regards Articles 6.10 and 6.11. Indeed, from the discussions during the consultations the claims under this Article were not unknown to the EC at all. Claim 16 is linked to India's claims regarding the selection of the sample in connection with Article 3. Accordingly claim 16 in the First Submission could not

have been a surprise for the EC and directly follows from claim 15. Claim 16 forms part of the context of the provisions that have been violated.[1] Moreover, India does not consider that the EC's rights of defense to have been infringed at all. In this regard India also refers to the ruling of the Appellate Body in the proceeding concerning Korean Safeguard measures on Dairy products[2] at 131: The EC has in the present case not demonstrated that its ability to defend itself in the course of the Panel proceedings has been prejudiced. On the contrary, the EC has had ample time and opportunity to respond to this claim, especially since the alleged inconsistencies were pointed out in detail during the consultation process;

1.3.2 As far as claim 14 is concerned, it is clarified that this claim forms part of an argument in support of claim 13 and addresses a further aspect of the matter.[3] It is recalled that claim 13 was explicitly mentioned in paragraph 15 of the request for the establishment of the Panel;

2. "That India's claim regarding Article 3.4 is dismissed because India has failed to clearly identify this issue in the request for the establishment of the Panel in violation of Article 6.2 DSU"

2.1 India rejects the suggestion of the EC that India has failed to clearly identify a "claim" under Article 3.4 in its request for the establishment of the Panel. India assumes that in light of paragraph 11 of the EC's submission, the EC is in paragraph 46 only referring to claim 19. *I.e.*, India assumes that the EC is not referring to India's claims 11 and 15. If that were the case, India would strongly object to such contentions since these claims were clearly identified in paragraphs 15 and 14, respectively, of the request for the establishment of the Panel.

2.2 As far as India's claim 19 itself is concerned, this claim was clearly identified in paragraph 13 of the request for the establishment of the Panel. Paragraph 13 of the request for the establishment of the Panel clearly mentions *"Contrary to the wording of Article 3 [and especially Article 3.5] of the ADA . . ."*. Clearly, the reference to Article 3 includes Article 3.4. The word 'especially' does not exclude other sub-paragraphs of the Article, which are also at issue for the claim in question. India also refers to the Appellate Body Report in *Bananas,*[4] which held that it is sufficient to mention Articles [for example, Article 3]. It is therefore not necessary to cite each paragraph or sub-paragraph, or each claim thereunder, of an Article.

2.3 Moreover, India also refers to the ruling of the Appellate Body in the proceeding concerning Korean Safeguard measures on Dairy products[5] at 131. In this ruling the criterion was espoused whether it had been demonstrated that the ability to defend itself in the course of the Panel proceedings had been prejudiced. Since the EC itself has commented in substance and in detail on claim 19 in its section V.12, paragraphs 343 through 350, the EC has in fact explicitly demonstrated that its rights of defense have *not* been prejudiced.

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[1] Panel Report in *United States – Anti-Dumping Act of 1916*, 31 March 2000, WT/DS136/R at 6.22 through 6.28. At the very least, claim 16 forms part of an argument in support of the specific claim mentioned in paragraph 14 of the request for the establishment of the Panel and addresses a different aspect of the matter.

[2] Appellate Body Report in Korea – Definitive Safeguard Measure On Imports Of Certain Dairy Products, 14 December 1999, WT/DS98/AB/R.

[3] *See also* Panel Report in *United States – Anti-Dumping Act of 1916*, 31 March 2000, WT/DS136/R at 6.22 through 6.28.

[4] Appellate Body Report in EC – Regime for the Importation, Sale, and Distribution of Bananas, 9 September 1997, WT/DS27/AB/R.

[5] Appellate Body Report in Korea – Definitive Safeguard Measure On Imports Of Certain Dairy Products, 14 December 1999, WT/DS98/AB/R.

3. "That India's Claims 2, 5, 8 (in part), 9, 11 (in part), 12, 15 (in part), 17, 19 (in part), 21, 24, 27, 29 (in part), and 30 are excluded from the scope of the proceedings."

3.1 As a preliminary remark India notes that while it has made certain arguments regarding the provisional Regulation it has always been clear that the definitive Regulation is the specific 'measure' at issue [see paragraph 2 of First Submission of India]. The fact that the definitive Regulation is the measure at issue does not limit the nature of arguments and claims that can be made. India notes that the EC posits in footnote 9 that *"in accordance with EC law and practice, aspects of the text of the provisional regulation are adopted by references in the definitive regulation. In so far as there is any difference between the texts of the two regulations, that of the definitive regulation prevails."* India shares this view and as there is agreement between the parties, this view automatically entails that aspects of the provisional regulation can be challenged in the context of the definitive regulation:

- Therefore, India does not seek a ruling from the Panel on claims 2, 5, 9, 12, 17, 21, 24, 27, and 30, it being understood that the EC's view expressed in footnote 9 entails that aspects of provisional Regulation endorsed at the definitive stage, can be challenged in the context of the definitive Regulation;

- India strongly disagrees to exclude claim 11 [even in part]. The claim itself clearly only relates to the Definitive Regulation [although the text of India's first submission may include discussion of aspects of the Provisional Regulation where there is no difference between the Definitive and Provisional Regulation]. As pointed out by the EC in its footnote 9, the text of the Provisional Regulation is endorsed in the Definitive Regulation and is therefore not different at the definitive stage. The *arguments* may still relate to the Provisional Regulation since the claim itself is clearly directed at the definitive measures. Finally, and in any event, as the AB noted in *Guatemala-Cement "This requirement to identify a specific anti-dumping measure at issue in a panel request in no way limits the nature of the claims that may be brought concerning alleged nullification or impairment of benefits or the impeding of the achievement of any objective in a dispute under the Anti-Dumping Agreement.";*[6]

- India strongly disagrees to drop claim 15 [even in part] for the same reasons mentioned directly above [India's response to EC's request for preliminary ruling on claim 11];

- India agrees not to seek a ruling on claim 8 as regards the infringement of Article 3.6;

- India does not agree to exclude claim 19: As mentioned under point 2 above, paragraph 13 of the request for the establishment of the Panel clearly identifies Article 3 and this also includes Article 3.4.

- India does certainly not agree to exclude claim 29. Claim 29 relates to the EC's obligations towards developing country Members and was clearly identified in the request for the establishment of the Panel. India deplores that even at this stage the EC is trying to evade its obligations towards developing country members, as unfortunately also happened throughout the entire administrative proceeding. Article 15 is important to India and to all developing countries. The fact that arguments in the context of claim 29 may relate to the provisional measures as far as the timing element is concerned does not mean that aspects of the provisional measure cannot be challenged in the context of the definitive measure. Claim 29 is therefore maintained;

[6] Appellate Body Report in Guatemala – Anti-Dumping Investigation Regarding Portland Cement From Mexico, 2 November 1998, WT/DS60/AB/R.

4. "That the verbatim reports of the consultations submitted as evidence by India are inadmissible and will be disregarded"

4.1 As a preliminary observation India stresses the absolute accuracy of the verbatim reports which were drafted by two authors taking notes and were subsequently proof-read by members of the Indian delegation present during the consultation process. These reports are therefore neither unreliable nor pointless at all. Indeed, most aspects of the consultation process as recorded in the reports can also be found back in the written answers of the EC. While it is perhaps unusual to present verbatim reports as an Exhibit in a First Submission, India was left with no other choice: the reports bear witness to the lack of respect on the part of the EC for the basic objective of the consultation process, which is to seek an amicable solution. India therefore disagrees with the EC's requested ruling number 4.

5. "That the document submitted by India as Annex 49 is not part of these proceedings"

5.1 India disagrees. The EC's position would imply that documents that were not published could not serve as evidence, even though they were communicated to interested parties and formed the basis for EC determinations;

5.2 Secondly, India notes that ex point 3 of the working procedures, all information submitted to the panel shall be kept confidential. Point 3 also provides that nothing shall preclude a party to a dispute from disclosing statements of its own position to the public, which in fact has not happened in this case;

5.3 Last, the allegation of breach of confidentiality is not at issue because the document submitted by India as Exhibit 49 is submitted with the explicit written approval of the producer concerned [see India Exhibit-81];

5.4 In light of the above, the question of breach of confidentiality does not arise and India respectfully submits to the Panel to dismiss the ruling requested by the EC;

5.5 Respectfully, India would also take this opportunity to briefly comment on a view espoused by the US in its third party submission on this issue. In footnote 2 the US states that it " . . . is of the view that it is not clear that this document demonstrates any inconsistency on the part of the EC." In the opinion of India however, the inconsistency is clear. When comparing the calculations of Annex 49 and paragraph 3.158 of its first submission, the respective columns "dump total" and "dumping result" are the equivalent of each other. In the calculations of Annex 49 however the "dump total" serves as the numerator for the determination of the dumping margin and thereby effectuates the genuine weighted average comparison. In paragraph 3.158, however, one "extra step" is performed before effectuating the comparison and calculating the dumping margin. This "extra step" is the zeroing of the amounts of negatively dumped models. This extra step, not foreseen in the ADA, therefore distorts the genuine weighted average comparison. When compared with the Bed Linen-II proceeding, Annex 49 therefore demonstrates different applications of the weighted average calculation methods between various proceedings; in the view of India this shows an inconsistency on the part of the EC.

Note: India does not comment on possible other rulings requested but not explicitly specified in paragraph 46. India reserves its rights to comment on any other rulings requested but not specified in paragraph 46 and its silence on such possible other requests should not be taken as acceptance.

ANNEX 1-4

ORAL STATEMENT AND CONCLUDING REMARKS OF INDIA

FIRST MEETING OF THE PANEL

(10-11 May 2000)

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Preliminary Rulings Requested by EC

India refers to its written answers as provided last Friday, 5 May 2000 which set out its position in detail.

Nevertheless, India welcomes this opportunity to briefly comment on the EC preliminary rulings requested by EC. India has noticed that at most points in time, rather than replying to the substance of arguments raised, the EC side-tracks into generalizations and deviates attention from the core of India's arguments.

As an example of this side-tracking, India would like to highlight the example of Article 1. EC has requested a dismissal of India's claim under Article 1. However, it is India's view that this Article lays down a general principle as indicated by its title. It obligates Members to conduct anti-dumping investigations in accordance with the provisions of the ADA and to apply AD measures in accordance with GATT Article VI. Even if this Article were not specifically mentioned in an anti-dumping panel request, violation of any ADA provision automatically constitutes a breach of this Article as well. In this light, the EC's argument is moot.

Other examples concern Articles 2, 3.4, 6, and 15, each alone and in conjunction with Article 12. The EC is not entering into a specific debate, as it had ample opportunity to do, but rather trying to avoid the issues.

Detailed arguments on these Articles and their respective claims will be set forth in India's first Oral Statement as regards substantive matters.

Preliminary Ruling Requested by India

India first of all objects to the assertion that its claim is inadmissible. India is not merely expressing its lack of understanding. Instead, India has posed two specific queries as regards the status of the document Exhibit EC-4: *when was it established* and for what purpose. India requests the Panel to use its investigative powers to establish a conclusive reply to these questions.

The date of establishment of the document is important since the EC communicated in writing on 29 June 1999 [Exhibit India-14] in its answers to the written questions by India that "only those companies which showed express support for the complaint . . . were considered as complainants . . . and included in the non-confidential standing file." Other declarations that were not considered in the standing determination were not placed on the file.

By contrast, the EC now suggests in recital (99) of its First written submission, that it has relied on data *of the eight French producers which were not on file* to reach the 34 per cent which it says to have relied on for initiation [EC recital (100)].

The information now contained in Exhibit-EC-4 is therefore contradictory if it was relied upon at the time of determination of standing. And this document cannot have been relied upon for the standing determination if it was established after 29 June 1999.

For similar reasons India also objects to the suggestion of the EC that the document does not contain new evidence: at no point in time prior to the EC submitting Exhibit-EC-4 to the Panel did India know of the inclusion of the declarations of support of eight French producers in the standing

determination, which were never included in the non-confidential file in the first place. In view of the above, the EC must clarify the following:

What is the status of the document? In case the document only summarizes ["recapitulative table"] the level of support for the complaint amongst the producers then why are there no details concerning the production output of each producer, which presumably formed the basis for the country-wise sub-totals?

When was Exhibit EC-4 finalized [date] and for what purpose.

Substantive Issues

I. INTRODUCTION

1. India wishes to extend its sincere appreciation to you all for the difficult task ahead. Some of the claims in the case before you are complicated and may require much of your time and efforts in the coming months. Others are relatively straightforward. We offer you our full co-operation.

2. In the course of this oral statement, we will summarize and explain our claims. We will also orally present a first rebuttal of the arguments made by the EC in its first submission to the Panel.

3. Our oral statement is divided into six parts:

- Background of the case (II);
- Initiation claims (III);
- Dumping claims (IV);
- Injury and causation claims (V);
- Developing country status claims (VI); and
- Explanation claims (VII).

4. As we have already submitted our comments on the EC's request for preliminary rulings in writing, we will not at this stage reiterate these comments.

5. As a last observation in this introductory part, we wish to bring to your attention that India is aware that two previous GATT panels (Swedish steel and Mexican cement) which held against the importing country authorities on initiation claims, did not address the other claims made by the exporting countries in these disputes, on the ground that the defective initiation constituted a fatal error which could not possibly be repaired and was therefore outcome-decisive. These holdings were correct under the GATT system and equally apply under the WTO system. However, the dispute settlement framework of the WTO involves an additional dimension: the appeals procedure before the Appellate Body. With this in mind, if the Panel agrees with India, as we hope it would, on any of the initiation claims or other outcome-decisive decisions[1], India requests that the Panel nevertheless also rule on the other claims pursued by India in this proceeding, in case the EC were to appeal the outcome-decisive findings of the Panel.

[1] But decisions which could be overturned by the Appellate Body on appeal.

II. BACKGROUND OF THE CASE

6. Allow us to recall, Mr Chairman, that the matter under dispute was in fact the second anti-dumping proceeding targeting *Bed Linen* from India. The first *Bed Linen* proceeding had to be terminated due to lack of co-operation on the part of the EC producers. In fact, this second *Bed Linen* proceeding may also be viewed from the larger perspective of four other cases brought by the European trade association *Eurocoton* , all of which were terminated due to defects of some sort which surfaced during these respective proceedings. These cases are commonly referred to as: *Synthetic Fabrics, Cotton Fabrics, Unbleached Cotton Fabrics I,* and *Unbleached Cotton Fabrics II*. India firmly believes that even this *Bed Linen II* should have been terminated if the EC had acted consistently with the rules of the ADA. India has been involved in a large number of anti-dumping investigations initiated by the EC. However, at no point has India been so firmly convinced that the rules of the Agreement have been so repeatedly and systematically violated and the results so unfair as in this *Bed Linen II* proceeding.

7. Paramount standing problems were ignored and/or not addressed. It appears that the EC was determined to " find" dumping and did so by using an extravagant profit margin of over 18 per cent and by using questionable calculation techniques in the "weighing process." Most of the obligatory injury factors to be examined were systematically ignored. Those injury factors that were relied upon were chosen from various sources, depending on the preferred outcome. On this basis it was then assumed that imports during the preceding years were also dumped and had also caused injury. Finally, in applying measures, the EC chose to ignore the repeated pleadings from India that, notwithstanding the serious deficiencies of this proceeding, it was prepared to explore constructive remedies.

III. INITIATION

1. Article 5.3: No 5.3 examination (Claim 23)

8. India recalls that the *Bed Linen* II complaint was a so-called back-to-back complaint, which was filed 20 days after the previous case had been terminated because of withdrawal by *Eurocoton* of its first *Bed Linen* complaint. Although not stated in the notice of termination, the immediate reason for the withdrawal of the *Bed Linen I* complaint was an overwhelming lack of cooperation from the EC industry (up until the termination of the case on 10 July 1996), as was clear from the non-confidential file. This was known by all, a fact which is also evident from the third party submission filed by Egypt. India considers that, against this specific background, the obligation upon the EC to examine the accuracy and adequacy of the evidence in the application was all the more acute.

9. India strongly rejects the argumentative statements by the EC that India is arguing for an ‘eccentric ’ interpretation of the word ‘examine’ [point 54] or that its interpretation of the word ‘examine’ is ‘so vague as to be useless’ [point 49].

10. The situation is much more straightforward than that. It is clear from the very text of the EC’s notice of initiation, that there was no examination whatsoever. This simply is a fact. It is recalled that the relevant part of the EC notice of initiation states that:

> *"It is further alleged that the volume and prices of the imported products have, among other consequences, had a negative impact on the quantities sold and the prices charged by the Community producers, resulting in substantial adverse effects*

> *on employment and the financial situation of the Community industry."* [Emphasis added].

11. From the plain meaning of this statement, and juxtaposed with the preceding paragraph in the notice of initiation which stated that *"the complainant alleges and has provided evidence" [emphasis added]* on other matters, it is crystal clear from the record that the EC did not examine this aspect *at all*.

12. In this connection India also rejects the statement contained in paragraph 55 of the first submission of the EC where the EC claims that *"The Community authorities . . . have no interest in initiating investigations that are likely to fail for lack of evidence reached a positive conclusion."* It is ironic to read such bold statements when India had recently been subjected to *Synthetic Fabrics, Cotton Fabrics, Bed Linen I*, *all of which* failed exactly for lack of evidence.

13. The EC did not examine whether the volume and prices of the imported products had, among other consequences, had a negative impact on the quantities sold and the prices charged by the Community producers, resulting in substantial adverse effects on employment and the financial situation of the Community industry. Rather, the EC accepted these allegations at face value and chose to initiate on that basis.

14. The Article 5.3 examination must be clear from the (published) record of the proceeding, *i.e.* the notice of initiation. The EC cannot hide behind the fact that, in addition to the fact that examination is required, the notice of initiation should also contain information on six specifically enumerated factors. These factors under Article 12.1.1 are clearly different and should *follow* the examination [Article 12.1: '*When the authorities are satisfied'*].

15. Indeed, to the extent that the EC claims that it did in fact examine the evidence [paragraphs 68-70] -- although the EC implicitly acknowledges to have failed to publish the result of these findings -- India observes that the EC's statements are confusing if not contradictory:

- Paragraph 68 mentions that the previous investigation might have indicated that injury did not occur, in which case this information would not be material;

- However, in paragraph 69 the EC states that the previous investigation did contain indications that there was injury, and therefore did help to take the decision to initiate [paragraph 70].

16. It therefore appears that evidence has only been examined to the extent that it may have pointed towards injury, an establishment of the facts which can hardly be said to be 'unbiased and objective'.

17. For these reasons, India requests the panel to rule that there was no examination by the EC of the allegations in the application that the volume and prices of the imported imports had, among other consequences, a negative impact on the quantities sold and the prices charged by the Community producers resulting in substantial adverse effects on employment and the financial situation of the Community industry.

2. Article 5.4: Defective standing determination (Claim 26)

18. As a factual matter, India objects to the EC's insinuation[2] that India had suggested that EC officials falsified records and deceived the exporters in a fraudulent attempt to demonstrate that they complied with WTO rules. However, two facts stand out:

- The non-confidential file, supposedly containing the producers' declarations of support, was only made available nearly four months after the initiation of the proceeding.

- The file contained copies of faxed declarations of support from which the fax headers had been removed, preventing interested parties in the proceeding from objectively judging and acknowledging the proper chronology of events.

19. India notes that, to this day, the EC has not contested these facts and has at no stage attempted to give any explanation.

20. To the contrary, and making matters even worse, India now notes a new fact emanating from the EC's first submission. In that submission, the EC has now provided a new document Exhibit EC-4 suggesting that, in addition to the declarations that *were* contained in the non-confidential file, there had been *other* declarations from eight French producers which were taken into account to determine standing. These eight declarations were never made available in the non-confidential file. This newly offered evidence appears to be in direct contradiction with the second written reply of the EC during the consultation process: *" Only those companies which showed express support for the complaint . . . were considered as complainants at the stage of initiation, and included in the non-confidential standing file. Certain declarations of "passive support", also received before the initiation, were not considered in the standing determination, and therefore not placed on the file."* [Emphasis added; Exhibit India-14, page 263].

21. It should be noted moreover that, as a factual matter, it remains extremely doubtful whether the 25 per cent threshold was ever met:: 34 per cent[3] minus the eight French producers which were never on record leaves a mere 26.7 per cent. From this 26.7 per cent one must remove three producers, whom the EC did not accept as belonging to the 'Community Industry'.[4] If these three producers merely represented 0.6 per cent each[5] even then the 25 per cent test has not been met.

22. Turning now from the factual to the legal aspects of India's claim, India recalls that there were three types of entities involved:

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[2] EC first submission, at paragraph 83.

[3] Assuming, for the sake of argument, that the total production of all producers in the EC is not higher than the figure used by the EC in its calculations.

[4] The 35 which, according to the EC's own words, are also the same companies as those that brought the complaint); *See* rec 52 jº rec 57 PR, jº point 308 EC first submission jº list of 35 producers handed over during process of consultations. The three produces not belonging to these 35, according to EC, are Foncar (Portugal), Luxorette (Germany), and Erbelle (Germany).

[5] In view of absence of producer-specific output in EC Exhibit-4, India is prevented from checking the actual impact that the exclusion of these three producers has had on the standing determination. However, the five Portuguese producers allegedly represented 12.7 per cent which at a simple average would imply 2.54 per cent for Foncar. The 11 German producers allegedly represented 8.7 per cent, which at a simple average would imply 1.58 per cent for Luxorette and Erbelle. Together these three producers would represent 4.12 per cent, which, if subtracted from the 26.7 per cent brings the alleged support to merely 22.58 per cent.

- *Eurocoton*, the European trade association, initially allegedly representing 38 or 53 per cent of bed linen production [page 3 of the complaint is ambiguous (India Exhibit-6, page 80)];

- *National associations*, members of *Eurocoton*;

- *Producers* allegedly represented by Eurocoton and, now, allegedly accounting for some 34 per cent [See EC Exhibit-4].

23. India recalls that Article 5.4 requires a *determination*, before initiation, that domestic *producers* expressly supporting the application account for at least 25 per cent of total domestic production. GATT panels (Swedish steel; Mexican cement) have consistently held that the failure to properly determine standing before initiation is a fatal error which cannot be cured retro-actively later on in the proceeding.

24. The declarations of support in the non-confidential file came partially from the producers identified in the complaint and partially from national textile industry associations, in the case of France, Spain and Austria, acting on behalf of producers in their countries.

25. Firstly India contends that it is unacceptable under Article 5.4 that European or national trade associations issue declarations of support to themselves: the declarations of support must emanate from individual producers, according to the plain meaning of Article 5.4 and according to the obvious purpose behind Article 5.4: the prevention of the filing of frivolous complaints. India recalls that Article 5.4 contains clear language as to whose support is to be taken into account: *"the degree of support for, or opposition to, the application expressed by domestic producers of the like product."* Alternatively, if the group of producers is very large, the footnote to Article 5.4 offers the alternative of sampling. India notes that the EC chose not to invoke this available possibility of sampling in this case.

26. To be sure, India does not contest, and has never contested, that a trade association can file an application on behalf of its members. However, India recalls that the support for the application must be *expressed* by *domestic producers.* The EC interpretation that a trade association can issue support declarations to itself defeats the very purpose of Article 5.4, and this all the more so because, according to the EC's interpretation of Article 5.3, the authority does not even have to examine the accuracy and the adequacy of the evidence in the complaint.

27. Secondly, India therefore respectfully requests the panel to use its investigative powers to determine whether the declarations of support from the producers [and, for completeness' sake, the national textile industry associations] were received by the EC *prior to the initiation* of the proceeding, as is required by Article 5.4. India stresses that this is an outcome-decisive issue and that in the EC system of confidentiality of information [and the *ad hoc* removal of the fax headings in this case], India as of today is not in a position to establish the exact chronology of events.

28. The above two points raised by India are very straightforward; the EC, however, obfuscates their simplicity by side-tracking into discussions about degree of proof[6], and interpretation of the term 'on behalf of'.[7] In the view of India, these discussions are beside the point.

[6] EC first submission, at paragraphs 84-89.
[7] EC first submission, paragraphs 90-97.

29. To the extent that it is suggested that Article 6 should be considered in the determination of standing, India rejects these suggestions. Article 6 explicitly deals with issues *'throughout'* the investigation, *i.e.* explicitly after the standing determination has been made and after the proceeding has been initiated. At issue here however is what the authorities must do *prior to the initiation of the proceeding*.

IV. DUMPING

30. Let us now turn to dumping issues: As regards the dumping calculation India recalls that there are three Articles that are at the core of the dumping claims: Article 2.2, Article 2.2.2 (ii), and Article 2.4.2.

1. Article 2.2: The profit must be '*reasonable'* (Claim 4)

31. At the heart of the claim as regards Article 2.2 is the question whether the principle of 'reasonable' is an over-arching requirement, instructing the whole of Article 2.2, or whether any profit determined in accordance with the further specifics of Article 2.2.2 is *in se* reasonable?

32. India is strongly convinced that a profit arrived at under the methods foreseen under Article 2.2.2 is *not automatically* reasonable. The word 'reasonable' in the chapeau of 2.2 instructs the whole Article as an independent requirement, both as regards the method and its result. India categorically and strongly denies the EC 's suggestion that the methods in 2.2.2 (i) and 2.2.2 (ii) are 'evidently formulae that produce reasonable solutions' [paragraphs 181]. Indeed, what if the EC had calculated a profit of 1000 per cent for one producer--would this also automatically be reasonable?

33. Let us also have a look to the facts at hand. The Indian producers have always maintained--and this fact has never been challenged by the EC--that Bombay Dyeing is a peculiar company in India possessing an established position in the market for over one-hundred years. The facts of the case bear this out. By way of illustration, however, India herewith wishes to show some photographs as well as sample evidence which bear out this statement.

34. India rejects the contention that no evidence was ever presented witnessing that the profit of Bombay Dyeing was anomalous. Countless times during the proceeding has this patent fact been brought to the attention of the attention of the EC.

35. In this connection India also rejects the EC' s brushing off of India's argument that a profit is unreasonable simply because it is higher than that obtained in other countries [point 188]. The point is not and has not been that the profit so determined for India was a bit higher than in other countries [implied by EC paragraph 188]. The point was that the profit determined for and used in the calculations for India was three times higher than that of any other profit found to exist in the proceeding.

36. As regards EC's paragraph 190 India first of all rejects the statement that "India does not attack the methodology adopted by the EC authorities." It is clear that the second argument of the first claim of India, pertaining to Article 2.2.2(ii), challenges the EC's very methodology [III.A.4.2 of India's first submission] of determining profit based on profitable sales only.

37. The EC then obfuscates the issue between a normal profit "incurred and realized" and the profit "calculated and determined" for dumping purposes. In this connection India recalls that the three respective profit margins of Bombay Dyeing were *overall* 4.66 per cent, 12.09 per cent

"*incurred and realized* on Bed Linen", and 18.65 per cent "*determined* on profitable sales only of Bed Linen". Now that the EC argues that this 18.65 per cent profit of Bombay Dyeing was perfectly representative [paragraph 190], it may be recalled that the quantity of its profitable sales was *only half* of its total domestic sales [page 374 India Exhibit-24].

38. Indeed, the EC even states that there is "nothing to suggest that other companies selling in India could not have obtained profits similar to those of Bombay Dyeing" [Point 190]. India points out that it was the EC itself which refused to include Standard Industries, which along with Bombay Dyeing was the largest seller on the domestic market, in the main sample [paragraphs 3.9, 3.10, 3.11, 3.12, and 3.13 of India's first submission]. From the very beginning India's suggestions in this regard were not taken into account.

39. Moreover, to suggest that the inclusion of data of another producer would have had little effect [again paragraph 190] is not borne out by the facts. As the EC knows, Bombay Dyeing and Standard Industries were the largest sellers on the domestic market [see India's first submission paragraph 3.3]. Since the EC failed to investigate Standard Industries, its potential impact is unknown.

40. India recalls one important precedent from the Panel Report on Audio Tapes in Cassettes. In that report the Panel held at paragraph 393 that it "did not consider that an amount for profit was by definition reasonable simply because [it met the relevant criteria]".[8] Although that Panel Report was not adopted at the time, India nevertheless considers its logic instructive and convincing.

41. Finally, India recalls the EC's own observations in paragraphs 135 through 152, most explicitly 152. In these paragraphs the EC suggests and stresses that the basic principle stems from the *chapeau* of Article 2.2 [paragraph 152] and that Article 2.2 seeks to avoid outcomes that would be distorted [paragraph 145]. Clearly, when the EC considers that the *chapeau* should override the sub-paragraphs for the 'ordinary course of trade' principle, it cannot suddenly take a different view when it comes to the notion of 'reasonable' which is at least as basic as the former.

2. Article 2.2.2: Incorrect application (Claim 1)

42. In relation to Article 2.2.2 there are three arguments that have been put forward:

- The text of Article 2.2.2 (ii) itself is evidently in the triple plural: weighted average, amounts, and exporters or producers;

- The text of Article 2.2.2 (ii) itself mandates the use of amounts "incurred and realized" and not amounts "determined";

- Option (ii) follows option (i).

43. As regards the first argument of this claim India does not deny that, in general terms, words in the plural could sometimes contain references to the singular as well. In this connection India has never meant to defy common sense. However, India believes that the text of Article 2.2.2(ii) is very explicit in referring to a *triple plural*. Moreover, in the current case the interpretation of Article 2.2.2(ii) allowing the use of one peculiar producer has led to a result which clearly is

[8] Copy of relevant part attached as India Exhibit-81.

"unreasonable" both in terms of Article 32 of the Vienna Convention, as well as in terms of the hierarchically superior Article 2.2.

44. India also wonders how it is possible that a result arrived at under a method categorized under option (ii) could be reasonable when, if the same calculation method would have been used but categorized under option (iii), the result would have been considered illegal [because it exceeds normally realized profits of all other producers].

45. As far as the second argument concerning amounts "incurred and realized" are concerned, India first of all objects to the suggestion that it has not considered the context, object and purpose of the provision [EC paragraph 135]. However, it is clear from the Vienna Convention that the terms of a treaty in its ordinary meaning are the first source of interpretation. India has therefore rightfully considered the text of the provision.

46. Indeed, to improperly graft the concept of "ordinary course of trade" onto Article 2.2.2 (ii) has several flaws as a matter of treaty interpretation:

- First the initial sentence of Article 2.2.2 chapeau explicitly includes the concept "ordinary course of trade." This first sentence of this *chapeau* however is grammatically distinct from the second sentence that serves as the *chapeau* for the remainder of this provision. The concept "ordinary course of trade" is therefore not properly considered to be part of the remaining text of this provision. This is different from the concept of 'reasonable' which does not form part of the *chapeau* of 2.2.2, but is an overarching concept engraved in Article 2.2 and thereby instructing the whole of Article 2.2;

- Second, the drafters of Article 2 were quite careful to insert the concept "ordinary course of trade" in precisely those places where they intended the concept to apply. The decision not to include the concept in Article 2.2.2(ii) must therefore be given meaning when interpreting this language;

- Third, the EC's interpretation gives no significance to the important distinction between the language and the option set forth in Article 2.2.2 *chapeau* based on "actual data" and the language of the option set forth in Article 2.2.2(ii) based on "actual amounts incurred and realized".

47. The EC tries to bolster its own flawed interpretation by providing two hypothetical scenarios in paragraphs 145 and 146. In paragraph 145 no amounts for profits are realized so it is hard to see how in the absence of profits these amounts [nil?] could be used.

48. In paragraph 146, the EC provides a hypothetical example which firstly suggests that if for other producers an amount for profits is used that is lower than that of 'company A', it would automatically imply that this is unreasonable. This implied reference to the 'perverse' end-result [because it would be lower than the amount for producer A in question] contrasts unfavourably with the EC's stubborn unwillingness to re-consider the extreme profit of over 18 per cent for Bombay Dyeing, which resulted from the EC's actual interpretation and application of Article 2.2.2(ii).

49. Secondly, if indeed the actual text of 2.2.2(ii) would be applied to the facts at hand, the result is not as bizarre as paragraph 146 of the EC submission seeks to suggest. Suppose that, for other producers the EC would indeed have properly applied 12.09 per cent profit [the amount *"incurred and*

realized"] instead of 18.65 per cent, the dumping margins could in similar vein be expected to have been approximately 6.56 per cent lower, as follows:

Anglo-French:	18.1 per cent;
Bombay Dyeing:	7.7 per cent [not affected];
Madhu:	10.4 per cent;
Omkar:	7.6 per cent;
Prakash:	Nil.

50. Clearly the above result would have been more 'reasonable' than the current *"bizarre"* [see EC recital 144] dumping margins which resulted from the imputed 18.65 per cent profit.

51. In sum, it would appear that the EC has acted contrary to Article 2.2.2 on the above counts.

3. Article 2.4.2: Incorrect interpretation of all weighted average export transactions; main rule and exceptions cannot be mixed (Claim 7)

52. India reiterates its concern that allowing the offset within models but not between models contradicts the plain meaning of Article 2.4.2. The EC's interpretation disregards the word 'all' in the context of 'all comparable export transactions.' 'All' is apparently taken to mean by EC practice only the transactions that are dumped, not those transactions involving models that are not dumped.

53. Moreover, India respectfully submits that the alternative option contained in Article 2.4.2 allows the authorities to compare a weighted average normal value with individual export prices, in case of a 'pattern of export prices.' Such pattern could exist, for example, in a case where three models would appear very much dumped while two would appear very much non-dumped. However, in the view of India, the ADA does not allow the mixing of the main rule and the invocation of the exceptions. Either the main rule is applied or the exceptions are invoked on the basis of an explicit finding of existence of a pattern of export prices.

54. As far as Article 2.4.2 is concerned, India considers the arguments of the EC unconvincing. The fact remains that no genuine 'weighted average' on the export side is being effectuated: while normal value is always considered at the 'weighted average' level, the 'export prices' are sometimes 'zeroed' and therefore not considered at their 'weighted average' level.

55. The 'eccentric' interpretation of the EC which for certain models imputes 'zero' instead of 'weighted average' is tantamount to skewing the proper weighted average by essentially adjusting some prices, but not others.

56. The offsetting of dumped with non-dumped transactions within models [*intra*-model offsetting], but not between models [*inter*-model zeroing], is also illogical as shown in the Annex to this Statement.

57. The spirit of the provision should also be kept in mind. Article 2.4.2 was introduced in the Uruguay Round of negotiations to address specific concerns, including the fact that exporters should not be put in an unfair situation due to skewed calculation techniques, and to effectuate a genuinely fair comparison as per Article 2.4.

58. Finally, India further rejects the introduction by the EC of Article 9.4, which deals with the duty for the non-sampled co-operating exporters. It is clear that it is not the sampling duty

calculation, but the operation of Article 2.4.2 which is the Article towards India's claim is directed. The fact that a sampling duty could under certain specific circumstances be higher by the exclusion of zero or *de minimis* dumping margins is not at issue. No claims have been raised with respect to Article 9.4. Indeed, as the EC points out in the first sentence of paragraph 209: "The process of determining a (single) dumping duty from these margins is a separate one, which does not fall within the express terms of Article 2.4.2.".

V. INJURY

1. Article 3.1: Failure to examine only dumped transactions (Claim 8)

59. India considers that the failure of the EC to examine dumped transactions only for the purpose of the injury determination in the Bed Linen II proceeding is inconsistent with Articles 3.1, 3.2, 3.4, 3.5 of the ADA.

60. India first of all objects to the suggestion by the EC that India's interpretation has *"moved beyond complexity into confusion"* [paragraph 221]. In this connection it is unfortunate that the EC is quoting selectively from the Vienna Convention: There is a real question here stemming from the discernible plain meaning of the language of the Article: the words "dumped imports" have been referred fifteen times in Article 3 alone.

61. If the EC authorities find that some imports are dumped and others are not, then they must distinguish between the two while making the injury determination. In this connection India disagrees with the statement that *"it is not possible to isolate the effects of individual transactions in a single product market. The market situation is determined by the overall impact imports"* [*sic*, recital 227]. Based on the detailed dumping calculations it must have been clear to the EC how much of the Indian exports had been dumped.

62. India further disagrees with the suggestion that the ASCM contains a parallel provision in this context [paragraph 231]. Dumping is by its nature company-specific and can therefore clearly differ between companies within a country while subsidies stem across the board from the Government. [This is not to say that for other purposes there could not be parallels between the ASCM and the ADA].

63. In short, allowing some *"dumped"* imports to taint all imports from a company and, indeed, a country skews, the fundamental injury analysis of Article 3. The core analysis of Article 3.1 and 3.2 requires the assessment of the volume and price impact of *"dumped"* imports only.

2. Article 3.4: Failure to evaluate all factors (Claim 11)

64. The EC failed to evaluate all injury factors mentioned in Article 3.4 of the ADA for its determination on the state of the domestic industry. Particularly, the EC did not evaluate the following twelve [of eighteen] factors:

- Productivity;
- Return on investments;
- Utilization of capacity;
- Factors affecting domestic prices;

- The magnitude of the margin of dumping;
- Actual effects on cash flow;
- Potential negative effects on cash flow;
- Inventories;
- Wages;
- Growth;
- Ability to raise capital;
- Ability to raise investments;

Thus the EC acted inconsistently with Article 3.4.

65. Firstly, India would like to recall the intrinsically contradictory nature of the defences put forward [paragraph 249] by the EC against this claim from India. At the outset the EC suggests that it has evaluated all the factors. Simultaneously however the EC also claims [EC's third line of defense] that such evaluation of all factors is not necessary. A defense which is irrelevant in case the EC had evaluated all factors.

66. Secondly, India is perplexed by the statement contained in EC submission at paragraph 262 that it is apparently up to the exporters to suggest factors to the EC which it otherwise might forget to evaluate and examine. Apparently the EC believes that the Indian exporters should have *guessed*, before imposition of measures, that the EC was only going to rely on *two* injury factors in its examination. For that reason the exporters should, on the basis of such speculative *guesswork*, have pointed out to the EC that there are at least 16 other factors which are relevant under the ADA and should be examined.

67. In this connection India recalls that the purposes of Article 3.4 is to ensure an unbiased and objective injury analysis, which is mandatory as per the Article. Evaluation of the factors is required in every case, although such consideration may lead the investigating authority to conclude that a particular factor is not probative in the circumstances of a particular industry and therefore is not relevant to the particular determination.[9]

68. Similarly, the Panel in *Korea Resins* concluded that the investigating authority could not focus solely on factors supporting a conclusion that the domestic industry is encountering difficulties, while disregarding other factors.[10]

69. Contrary to what the EC seems to suggest in its paragraph 289, the Panel in *HFCS* did not make its decision based on simplistic reliance on an inappropriate precedent. As the third party submission of the United States emphasizes, the parties to that dispute fully argued the issue to the panel, citing GATT anti-dumping determinations such as *Korea Resins*.

70. Article 3.4 specifies the 18 relevant factors and indices which shall at least be evaluated to examine the impact of the dumped imports on the domestic industry. Moreover, this list is not

[9] *Mexico--HFCS,* WT/DS132/R, 28 January 2000.
[10] *Korea-Resins*, ADP/92 and of 2 April 1993.

exhaustive. The EC observes in paragraph 265 that *"to insist that the listed factors must be evaluated in all circumstances, would be to require the evaluation of a factor that has already been found to be irrelevant, which is nonsense"*. However, this reasoning is illogical: how can investigating authorities determine that a factor is not relevant if it is not examined/evaluated? How can interested parties know that the authority has evaluated such factors, if nothing is published. In EC's logic, investigating authorities should first determine on which relevant factors/indices they will rely upon, and then examine only their importance. Such an approach makes a mockery of Article 3.4.

71. Regarding the EC's observation in paragraph 274 that *"the domestic producers are the best, and sometimes the only source of information on the factors relevant to injury"*, India questions the accuracy of this statement. The statement is hard to reconcile with the EC's practice in the Bed linen proceeding where three 'levels' were examined depending on the factor in question as described in paragraph 62 of the provisional Regulation, confirmed by the definitive Regulation.

72. As far as the EC's argument regarding 'or' is concerned [EC paragraph 282], India recalls that Article 6.3 of the Tokyo Round ASCM was virtually identical in wording, and contained exactly the same 'or' issue.[11] In fact the EEC argued in Brazil--CVD on Milk:

> *"125. . . . that in carrying out an objective examination required under Article 6:1 of the Agreement, the investigating authorities were obliged to consider the criteria and indicators laid down in Articles 6:2 and 6:3. Therefore, an essential element of a review of whether a determination of material injury was in conformity with the standard of Article 6 was an examination of whether the factors set forth in Articles 6:2 and 6:3 had been properly considered, though Article 6 did not prejudge the weight to be assigned to each factor.*[12] *However, in this case, the data on the elements contained in Article 6:3, such as on consumption, market shares, production or prices, had not been provided by Brazil at the time of its definitive determination. Moreover, despite the EEC having had earlier requested data on these aspects from Brazil, the first time the EEC received such data was when Brazil submitted the information on these aspects to the Panel."* (Emphasis added).

The EC thus advocated exactly the same interpretation as is being argued by India in the present case. The EC's present defense therefore is simply not credible.

3. Article 3.4: Picking and choosing of the domestic industry for injury determination (Claim 15)

73. The first submission of India contains three arguments showing the inconsistency in the injury determination:

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[11] "The examination of the impact 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 such as actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investment and, in the case of agriculture, whether there has been an increased burden on Government support programmes. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance."

[12] [Footnote in original]: To support its point that the question of whether the determination of injury was based on positive evidence was distinct from the question of the weight to be accorded to the facts before the investigating authorities, the EEC cited the report of the panel on "United States - Salmon", paragraph 260.

- The EC explicitly determined that the domestic industry consisted of 35 companies [the complainants according to the EC], but relied in its injury determination on companies outside this group of 35;

- The EC chose a sample from the domestic industry, but it did not consistently rely on it;

- The EC chose to rely on different 'levels' of industry for different injury indices without any apparent reason other than goal-oriented 'picking and choosing of injury'.

74. India maintains that the arguments put forward by the EC do not refute the claims made by India in its First Submission *at all*. Moreover, India objects to the newly introduced concept by the EC [as far as we understand it] that within one and the same single investigation a Member may use either of the alternative definitions of the domestic industry contained in Article 4.1 of the ADA, suited to its needs. Such innovative 'right' of picking and choosing the most desirable definition whenever a choice is available runs contrary to the concepts of consistency fairness and predictability. One may also wonder how such innovative approach fits with Article 17 (6) (i) which provides that establishment of the facts must be proper and the evaluation must be unbiased and objective.

75. In paragraph (57) of the provisional Regulation, subsequently endorsed, the EC noted that:

> *"The remaining 35 companies, which cooperated with the enquiry and are located in France, Germany, Italy, Spain, Portugal, Austria and Finland, represented a major proportion of total Community production in the investigation period. <u>These companies were therefore deemed to make up the Community industry under the terms of Article 4 (1) of the basic Regulation.</u>"* (Emphasis added).[13]

76. In paragraph 317 of its first submission the EC reiterates that its finding of injury is not based on the EC producers as a whole but on the Community industry. For this purpose the EC quotes recital (40) of the Definitive Regulation. The Definitive Regulation refers back to the sample companies. The sample however contained at least one company [Luxorette] that does not belong to the Community industry. The EC is therefore contradicting itself: how can EC say that it is not looking outside the Community industry when, for the purpose of analyzing the situation of the Community industry, It has relied on a sample which consists of companies not part of the Community industry?[14]

77. In paragraph 318 of its first submission the EC suggests that "India's arguments appear to rest on the notion that all factors . . . must indicate injury." For the record, India denies having ever relied on such notion.

78. As regards the sampling, India maintains that once the EC selected a sample from the domestic industry, it was not entitled to subsequently deviate from that sample in order to find injury.

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[13] This finding was confirmed in paragraph 34 of the definitive Regulation. If--notwithstanding this explicit determination--other companies were also part of the domestic industry, the provisional and definitive Regulations suffer <u>at least</u> from an Article 12 problem.

[14] The German company Luxorette formed, at least according to the Provisional Regulation, part of the 17 sampled producers. This company Luxorette however did <u>not</u> form part of the 35 producers comprising the Community industry, at least according to the list of 35 producers provided in writing during the consultations. [Furthermore, two more companies formed part of the original sample of 19 producers. Both companies did later no longer belong to the sample; one of these however did continue to form part of the Community Industry.]

India notes that the EC does not deny having looked at information outside the sample. India rejects the implications put forward by the EC [paragraphs 326-327] that once it had selected a sample it could still use information outside the sample if available. Such approach distorts the very purpose of a sample and cannot, contrary to what the EC suggests in its paragraph 327, be considered 'unbiased and objective' at all.

79. As regards the 'picking and choosing' of the preferred level in order to establish injury India notes that the EC does not deny the facts as summarized by India. Indeed, the EC even seems to acknowledge that it has used various injury factors from the preferred level so long as this would support an injury determination. India underlines that such an approach cannot be considered unbiased and objective by any stretch of imagination.

4. Articles 6.10 and 6.11: No statistically valid sampling (Claim 16)

80. As pointed out in its response to the preliminary rulings requested by the EC, India is of the opinion that its claim regarding sampling is duly before the Panel because the rights of defense of the EC have not been impeded, as these claims were discussed during entire course of the proceedings and the consultations.

81. India underlines that for a sample to be statistically valid it must fairly represent the entire underlying population from which the sample was taken. India contends that to take a sample only from the pool of the complaining domestic producers does not meet the requirements of a 'statistically valid' sample. Alternatively, however, in case the sample is supposedly taken to represent only the Community industry, *i.e.* the complaining producers as the EC seems to argue, then it should not have contained companies from outside that industry.[15]

5. Dumped imports before I.P. (Claim 19)

82. India considers the assertion of the EC contained in its paragraph 343 where it now denies having ever considered as "dumped" all imports of bed linen from India in the years preceding the investigation period as factually incorrect. In this connection India recalls, to give just one example, paragraph 67 of the provisional Regulation, endorsed by the definitive Regulation, which states:

> *"dumped imports from the three countries concerned increased from 33,825 tonnes in 1992 to 46,656 tonnes during the investigation period i.e. an increase of 12,831 tonnes or 38 per cent. During the same period their market share increased from 16.9 per cent to 25.1 per cent"* [emphasis added].

In the light of this India is surprised to read paragraphs 344 and 345 of the EC's first submission, which contradict its statements in the Official Journal on this point. Clearly, India is not 'in confusion' at all [EC paragraph 345] but is merely relying on the text of the published Regulation.

83. Accordingly, India reiterates that the EC practice to automatically consider as *'dumped"* all imports of bed linen from India in the years preceding the investigation period, is inconsistent with Article 3.4. In particular, EC could not attribute the alleged closures of the 29 companies in the period from 1992 up to the I.P. to the *"dumped imports"* during the I.P., since these imports occurred only after the alleged company closures.

[15] The company Luxorette was part of the sample but did not belong to the Community industry.

84. Second, the statements contained in paragraphs 346 through 350 contradict and try to explain away the EC's very own injury analysis as published in the Official Journal. In this connection India refers for example to recitals (91) and (92) of the Provisional Regulation, maintained in recitals (40) and (41) of the Definitive Regulation. The statements now made by the EC in its first submission, alleging for example that India's arguments are "misplaced" [paragraph 348], are completely contradicted by the published statements in the Official Journal.

6. Article 3.5: No consideration of other factors (Claim 20)

85. India believes that the EC acted inconsistently with Article 3.5 by automatically considering all imports of bed linen from India in the period 1 January1992 - 30 June 1995 as *"dumped"* and thereby causing injury *"through the effects of dumping"*.

86. For the same reasons as explained by India above under claim 19, the statements of the EC contained in paragraph 352 are not borne out by the facts. The Regulations imposing provisional and definitive duties are clear and form the basis on which this dispute is to be adjudicated. The clear language of these Regulations cannot be waived away by suggestive statements that India's claim is based on a *"misunderstanding of the EC's practice"* [EC paragraph 354].

VI. ARTICLE 15: NO DEVELOPING COUNTRY STATUS (Claim 29)

87. India briefly recalls the objective of Article 15 ADA. This specific Article of the ADA tries to take care and addresses the different market mechanisms applicable between the various countries in the world. For this purpose "special regard " ***must*** be given by developed country Members to the "special situation" of developing country Members.

88. Unfortunately however the EC chose to ignore this Article altogether. The EC did not explore any possibility for any constructive remedy at all and did not even take the trouble to address requests made by Indian exporters throughout the proceeding. During the consultations, the EC replied that the EC had in fact accorded special treatment to Indian exporters in three manners:

- Simplified questionnaires;
- Acceptance of responses beyond stated deadlines;
- Individual treatment of newcomers.

In its first submission, India has proven this alleged "special treatment" to be factually incorrect. Moreover, as already pointed out by India in its first submission: even if the EC would have done so these would not have constituted constructive remedies. Accordingly the EC did not pursue its earlier arguments in its first submission.

89. Instead the EC now argues that the Indian exporters missed the deadline for offering an undertaking. Again, unfortunately, this statement is factually incorrect, as India Exhibit-72 shows.

90. Furthermore, Article 15 clearly puts the initiative for exploring constructive remedies with the importing country authority, as the third party submission of Egypt also argues.

91. India regrets that the EC has completely and blatantly ignored its obligations under Article 15. The issue does not only affect India, but all developing country members alike, all of whom are looking with anticipation to the Panel ruling on this important issue.

VII. ARTICLE 12.2.2: NO/INSUFFICIENT EXPLANATIONS (CLAIMS 3, 6, 10, 13, 18, 22, 25, 28, AND 31)

92. Those familiar with anti-dumping and injury determinations in other jurisdictions, notably the United States and Canada, are often surprised at the scarcity of information provided in public determinations issued by the EC authorities. Contrary to, for example, the practice of the Commerce Department in the United States of addressing specific comments raised by parties in a section following the findings of the authorities, determinations in the EC are full of standard phraseology (see notably notices of initiation) and summaries of selective EC findings.

93. The EC tries to brush aside the concerns raised by India on the ground that the importing country authorities have discretion to decide which matters of fact and law, arguments and claims are *relevant* within the meaning of Article 12.2.2 and that the arguments made by the Indian exporters in the course of the proceeding were not relevant. Obviously, such line of reasoning would give the administering authorities *carte blanche* to reproduce only supposedly 'favorable' findings and to simply ignore arguments adverse to its case. Such interpretation is illegal and unwarranted and constitutes a violation of Article 17.6 (i).

94. Furthermore, the structure of India's first submission, which was designed on purpose to show the close linkage between key arguments and insufficient explanation by the EC, negates the EC's apparent conclusions that India' s claims and arguments were irrelevant for purposes of application of Article 12.2.2. The following table shows once more that on each of India's substantive claims, the EC provided either no or extremely cursory information on public record:

Substantive claims	Explanation claims	
1-Article 2.2.2	3	Recital 18 addresses only 1 of 3 arguments, and very summary
4-Article 2.2 reasonable	6	Recital 18 does not address claim
8-All imports dumped	10	Not addressed
11-3.4 factors	13	Not addressed
15-3.4 picking and choosing domestic industry	18	Four arguments raised not addressed
20-Pre-IP imports	22	Not addressed
23-5.3 examination	25	Not addressed
26-5.4 standing determination	28	Not addressed
28-15-developing country	31	Not addressed

95. To sum up, the explanation in the definitive Regulation, which incorporates parts of the provisional Regulation suffering from the same defects, was self-serving and the EC failed to address virtually all of the claims and arguments made by Indian exporters in the proceeding. In view of this systematic and repeated pattern of ignoring claims and arguments made by Indian exporters in the proceeding, India requests the Panel to send a strong message to the EC: that self-serving explanations which do not address the claims and arguments made by exporters in the course of the proceeding do not meet the standards of Article 12. The most recent example of non-transparency of

EC proceedings is the reluctance, even today, to give the exact date of exhibit EC-4 and producer specific data in that exhibit.

ANNEX ON EC INTERPRETATION OF ARTICLE 2.4.2

Situation 1: One Model A

Date	Normal value	Export price	Difference
1 May	50	50	0
10 May	100	100	0
20 May	150	150	0
30 May	200	200	0

Agreed between all Members:

Weighted average-to-weighted average:

125 (50+100+150+200/4) – 125 (50+100+150+200) = 0

Situation 2: Four different models A, B, C, D:

Date	Normal value	Export price	Difference
1 May-Model A	50	50	0
10 May-Model B	100	100	0
20 May-Model C	150	150	0
30 May-Model D	200	200	0

Inter-model zeroing:

[India's method: Weighted average-to-weighted average: 125-125=0]

Transaction by transaction-to-transaction by transaction:

[Model A: 50-50=0
Model B: 100-100=0
Model C: 150-150=0
Model D: 200-200=0]

EC method, as applied in *Bed Linen*: Weighted average normal value to transaction by transaction export price

Model A: 125-50=75
Model B: 125-100=25
Model C: 125-150=-25=0
Model D: 125-200=-75=0
100/500x100=20 per cent

The EC has managed to find a dumping margin of 20 per cent

Concluding Remarks

Mr. Chairman, the complexity of the legal and factual issues involved in this case are by now no doubt clear. Yet, despite this complexity and the fact that the case was initiated nearly four years ago, all that the Indian exporters targeted in this proceeding have sought, has been the right to fairly and properly defend their interests as envisaged in the Anti-Dumping Agreement. Unfortunately, Mr. Chairman, from the time of initiation, through to the provisional and definitive findings and during the consultation process, it has been exactly this expectation of fairness, transparency and accountability which has been totally denied to the Indian exporters, by the EC authorities.

The ADA imposes an obligation on investigating authorities to observe a minimum degree of transparency with respect to the methodology and evidence relied upon by the investigating authority; to provide access to meaningful *and timely* information on issues such as standing and injury; and, in the case of a developing country such as India, it also obliges the investigating authority to explore constructive remedies before the application of anti-dumping measures.

This has been provided to ensure that anti-dumping investigations are carried out in a fair and transparent manner, and so as to allow the targeted exporters a genuine chance to evaluate and comment upon the quality, accuracy and probative value of the evidence on the basis of which the investigating authority intends to make its determination

Unfortunately, this was not done. On several key, outcome-decisive elements, EC's approach to the whole matter has been somewhat reminiscent of the phrase 'you'll just have to take our word for it.'

For instance, was there sufficient support among the EC producers to justify the initiation of this case? Yes, according to the EC, but the exporters had to wait for four months following the initiation before the non-confidential file was shown to them. Why? We don't know. Did the EC satisfy itself that this support met the prescribed threshold and that it was expressed *by* the domestic producers *prior* to the initiation of the proceeding? Yes replied the EC but in spite of repeated requests did not produce the full copy of the faxed declarations of support, a practice they presumably follow in all anti-dumping investigations; did not give company wise production data; and did not include copies of expression of support from eight French companies in the confidential file, while enclosing all other similar expressions of support. And yet they say that the prescribed threshold of support was met before the initiation of the investigation.

Did the EC examine the accuracy and adequacy of the allegations in the complaint prior to initiation? Yes, assures the EC and confirms that it read the complaint, and did apparently measure the allegations in the complaint against an internal, unknown standard of 'credibility.' Even though EC does not elaborate upon this standard of 'credibility' it argues that this so called examination apparently bridges the gap between mere conjecture or allegation on the one hand, and persuasive *prima facie* evidence on the other hand, which proves both the adequacy and accuracy of the complaint.

Did the EC examine *all* the injury factors mandated under Article 3.4 of the ADA? First the EC says that it is under no obligation whatsoever to examine all the listed injury factors, contrary to certain laid down jurisprudence. Later, it contends that it nonetheless undertook this exercise, first

determining, though we don't know, how what it considered 'relevant,' and then evaluating only those relevant factors- while at the same time continuing to affirm that it examined *all* listed injury factors.

Mr. Chairman, unfortunately, this is not an exhaustive list. EC appears to have carried this approach throughout the present proceeding.

Mr. Chairman, we sincerely believe that justice was neither done, nor seen to be done in this case. The ADA spells out the obligations which the investigating authority must adhere to, obligations which are designed to provide fairness, equity and transparency, obligations which are designed to protect the trade interests of developing countries. Unfortunately EC failed to meet its obligations. We ask the Panel to so find and to ensure that justice is finally done.

ANNEX 1-5

QUESTIONS FROM INDIA TO THE EUROPEAN COMMUNITIES AND THE UNITED STATES

(15 May 2000)

To the EC

1. The EC states at paragraph 38 of its First Oral Statement that *"even if, during the course of the investigation, information became available which caused the authorities to conclude that they had been mistaken regarding the sufficiency of the evidence for the purposes of the initiation decision, that would not in itself be a basis for halting the investigation."* In light of this statement, could the EC please clarify whether it agrees with the past panels (Swedish steel; Mexican cement) that have held that the failure to effect a proper standing determination is a fatal error which cannot be cured retro-actively?

2. In its paragraph 34 of its First Oral Statement the EC acknowledges that in fact it has considered *"information gained during a previous investigation on bedlinen."* Can the EC please provide details of this information that it considered?

3. Similarly, Can the EC provide details of the *"number of exchanges"* that took place in the process of verification of standing, as referred to in the Footnote 1 of EC Exhibit-4. Can the EC provide details of other similar *"exchanges*", if any, between itself and producers [or Eurocoton and/or national associations] in the period between the termination of Bed Linen-I and the initiation of Bed Linen-II?

4. In paragraph 41 of its First Oral Statement the EC implies to have relied on the 25 per cent test as the minimum required to determine standing. In view of the absence of any comments on the separate 50 per cent test, and India's Exhibit-79, is it factually correct that the EC did not in fact before 13 September 1996 consider the six Spanish companies not opposed to the initiation?

5. In paragraph 43 of its oral statement the EC explains that the arguments concerning the initiation were *"not relevant at the point at which they were posed."* Would the EC not agree that in the EC anti-dumping system it is not known when a complaint is filed and hence when a dumping case would be initiated? Could the EC indicate when the arguments should have been posed in order to have been considered relevant? Is it the EC's position that exporters should *"guess"* that a complaint has been filed and that a proceeding *"could"* start and that the only moment at which a comment is relevant is when such a *"guess"* is indeed made at the right moment?

6. As agreed during the first meeting with the Panel, the EC will submit the original faxed copies of the producers' and national associations' declarations of support so that the dates of receipt by the EC of the declarations of producers' support can be verified. In reply to the question by the Chairman of the Panel why the fax headers were removed, the EC stated that the fax headers had been removed to protect the – apparently confidential – fax numbers of the EC producers. However, this information (that is the telephone and fax numbers) was as it is to be supplied by the company expressing support. Could the EC therefore explain why the fax headers were removed?

7. Moreover, under the EC system of confidentiality of information, it is incumbent upon the party supplying confidential information, to simultaneously provide a non-confidential version thereof (Article 19.2 EC Basic Regulation) that is to be placed in the non-confidential file. Failure to do so by an interested party will lead the EC to use best information available (Article 19.3). Why then did

the EC, in violation of its own Basic Regulation and its standard practice, not follow this standard practice, and instead, of its own volition remove the fax headers?

8. Would the EC agree that in other EC anti-dumping proceedings it does not normally remove fax headers? Would the EC also not agree that in other EC anti-dumping proceedings the declarations of support are normally contained in an Annex to the complaint rather than being separately obtained and filed in a non-confidential standing file?

9. The European Commission maintains a 'chron-in' log in which all incoming correspondence is recorded. Could the EC indicate on the basis of this chron-in log when the faxed declarations of producers' support were received by the EC?

10. Exhibit EC-4, appended to the first submission of the EC, now indicates that the declarations of support from the eight French producers were submitted. However, these eight declarations of support were never in the non-confidential file on 8 January 1997. When did the EC receive the declarations of support from these eight French producers? Why were these eight declarations of support not included in the non-confidential file? Did the EC rely on these declarations of support during any part of the standing determination? Could the EC provide the original faxed copies of these eight declarations of support?

11. Paragraph 3 of the working procedures indicates documents submitted to the Panel shall be kept confidential by all. In light of this confidentiality requirement, why did the EC not disclose producer-specific production-output details of EC Exhibit-4? Can the EC provide the individual producer-wise production-output details, not contained in EC Exhibit-4, but forming the basis for the country-wide figures?

12. Can the EC confirm that the information on production output contained in Exhibit EC-4 was available at the time initiation and at the time of sample selection?

13. It has been argued that the German companies Irisette and Frankische Bettwarenfabrik are, respectively, a trader and a producer with production outside the EC. Can the EC provide an explanation on these assertions?

14. Why did it take four months from the date of initiation, for the EC to grant access to the non-confidential file?

15. The EC takes the position that the filing of an anti-dumping complaint by a trade association on behalf of domestic producers is in accordance with Article 5.4 ADA. Does the EC agree that the objective of Article 5.4 is the prevention of the filing of frivolous complaints? Would the EC agree that its position in this case may undermine that objective to the extent that it could occur that a trade association files a complaint which later turns out not to be backed by members of the association? Would the EC agree that this has in fact occurred in several EC anti-dumping proceedings?

16. Supposing, for the sake of argument, that the EC did *'examine'* as per Article 5.3 the adequacy and accuracy of the complaint. Can the EC confirm whether it shares the view that such examination should take place before initiation? Can the EC confirm that in this Bed Linen proceeding such examination indeed took place before initiation?

17. In paragraph 97 of its first written submission the EC acknowledges that support for (or opposition to) an application must be *expressed by domestic producers*. The EC then takes the position that the expressions of support from the domestic producers need not necessarily be expressed directly to the investigating authorities, but could be expressed to a trade association. India agrees with this argument. However, in examining standing, the authorities under Article 5.4 must *examine* the declarations of support of the domestic producers and it does not suffice to rely solely on

declarations made by trade associations. Would the EC agree that, while declarations of support may indeed be addressed/expressed to or channelled through a trade association, Article 5.4 obliges the investigating authorities to examine the declarations of the *domestic producers* before the initiation?

18. In paragraph 99 of its first written submission the EC states that *"on the basis of information they had received from various sources, the authorities estimated the total EC production in 1995 to be between 123,917 and 130,128 tonnes."* Could the EC divulge to the panel which sources are referred to here? Assuming that this information came from the complainants, would the EC agree that such information might be self-serving? If so, could the EC explain which steps it took to verify the accuracy of the data provided on total EC production?

19. Does the EC agree that the exclusion of sales below cost for Article 2.2.2(ii) purposes will by definition when not all sales are profitable lead to the calculation of a higher dumping margin than would otherwise exist?

20. At paragraph 57 of its First Oral Statement the EC states that "ordinary course of trade is part of the basic definition of dumping contained in Article 2.1". At its paragraph 69 the EC states that *"Article 2.2 enounces that . . . profit included in the constructed normal value must be 'reasonable'."* Could the EC please explain why under Article 2.2.2(ii), which contains neither the words *'ordinary course of trade'* nor the word *'reasonable'* only the concept of *'ordinary course of trade'* applies, and not the concept of *'reasonable'* [other than that such approach invariably leads to a higher dumping margin].

21. At its paragraph 73 the EC in the context of…asserts that *"India has presented no relevant evidence to that effect."* At countless times during the disclosure comments India has explained that 18+ per cent profit for Bed Linen is not reasonable, together with a variety of *prima facie* proof. Could the EC indicate what it means by 'relevant'? Were the arguments not relevant because they were posed at a wrong moment [such as suggested in paragraph 43 of its First Oral Statement]? Or was the evidence not relevant because it was not *"significant independent factor"* [such as in 253 of its First Written Submission]?

22. In paragraph 76 of its first oral statement the EC suggests that the profit margin of Bombay Dyeing calculated in the ordinary course of trade was representative beyond question because all of its sales nearly reached 80 per cent of the domestic market. Would the EC not agree that nearly half of the sales of Bombay Dyeing were loss making and that the profit margin so established was based on the profitable sales only?

23. At paragraph 78 of its first oral statement the EC states that *"the 'zeroing' practice . . . is not covered by Article 2.4.2."* This view is repeated in paragraph 79 of its oral statement where the EC states that *"'zeroing' took place only at the subsequent stage of combining the dumping margins determined for each type in accordance with Article 2.4.2 into a single dumping margin. That stage of calculation, however, is not subject to Article 2.4.2."* In light of these assertions could the EC please indicate, in the alleged absence of the applicability of Article 2.4.2, what Article of the ADA covers the zeroing practice and what Article covers of the ADA covers the *'subsequent stage'* of determining a *'single dumping margin'*?

24. The EC in paras. 144-148 of its first written submission tries to show with theoretical examples that the method advocated by India leads to *"absurd"* and *"perverse"* results. Would the EC not agree that in the real life situation presented by the case at issue the only reason why the EC was able to find significant dumping for all Indian exporters other than Bombay Dyeing and Anglo-French was through its use of an 18.64 per cent profit margin, which itself was largely the result of the inflation of the real profit margin of Bombay Dyeing through exclusion of all below cost sales?

25. The EC in paragraph 156 of its first written statement tries to create the impression that one of the reasons why it prefers to use Article 2.2.2(ii) over Article 2.2.2(i) is to accommodate difficulties experienced by interested parties, in particular small companies. It is India's experience that exporters prefer use of their own data (method 2.2.2(i)) over use of other producers' data, particularly in EC anti-dumping proceedings, because under the EC system of confidentiality of information, method 2.2.2(ii) completely precludes companies from checking the dumping margin calculations of the EC (because the SGA and profit data of the other producer(s) used are considered as business proprietary). India appreciates the EC's apparent concern for small exporters, but has never seen any concrete evidence of this concern, either in the present anti-dumping case or in other EC anti-dumping cases. Could the EC produce such evidence?

26. The Article 2.2.2(ii) option, especially after exclusion of sales below cost (as advocated by the EC), can lead to establishment of huge profit margins. Yet, the EC position is that any profit thus found is by its very nature reasonable. Suppose that a profit margin thus established would be 1,000 per cent; would this then be reasonable?

27. In paragraph 190 of its first written submission the EC states that where *"…one producer can have 80 per cent of its domestic market and make a profit of over 18 per cent while the numerous other producers ignore this market and devote themselves to exporting, may be an uncommon situation."* Does the EC agree that Bombay Dyeing did not in fact make 18.64 per cent profit on its domestic sales of bed linen, but that the 18.64 per cent profit quoted by the EC is the profit *established* by the EC after systematic exclusion of all domestic sales at a loss? Does the EC agree that the actual overall profit made by Bombay Dyeing on domestic sales of bed linen is only 12.09 per cent and its overall profit only 4.66 per cent?

28. Does the EC agree that Article 2.4.2 provides for a two step analysis under which a mixing of methodologies for establishing normal value and export price comes into play only in the second step, *i.e.* where there is a pattern of differing export prices? Does the EC agree that the first step of Article 2.4.2 does not allow such mixing?

29. Suppose that a producer has been found not to have dumped, would the EC include such producer's exports for the purposes of the injury determination? If so, does this not mean that the causal link between dumping and injury is broken because injury cannot logically be caused by a non-dumping producer?

30. If the EC persists in the argument that countries are dumping, then why has the EC on occasion initiated anti-dumping proceedings against specific producers (Orion and Funai) in a country (Japan)? Similarly why has the EC on occasion excluded specific dumping producers in a country from the injury determination (BASF: 23.1 per cent; Eastman Chemical: 9.9 per cent and Celanese Fibres: 9.2 per cent in Synthetic fibres of polyesters from the United States)?

31. If the EC persists in the argument that countries are dumping, then why has it on several occasions initiated company-specific reviews?

32. Similar to its First Written Statement [paragraph 309] the EC again presents its arguments concerning the permissibility of a double domestic industry definition within a single investigation [paragraph 135 First Oral]. In light of paragraph 308 of its First Written Submission and the statements during the First Meeting with the Panel can the EC confirm that it only used one of the permissible definition during the Bed Linen proceeding?

33. In paragraph 221 of its first written submission, the EC posits that the ordinary meaning proposed by the EC is straightforward. But would the EC not agree that the EC's reading of the term *'dumped imports'* renders the word *'dumped'* obsolete, and this throughout the entire Article 3?

34. Could the EC confirm that the theory of the *"found not to be a significant independent factor"* has been advanced for the first time in the first submission of the EC to this Panel? In other words, could the EC confirm that this theory has never before been communicated to the Indian exporters, either in the published Regulations or in any other communications to the Indian exporters?

35. Could the EC explain the *interconnection* (paragraph 253 EC's first written submission) between on the one hand the 7 factors it did evaluate, albeit at varying levels, *i.e.* actual and potential decline in sales, profits, output, market share, factors affecting domestic prices, employment and, on the other hand, the 11 factors it did not address anywhere, *i.e.* productivity, return on investments, utilization of capacity, magnitude of margin of dumping, actual and potential negative effects on cash flow, inventories, wages, growth and ability to raise capital or investments?

36. Does the EC interpret the word *relevant* in Article 3.4 as providing unlimited discretion to the administering authority to unilaterally determine which factors it considers relevant and to then base its injury determination on those factors only?

37. Does the EC agree that in an ASCM case (Brazil-milk) the EC itself argued that the comparable ASCM provision should be interpreted as requiring an evaluation of *all* injury factors listed in the comparable provision?

38. Does the EC agree that its position taken in paras. 271 to 277 of its first written statement, would encourage domestic producers to provide information only on the factors that are beneficial to their case, as apparently happened in the bed linen case?

39. Would the EC agree that the company Luxorette was part of the sample? Would the EC also agree that Luxorette was not one of the 35 companies which were determined to make up the domestic industry? Would it be therefore correct to conclude that in any event EC relied on at least one company not part of the domestic industry for its injury finding?

40. Can the EC explain whether the sample was established before, after, or simultaneous with the date on which the Community Industry [the 35 producers] were established? More specifically: can the EC provide the dates on which it established the Community Industry and the EC sample (of 17 producers)?

41. Could the EC provide any support for its contention in paragraphs 309 and 332 that *"a member may use both definitions of the domestic industry in the course of a single investigation"*?

42. Would the EC agree that it only referred to trends of all EC producers or the complaining producers (as opposed to the sampled producers) where this benefited its conclusion that there was injury? Would the EC agree that this approach can be described as 'picking and choosing'?

43. In paragraph 325 of its first written statement the EC states that *"India does not explain in what way the EC could have, but did not, take account of data concerning exporters not part of the sample nor what difference this would have made*." Would the EC agree that India explained this in great detail in Section III.A.1, paras 3.2 to 3.13, of its first submission to the Panel and that this statement is therefore factually incorrect?

44. The EC acknowledges in paragraph 349 of its first written submission that the Regulation imposing definitive duties repeatedly referred to companies that ceased production/disappeared in the years preceding the investigation period. As such statements were used to substantiate the finding of injury, does the EC then not agree that as a matter of pure logic, the EC is assuming that pre-investigation imports were also dumped because any other interpretation would break the causal link between dumping and resulting injury and the repeated statements would therefore be non-sensical?

45. Article 15 of the Agreement specifically indicates that 'special regard must be given by *developed country* Members to the special situation of developing country member when considering the application of anti-dumping measures'. It is therefore clear that the onus of exploring constructive remedies is on the *developed country Members*. Can the EC explain how it fulfilled this obligation?

46. The EC states in paragraph 80 of its first submission that the (Article 12.2.2 ADA) obligation on the Member concerned is to deal with *relevant* arguments and claims. Is it the position of the EC that a Member can then ignore arguments and claims made by interested parties on the simple ground that the Member unilaterally judges such arguments and claims not *relevant*?

To the US

1. In paragraph 19 of its Oral Statement made on 11 May, the US has stated that Article 15 of the Anti-Dumping Agreement "provides important procedural safeguards to developing countries". Could the US please explain and elaborate, on the basis of its own experience of implementing Article 15, what these important procedural safeguards are?

2. In paragraph 25 of its Oral Statement, the US has referred to the draft recommendations of the WTO Committee on Anti-Dumping Practices on the period of data collection for anti-dumping investigations. Would the US agree that these guidelines are only in the form of recommendations?

ANNEX 1-6

RESPONSES OF INDIA TO QUESTIONS
FOLLOWING THE FIRST MEETING OF THE PANEL

(18 May 2000)

Questions from the Panel for India

1.A At paragraphs 41-46 of its first oral statement, India seems to agree that the "reasonable" criterion, which it has suggested applies to the result of the calculations under Article 2.2.2 (i) and (ii), and which India asserts derives from Article 2.2, applies to the chapeau. Could India confirm whether the Panel's understanding of India's position is correct, that the test of "reasonableness" India is proposing applies to the chapeau of Article 2.2.2 as well as to the subparagraphs?

India confirms that this understanding is correct. The criterion of reasonableness, as laid down in Article 2.2 instructs the chapeau of Article 2.2.2 and its subparagraphs.

1.B Does India acknowledge that, as the proponent of the claim that the EC has violated Article 2.2.2 (ii) in its interpretation and application, India bears the burden of presenting a *prima facie* case on these questions.

India acknowledges this. In this connection India wishes to recall that in its view it *has* made a *prima facie* case at many instances during the proceeding, especially at the time of provisional disclosure comments, the hearings, as well as at the time of definitive disclosure comments.

For example, India has shown the profit in other countries to be three times lower, and the profit in the same general category on the domestic market to be much lower as well. In this connection India recalls the following paragraphs of its first written submission: paragraph 3.23, especially sub-paragraphs 3, 4, and 5; paragraph 3.24, sub-paragraphs 2 [B] and 3; paragraph 3.26, sub-paragraphs 2.3 and 2.4; paragraph 3.27, sub-paragraph 2.1; paragraph 3.28; paragraph 3.29; paragraph 3.30; paragraph 3.31; paragraph 3.32; and, as far as comments on the definitive disclosure are concerned, India Exhibits-34, 35, 36, 37, and 38.

2.A The Panel understood India to state, in responding orally to the Panel's questions during the first meeting, that the reasonableness test applies to the chapeau of Article 2.2.2, and that in the case of the chapeau, the reasonableness test is satisfied by the limitation to sales in the ordinary course of trade. Is the Panel's understanding correct?

The Panel is correct in its understanding that in India's view the test of reasonableness applies to the chapeau of Article 2.2.2 [see also paragraph 3.128 of India's First Written Submission]. India accepts that for the calculation of profit under the chapeau of Article 2.2.2 the authorities are indeed explicitly allowed to restrict themselves to sales in the ordinary course of trade. However, for the profit calculation under Article 2.2.2 (ii) no such restriction to the ordinary course of trade is envisaged.

This does not imply that *any* profit established under the method of Article 2.2.2 chapeau and Article 2.2.2 (ii) is automatically reasonable; for example, if a profit of 1,000 per cent would be established is this then reasonable? In the view of India not. However, what India would like to stress is that it is concerned that the profit of 18+ per cent calculated on the basis of Article 2.2.2(ii) for Bombay Dyeing was applied to all other producers.

2.B If so, could India explain why the limitation to sales in the ordinary course of trade under Article 2.2.2 (i) and (ii), which the EC applied in its calculation under Article 2.2.2 (ii) in this case, does not similarly satisfy any reasonableness requirement applicable to the sub-paragraphs of Article 2.2.2?

Sub-paragraphs (i) and (ii) explicitly do not contain the words "in the ordinary course of trade." The chapeau of Article 2.2.2 does contain such words. There is therefore a difference between the methods although both must lead to a reasonable result.

It appears therefore not correct that the same standard of reasonableness would apply to the chapeau and to the sub-paragraphs. In the situation under consideration, it is striking that a company such as Bombay Dyeing is achieving 18+ per cent on its sales in the ordinary course of trade as per Article 2.2.2 chapeau while it only incurs and realizes a 12 per cent overall profit on domestic sales of this product. But it becomes "unreasonable" when this 18+ per cent profit is subsequently extrapolated under Article 2.2.2 (ii) to all other sample companies [and none of which sold domestically], which are in a totally different league from the well-established premium company Bombay Dyeing.

Both the sub-paragraphs and the chapeau of Article 2.2.2 must produce reasonable results. However, to achieve this, the chapeau explicitly allows for an ordinary course of trade restriction, but the sub-paragraphs explicitly do not.

Accordingly the standards for reasonableness, as far as the different paragraphs are concerned, can also vary depending on the facts under consideration. More specifically a State-owned company such as Anglo-French with high labour costs would never be able to realize a profit of 18+ per cent. Bombay Dyeing's profit incurred and realised on Bed linen itself was 12 per cent; Anglo-French by contrast was, overall, loss-making, while the same category on the domestic market had a profit of 5+ per cent (*vide* paragraph 3.134 First Written Submission of India). Nevertheless, India reiterates that the 18+ per cent profit calculated for Bombay Dyeing *was after exclusion of sales below cost*.

3.A What, in India's view, is the difference between "actual data" and "actual amounts incurred and realized" -- don't both require consideration of real information to derive the amounts to be used for profit and SGA in constructing a normal value?

Firstly, it is correct that the first sentence of Article 2.2.2 chapeau stipulates that the amounts for SGA and profits shall be *based on* actual data, i.e. indeed consideration of real information to derive the amounts to be used for profit and SGA.

Secondly, it is also correct that the second sentence of Article 2.2.2 chapeau stipulates that, as an alternative method, the amounts may be determined on the basis of the weighted average of the actual amounts, i.e. consideration of real information to derive the amounts to be used.

Both possibilities therefore require consideration of real information to derive the amounts to be used. However, the "real information" from which the amounts are to be derived *has* been qualified in the first sentence of Article 2.2.2 chapeau: the real information on which such SGA and profits amounts are to be based is "actual data *pertaining to . . . sales in the ordinary course of trade*." [emphasis added] By contrast, the "real information" from which the amounts in the second sentence of Article 2.2.2 are to be derived are not subject to qualification: the real information from which the amounts for SGA and profits are to be derived are the "actual amounts incurred and realized."

In both instances [first and second sentence of Article 2.2.2 chapeau] the 'actual data pertaining to ordinary course of trade' as well as the 'actual amounts incurred and realized' form the basis for the determination of the SGA and profit. Both are ' real information' which form the basis

for SGA and profit determination. The difference in the view of India is that this "real information" has in the case of 'actual data' explicitly been qualified by the ADA to pertain to ordinary course of trade. In the case of 'actual amounts incurred and realized' this is specifically not the case.

3.B Is the Panel correct in understanding that India does not dispute that the profit rate for Bombay was properly calculated on the basis of actual data in accordance with the chapeau of Article 2.2.2?

This understanding is correct. Profit for Bombay Dyeing was based on actual data pertaining to the ordinary course of trade.

3.C Is the Panel correct in understanding that India does not dispute that the resulting profit level was "reasonable" because it was calculated on the basis of sales in the ordinary course of trade, in accordance with the chapeau of Article 2.2.2?

A profit that is calculated on the basis of sales on the ordinary course of trade as per the chapeau of Article 2.2.2 is not *ipso facto* reasonable. It is our view that the test of 'reasonableness' would *still* apply even for a profit calculated as per the method of Article 2.2.2 chapeau. However, contrary to sub-paragraph (ii) of Article 2.2.2, the chapeau itself contains the 'ordinary course of trade' restriction. With this in mind, while the test of reasonableness for profit under the chapeau of Article 2.2.2 still applies, it is perhaps somewhat easier to satisfy than in the case of Article 2.2.2 (ii). India also refers to its answer to question 5.A, *infra*.

The profit used for Article 2.2.2 (ii) was in the view of India definitely not reasonable. As pointed out earlier, this enormous profit calculated for a product such as Bed Linen was not normal (let alone reasonable) for any other company in or outside India.

Whether or not this same profit was reasonable for Bombay Dyeing itself is a different question. India takes the view that in this case it was at least permissible because it was calculated as per the explicit rules of the chapeau of Article 2.2.2. This does not take away the possibility that even a profit calculated under the method of the chapeau can under certain circumstances be unreasonable.

4. India seemed to suggest, at paragraph 44 of its first oral statement, that the profit cap under Article 2.2.2 (iii) must always be calculated, in order to assess the reasonableness of results obtained under Article 2.2.2 (i) and (ii). How is this suggestion consistent with India's view that the sub-paragraphs of Article 2.2.2 are hierarchical?

Article 2.2.2 has three main components. Firstly, the Chapeau is provides a general direction on how the SGA expenses and the profits can be calculated in a reasonable manner by basing these on actual data pertaining to production and sales in the ordinary course of trade. However, if this is not possible, paragraphs 2.2.2 (i) & (ii) provide specific alternative methodologies for calculating SGA and profits. These two sub-paragraphs constitute the second component of Article 2.2.2. In drafting the final component of Article 2.2.2, as contained in 2.2.2 (iii), the drafters evidently wanted to take care of a possible alternative methodology other than those specifically alluded to in sub-paragraphs (i) & (ii). It is important to note that this open-ended reference to the alternative methodology is subjected to the important proviso of reasonableness expressed as a cap on the profit. This was done so as to ensure that any alternative methodology should satisfy these conditions, just as the methodologies indicated in 2.2.2 (i) & (ii) were expected to fulfil. It is therefore India's firm conviction that even though the chapeau and sub-paragraphs of 2.2.2 are hierarchical, any methodology that is chosen to calculate SGA and the profits should satisfy the test of reasonableness expressed as cap on profit, as elaborated in 2.2.2(iii).

5.A The Panel understands India's argument on including Standard's data in the calculation of profit under Article 2.2.2(ii) as not relating to sampling *per se*, since India does

not challenge the establishment of the sample, but as suggesting that, for the profit amount calculation, the sample should have been "expanded" to include Standard, in light of the fact that Bombay's profit on sales in the ordinary course of trade was markedly higher than the available information concerning Standards profit rate. Is the Panel's understanding of India's argument correct?

The Panel's understanding is partially correct: the sample that was unilaterally imposed by the EC upon the Indian textiles industry has not been challenged. In fact it should be pointed out that the so-called 'reserve sample' [consisting of two reserve companies] *did include* Standard, and that the questionnaire response of Standard *was* duly available with the EC. The sample is therefore not challenged since the [reserve] sample did in fact include Standard.

Standard should have been included in the profit margin calculation. Clearly, this company was more representative than Bombay Dyeing and clearly it also had a significant amount of domestic sales. Whether or not the profit rate of Bombay Dyeing was 'markedly higher' could only have been determined if the questionnaire response of the reserve company, Standard, had been verified and further analyzed by EC. We have never suggested that Standard should have been included *solely* because it was likely to have a lower profit. Rather, we genuinely believe that Standard was more representative of the Indian industry, and that a sample containing both Bombay Dyeing and Standard would have been more representative. It is likely that the inclusion of Standard would have resulted in a lower margin of profit. However, the basic reason for the inclusion of Standard was that it would have made the profit more representative and would have resulted in a truly valid -- and indeed hopefully lower -- weighted average profit.

We feel that the inclusion of one more – *less anomalous and less peculiar* – company in the calculation of the profit would have resulted in a more representative and less 'peculiar' profit rate. Moreover such an inclusion would have done justice to the text of Article 2.2.2(ii) which provides for a weighted average, presumably to avoid exactly such results, as have been obtained in the current case, where a single peculiar company is allowed to contribute in its entirety to all dumping margins of the country.

The EC's current position to exclude Standard *ab initio*, because it could not have been relevant since it 'only' has 14 per cent domestic sales [as pointed out during the EC's First Oral Statement] is beside the point. Such approach resembles the EC's defence in other parts of this dispute: 'it is not relevant and *therefore* it will not be investigated.' How could Standard be judged not relevant without first analyzing its data?

5.B Does the information concerning Standard's profit rate which India considers should have been taken into account relate to all of Standard's sales of the like product, or only to sales in the ordinary course of trade?

Similar to its second argument with respect to its first claim [paragraph 3.78 *et seq.* of its First Written Submission] India considers that this should have been the profit pertaining to all sales. The reason is that according to India the profit should have been calculated in accordance with Article 2.2.2(ii) that is based on profit *incurred and realized* and not restricted to ordinary course of trade. India is not arguing that Standard should have been attributed its own dumping margin and that Standard should have been used to determine the weighted average dumping margin. India merely argues for compliance with Article 2.2.2 (ii) in that a genuine weighted average of actual amounts incurred and realized be used.

Nevertheless, *even if* the profit would have been restricted to sales in the ordinary course of trade only, it would still have addressed the separate basic concern that India has had all along with the EC's use of a profit margin of *one* peculiar producing exporter. In the view of India the use of one

or two companies' data and the use of all their sales or only their sales pertaining to the ordinary course of trade are separate arguments.

6. India's argument against zeroing relies on the language of Article 2.4.2 concerning weighted average prices. Assume, for the sake of argument, that a transaction-to-transaction comparison were used. There is no weighted average of prices in that case. Would zeroing still be prohibited? If so, why? If not, how would the overall dumping margin be calculated from the individual transaction margins? How is this different from the calculation of an overall margin from individual model margins?

As India has stated during the meeting with the Panel, to the best of India's knowledge and experience, the EC has never used a transaction-to-transaction comparison. During the third party meeting, the United States stated that it might use a transaction-to-transaction method, for example, in cases involving sales of capital equipment. Presumably, the United States would then compare domestic and export sales transactions made at, as nearly as possible, the same dates. In such a case, the dumping margin would therefore presumably initially be calculated transaction to transaction (unless there were several transactions effected on the same date).

However, to calculate the weighted average dumping margin for an exporter, weighted averaging would still need to take place in all cases where at least two export transactions at different dates were concerned. It is India's view that in such a case the text of Article 2.4.2 is distinct for a T-to-T comparison as compared with the text for a WA-to-WA comparison. The WA-to-WA method clearly admonishes a weighted average of all comparable export transactions, whereas the T-to-T method does not contain similar strong language. In light of this different language India considers it an open question whether zeroing would be permitted in the T-to-T method.

As regards some concerns expressed by the United States during its third party meeting with the Panel, India notes that the first sentence of Article 2.4.2 explicitly contains the words "during the investigation phase." Article 2.4.2 therefore does not necessarily address dumping margin calculation methods in connection with collection of anti-dumping duties in retrospective systems, such as the United States.

7.A Regarding India's Article 5.3 claim that the EC "failed to examine the allegations in the complaint", the Panel notes that India has not argued that the application did not contain information required under Article 5.2.

The Panel's understanding is correct and India confirms that it has not argued that the application did not contain information required under Article 5.2.

7.B Regarding India's Article 5.3 claim that the EC "failed to examine the allegations in the complaint", the Panel notes that India has not specifically argued that the EC erred in its determination that there was sufficient evidence to justify initiation.

India has argued that the EC erred in its determination that there was sufficient evidence to justify initiation. In paragraph 5.20 of its first submission India argued that the evidence provided in the application can in itself never be the only element to justify the initiation of an investigation. In this connection India cited from the relevant part of the Panel report of 19 June 1998[1] , where it was stated that *"Article 5.3 established an obligation that extends beyond a determination that the requirements of Article 5.2 are satisfied."* In this connection India in paragraphs 5.28 through 5.31 argued that the counter-evidence existing before the initiation was not duly taken into account and should have warranted a further examination due to these circumstances. India has repeatedly put

[1] Guatemala--Anti-dumping investigation regarding Portland cement from Mexico, Report of the Panel of 19 June 1998; WT/DS60/R.

forth the point that the EC failed to examine the veracity of the allegations in the complaint and thereby erred in its determination that there was sufficient evidence to justify initiation, when none existed.

7.C Regarding India's Article 5.3 claim that the EC "failed to examine the allegations in the complaint", the Panel notes that India has not argued that the EC's notice of initiation was insufficient.

In the view of India it did make the argument that it had serious concerns as regards the transparency of the EC's behaviour. In paragraphs 5.26 and 5.27 of its First Written Submission India expressed such concerns. While the notice of initiation perhaps[2] contained standard phraseology on items (i) through (vi) as required per Article 12.1.1, India has until today not been able to ascertain that the EC *examined* the complaint, neither from the notice of initiation nor from any other record. Even during its First oral Statement the EC did not clarify how it examined the 'accuracy and adequacy' of the evidence, as provided for in Article 5.3.

7.D Can India clarify the scope of the violation it alleges in arguing that the EC failed to "examine" the allegations in the application, and how, in India's view, the Panel is to assess whether such a violation occurred?

Article 5.3 ADA provides that the authorities *shall examine* the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation. This is a positive obligation imposed on the authorities. In view of the existing counter-evidence it is hard to understand how the EC could have examined the evidence in the complaint without looking at other information [which was available and at the disposal of the investigating authorities at the time of initiation].

7.E Does India agree that it has the burden of presenting a *prima facie* case of violation of Article 5.3 in this regard?

India agrees and, in its view, it has made a *prima facie* case that there was *no examination whatsoever*. This was also pointed out during India's First Oral Statement in paragraphs 10 and 11. In fact the EC's Notice of Initiation is totally silent on the aspect of due examination of the complaint and merely states that *"the volume and prices of the imported products have, among other consequences, had a negative impact on the quantities sold and the prices charged by the Community producers, resulting in substantial adverse effects on employment and the financial situation of the Community industry"*. As the notice of initiation is the only public document on record in which the EC "discusses" its 'examination', it follows that India and the Panel must rely on this document and conclude that no examination took place.

India, in its view, has made a *prima facie* case that the allegations in the complaint were taken at face value by the EC [*"allegations"*] and were not examined at all before initiation [see the striking Exhibit from the non-confidential file attached as India-82]. Moreover, the EC has not adduced any evidence to the contrary. India acknowledges that Article 5.3 itself unfortunately does not impose any form requirements for the examination, but notes that the Panel in *Guatemala-Cement* [Panel Report of 19 June 1998] did impose the obligation to go beyond Article 5.2. In any event, it is clear from the notice of initiation and from EC' s First Oral Statement and responses to some of the preliminary

[2] Although India has not made this argument, it is for example unclear whether the date of initiation was mentioned in the notice of initiation. The EC has argued in other proceedings in the past that the date of initiation is not necessarily the same as the date of the Official Journal. Since these two potentially different dates therefore not necessarily coincide it could be argued that the date of initiation was not mentioned. In order to avoid facetious arguments, India has not made this claim.

questions raised by the Panel that the complaint was not examined at all. It is therefore clear that EC violated the provisions of Article 5.3.

8.A On what legal principle does India base the suggestion, made at paragraph 8 of India's oral statement at the Panel's first meeting, that circumstances and/or information outside the application somehow increase the obligation to "examine accuracy and adequacy" of information?

India in paragraph 8 of its oral statement has reasoned that the obligation imposed by the provisions of Article 5.3 that the investigating authority shall examine the accuracy and adequacy of information provided in the complaint, was in this particular case rendered even more acute by the fact that the same investigating authority had carried out back to back investigations on practically the same product being imported from India. In fact, the previous investigation had been terminated only twenty days before the filing of the present case. Thus while in principle India seeks to highlight the non-fulfilment of the obligation imposed by Article 5.3 by the EC authorities, it also seeks to stress this lapse in the context of the previous investigations initiated by EC.

India's views are supported by those expressed by the Panel in *Guatemala Cement* in paragraphs 7.47 through 7.60. First of all, in that Report at paragraph 7.49 the Panel stated that *"Article 5.3 established an obligation that extends beyond a determination that the requirements of Article 5.2 are satisfied."* [emphasis added]. Secondly, in paragraph 7.51 of the same Report the Panel stated that *"compliance with the requirements of Article 5.2 does not* ipso facto *mean that there was sufficient evidence to justify initiating an investigation under Article 5.3"*. The Panel in that paragraph then provides an example that while the requirements of Article 5.2 could be satisfied, there could nonetheless not be sufficient evidence to initiate as per Article 5.3.

The Panel in paragraph 7.52 of *Guatemala-Cement* expressed the view that Article 5 as a whole and Article 5.3 in particular is meant to strike a balance between competing interests, as far as the initiation of an investigation is concerned. If the authorities were to disregard certain other evidence readily available, then this balance between competing interests cannot be achieved.

8.B Does India mean the investigating authority must go beyond the application in determining whether there is sufficient evidence to justify initiation, for instance by considering the facts concerning a previously terminated investigation involving at least in part the same parties and products.

India does not imply that the investigating authority 'must' go beyond the application in every case in determining whether or not there is sufficient evidence to justify initiation. However, India strongly feels that in particular cases, for instance the present case which had a history of repeated initiations, the investigating authority 'should' have gone beyond the facts presented in the complaint, specially since this evidence was readily available. This information should not have been ignored.

India's view is supported by the clear wording of the *Guatemala-Cement* Panel which held in its paragraph 7.49 that: *"Article 5.3 established an obligation that extends beyond a determination that the requirements of Article 5.2 are satisfied."*

8.C India's argument suggests that the "examination" under Article 5.3 of the adequacy and accuracy of the evidence in the application must be carried out as some sort of "mini" or "pre-" investigation. Is this India's view?

It is not India's view that the examination of the complaint should involve a mini or pre-investigation. In this context, India agrees with relevant statements in prior Panel reports, such as *HFCS* and *Softwood lumber*. On the other hand, India recalls and stresses that the authorities' establishment of the facts must be proper and its evaluation of the facts unbiased and objective.

In the pre-initiation phase of a case, the authorities normally have at their disposal the allegations in the application and possibly other information in the public domain. India would suggest that, if, for example, the information readily available in the public domain directly contradicted some of the allegations in the complaint, then an examination of the facts would be necessary to resolve the contradictions. Similarly, where, as was the case here, a previous investigation involving largely the same parties and products was terminated days before the initiation of the new proceeding, it would indeed be necessary that the facts pertaining to the previously terminated investigation are taken into consideration.

An authority that does not accept that it has the onus to examine and therefore does not conduct an unbiased and objective evaluation of the facts acts contrary to the obligation contained in the ADA and paragraph 7.49 of the Panel Report in *Guatemala Cement*.

9. Does India consider that the standing determination must take account of "opposing" views? In this regard, the Panel notes that the standing determination must take place prior to initiation, during which time Article 5.5 admonishes investigating authorities to avoid publicizing the application. Is India of the view that an investigating authority must, in all cases, canvass all domestic producers of the like product to determine their opinions, whether supporting or opposing the application, before a determination of standing can be made? How could such an obligation be carried out consistently with the Article 5.5 obligation?

First, India agrees fully with the Panel that the standing determination (both the 25 per cent and the 50 per cent test) must take place prior to initiation. Failure to do so constitutes a fatal error on the part of the authorities, which cannot be cured retro-actively in the further course of the proceeding [*Swedish Steel*; *Mexican Cement*]. Thus, as regards the 25 per cent test, in India's view it is clear that the *producers* supporting the complaint must do so *expressly, i.e. individually*, and together must account for at least 25 per cent of total domestic production, this being an absolute figure. In order to make this determination in accordance with Article 5.4, the authorities should satisfy themselves as to the accuracy of the numerator and the denominator. [In the case of an exceptionally large number of producers (as perhaps in Bed Linen), authorities may determine support and opposition by using statistically valid sampling techniques as per the footnote to Article 5.4, but the EC chose <u>not</u> to invoke this option].

As regards the 50 per cent test, on the other hand, India suggests that a more nuanced approach is necessary, in light of Article 5.5 as well as the plain meaning of Article 5.4. Article 5.4 provides in relevant part that the application must be supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. In India's view, it follows from the wording of this provision that the denominator for the 50 per cent test is different from the denominator to be used for purposes of the 25 per cent test.

Whereas for the latter, the denominator is the total domestic production of the like product [arguably after the exclusion of related parties *ex* Article 4.1(i)] and therefore a fixed figure independent of the specifics of the case, the denominator for the 50 per cent test depends on the totality of producers expressing either support or opposition to the application and it may therefore vary, depending on the producers expressing opposition to the application. If, for example, there are domestic producers which do not take a position in a certain case (neither oppose nor support) or which remain quiet, the production figure of such producers must be taken into account for the 25 per cent test, but not for the 50 per cent test.

In other words, India does not, in such cases read into Article 5.4 an obligation on the part of the authorities to actively canvass *all* domestic producers in order to determine whether they support or oppose the application. The 50 per cent test can be satisfied on the basis of an examination of the

degree of support for, or opposition to, the application *expressed by domestic producers* of the like product.

In India's view, the important point in response to the Panel's question is that it is absolutely necessary for the investigating authority to verify the support for a complaint, specially if the support has been expressed by an association of producers [which, in India's view, is in any event not permissible]. If during the verification some of the domestic producers express opposing views then the investigating authority must take these into account. This, in India's view, does not in any way dilute the obligation of Article 5.5.

10. On what basis does India argue that Article 6.10 applies to the selection of a sample for purposes of assessing material injury to the domestic industry, given that that Article only refers to samples of foreign producers and exporters?

India agrees with the Panel that Article 6.10 only refers to sampling of foreign producers and exporters. The ADA does not explicitly contain any provisions on sampling of domestic producers for purposes of the injury determination, and it is therefore not completely clear about such sampling.

However, the ADA does specify that sampling is appropriate in other contexts such as the use of "statistically valid sampling techniques" to determine support and opposition for an application in the case of fragmented industries [footnote to Article 5.4]. In Article 6.10 itself sampling is explicitly allowed for the determination of dumping margins. The critical criterion is that sampling should be statistically valid.

From these general principles India therefore derives that once sampling is applied, it should be statistically valid. If such obligation exists for the sampling of foreign exporters and producers, the same should equally apply for the sampling of the domestic industry.

11. Does India take the view that every element of the investigative process and every decision taken during that process must be explained in the notice of final determination? If not, on what criteria would India suggest that an investigating authority base its judgment as to what must be addressed in the notice? In what does India base the table on page 28 of its first oral statement, in light of the fact that the "claims" there addressed are those being pursued in this dispute? Is India of the view that every element set forth in that table was required to be addressed by the EC authorities in the notice of definitive Regulation?

In the view of India, Articles 12.1.1, 12.2.1 and 12.2.2 set forth – progressively detailed – explanation requirements for, respectively, notices of initiation, notices of imposition of provisional measures and notices of imposition of definitive duties. A comparison of the relevant texts of Articles 12.2.1 and 12.2.2 is instructive:

> *"[12.2.1] shall set forth sufficiently detailed explanations for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected.*
>
> *[12.2.2] shall contain **all** relevant information on the matters of fact and law and reasons which have led to the imposition of final measures…in particular, the notice shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers".* [emphasis added]

Thus, according to the text of Article 12.2.2, the notice of imposition of definitive duties (where Article 12 imposes the most detailed obligations) must contain all matters of fact and law which have led to arguments being accepted or rejected as well as the reasons for the acceptance or

rejection of relevant arguments or claims made by the exporters. The only important qualification in this sentence is the word *relevant* which implies that all relevant information must be included. In the view of India, there are only so many arguments or claims that are typically raised in the course of an anti-dumping proceeding. Of these, some might be more important to the outcome of the proceeding and some might be *prima facie* non-sensical, which could in turn imply that they are not *relevant* within the meaning of Article 12.2.2.

However, the objective of Article 12 as a whole is clearly to require transparency and India therefore suggests that authorities should err on the side of caution when deciding not to include certain arguments or claims in the notice of final determination. Clearly, when an authority expressly chooses not to address an argument it should at least as a bare minimum indicate as to why it has chosen not to address an argument. Clearly this is what the drafters had in mind as a permissible interpretation of Article 12.

India notes in this context paragraph 97 of the third party submission of the United States that the United States supports India's views and states that it *"shares some of India's concerns about the adequacy of the EC's findings because the EC's specific findings on the factors it addressed do not elucidate why it did not give weight to factors it did not discuss".*

In the table on page 28 of India's first oral statement, India has provided a summary of nine substantive claims which were not addressed in the notice imposing definitive AD duties. Of these nine substantive claims, eight were made in the course of the proceeding.[3] All eight claims are not only relevant, but also important, either because they are outcome-decisive (claims 11, 15, 20, 23, 26), have a significant impact on the level of the dumping margin (claims 1 and 4) or are important as a matter of principle to India and other developing countries (claim 29).

Accordingly, India is indeed of the view that these arguments and claims should have been addressed in the notice imposing definitive AD duties, and by not doing so the EC violated the provisions of Article 12.

12. Could India explain the statement, at paragraph 87 of its first oral statement, that Article 15 *"tries to take care and addresses the different market mechanisms applicable between the various countries in the world"*, and that for this purpose, special regard must be given to the special situation of developing countries?

India, in paragraph 87 of its oral statement has tried to indicate the reasoning and objective behind the introduction of the provisions of Article 15, when the ADA was being negotiated. At that stage, it was pointed out by a large number of developing countries, and accepted by a large number of developed countries, that the operation of the markets and the market mechanism existing in developing countries was very different from that in developed countries. It was accordingly argued that it was extremely important to provide a special dispensation to developing countries as far as the anti-dumping provisions were concerned. Accordingly, Article 15 of the ADA begins by the recognition that 'special regard must be given by developed country members to the special situation of developing country Members'. It was this 'special situation' prevailing in developing countries, for which there was a need to give a special regard that India had attempted to highlight and explain in paragraph 87 of its oral submission.

13. In the view of India, given that no specific offer of price undertakings was made by Indian producers within the time-limit specified by the EC, what should the EC have reasonably been expected to do in fulfilment of its obligations under Article 15?

[3] The exception is claim 8. It is standard practice in the EC to treat all imports as dumped as long as there is an overall dumping margin and it was therefore not considered fruitful to raise this claim in the course of an administrative proceeding in the EC.

India has repeatedly stated that the obligation to explore constructive remedies, as provided for in Article 15 of the ADA, rested on the EC authorities. Thus, the EC should have proposed either a price undertaking, or any other alternate constructive remedy to the Indian exporters, irrespective of whether these exporters/producers had made any overtures in this regard. However, the EC authorities did not do so. In fact they did not offer any alternate constructive remedies even after Texprocil had sent a written proposal to explore a price undertaking as an alternative to the levying of anti-dumping duties. Thus, at the very least the EC authorities should have responded positively to the offer made by Texprocil by making a concrete offer, vis-à-vis the possibility of a price undertaking. However, India would like to make it clear that by simply making an offer of a price undertaking, EC would still not have been in full compliance of its obligations under Article 15. This obligation would have been fulfilled had EC with an open mind and constructive attitude tried to explore all possible alternative remedies, including that of price undertaking, before levying anti-dumping duties.

Questions from the Panel for both parties

32. The Panel understands, from the statements of the Parties at the first meeting, that the EC authorities calculated SGA expenses on the basis of all sales in the ordinary course of trade, and that India has posed no claim with respect to this methodology. Could the parties confirm whether the Panel's understanding is correct, and that the parties agree that Article 2.2.2(ii) allows the calculation of SGA expenses on the basis of all transactions?

India has posed no claim with regard to the calculation of SGA expenses since according to the understanding of India, the SGA expenses expressed as a percentage [10.39 per cent] were in this case for the sales in the ordinary course of trade the same as for all sales. In the EC's system these amounts are normally the same.

In this connection India also refers to its summary table under paragraph 3.78 of its First Written Submission where it is shown that the SGA percentage pertaining to the ordinary course of trade is the same as the percentage pertaining to all sales.

In fact, according to India's understanding, the SGA expenses were derived from the P/L table in the questionnaire response and were derived from all sales.

33. Where an investigation involves multiple product types, investigating authorities will have different SGA expenses for each of them, not all of which product types may be sold for profit. As a result, if the investigating authority excludes from consideration sales of one or more product types as not sold in the ordinary course of trade, it will have different data sets for calculation of SGA expenses as compared to those for calculation of profit. In the view of the parties, would such a methodology fulfil the "fair comparison" requirement of Article 2.4?

Assuming for example that there are three sets of main product groups A, B, and C. Each group has its own level of SGA expenses and each Group comprises a variety of, for example, 10 models. Suppose that the SGA percentages are 8, 10, and 12 per cent respectively. Suppose that Group C is entirely loss-making. The EC would then probably calculate constructed normal value on the basis of the cost of manufacture for Group C *and* the SGA of Group C, together with the weighted average profit of Groups A and B. Since this method therefore does not apply different SGA expenses to Group C than those that were actually incurred and realized, India made no claim on SGA calculation. In the view of India it is hard to generalize that, once the comparison is made under Article 2.4 in the situation above, this EC method of basing SGA on all sales of Group C would be inconsistent with the ADA.

34. Would the parties indicate whether, in their view, in a case in which there is information from more than one exporter or producer available for use in the calculation of profit amounts

under Article 2.2.2(ii) (including the case in which a proper sample includes more than one exporter or producer), the investigating authorities may nonetheless choose to rely on the information concerning only one of those exporters or producers?

The text of 2.2.2(ii) clearly refers to a triple plural. Therefore, once the criteria to rely on option (ii) are fulfilled by the existence of more than one exporting producer there can be no reason and for that matter no discretion, for the investigating authorities to rely on the information of only one of those exporters or producers.

For example, in the current case information from both Bombay Dyeing and Standard Industries was readily available [Standard did file a questionnaire response and was included in the reserve sample]. The EC authorities should have relied on the information of both, without the *a priori* decision to exclude Standard because it was not considered relevant in view of its 'mere' 14 per cent share of the domestic market [EC's First Oral Statement].

35A. As the Panel understands it, India takes the position that in the case of multiple comparisons of weighted average normal value to weighted average export price, Article 2.4.2 specifically precludes "zeroing", but that Article 2.4.2 does not address the question of "zeroing" in the process of "summing up" the results of multiple transaction to transaction comparisons of normal value and export price.

This understanding appears correct [see also answer to question 6, *supra*]. The first possibility under 2.4.2 [w.a. to w.a.] specifically deals with *weighted average* normal value to be compared with *weighted average* prices of *all* comparable export transactions. The T-by-T method does not include the words 'all' or 'weighted average' and specifically addresses the situation of one transaction compared with one transaction.

35B. The Panel notes that if a Member makes separate comparisons of weighted average normal value and weighted average export price for each quarter during the investigation period, the same question of summing up arises. Could the parties explain, with specific reference to the text of the provision, whether, and if so how, Article 2.4.2 governs this process of "summing up" in these situations?

Article 2.4.2, second sentence, specifically foresees the possibility of use of a weighted average normal value to be compared with individual export transactions in case of a pattern which differs among time periods. This is, however, the second step [the exceptions].

Before further answering the question, it appears best to provide an example. Suppose there is one model A with four transactions as follows:

Transaction #1 on day 1: normal value: 100; export price 100
Transaction #2 on day 2: normal value: 105; export price 105
Transaction #3 on day 3: normal value: 115; export price 115
Transaction #4 on day 4: normal value: 120; export price 120

Dumping margin if weighted average normal value to weighted average export price: 0 [110 - 110 = 0]. Presumably, the authorities could not use a weighted average normal value to individual export price method since there is no pattern of export prices which differs.

Suppose now that there are four quarters with a similar fact pattern for one and the same model:

Transactions in Q1: w.a. normal value: 100; w.a. export price 100
Transactions in Q2: w.a. normal value: 105; w.a. export price 105

Transactions in Q3: w.a. normal value: 115; w.a. export price 115
Transactions in Q4: w.a. normal value: 120; w.a. export price 120

In this situation the question of zeroing does not arise either.

Suppose now that the situation is somewhat more extreme with some quarters revealing some positive dumping and others revealing negative dumping:

Transactions in Q1: w.a. normal value: 100; w.a. export price 90
Transactions in Q2: w.a. normal value: 105; w.a. export price 115
Transactions in Q3: w.a. normal value: 115; w.a. export price 105
Transactions in Q4: w.a. normal value: 120; w.a. export price 130

Clearly, there is positive dumping in Q1 and Q3 and negative dumping in Q2 and Q4. In the view of India there is then a significant difference between time periods and the exception can be applied. However, turning back to a situation where these are not four quarters but simply four transactions within one model WA-to-WA must be applied and the issue of zeroing consequently does not arise [unless one of the other exceptions applies]:

Transaction #1 on day 1: normal value: 100; export price 90
Transaction #2 on day 2: normal value: 105; export price 115
Transaction #3 on day 3: normal value: 115; export price 105
Transaction #4 on day 4: normal value: 120; export price 130

WA-to-WA = 0 [110-110]. This is now consistent EC practice.

This then brings us to the last question: suppose that there is a variation between models, as follows:

Model #1 on day 1: normal value: 100; export price 90
Model #2 on day 1: normal value: 105; export price 115
Model #3 on day 1: normal value: 115; export price 105
Model #4 on day 1: normal value: 120; export price 130

The text of Article 2.4.2 does not contain an exception of applying weighted average price with individual export prices in case of differences between models. On the contrary, 2.4.2 only permits use of the exception when there is a pattern of differences between purchasers, regions, or time periods. Moreover, the main rule of 2.4.2 talks about the weighted average of <u>all</u> comparable export transactions, and not of only those that are positively dumped.

In summary, according to India, Article 2.4.2 is clear. The first sentence sets out the principle [WA-to-WA or T-to-T]. The second sentence provides for <u>three</u> limited exceptions [purchasers, regions, time-periods], usage of which must be explicitly motivated. The failure of the EC to offset inter-model negative dumping, however, introduces a third method which is neither fish nor fowl. As the plain meaning of Article 2.4.2 is clear, such third method is, however, not a permissible interpretation.

36.A The Panel understands India to take the view that an investigating authority, having established a sample for consideration of injury to the domestic industry, is limited to considering only information for that sample set, and <u>must</u> ignore other information concerning the information concerning the condition of the domestic industry if it relates to producers outside the sample?

The very purpose of establishing a sample would be defeated if, during the process of collecting information from the sample and examining such information, the investigating authority can go back to the original source which the sample is supposed to represent in the first place. There could perhaps in rare cases be overbearing circumstances to go back to the original source but it makes no sense to go back only if and when this suits the purpose of authorities. The sample was drawn from the domestic industry to facilitate the analysis of injury; therefore, to allow the data of the sample to count only when it shows negative factors is meaningless.

Moreover, the EC did not only look beyond the sample to the Community Industry [the original source from which the sample was drawn], but even relied on data from EU-15 as well [*i.e.* outside the original source for the sample; see paragraph 4.151 of First written submission of India]. India emphasizes that the EC relied on different levels when such reliance favoured a finding of injury [see also India's table at paragraph 4.151 of its First Written Submission].

36.B Does this not conflict with India's suggestion that the EC was obliged to take account of Standard' s information in calculating normal value despite the fact that it was not part of the sample established by the EC for the dumping calculation?

Standard Industries was part of the sample and hence India's views are not in conflict with its response to question 36.A. Standard Industries has from the very outset been included in the reserve sample as unilaterally imposed by the EC [see India Exhibits page 327 obliging the "reserve companies" Jindal and Standard to respond to the questionnaire]. Standard duly answered to this obligation and the questionnaire response of Standard was available with the EC from the outset. One of the very purposes of a reserve sample is to provide extra information, in case this is or becomes necessary. If it is considered not necessary to rely on the reserve when it becomes apparent that the criteria of Article 2.2.2(ii) are not met and one still wants to rely on Article 2.2.2(ii), then when would it become necessary to have to rely on a company from the reserve?

India has not suggested and is not suggesting that the EC should go *beyond* the companies in the (reserve) sample. On the contrary, the EC should have relied on the sample and the reserve sample.

In the view of India, therefore, no conflict whatsoever exists between India's answer to question 36A and this answer to question 36B. On the contrary, India cannot escape the impression that the EC has measured the situation of the foreign exporting producers and the Community industry with a double standard, incompatible with the provisions of the ADA.

Indeed, instead of a contradiction, India could see a similarity between the use of samples by the EC, if the inclusion of Standard would be considered as going outside the sample in the first place--*quod non*. The EC seems to take the position that where data of the sample are 'beneficial' for the EC, it is relied on. Where data of the sample are somehow not beneficial, these are ignored. Where data outside the sample are beneficial, they are relied on. Where data outside the sample are not beneficial, they are not relied on. One only needs to look at the table in India's paragraph 4.151 of its First Written Submission as to how this principle worked for the determination of injury. For dumping the same applies. Even if the inclusion of Standard for the profit determination would be considered by the EC as 'going outside the sample' -- which was not the case because Standard was in the reserve -- there could perhaps be other reasons for not doing so. Perhaps Standard was disregarded because its inclusion for the profit determination for the purposes of Article 2.2.2(ii) could have been less 'beneficial' for EC. Perhaps Standard was *prima facie* 'estimated' not to be relevant in the first place because of a risk of reducing the profit and therefore not further analyzed altogether.

36.C Can the EC explain how its action in going beyond the sample in considering information on the question of injury to the domestic industry is consistent with its apparent

view that it was precluded from, or at a minimum was not required to, go beyond the sample to take into account Standard's data for the calculation of the profit rate under Article 2.2.2 (ii).

Not for India to answer.

36.D Why did the EC go beyond the sample data for the Community industry, and further to data for all EC bed-linen producers in considering some elements of their analysis under Article 3.4, and where are these reasons explained in the final determination?

India really does not know or understand why the EC [partially] relied on information beyond the sample data for the Community industry [such as for example with the company Luxorette]. Similarly India does not know why the EC refused to explain its actions, despite repeated observations and arguments on this issue.

37.A In the view of the parties, does the term "anti-dumping duties" in the second sentence of Article 15 include provisional measures, or refer only to definitive duties?

According to India it is clear from the wording of Article 15 that the term 'anti-dumping duties' in the second sentence of the Article includes provisional measures. This is because the first sentence in the Article specifically states that the special situation of developing countries must be kept in mind when considering the application of 'anti-dumping measures'. It is, therefore, evident that the reference in the Article is to any kind of anti-dumping measures, whether in the form of provisional or definitive duties. This view is also supported by the fact that duties whether provisional or definitive tend to have a negative effect on trade. It was with a view to limit this negative trade effects in developing countries, by minimising the application of anti-dumping measures, whether in the form of provisional or definitive duties, that the drafters of the ADA specially included Article 15.

37.B Could the parties, in their answers, refer specifically to the text of other provisions of the AD Agreement which relate to provisional and/or final duties and/or measures.

India's view is strengthened by a reference in Article 1 where again the phrase 'anti-dumping measure' has been used. Since Article 1 provides a preface to the entire ADA, and since the ADA refers to both the application of provisional and definitive duties, it is clear that the term 'anti-dumping measure' refers to both provisional and definitive duties. Article 7.2 provides that *"provisional measures may take the form of a provisional duty."* Clearly, therefore "anti-dumping duties" include provisional duties as well.

38.A In the view of the parties, does the fulfilment of obligations imposed by Article 15 go beyond the fulfilment of obligations under Article 8.3?

It is India's view that indeed Article 15 goes beyond the fulfilment of obligations imposed under Article 8.3. A price undertaking is only one of the possible constructive remedies that have been referred to in Article 15. There could obviously be other constructive remedies as well, in the form of other modalities. Article 8.3 only deals with the specific situation of an undertaking. Moreover, Article 8.3 is applicable to all Members of the WTO. It is therefore, clear that the possibility of a price undertaking under Article 8.3 can be explored irrespective whether the imports under investigation are from a developed or a developing country. If the drafters of the ADA wanted to limit the use of alternate constructive remedies to only price undertakings, then they may perhaps have not felt the need for a separate Article 15. By including a specific and separate Article dealing with the special situation of developing countries and referring to 'constructive remedies' (in plural) in the Article, it is more than clear that the fulfilment of the obligations imposed by Article 15 go very much beyond the fulfilment of the obligations under Article 3.

38.B In particular, is it necessary for the investigating Member, for instance, to take the initiative to seek an understanding, and if so, how, and when, is that to be done?

Article 15 of the ADA specifically states that constructive remedies 'shall be explored'. It is therefore, clear that the onus and obligation is on the investigating Member to take an initiative to seek such an understanding. In fact, the second sentence read in conjunction with the first sentence of the ADA further strengthens this, since it has been specified that special regard must be given by developed country Members. Furthermore, it is also mandated that the possibility of alternative remedies shall be explored 'before applying anti-dumping duties'. It is, therefore, clear that the investigating Member needs to take the initiative of exploring alternate constructive remedies before the application of anti-dumping duties.

38.C And again if the fulfilment of obligations imposed by Article 15 does go beyond the fulfilment of obligations under Article 8.3, how did the EC authorities' actions in the context of the Bed Linen investigation go beyond the fulfilment of their obligations under Article 8.3?

As detailed in India's response to question 13 above, the EC investigating authorities did not take any initiative whatsoever in fulfilment of their obligations under Article 15. In fact, the EC authorities did not even respond to the proposal made to them by Texprocil regarding a price undertaking, except for stating that it had been received on the last day. It is, therefore, clear that the EC authorities did not even fulfil the obligations imposed under Article 8.3, let alone the obligations imposed under Article 15.

Questions from the EC

As a general preliminary matter, India notes that many of the questions raised by the EC either refer to, or request information about India's anti-dumping law and practice. EC does not appear to be focusing on the legal or factual arguments relating to the present case, but instead wants to focus on India's anti-dumping law and practice. India's anti-dumping law and practice are in conformity with the ADA and have so far never been subject matter of a dispute. Furthermore, India considers that its anti-dumping law and practice is not relevant to the matter before the Panel. Indeed, India's anti-dumping law and practice is outside the terms of reference of the Panel.
Initiation Questions

1. INITIATION QUESTIONS

1. According to India, what type of evidence has to be evaluated in order to determine whether or not to initiate an anti-dumping investigation under Article 5.3 of the Anti-dumping Agreement?

India welcomes this opportunity to reiterate and further explain arguments that are already contained in its First Written Submission with respect to its claim 23.

More specifically, India refers to the Report of the Panel of 19 June 1998, Guatemala—Anti-dumping investigation regarding Portland cement from Mexico. According to the Panel, the obligation to examine the accuracy and adequacy of the evidence provided extends beyond a mere determination that the requirements of Article 5.2 are satisfied:

> *"7.47 Guatemala's position on this issue is clear: if the information supplied in the application is all that is reasonably available to the applicant as required by Article 5.2, the investigating authority is justified in initiating the investigation . . .*
>
> *7.49 We cannot accept Guatemala's arguments in this regard. In our view, the fact that the applicant has provided, in the application, all the information that is*

> *'reasonably available' to it on the factors set forth in Article 5.2(i) - (iv) is not determinative of whether there is sufficient evidence to justify initiation. Rather, Article 5.3 establishes an obligation that extends beyond a determination that the requirements of Article 5.2 are satisfied."* [Footnotes omitted, emphasis added].

The Appellate Body did not overrule the Panel report on this issue.

Clearly, *in abstracto*, the evidence to be evaluated extends beyond that what is contained in the complaint as per Article 5.2. *In concreto*, the evidence to be provided will obviously depend on the facts of the case. However, as also pointed out in paragraph 5.28 of India's First Written Submission, immediately before the initiation the investigating authorities did have more information at their disposal than merely the allegations in the complaint. This is in fact apparently also the position of the EC in paragraph 38 of its first written submission, although it is unclear as of yet what information was considered.

Could India illustrate its answer with examples taken from its own anti-dumping practice?

See general comment above.

2. Could India provide an example of how public notice of examination of evidence prior to initiation of an investigation has to be given?

The EC has ample opportunity to explain how it had examined the evidence in the various phases of the case: at the moment of initiation, at the time of provisional measures, and at the time of the definitive measures. The manner in which such explanation is given is obviously form-free, but it has to be given. One cannot simply state that *"it has been alleged that"* and thereby consider to have fulfilled the obligation. In the view of India, it has provided *prima facie* evidence that the EC did not conduct an examination of the pre-initiation evidence, let alone provide public notice of such examination.

Does India consider that issues relating to evidence provided in the industry's complaint and examined for purposes of initiation should be dealt with in the public notice of conclusion?

As stated, explanations can be given at three points in time: in the public notice of initiation, in the public notice of the imposition of provisional measures, and in the public notice of definitive measures. Article 12 provides the respective legal obligations in this regard and in the view of India is self-explanatory. Under the mechanics of EC anti-dumping law and practice (where applications received are confidential and are provided – in non-confidential form – to interested parties only after the initiation of the proceeding), interested parties logically can comment on the evidence provided in the domestic industry's application only once they have received a copy of the non-confidential application, *i.e.* after the initiation of the proceeding. Thus, it is only after the initiation of the proceeding that interested parties can analyze and review the evidence in the application and can make comments thereon. If interested parties make relevant arguments and claims with respect to the evidence provided in the domestic industry's complaint, the authorities have obligations under Articles 12.2.1 and 12.2.2 to address such arguments and claims. A member cannot simply fail to explain and therewith consider its obligations under Article 12 fulfilled.

Could India illustrate its answer with examples taken from its own anti-dumping practice?

See general comment above.

3. According to India, how should the domestic industry's standing requirement be assessed for purposes of initiation?

India refers to its answer to question 9 of the Panel. India recalls that the objective of the pre-initiation standing determination requirement in Article 5.4 is the prevention of frivolous complaints. As regards both the 25 per cent and the 50 per cent tests, India is of the opinion that the text and plain meaning of Article 5.4 are unambiguous: declarations of support/opposition must emanate from individual producers and the authorities must examine such individual producers' declarations of support/opposition in order to determine prior to initiation whether the tests have been met. While the application itself obviously may be filed by a trade association on behalf of its members, the underlying declarations of support/opposition must emanate from individual producers and it is such individual producers' declarations that must form the basis for the standing determination. To adopt the interpretation that trade associations may issue the declarations of support/opposition on behalf of their members not only defeats the very objective of Article 5.4, but in addition makes footnote 13 meaningless.

As regards the denominator of the 25 per cent test, India considers that this is by definition a fixed figure which must be determined by the authorities prior to initiation. In this respect, India would suggest that while in the majority of cases the denominator may not be decisive because the producers expressly supporting the application represent much more than 25 per cent, in critical cases, such as the present case, it is incumbent upon the authorities to take appropriate steps to ensure that the 25 per cent test is met and the correct numerator and denominator are used.

As far as the 50 per cent test is concerned, India does not wish to go as far as to suggest that the authorities must actively canvass *all* domestic producers in order to examine the degree of support/opposition [but only canvass those who have made themselves known], although both footnote 13 and practice of other traditional AD users would appear to contemplate such an approach. If, however, the Panel were to decide that Article 5.4 does in fact require such canvassing, India would welcome such a ruling while noting that it is clear that the EC has not canvassed all domestic producers in order to determine degree of support/opposition, as seems not contested by the EC.

What is the standard of proof that the India considers necessary under Article 5.4 of the Anti-dumping Agreement?

India first notes that the notion of a 'standard of proof' and the threshold for meeting a particular standard cannot inherently be defined with absolutely precision in most legal situations, nor is the appropriate standard of proof necessarily completely static throughout the ADA.

In India's view, the standard of proof required under Article 5.4 is a function of several factors. These factors include:

- the text of Article 5.4, including the nature of the threshold test set out therein;
- the object and purpose behind the standing requirement in Article 5.4, interpreted according to the ordinary meaning of the text and in the light of the other provisions of the ADA; and
- the facts of each case.

With regard to the text of Article 5.4 and the nature of the test set out in that provision, we note that Article 5.4 provides for a very specific test for determining standing. This test is based on objective, mathematical parameters. Article 5.4 clearly states that this test *shall* be satisfied as a prior condition for initiation. Also, it is clear that it is the *authority* that shall determine whether the

standing threshold has been met, on the basis of an examination by the authority of the degree of support for or opposition to the application by domestic producers.

When these factors are considered together, it would seem incongruous to take the position that, while the drafters apparently went to some length to create an objective and mathematically measurable test which is *required* to be fulfilled (as opposed to favouring a more subjective or vague test), those same drafters then intended a very low standard of proof with respect to examining whether the standing requirement is in fact met in any given case. On the contrary, the nature of the standing requirement laid down in Article 5.4 would seem to suggest that a high degree of precision and diligence is required when carrying out the obligation of determining standing under this provision.

This conclusion is further supported by consideration of the object and purpose of the standing requirement, and its relevance to the overall objectives of the ADA. The primary purpose of the standing requirement clearly seems to be to avoid frivolous complaints, bearing in mind the severe and immediate negative effect on exporters' trade that often results from the 'mere' initiation of a proceeding. Such trade distortions are clearly wholly inconsistent with the objectives of the WTO Agreement. Also, with regard to the 'standard' that must be satisfied in a complaint generally, Article 5.2 makes it clear that *"simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient…"* In our view, the principle expressed in Article 5.2 is instructive in examining the 'standard' required under Article 5.4, in that it again implies that a high degree of diligence is required on the part of the authority, and that not all information or assertions can simply be taken at face value.

It is clear from previous panels that unless an investigating authority can back up its determination that the standing requirement has been met by reference to reliable evidence or data, the authority cannot have properly be considered to have fulfilled its obligation to verify this issue prior to initiation. For example, in the *Swedish steel* case, the United States argued that its initiation of the anti-dumping investigation in that case was fully consistent with the standing requirements in Article 5.1 of the previous Agreement on the Implementation of Article VI of the GATT 1947. The petition in that case had been filed by a trade association. The United States agreed that investigating authorities must verify the standing requirement prior to initiation, noting that *"[t]here has to be a careful examination of inter alia a petitioner's representation that it filed on behalf of a domestic industry."*[4] Nonetheless, although the US argued that it had indeed conducted such a careful examination, the Panel rejected the US argument, noting that the US had failed to back up its assertion with solid data showing that the standing requirement had been met. The Panel noted that:

> *"…there was, therefore, no statistical evidence provided to the Panel in support of the claim that the request 'on its face' supported the initiation of an investigation on behalf of the domestic industry."*

With regard to the facts of each case, we would first note that, while a trade association can undoubtedly act on behalf of its members, Article 5.4 clearly requires that the authority must *always* satisfy itself that the required level of support exists and examine the declarations of support of the individual producers. In addition, however, as we noted above, in cases where the denominator of the 25 per cent test may be decisive, it is equally important that the investigating authority take the appropriate steps to ensure that the 25 per cent test is met and that the correct numerator and denominator are used.

Finally, as we noted above, the standard of proof which is required is not entirely static throughout the ADA. For example, previous panels have held that the requisite level of proof of dumping, injury and causation for the purposes of initiation is somewhat less than that required for the

[4] Paragraph 5.11.

imposition of provisional or definitive duties. In the context of determining dumping, injury and causation, this is obviously a sensible principle because of the complexity and volume of information which must be analyzed and weighed in order to reach provisional or definitive determinations.

However, we believe it is important to distinguish between the required level of proof of dumping, injury and causation at the initiation stage on the one hand, and the required level of proof for *standing* at the initiation phase on the other.

First, conclusive findings on the former are by their nature impossible to reach at the outset of an investigation because of the complexity of the evidence. This is not at all true with respect to the determination of standing. In fact, given the much simpler factual assessment that must be made for the standing determination, and the clear, simple test provided for by Article 5.4, there is no logical reason why an assessment of the standing requirement cannot be achieved with a relatively high degree of certainty. The authority is simply being asked to verify that sufficient support is truly being expressed by individual producers, and that these producers represent a sufficient portion of domestic production to meet the threshold. In fact, even if there were an exceptionally large number of domestic companies involved, footnote 13 in Article 5.4 guarantees that this will still be a very achievable requirement by allowing the degree of support or opposition among the domestic industry to be assessed using statistically valid sampling techniques.

Also, it should be recalled that no anti-dumping duties can be applied until/unless a *provisional or final* determination has been made. Since duties are obviously not imposed at the initiation phase it is logical that a somewhat lower standard of proof of dumping, injury and causation is required at that stage, *because the harm resulting from the imposition of duties does not come into play at the initiation phase*. However, one must distinguish between the harm resulting from the imposition of duties on the one hand, and the immediate and different harm to exporters which results from the initiation itself (e.g. lost sales, legal expenses and lost man hours). With respect to the type of harm resulting from initiation, the prior examination by the authority of the standing requirement is the 'last chance' the exporter has to avoid this harm, and in this respect, in terms of consequences, the authority's determination of standing is somewhat more closely analogous to a provisional or definitive finding of injurious dumping than to a mere preliminary assessment.

For all the reasons set out above, it is our view that the drafters of Article 5.4 considered the standing requirement to be a crucial prior condition to initiating an anti-dumping investigation and a specific test was designed to ensure that the level of support required for standing could be measured with considerable accuracy. India therefore considers that Article 5.4 requires that reasonable steps must be taken by the authority to ensure that the proper thresholds have been met, particularly where it appears that the standing issue could be decisive. Again, the nature of the standing requirement laid down in Article 5.4 would therefore seem to suggest that a high degree of precision and diligence is required.

In its anti-dumping practice, does India only accept complaints for which support is expressed explicitly by individual domestic producers? In case of affirmative answer, could India provide actual examples of this expression of support? In case of negative answer, could India explain in which cases it considers that complaints filed on behalf of the domestic industry are acceptable?

See general comment above.

4. Could India explain how public notices of initiation should be formulated with regard to the initial standing determination, if possible also by way of actual examples? Does India consider issues relating to the initial standing determination in the public notice of conclusion of an investigation?

India notes that Article 12.1.1 does not contain provisions with respect to the standing determination. On the other hand, it is crystal clear from Article 5.4 and from GATT Panel reports [Swedish Steel; Mexican Cement] that the standing determination must be made correctly prior to initiation and that a defective standing determination cannot be cured retro-actively in the further course of the proceeding. Obviously, however, these two observations are not necessarily contradictory. Thus, under the ADA, no *formal* obligation for an explanation is cast upon the authorities to explain the standing determination in the notice of initiation. On the other hand, Article 5.4 imposes the unequivocal *substantive* obligation that a correct standing determination must be made prior to initiation. India would agree that issues relating to the standing determination may be explained in the provisional or definitive determinations. However, the standing determination as such must be made correctly prior to the initiation on the basis of the facts, available at the time of such determination. Thus, for example, failure to request or receive individual declarations of support prior to the initiation cannot be cured by ex post facto receipt of individual declarations of support after initiation of the proceeding. In any event, if concerns are expressed concerning this determination these concerns cannot be simply left un-addressed.

2. INJURY QUESTIONS

5. Does India, in its own anti-dumping practice, attempt to determine that material injury is being caused only by those transactions that are dumped?

The EC would refer India to the following examples of its practice:

Hydrodesulpherisation Catalyst (HDS), Zinc Oxide Desulpherisation Catalyst (ZnODS), High Temperature Shift Catalyst (HTS), Low Temperature Shift Catalyst (LTS), Secondary Reforming Catalyst (SR), Methanation Catalyst (Meth) from Denmark – Preliminary findings. ADD/IW/39/95-96, Ministry of Commerce, 7 May 1997 (esp. paras. 18, 23) (Confirmed in Final Findings);

Sodium Cyanide from United States of America, Federal Republic of Germany (FRG), Czech Republic, Korea RP and the Territory of European Union – Preliminary Findings, No. 8/1/99-DGAD, Ministry of Commerce, 20 Oct. 1999. (pp. 19, 21) (Confirmed in Final Findings).

See general comment above.

6. Does India, in its own anti-dumping practice, evaluate all the factors listed in Article 3(4) *Anti-dumping Agreement* or only those that appear relevant?

See general comment above.

At the meeting with the Panel, the EC referred India to paragraph 19 of its recent Final Findings dated 6 March 2000 in the *Anti-dumping investigation concerning imports of Sodium Cyanide from the USA, European Union, Czech Republic and Korea Republic*. 8/1/99-DGAD.

7. Does India, in its own anti-dumping practice, attempt to determine whether dumping was occurring during the whole of the injury investigation period or does it assume that there was either dumping or no dumping in the period immediately prior to the investigation period (for dumping)?

See general comment above.

The EC would refer India to the following examples of its practice:

Oxo Alcohols from Poland, South Korea, Indonesia, Saudi Arabia, Russia, Iran, US and the European Union – Preliminary findings No. 15/1/99-DGAD, Ministry of Commerce, Directorate General of Anti-Dumping & Allied Duties, Notification, 3 Dec. 1999. (see pp 41, 66, 70);

Hydrodesulpherisation Catalyst (HDS), Zinc Oxide Desulpherisation Catalyst (ZnODS), High Temperature Shift Catalyst (HTS), Low Temperature Shift Catalyst (LTS), Secondary Reforming Catalyst (SR), Methanation Catalyst (Meth) from Denmark – Preliminary findings. ADD/IW/39/95-96, Ministry of Commerce, 7 May 1997 (esp. paras. 1-o, 18, 21-a, 23). (Confirmed in Final Findings)

Sodium Cyanide from United States of America, Federal Republic of Germany (FRG), Czech Republic, Korea RP and the Territory of European Union – Preliminary Findings, No. 8/1/99-DGAD, Ministry of Commerce, 20 Oct. 1999. (pp. 5, 21) (Confirmed in Final Findings)

3. PROCEDURAL QUESTIONS

8. On page 79 (para 3.135) of its First Written Submission, India reveals the profit margins of companies in other countries. Where did India obtain this highly confidential information?

The direct source for this paragraph is India Exhibit-27, page 438, which consists of the disclosure comments of Texprocil of 6 July 1997 in response to the provisional disclosure. India understands that the underlying sources of this information are from the market. India also notes that these profit rates during the past three years have never been disputed by EC. The profit considered for the EC [5 per cent] is based on recital (130) of the provisional Regulation.

9. In Exhibit 16 a letter from the Indian government agency responsible for export licensing of the products under consideration reveals that there are 287 Indian exporters. During the investigation, the EC was told that only of 84. The export volumes indicated are also inconsistent with those given to the EC. Can India please explain these discrepancies?

It appears that the EC confuses producing exporters and traders. The document in question clearly refers to 'shippers.' Since it is the EC's policy that only producing exporters are eligible for their own dumping margin [vide (1994) O.J. L48/10[5]], traders are in fact immaterial for a sampling exercise which seeks to establish a weighted average dumping margin. It is further noted that a number of traders in the list exported as much as 1 [one] kilogram and it therefore appears that the EC is perhaps being a bit facetious. As regards the alleged discrepancies India does not know to which discrepancies the EC is in fact referring.

[5] In this proceeding the EC announced that, as a general rule, it will not calculate separate dumping margins for trading houses: "*[c]onsidering that a trading company is normally free to purchase from any source, and may change its source of supply whenever convenient, a trading company cannot be treated in the same way as a producer. Therefore, as a rule, individual dumping margins are not established, nor are duties imposed on exporters who do not manufacture the product.*"

ANNEX 1-7

SECOND WRITTEN SUBMISSION OF INDIA

(24 May 2000)

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I. INTRODUCTION

1. India thanks the Panel for its continued attention and welcomes this opportunity to rebut the arguments of the EC, and to further point out factual inconsistencies on the part of the EC. [E.g. with respect to its contradictory assertions on Luxorette, the offering of undertakings, inspection of the non-confidential file, examination of the complaint, the standing determination, etc.].

2. As a preliminary observation India considers this Second Written Submission to incorporate and complement its arguments presented during its First Oral Statement. Therefore India will try to avoid detailed repetition of arguments and rebuttals at this stage.

3. As a second preliminary observation India regrets that the EC initially did not answer a number of important questions from the Panel [e.g., Panel questions 14, 15, 16, 17] and only provided answers three days after the deadline. India does not comment on these EC's answers to the Panel because these answers were not provided within the deadline.1 India requests that the Panel draws inferences from the EC's refusal to answer the Panel's questions 14 through 17 within the deadline. The situation is similar to the determination that Article 6 ADA is outside the terms of reference because India did not mention that Article on time, even though the EC in fact had three weeks to respond to it. India now only has two days to respond to EC's answers 14 through 17.

4. India also regrets that the EC has answered other questions from the Panel only in part [e.g. Panel question 18] and that the EC has not substantially answered a number of questions from India, even though most of India's questions were very straightforward [e.g. India's questions 2, 3, 9, 10, 11, 23]. India would like to particularly draw the Panel's attention to the manner in which EC has deliberately avoided answering India's questions 6 to 10, and has refused to clarify the issue. The EC's response to a number of questions that "given the advanced stage … only if the Panel believes it is necessary…" [e.g. answers to questions 2, 9, 10], is extremely regrettable.

5. In the view of India this attitude on the part of the EC is symptomatic of the manner in which the EC has been treating India and its exporters throughout the course of the administrative and dispute settlement proceeding. This contrasts with the very serious efforts on the part of India to fully co-operate with the EC throughout the entire administrative Bed Linen I and II proceedings and to fully co-operate with the Panel and the EC during this dispute settlement proceeding. Until today, it remains unclear what happened before and in the beginning of the administrative proceeding as regards the examination of the complaint and the standing determination. Since this evidence, in the sole possession of the EC, has been withheld for nearly four years by the EC and continues to be withheld vis-à-vis the Panel, India notes that the Panel is allowed to draw inferences if it deems that there is sufficient basis to do so.[2] This will be discussed in more detail below.

6. This rebuttal is divided into 6 parts:

- Introduction (I);
- Initiation claims (II);
- Dumping claims (III);
- Injury and causation claims (IV);
- Developing country status claims (V); and
- Explanation claims (VI);

II. INITIATION

1. Article 5.3: No 5.3 examination (Claim 23)

7. As a preliminary matter, India rejects the arguments contained in paragraphs 47 through 74 of the EC's First Written Submission. Particularly India rejects the arguments by the EC that India is arguing for an 'eccentric' interpretation of the word 'examine' [point 54] or that its interpretation of the word 'examine' is 'so vague as to be useless' [point 49]. India also rejects the arguments contained in paragraphs 30 through 35 of the EC's First Oral Statement. India regrets the EC's refusal to answer India's legitimate questions on the EC's assertions contained in the above-referred paragraphs [*e.g.* India's questions 2 and 16].

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[1] Contrary to India's offer for undertakings which was submitted on the last day, *i.e.* on time, and for that reason rejected by EC, the EC's answers are now simply three days too late.

[2] Canada -- Measures affecting the export of Civilian Aircraft, WT/DS70/R, of 14 April 1999; Argentina -- Textiles and Apparel, WT/DS56R, of 22 April 1998.

8. It is clear from the very text of the EC's notice of initiation, that there was no examination whatsoever. Before initiation the complaint was taken at face value as regards the companies allegedly supporting it and no examination took place.

9. In this connection India also strongly rejects the statement contained in paragraph 55 of the first submission of the EC where the EC claims that *"The Community authorities . . . have no interest in initiating investigations that are likely to fail for lack of evidence."* It is ironic to read such bold statements when India had recently been subjected to *Synthetic Fabrics, Cotton Fabrics, Bed Linen I*, all of which failed exactly for lack of evidence.

10. It appears that evidence has only been examined--if this indeed happened--to the extent that it may have pointed towards injury, an evaluation of the facts which can hardly be said to be 'unbiased and objective.' This is also witnessed for example by the EC taking into account the declaration of the Spanish Association only as far as it concerned active support [India Exhibits page 1071] while failing to examine *before* the initiation whether any producer of that Association would perhaps be opposed to the complaint [see EC answer to India's question 4].

11. As regards the assertion in paragraph 68 of the EC 's First Written Submission that possible evidence that injury may not have occurred is not relevant, India recalls the Report of the Panel of 19 June 1998, *Guatemala—Anti-dumping investigation regarding Portland Cement from Mexico.*[3] The EC's argument on the precedent in *HFCS* is misplaced because that case involved a different fact pattern: In that case the question was whether the complaint should contain information on all injury factors. India is not arguing this [while it is clear that the *Eurocoton* complaint of course did not contain evidence on all injury factors]. In the current dispute the question is whether investigating authorities can ignore information patently at their disposal. And, as also pointed out in paragraph 5.28 of India's First Written Submission, immediately before the initiation the investigating authorities did have more information at their disposal than merely the allegations in the complaint. This is apparently also the position of the EC in paragraph 38 of its first written submission, although despite India 's legitimate question on this issue the EC unfortunately refuses to provide factual evidence for its assertions [EC answers to India's questions 2 and 3].

12. For these reasons, India requests the panel to rule that there was no or insufficient examination by the EC in violation of Article 5.3.

2. Article 5.4: Defective standing determination (Claim 26)

13. As a preliminary matter India rejects the EC's arguments in paragraphs 82 through 100 of the EC's First Written Submission. India also rejects paragraphs 39 through 44 of the EC's First Oral Statement.

14. India recalls that there have been two GATT Panel reports on the issue of standing: United States-Imposition of Anti-Dumping Duties on imports of Seamless Stainless Steel Hollow Products from Sweden[4] , [Swedish Steel] and United States-Anti-dumping duties on Gray Portland Cement and Cement Clinker from Mexico[5] [Mexican Cement]. Both Panel reports establish beyond doubt that (1) the authorities have the obligation to actively check whether an application has indeed been filed on behalf of[6] the domestic industry and (2) that the failure to correctly determine standing is a fatal error

[3] *See also* India's written answers to questions of the Panel.

[4] ADP/47 (20 August 1990).

[5] ADP/82 (7 September 1992).

[6] For the record, India notes that paragraph 89 of the EC's First Written Submission misreads India's argument. A complaint may be submitted "by or on behalf of" the industry (Article 5.2). An association such as Eurocoton can submit a complaint "on behalf of" the EC industry. However, Article 5.4 requires that the EC determine whether the complaint is made "on behalf of" the EC industry. This must be done on the basis of "an examination" of "the degree of support (etc.)". The EC seems to argue that a listing of the associations in

which cannot be cured retro-actively in the course of the proceeding. The pertinent language in the two Panel reports is remarkably similar. Thus, the Swedish Steel Panel noted that:

> *" … in its ordinary meaning this term ['on behalf of'] was used to refer to a situation where a person or entity acted on the part of another involving the notion of agency or representation. Nothing in the text of Article 5:1 suggested that the drafters of the Agreement had wished to attach a different meaning to this term; on the contrary, the fact that the term "on behalf of" appears in Article 5:1 as an alternative to "by" underlines that this term must be interpreted in accordance with its ordinary meaning. In the view of the Panel, the alternative for the requirement that a petition be filed "by" the domestic industry affected cannot be a requirement so loose as to allow a request to be filed by some members of an industry simply claiming to be acting "on behalf of" the rest of the industry. The Panel concluded that " a written request … on behalf of the industry affected" implies that such a request* ***must*** *have the authorization or approval of the industry affected before the initiation.*
>
> *The Panel then turned to the question of whether Article 5.1 must be interpreted to require investigating authorities to satisfy themselves before initiating an investigation, in a case where a written request for the initiation of an investigation has been made allegedly on behalf of a domestic industry, that the request in question has indeed been made on behalf of that industry. The Panel considered in this respect that the reference in the first sentence of Article 5.1 to the definition of the domestic industry in Article 4 meant that, in evaluating a written request allegedly made on behalf of a domestic industry, investigating authorities must take into account this definition. This requirement to observe the definition of industry in Article 4 in decisions to initiate an investigation could only be met if investigating authorities examined whether the person or entity who made a request for the opening of an investigation acted on behalf of the industry affected, as defined in Article 4. The Panel therefore concluded that Article 5:1 must be interpreted to require investigating authorities,* ***before*** *opening an investigation, to satisfy themselves that a written request is made on behalf of a domestic industry, defined in accordance with Article 4."* [Paras. 5.9-5.10; emphasis added].

15. The Panel found that the United States had not checked that the application had indeed been filed 'on behalf of' the domestic industry prior to initiation and considered that *"…in light of the nature of Article 5.1 as an essential procedural requirement…there was no basis to consider that an infringement of this provision could be cured retro-actively."*[7]

16. In *Mexican Cement*, the Panel similarly found that in Article 5.1, the term *"on behalf of"* involved a notion of agency or representation, and that a petition had to have the authorization or

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Eurocoton' s complaint was sufficient for the purposes of Article 5.4. In its submission, the EC does not specify whether it checked whether the membership of these national associations represented at least 25% of EC production, but in any event this is irrelevant. The whole point of Article 5.4 is that the claim of the complainant that it represents the industry must be checked. If the number of producers is not overly large, this can be done by contacting them or by some statement from them to this effect. If the industry is fragmented, the first footnote to Article 5.4 allows statistically valid sampling (which the EC did not do in this case). It is evident from the structure of Article 5 that the EC's interpretation is unacceptable. For example, if a mere declaration by the complainant (whether or not accompanied by declarations from associations that themselves are not producers) would suffice for Article 5.4, the first footnote to that provision becomes meaningless. This footnote clearly requires positive action from the investigating authorities: "authorities may determine support and opposition by using statistically valid sampling techniques."

[7] Para. 5.20.

approval of the industry affected, the term industry being defined in Article 4.[8] The Panel went on to determine on the basis of the word "shall" in Article 5:1 that this was a mandatory requirement and that the investigating authorities had to satisfy themselves, prior to initiation, that the application was by or on behalf of the producers of all or almost all of the production (the latter because of the regional industry involved).[9] Thus, the investigating authorities had to satisfy themselves, prior to initiating the investigation, that the application was made with the authorization or approval of producers of all or almost all of the production within the regional market.[10] The Panel then found, as a factual matter, that the Department of Commerce had made no effort to ascertain the extent of approval for the application prior to initiation and had therefore violated Article 5:1.[11]

17. India notes that in both cases the Panels recommended that, in light of the nature of the infringement, the anti-dumping duties collected be reimbursed.

18. India recalls that in the *Bed Linen* proceeding it has made several arguments related to the defective EC standing determination:

- the standing determination must be made prior to the initiation;
- declarations of support must emanate from domestic producers; and
- the substantive test of 25 per cent must be met, [while the 50 per cent test should be checked as well].

19. In the view of India, and in accordance with ample precedent (*Mexican cement*; *Swedish steel*), the failure of the authorities to abide by any of these requirements vitiates the standing determination and constitutes a fatal error which cannot be repaired in the further course of the proceeding.

20. In light of EC's illuminating answer to India's question 40, India is surprised at the statements contained in paragraph 41 of the EC's First Oral Submission and Paragraphs 98 and 99 of the EC's First Written Submission. According to the EC's answer to question 40 the timeline of events was as follows:

A. Before 13 September 1996 46 companies apparently 'supported' the complaint before Initiation. According to the same answer, 35 companies out of these 46 producers supporting the complaint represented 34 per cent of total EC production [It has always been the position of the EC that this determination of 35 companies representing 34 per cent of EC production constituted the standing determination (see *e.g.* also EC Exhibit-4 (disregarding the fact that this Exhibit concerns in fact 38 companies))];

B. The 35 companies constituting the Community Industry on which basis the 34 per cent can be calculated were fixed much later than 13 September 1996, in the course of the investigation, when 11 producers were gradually excluded. [The figure of '35' is arrived at only after exclusions of 11 producers after initiation].

[8] Para. 5.20. Contrary to what the EC seems to imply in para 93 and 95 of its First Written Submission, India does not dispute that companies may request their association to file a complaint for them (as actually often happens in EC practice), or that an association files a complaint on its own initiative. Associations can also draft standard letters of support for producers, which can then be signed by them and filed with the investigating authorities before the initiation. If this is unworkable because of the number of producers, there is still the option in footnote 1 to Article 5.4. What India cannot accept is that Article 5.4 allows that an association supports *on behalf of producers* a complaint which is submitted on behalf of them [French, Spanish, Austrian Association]. This is the same as a lawyer issuing a power of attorney to itself.

[9] Para. 5.29.

[10] Para. 5.31.

[11] Para. 5.32.

21. How could the EC know before initiation that these 35 companies, later determined to constitute the Community industry, represented 34 per cent at the time of initiation, while these 35 companies [the Community industry] were only identified after initiation? In other words, on the basis of the EC's reply to question 40, it is logically impossible that the EC determined, prior to initiation, that these 35 companies represented around 34 per cent of EC production. At that stage--according to the explicit written answer of the EC to India's question 40--none of the 46 producers which supported the complaint had yet been excluded.[12]

22. Similarly, how could the EC on 12 September 1996 already know that it was going to restrict, after 13 September 1996, the initial 46 companies supporting the complaint to those companies which allegedly represented 34 per cent of the total production. *I.e.*, on 12 September 1996 the EC states that "*The sum of the 1995 production figures contained in the following documents, which corresponds to the companies actively supporting the complaint, is 45952 tonnes."* But this is the production figure of 38 companies! [copy of page 1035 of India's Exhibits, re-attached]].[13]

23. India also notes that the EC has proffered Exhibit EC-4 annexed to the EC's First Written Submission as evidence of the examination it conducted *prior to initiation*. Exhibit EC-4, however, lists only 38 companies. As the EC states in its answer to question 40 that exclusions of EC producers took place only after the initiation of the proceeding, it is logically impossible that Exhibit EC-4 reflected the situation before the initiation; rather, it reflects the situation at some stage later in the proceeding. As eight companies [46-38=8] were excluded in Exhibit EC-4, and based on the EC's reply to India's question 40, it becomes clear that Exhibit EC-4 [and the Commission letter referred to in the previous paragraph] can at the earliest reflect the situation after the questionnaires were sent. This is because, according to the EC's reply to question 40, only 7 companies were eliminated after initiation while 3 more companies were eliminated after questionnaires were sent [apparently in October/November 1996, *i.e.* months after initiation].

24. Furthermore, since the EC considered that 46 companies supported the complaint at the time of initiation, why were there at that stage only 24 declarations of support from individual companies [according to EC]. [There were 32 such declarations if one counts the eight French declarations (which apparently were available but which the EC decided not to put on file) and 38 if the declarations of the Spanish and Austrian Associations are counted as company support]. Nevertheless, and at least, eight [*i.e.* 46-38] declarations of support were never received, even though the EC concluded that *46* companies at initiation supported the complaint.[14] Interestingly, these eight missing declarations happen to coincide with the names of the companies which, according to EC reply to India's question 40, were excluded at various stages after initiation [seven after initiation, three after the questionnaires were sent (10-11/1996) and one even after verification!].

25. Moreover, how could the EC already know on 12 September 1996 that companies actively supporting the complaint represented 45952 tonnes [copy of Exhibit India page 1035 attached], while it only received on 13 September 1996 the production figures from *Eurocoton*? [*Vide* India Exhibit-82]. How could the EC calculate the 34 per cent of total production on 12 September 1996 while it did not even have the total production figures on 8 November 1996, the date on which the EC

[12] Apparently, the EC, before initiation, considered the unchecked list of complainants, including companies such as Uco and Finnpile, to be the evidence that these companies actually did support the complaint. It also implies that before initiation the EC did not work on the basis of any stated support or communications from the companies.

[13] This figure of 45,952 tonnes of 12 September 1996 more or less coincides with the tonnage mentioned in Exhibit-4, footnote 3, of 44,187 MT.

[14] The 8 companies on which the EC relied but which never gave a declaration of support are: the 4 Portuguese companies (Jocaritas, Helena, Ribeiro, Texteis), the Belgian company Uco, the French companies Valrupt and Gisele, and the Finnish company Finnpile.

asked *Eurocoton* for further information [For example the production of the French company Gisele was missing until then, *vide* India Exhibit-82]?

26. It follows from the foregoing that the EC cannot possibly have made the standing determination *before initiation*. This constitutes a violation of Article 5.4 ADA [it also follows that the EC did not *examine* before initiation].

27. Further, as a factual matter, India objects to the EC's insinuation[15] that India has suggested that EC officials falsified records and deceived the exporters in a fraudulent attempt to demonstrate that they complied with WTO rules. However, apart from the above noted inconsistencies, two facts stand out:

- The non-confidential file, supposedly containing the producers' declarations of support, was only made available nearly four months after the initiation of the proceeding. [Contrary to the EC's answer to question 14, India had already inspected the regular non-confidential file in December 1996, at which stage the non-confidential standing file was still not available. In this regard, India attaches Exhibit-83 showing India's inspection of the regular non-confidential file. Indeed, the EC letter informing the Indian exporters that the non-confidential standing file was ready [India Exhibit-58 (re-attached)] only arrived 7 January 1997. India then inspected the non-confidential standing file one day later. India therefore rejects the factually incorrect suggestion by the EC in its answer to question 14 that access to the non-confidential file was never requested].

- The file contained a limited number of copies of faxed declarations of support, partially from producers and partially from trade associations, from which the fax headers had been removed, preventing interested parties in the proceeding from objectively establishing the proper chronology of events.

28. India notes that, to this day, the EC has not contested these facts and has at no stage attempted to give any explanation [In this regard the Panel may wish to refer to the manner in which EC has sidestepped clarification of this issue by its refusal to respond to India's questions 6-10].

29. To the contrary, in the first meeting with the Panel, the EC, during the course of discussion explained that the fax headers were removed from the producers' declarations of support because the fax numbers of the producers were considered to constitute business confidential information. At the meeting, India expressed its surprise at this explanation because the producers' declarations of support, in the text of the declarations of support themselves, provide such fax numbers in the identification details typed on the very same declaration.

30. At that time, India recalls that the Panel specifically confirmed, in answer to such suggestion by EC, that it would indeed be useful if the EC would produce the original faxed copies (with fax headers intact) to establish the proper chronology of events. Thus far, the EC has refused to do so, thereby preventing the establishment of the proper chronology.

31. As a supplementary means to establish the proper chronology of events, India has also requested the EC (question 9) to provide a copy of the relevant pages of the so-called 'chron-in' log that the EC maintains. To this request, the EC has responded that "*[g]iven the advanced stage of the proceedings, the EC will give additional factual information on this point only if the Panel believes it necessary.*" India considers that these documents are extremely relevant to the Panel's assessment of whether the individual declarations of support were in fact received by the EC before initiation. India observes, on the other hand, that neither the "*copies of faxed declarations of support by producers in non-confidential file, [nor] Exhibit EC-4 [nor] EC oral answers to Panel's questions during first*

[15] EC first submission, at paragraph 83.

substantive meeting of the Panel" [EC's answer to question 9] can be considered as establishing such date of receipt. India recalls that Exhibit EC-4, contrary to EC's assertions, cannot possibly summarize the situation before initiation because it provides details of 38 producers[16] only while the EC has now admitted in its reply to India's question that it excluded producers only after initiation and after questionnaires were sent [10-11/96].

32. India recalls 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." The Appellate Body[17] has stated in Canada – Measures affecting the export of civilian aircraft, paragraphs 187 – 189, that:

> *"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." 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. 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.*
>
> *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. 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.*
>
> *The chain of potential consequences does not stop there. To hold that a Member party to a dispute is not legally bound to comply with a panel's request for information relating to that dispute, is, in effect, to declare that Member legally free to preclude a panel from carrying out its mandate and responsibility under the DSU.*
>
> *So to rule would be to reduce to an illusion and a vanity the fundamental right of Members to have disputes arising between them resolved through the system and*

[16] Only after initiation producers were excluded and there should have been 46 producers. And, for example, on 8 November 1996, there were still 39 producers. [On 8 November the French producer Ets Gisele was still part of the 39 companies (Exhibit India-82) although it was not included in the list of 38 producers of EC Exhibit-4, a document which supposedly summarizes the situation before initiation (of 12 September 1996).]

[17] Canada – Measures affecting the export of civilian aircraft, WT/DS70/AB/R, 2 August 1999.

proceedings for which they bargained in concluding the DSU. We are bound to reject an interpretation that promises such consequences."

33. Similarly, the Panel in Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items ("Argentina – Textiles and Apparel") emphasized the "rule of collaboration" incumbent upon parties to WTO dispute settlement.[18] According to that panel, the rule of collaboration provides that once "the claimant has done its best to secure evidence and has actually produced some prima facie evidence in support of its case", the respondent has the obligation "to provide the tribunal with relevant documents which are in its sole possession".

34. India requests the Panel to draw inferences from the EC's refusal to provide relevant information solely in its possession and to conclude that the EC has failed to establish that it received the producers' declarations of support before the initiation of the proceeding.[19] India notes once more that, even if one accepts the declarations of support by the National Trade Associations, the maximum number of producers represented is 38. As the eight producers were excluded only after initiation and after the questionnaires were sent [10-11/96], it is unclear why their declarations of support, according to the EC received before initiation, are missing from the non-confidential standing file. Consequently, the EC could not possibly have determined standing within the meaning of Article 5.4 ADA.

III. DUMPING

35. India recalls that there are three Articles that are at the core of the dumping claims: Article 2.2, Article 2.2.2 (ii), and Article 2.4.2.

1. Article 2.2: The profit must be '*reasonable*' (Claim 4)

36. In connection with this claim, India rejects the observations contained in paragraphs 175 through 193 of the EC's First Written Submission. In this regard India also rejects the EC's arguments contained in paragraphs 68 through 77 of the EC's First Oral Statement.

37. India recalls that at the heart of its claim as regards Article 2.2 is the question whether the principle of 'reasonable' is an over-arching requirement, instructing the whole of Article 2.2, or whether any profit determined in accordance with the further specifics of Article 2.2.2 is *in se* reasonable?.

38. India is convinced that a profit arrived at under the methods foreseen under Article 2.2.2 is *not automatically* reasonable. The word 'reasonable ' in the chapeau of Article 2.2 instructs the whole Article as an independent requirement, both as regards the method and its result. India categorically and strongly denies the EC's suggestion that the methods in Article 2.2.2 (i) and 2.2.2(ii) are '*evidently formulae that produce reasonable solutions'* [paragraphs 181].

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[18] Panel report, WT/DS56/R, adopted 22 April 1998, as modified by the Appellate Body Report, WT/DS56/AB/R, para. 6.40.

[19] As the Appellate Body stated in Canada – Measures affecting the export of civilian aircraft, para 203:

"Clearly, in our view, the Panel had the legal authority and the discretion to draw inferences from the facts before it – including the fact that Canada had refused to provide information sought by the Panel."

Also, in para. 205 the Appellate Body continued:

"If we had been deciding the issue that confronted the Panel, we might well have concluded that the facts of record did warrant the inference that the information Canada withheld on the ASA transaction included information prejudicial to Canada's denial that the EDC had conferred a "benefit" and granted a prohibited export subsidy." [Footnotes omitted].

39. India rejects the contention that no evidence was ever presented showing that the profit of Bombay Dyeing was anomalous and not representative. Bombay Dyeing is a peculiar company in India possessing an established position in the market for over one-hundred years. This fact was brought to the attention of the EC countless times during the proceeding.

40. India also rejects the EC's brushing off of India's argument that a profit is unreasonable simply because it is higher than that obtained in other countries [EC First Written Submission paragraph 188]. The point has never been that the profit so determined for India was *a bit* higher than in other countries [implied by EC First Written Submission paragraph 188]. The point was that the profit determined for and used in the calculations for India was *three* times higher than that of any other profit found to exist in the proceeding. In this connection India also rejects the EC's answer to India's question 29.

2. Article 2.2.2: Incorrect application (Claim 1)

41. In relation to Article 2.2.2 India recalls that it has advanced three arguments:

- The text of Article 2.2.2 (ii) itself evidently mandates the use of a *weighted average* of *amounts* from *exporters or producers*;
- The text of Article 2.2.2 (ii) itself mandates the use of amounts *"incurred and realized"* and not amounts *"determined"*;
- Option (ii) follows option (i);

42. As a preliminary matter, India rejects the EC's arguments contained in its paragraphs 108 through 166 of the EC's First Written Submission. Similarly, India rejects the EC's arguments contained in paragraphs 47 through 66 of the EC's First Oral Statement and the EC's answers to questions 24 and 25.

43. As regards the first argument India considers the suggestion that the inclusion of data of another producer would have had little effect [again paragraph 190] is not borne out by the facts. As the EC knows, Bombay Dyeing and Standard Industries were the largest sellers on the domestic market [see India's first submission paragraph 3.3]. Since the EC failed to investigate Standard Industries, its potential impact is unknown. From the very beginning India's suggestions in this regard were not taken into account. The EC's position to exclude Standard *ab initio*, because it could not have been relevant since it 'only' has 14 per cent domestic sales [as pointed out during the EC's First Oral Statement] is beside the point. Such approach resembles the EC's defense in other parts of this dispute: *'it is not relevant and therefore it will not be investigated.'* How could Standard be judged as not being relevant without first analyzing its data? This refusal to analyze therefore constitutes a violation of Article 2.2.2(ii): the possibilities to properly apply the option *were* available, yet despite this the EC *refused* to take Standard into account and instead chose to interpret the option in a restrictive manner that it deemed more useful for its purpose. Such refusal is all the more bizarre in view of the inappropriateness to rely on Bombay Dyeing as being representative for Indian exporters.

44. Indeed, now that the EC argues that this 18.65 per cent profit of Bombay Dyeing was so perfectly representative [EC FWS paragraph 190], it may be recalled that the quantity of its profitable sales was *only half* of its total domestic sales [page 374 of India Exhibit-24]. In this regard India does not agree with the EC's answer to question 22 where the EC states that the profitable sales of Bombay Dyeing were *"sufficiently representative."* As pointed out earlier, Bombay Dyeing was never representative as a general concept; moreover, as already pointed out on 6 July 1997, the profitable domestic sales quantities of Bombay Dyeing were less than 5 per cent of India's export quantities to

the EC [page 435 India's Exhibits], and therefore not representative within the meaning of footnote 2 of the ADA.

45. As far as the second argument concerning amounts *"incurred and realized"* is concerned, India first of all objects to the suggestion that it has not considered the context, object and purpose of the provision [EC paragraph 135]. However, it is clear from the Vienna Convention that the terms of a treaty in its ordinary meaning are the first source of interpretation. India has therefore rightfully considered the text of the provision.

46. The EC confuses a normal profit *"incurred and realized"* and the profit *"calculated and determined"* for dumping purposes. In this connection India recalls that the three respective profit margins of Bombay Dyeing were *overall* 4.66 per cent, 12.09 per cent "*incurred and realized* on Bed Linen", and 18.65 per cent "*determined* on profitable sales only of Bed Linen".

47. Indeed, to improperly graft the concept of *"ordinary course of trade "* onto Article 2.2.2 (ii) has several flaws as a matter of treaty interpretation:

- First, the initial sentence of Article 2.2.2 chapeau explicitly includes the concept *"ordinary course of trade."* This first sentence of this *chapeau* however is grammatically distinct from the second sentence that serves as the *chapeau* for the remainder of this provision. The concept *"ordinary course of trade"* is therefore not properly considered to be part of the remaining text of this provision. This is different from the concept of 'reasonable' which does not form part of the *chapeau* of 2.2.2, but is an overarching concept embedded in Article 2.2 and thereby instructing the whole of Article 2.2.

- Second, the drafters of Article 2 were quite careful to insert the concept *"ordinary course of trade"* in precisely those places where they intended the concept to apply. The decision not to include the concept in Article 2.2.2(ii) must therefore be given meaning when interpreting this language.

- Third, the EC's interpretation gives no significance to the important distinction between the language and the option set forth in Article 2.2.2 *chapeau* based on *"actual data"* and the language of the option set forth in Article 2.2.2(ii) based on *"actual amounts incurred and realized"*.

48. In other words, in both instances [first and second sentence of Article 2.2.2 chapeau] the *'actual data pertaining to ordinary course of trade'* as well as the *'actual amounts incurred and realized'* form the basis for the determination of the SGA and profit. Both are *'real information'* which form the basis for SGA and profit determination. The difference in the view of India is that this *"real information"* has in the case of *'actual data'* explicitly been qualified by the ADA to pertain to ordinary course of trade. In the case of *'actual amounts incurred and realized'* this is specifically not the case.

49. In sum, it would appear that the EC has acted contrary to Article 2.2.2 on the above counts.

3. Article 2.4.2: Incorrect interpretation of <u>all</u> weighted average export transactions; main rule and exceptions cannot be mixed (Claim 7)

50. As a preliminary observation, India rejects the arguments put forward by the EC in paragraphs 201 through 214 of the EC's First Written Submission. In this connection India also rejects paragraphs 77 through 80 of the EC's First Oral Statement. India regrets that the EC has refused to answer the first part of its question 23. India further rejects EC's argument in the second part of its answer to question 23. India will now address this issue in further detail.

51. India reiterates its concern that allowing the offset within models but not between models [inter-model zeroing] contradicts the plain meaning of Article 2.4.2. The EC's interpretation disregards the word *'all'* in the context of *'all comparable export transactions.' 'All'* is apparently taken to mean by EC only the transactions that are dumped, not those transactions involving models that are not dumped.

52. Moreover, India respectfully submits that the alternative option contained in Article 2.4.2 allows the authorities to compare a weighted average normal value with individual export prices, in case of a *'pattern of export prices.'* Such pattern could exist, for example, in a case where three models would appear very much dumped while two would appear very much non-dumped. However, in the view of India, the ADA does not allow the mixing of the main rule and the exceptions. Either the main rule is applied or the exceptions are invoked on the basis of an explicitly motivated finding of existence of a pattern of export prices.

53. India considers the arguments of the EC unconvincing. The fact remains that no genuine *'weighted average'* on the export side is being effectuated: while normal value is always considered at the *'weighted average'* level, the *'export prices'* are sometimes *'zeroed'* and therefore not considered at their *'weighted average'* level.

54. The interpretation of the EC which for certain models imputes *'zero'* instead of *'weighted average'* is tantamount to skewing the proper weighted average by essentially adjusting some prices, but not others.

55. The offsetting of dumped with non-dumped transactions within models [*intra*-model offsetting], but not between models [*inter*-model zeroing], is also illogical as shown in the following example:

Situation 1: One Model A

Date	*Normal value*	*Export price*	*Difference*
1 May	*50*	*50*	*0*
10 May	*100*	*100*	*0*
20 May	*150*	*150*	*0*
30 May	*200*	*200*	*0*

Agreed between all Members:

Weighted average-to-weighted average:

125 (50+100+150+200/4) – 125 (50+100+150+200) = 0

Situation 2: Four different models A, B, C, D:

Date	*Normal value*	*Export price*	*Difference*
1 May-Model A	*50*	*50*	*0*
10 May-Model B	*100*	*100*	*0*
20 May-Model C	*150*	*150*	*0*
30 May-Model D	*200*	*200*	*0*

Inter-model zeroing:

[India's method: Weighted average-to-weighted average: 125-125=0]

Transaction by transaction-to-transaction by transaction:

[Model A: 50-50=0
Model B: 100-100=0
Model C: 150-150=0
Model D: 200-200=0]

EC method, as applied in Bed Linen: Weighted average normal value to transaction by transaction export price

Model A: 125-50=75
Model B: 125-100=25
Model C: 125-150=-25=0
Model D: 125-200=-75=0

*(100/500)*100=20 per cent*

The EC has managed to find a dumping margin of 20 per cent.

56. India takes this opportunity to make an observation as regards the example put forward by the United States in its First Written Third Party Submission at paragraphs 43 and 46. The United States suggests that *"India's methodology necessarily distorts the product-specific comparisons and is equivalent to simply aggregating normal values and export prices regardless of comparability."* In light of the strong wording of this statement, India wishes to draw the Panel's attention that it respectfully disagrees with its content. The reasons are twofold: in the example of the United States, the models have all been set to an equal volume thereby suggesting that India's method necessarily compares one weighted average normal value with one weighted average export price. Suppose however that the dumped models are all specialty products and the non-dumped models are all mass merchandise sold at non-dumping prices:

	WA Normal Value	WA Export Price	Dumping Amount per model	Quantity Exported	Total Dumping Amount	Total Export Price	Dumping per model
Model 1	5,500	5,000	500	10	5,000	50,000	10%
Model 2	1,800	2,000	-200	50	-10,000	100,000	-10%
Model 3	3,300	3,000	300	10	3,000	30,000	10%
Model 4	4,500	5,000	-500	50	-25,000	250,000	-10%
Model 5	2,200	2,000	200	10	2,000	20,000	10%
						450,000	

The US is now suggesting that only the positive dumping should count towards the overall margin: (10000 ./.. 450000)* 100 = 2.22 per cent. The company is therefore attributed a dumping margin. However, it is clear that on the whole the company was not dumping at all: its overall dumping amount was - 25000, i.e., its dumping margin was - 5.55 per cent. (-25000 ./.. 450000)*100=-5.55 per cent.

57. In the view of India the situation is therefore not as suggested by the United States. India's position takes due care of the overall situation of a company's behaviour, exactly in accordance with a

genuine weighted average of all export transactions. India believes that, in this respect, paragraphs 3.158 and 3.159 of its First Written Submission containing the *'real-life'* example of the company Prakash is also instructive. Companies are found to be dumping while they are in fact not practising dumping behaviour if their export transactions would be properly weighted. India regrets to note that its straightforward observations are drawn into a complex dispute as to whether Article 2.4.2 covers *'zeroing'* of non comparable models which, in fact, all are one *'like product.'* India further regrets that the inconsistent EC practice has been brushed aside with unprovoked attacks on the integrity of India's lawyers [*'breach of confidentiality'*], rather than by the EC explaining in straightforward terms that in some proceedings inter-model offsets are allowed and in other cases not [and notably not in the *Bed Linen* case].

58. In India's view, not only the letter but also the spirit of the provision should be kept in mind. Article 2.4.2 was introduced in the ADA during the Uruguay Round to address specific concerns of victims of anti-dumping actions, so that exporters should not be put in an unfair situation due to skewed calculation techniques, and to effectuate a genuinely fair comparison as per Article 2.4.

59. The EC has also argued that Article 2.4.2 does not address the issue of zeroing. Asked by India which provision does, according to the EC, address zeroing, the EC provided the *non-sequitur* answer that *"it is not for the EC's [sic] to formulate India's claims in this case."* India would recall that Article 2.4.2 was inserted in the ADA exactly to overrule the GATT *Audio Tapes in Cassettes* report on zeroing and therefore considers the EC's invocation of the ATC report[20] on this point unconvincing.

60. Finally, India further rejects the introduction by the EC of Article 9.4, which deals with the duty for the non-sampled co-operating exporters. It is clear that it is not the sampling duty calculation, but the operation of Article 2.4.2 which is the Article towards which India's claim is directed. The fact that a sampling duty could under certain specific circumstances be higher by the exclusion of zero or *de minimis* dumping margins is not at issue. No claims have been raised with respect to Article 9.4.

IV. INJURY

61. As a preliminary matter concerning injury, India wishes to address the concerns that it has regarding the manner in which the EC's sample and Community Industry have been established. The process of establishing the sample has been 'explained' in the Provisional Regulation, recitals 52 through 61, recital 8 of the Provisional Regulation, in EC's non-confidential letter to *Eurocoton* [India Exhibit-82] and in EC's answer 40 to India's written questions. For the purposes of summarizing the information made available by EC concerning the various stages in this process, India attaches a summary worksheet of the facts as India Exhibit-84.

62. India has earlier expressed concern about the fact that the company Luxorette was part of the sample, while it was not part of the Community industry. Having been asked this question, the EC answers in its written replies to the Panel and to India that Luxorette is not part of the sample. In light of the published explanations provided in the Official Journal, and the other information read in context, India is perplexed to learn that according to EC Luxorette is allegedly not in the sample. This assertion by the EC is inconsistent with the facts:

A. Recital 61 of the Provisional Regulation mentions that there is an initial list of 19 sample companies: 8 from France, six from Germany, four from Italy, and one from Portugal. These 19 companies are also mentioned in EC's non-confidential letter to Eurocoton attached as India Exhibit-82;

[20] EC's First Oral Statement at paragraph 81.

B. From these 19 companies, two companies are subsequently excluded, as per recital 61 of the Provisional Regulation. These two companies were respectively excluded for 'failing to co-operate' and 'for the reason as per recital 54'. From Exhibit-82 read in conjunction with the other information it follows that these two companies excluded by recital 61 were Erbelle [Germany] and Claude [France];

C. This then leaves 17 producers *including Luxorette* which the Commission considered *"to be representative of the Community industry"* [Recital 61]. These 17 producers are also specifically mentioned in recital 8 of the provisional Regulation, including Luxorette, where they are also indicated as sampled companies;

D. Up to this stage, Luxorette is still part of these 17 companies;

E. Now, in its answers to the Panel, the EC states that Luxorette has been excluded as per recital 54 of the provisional Regulation. This answer is incomprehensible in view of the fact that as per recital 61 the EC already used the reason of recital 54 to come down from 19 sampled producers to 17 sampled producers [17 in which Luxorette was still included]. Exclusion of one company as per the reason in recital 61 jº recital 54 cannot be used twice!;[21]

F. Indeed, in light of the EC's answer to question 40 of India, one more question arises. In its answer the EC states that the Community industry and the sample were established "in parallel in various steps." If this is the case, one may also wonder what happened with the French company "Claude". This company formed part of the original sample of 19 producers and of the original Community industry of 39 companies [recital 61 PR and India Exhibit-82]. In recital 61 of the provisional regulation two companies are excluded from this sample of 19, one for non-co-operation and one for the reasons as per recital 54. One of these companies is the French company "Claude" since it does not appear any longer on the list of 17 sampled companies as per recital 8 of the provisional regulation [while it did appear in the original sample of 19 producers mentioned in Exhibit-82]. This company was therefore excluded from the sample-19. However, this company does show up in the final Community industry of 35 producers. This begs the question whether the sample and the Community industry were indeed established in parallel and why Claude was removed from the original 19 sampled companies but not from the Community industry.[22]

1. Article 3.1: Failure to examine only dumped transactions (Claim 8)

63. India rejects the EC's arguments contained in paragraphs 215 through 241 of EC's First Written Submission and paragraphs 82 through 94 of EC's First Oral Statement. India further does not understand the EC's answer to India's question 33 where the EC appears to suggest that Article 3 refers only to 'dumped' imports. To the extent that this answer by EC indeed supports India's view that dumped imports cannot mean dumped and non-dumped imports alike, India does not reject this answer. In case this answer has another unknown meaning, India reserves its position on this point. India further regrets that the EC has only answered the Panel's question 18 in part.

[21] *I.e.* for coming from sample-19 to sample-17, and then *again* to argue that from the sample-17 another removal has to take place.

[22] India re-attaches the relevant pages of the Provisional Regulation [pages 143, 144, 150, and 151 of India's original Exhibits].

64. India recalls that it considers that the failure of the EC to examine dumped transactions only for the purpose of the injury determination in the Bed Linen II proceeding is inconsistent with Articles 3.1, 3.2, 3.4, 3.5 of the ADA.

65. India also draws the Panel's attention to the EC's reply to question 18, posed by the Panel. On the basis of the unique theory advanced by the EC that *"countries dump"*, the EC will even include exports by producers determined not to have dumped in its injury analysis. In the view of India, this practice completely breaks the causal link between dumping and injury, required by the ADA. During the first meeting with the Panel, the EC tried to explain away the consequences of its incomprehensible practice on this point by arguing that the level of undercutting/underselling might be less than it otherwise would have been. However, this explanation comes into play only if the non-dumping producer charged higher export prices than the dumping producer[s]. The EC, in fact, also argued that if 'today' some companies are not dumping, they could well be dumping 'tomorrow' and that since dumping by a few companies is beneficial to all exporters, all imports must be included. This logic is hard to accept. Indeed, the example put forth to the EC during the course of first meeting with the Panel in which one producer engaged in cost dumping [because of high investments] while the other producer did not, is in the view of India especially pertinent to India's argument. In India's view such example rebuts the EC's logic that *"countries dump."* India does not deny that there are various forms of dumping, but the argument that *'countries dump'* is simplistic in India's view. [There are many other situations envisagable where certain companies dump while others do not and, upon request of the Panel, India would be pleased to provide further details].

66. In short, allowing some *"dumped"* imports to taint all imports from a company and, indeed, a country skews the fundamental injury analysis of Article 3 apart from being a gross violation of the basic principles of 'natural justice.' The core analysis of Article 3.1 and 3.2 requires the assessment of the volume and price impact of *"dumped"* imports only.

2. Article 3.4: Failure to evaluate all factors (Claim 11)

67. India first of all rejects the EC's arguments provided in paragraphs 246 through 293 EC's First Written Submission and the arguments contained in paragraphs 95 through 118 of EC's First Oral Statement. As far as the answers to the questions from the Panel and from India are concerned, India is sure that the Panel would have noted that the EC now states that in fact there was no injury to the EC industry except for two factors and that for that reason all other factors were apparently not considered relevant by EC, without admittedly having even examined these other factors.

68. Indeed, India wishes to take this opportunity to highlight some of the EC's answers which, rather explicitly, admit that in fact there was no injury in the first place:

A. *"The point is illustrated by the circumstances on the bed linen industry. In that investigation an analysis of the industry showed, firstly, that the negative data on certain factors (profits and prices) justified an overall conclusion of injury, and secondly that (because of closures and consolidation) data obtained on other factors could give a false impression of good health. In circumstances such as these it would not be unreasonable to conclude that the latter factors were not relevant, without examining them all. (Some examination would probably be necessary in order to confirm the overall analysis)." [emphasis added; source: last paragraph of EC answer to Panel question 27];*

B. *" . . . factors which might otherwise have been expected to reveal injury were indicating an apparently healthy industry (PM rec. 92; DR rec. 41). It could be said that they had lost their relevance, or at least their direct relevance, to the conclusion on injury." [EC answer to Panel question 20, third paragraph];*

C. *"As explained in the answer to the previous question, in the peculiar circumstances of the case, indications of injury were apparent in only two of the factors listed in Article 3.4, in other respects the industry was in an apparently healthy condition." [emphasis added; source: EC answer to Panel question 27, second sentence];*

D. *" . . . the principal significance of the disappearance of companies is to explain how an affirmative determination of injury could properly be made when on all but two factors, the domestic industry was in an apparently healthy state (PM recs. 81, 90; DR rec. 41).*

. . .

Without information regarding the exit of the companies the Regulations would have given a misleading picture of developments in the state of the industry during the 'injury investigation period'. In particular, this information supported the finding that some of the Article 3.4 factors were not relevant (i.e. meaningful) in this case (e.g. employment and production), or that the relevant information risked giving a distorted image of the industry's condition (e.g., sales volume and value, capacity, capacity utilisation, and inventories)." [emphasis added; EC answer to India's question 44].

69. From the above quotes it would appear that the main reason why the EC has in fact restricted itself to merely two factors, sales prices and profits, is that all other factors did not indicate or prove injury. For this reason these other factors were disregarded. But, how can factors *prima facie* be considered to show no material injury when these factors have to form part of the analysis which eventually has to determine whether the health was good or not. In other words, the EC's logic enabled it to establish injury on the basis of two factors, thereby *ab initio* disregarding all other factors of Article 3.4, because according to EC such other factors provided a *'false impression of good health.'* This in India's view is both a subversion of the objectives of the ADA and of natural justice, which demand that injury to the domestic industry must be gauged on the basis of all relevant economic factors, and not on the basis of one or two factors alone.

70. India now briefly recapitulates its comments on the three EC's [contradictory] defences as regards Article 3.4 [that it did evaluate all factors, that only negative factors should be examined, that not all factors require examination].

71. First of all, contrary to the assertions in its First Written Submission, the EC failed to carry out the obligatory evaluation of all injury factors mentioned in Article 3.4 of the ADA for its determination on the state of the domestic industry. As the EC itself points out in its written answers to the Panel and in its description of the facts in its First Oral Statement: *"The EC recalls that two principal negative factors (profits and prices) were identified by the EC authorities in this case, and were thoroughly examined and evaluated. No other plausible negative factors were suggested to them or otherwise came to their attention."* [Emphasis added; EC First Oral Statement, paragraph 105, footnote omitted]. Apart from the factual incorrectness of this statement, apparently, the EC admits that it did not take into account the factors 'suggested' by Article 3.4, since these were neither suggested nor came to their attention. It becomes no longer necessary for India to further rebut the factually incorrect arguments put forth by the EC that all factors were evaluated [paragraphs 250 through 255 of EC's First Written Submission], because the EC itself admits that *"no other factors [than profits and prices] came to their attention."* If such other factors did not even come to the attention of the EC it is incomprehensible how these factors could have been evaluated in the first place. In any event they were not evaluated, as India also pointed out in its First Written Submission in paragraphs 4.72 through 4.76.

72. According to the EC's admissions in its answers, it did not examine the following factors [because it did not consider these factors to be relevant]:

- Output;
- Market share;
- Productivity;
- Return on investments;
- Utilization of capacity;
- Factors affecting domestic prices;
- The magnitude of the margin of dumping;
- Actual effects on cash flow;
- Potential negative effects on cash flow;
- Inventories;
- Employment;
- Wages;
- Growth;
- Ability to raise capital;
- Ability to raise investments.

73. India also registers its surprise at the statement contained in EC First Written Submission at paragraph 262, where the EC suggests that, in spite of the specific provisions of Article 3.4, it was up to the exporters to suggest factors to the EC which it otherwise might forget to evaluate and examine. Apparently the EC believes that the Indian exporters should have *guessed*, before imposition of measures, that the EC was only going to rely on *two* injury factors in its examination. For that reason the exporters should, on the basis of such speculative *guesswork*, have pointed out to the EC that there are 16 other factors which are relevant under the ADA and should be examined. In any event it should be noted for the record that India's exporters did make such arguments which they considered relevant on a number of occasions. Unfortunately, these arguments were never addressed by the EC.

74. India recalls that the purposes of Article 3.4 is to ensure an unbiased and objective injury analysis, which is mandatory as per the Article. Evaluation of all the factors is required in every case, although such consideration may lead the investigating authority to conclude that a particular factor is not probative in the circumstances of a particular industry and therefore is not relevant to the particular determination.[23]

75. India further rejects the argument that only negative factors [and negative aspects of factors] should be examined. As the EC now suggests in its answer to the question 20 of the Panel: *" . . . factors which might otherwise have been expected to reveal injury were indicating an apparently healthy industry (PM rec. 92; DR rec. 41). It could be said that they had lost their relevance, or at least their direct relevance, to the conclusion on injury."* [EC answer to Panel question 20, third paragraph] Apparently, the EC decided that when factors, which it expects to point towards injury, do in fact not point towards injury, they are no longer relevant for the determination of injury!? India rejects this unprecedented logic.

76. In this connection India recalls that the EC argued in *Brazil--CVD on Milk*:[24]

> *" 111. . . . that a review of whether the investigating authorities had made a determination of injury based on an objective examination of the volume of subsidized imports had to include an examination of whether they had considered all relevant facts before them, including facts which might detract from an affirmative determination, and whether a reasonable explanation had been offered of how the*

[23] *Mexico--HFCS*, WT/DS132/R, 28 January 2000.

[24] Brazil—imposition of provisional and definitive countervailing duties on milk powder and certain types of milk from the EEC (SCM/179).

facts as a whole supported the determination made by the investigating authorities."[25] [emphasis added]

The current reasoning of the EC in the *Bed Linen case*, that relevant information should be disregarded because it can create a *'false impression of good health'* is therefore contradictory with what it argued in *Brazil--CVD on Milk.*[26]

77. To the extent that the EC argues that it is not necessary to evaluate all Article 3.4 factors, India rejects such suggestion. In this connection India recalls the EC's own words in *Brazil--CVD on Milk.*[27]

> *"123. The EEC argued that Brazil had not considered the impact of the allegedly subsidized imports on the domestic producers as required under Articles 6:1(b) and 6:3 of the Agreement. The EEC said that Article 6:3 elaborated on the criteria for the examination of the impact on the domestic industry of the subsidized imports. The EEC argued that this subject was not addressed in the Administrative Order No. 569, where except for a vague reference in Article 1(e) to production having stagnated, there was no mention of any of the indicators which Brazil was required to evaluate in Article 6:3 of the Agreement ... Moreover, the EEC said that Brazil had never provided definitive data on production, consumption, profitability, capacity utilization, market share or any of the other factors indicated in Article 6:3, nor were these issues dealt with in any way in the final determination. . . .*
>
> *The EEC argued that in carrying out an objective examination required under Article 6:1 of the Agreement, the investigating authorities were obliged to consider the criteria and indicators laid down in Articles 6:2 and 6:3. Therefore, an essential element of a review of whether a determination of material injury was in conformity with the standard of Article 6 was an examination of whether the factors set forth in Articles 6:2 and 6:3 had been properly considered, though Article 6 did not prejudge the weight to be assigned to each factor.*[28] *However, in this case, the data on the elements contained in Article 6:3, such as on consumption, market shares, production or prices, had not been provided by Brazil at the time of its definitive determination. ..*
>
> *132. The EEC disagreed with Brazil's contention that Brazil had provided the relevant evidence on elements enumerated in Article 6:3 to the EEC prior to the panel proceedings. Brazil had never provided any evidence on consumption, market shares, capacity utilization or profitability relevant to an examination of injury to the domestic industry under Article 6, either during the investigation or in consultations*

[25] In this context, the EEC cited the Report of the panel on "United States - Salmon", paragraph 258.

[26] India notes that the text of Article 6:3 of the Subsidies Code was at the relevant point identical to 3.4 of the ADA:

"The examination of the impact 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 such as actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investment and, in the case of agriculture, whether there has been an increased burden on Government support programmes. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance."

[27] Brazil—imposition of provisional and definitive countervailing duties on milk powder and certain types of milk from the EEC (SCM/179).

[28] To support its point that the question of whether the determination of injury was based on positive evidence was distinct from the question of the weight to be accorded to the facts before the investigating authorities, the EEC cited the report of the panel on "United States - Salmon", paragraph 260.

> *or conciliation meetings. These data were definitely not provided in Administrative Order No. 569 which imposed the definitive duty." [emphasis added]*

78. The Panel in that case also concluded that:

> *"333. . . . the list of factors mentioned in Article 6:3 in this provision was illustrative in nature, and the last sentence made it clear that the provision did not prejudge the weight to be given to any particular factor mentioned in the provision. At the same time, Article 6:3 clearly required investigating authorities to conduct in each case a comprehensive analysis of "all relevant economic factors and indices having a bearing on the state of the industry". The Panel was of the view that to consider only the stagnation of domestic production in the analysis of the impact of imports on the domestic industry was inconsistent with this comprehensive character of the examination required under Article 6:3."*

79. Similarly, the Panel report in *Korea Resins* concluded that the investigating authority could not focus solely on factors supporting a conclusion that the domestic industry would likely encounter difficulties while disregarding other factors.[29] Article 3.4 and, indeed the Article 17.6(i) ADA require an unbiased and objective evaluation of the facts.

80. The *HFCS* Panel report, and other case law quoted in India's First Written Submission, is equally relevant. Contrary to what the EC seems to suggest in its paragraph 289, India does not consider that the Panel in *HFCS* made its decision based on simplistic reliance on an inappropriate precedent. As the third party submission of the United States emphasizes, the parties to that dispute fully argued the issue to the panel, citing GATT anti-dumping determinations such as *Korea Resins* .

81. Article 3.4 specifies the 18 relevant factors and indices which at a minimum must be evaluated to examine the impact of the dumped imports on the domestic industry.[30] Moreover, this list is not exhaustive. The EC observes in paragraph 265 of its First Written Submission that *"to insist that the listed factors must be evaluated in all circumstances, would be to require the evaluation of a factor that has already been found to be irrelevant, which is nonsense"*. However, this reasoning is illogical: how can investigating authorities determine that a factor is not relevant if it is not examined/evaluated? And how can interested parties know whether the authority has evaluated such factor, if nothing is published. In the EC's logic, investigating authorities should first determine on which relevant factors/indices they will rely, and only then examine their importance. Such an approach makes a mockery of Article 3.4.

82. As far as the EC's new argument in Table-4 of its First Written Submission is concerned [*"Found not be a significant independent factor"*], India recalls the Panel's views in *Brazil-Milk* on the introduction of such new arguments during Panel proceedings:

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[29] *Korea-Resins*, ADP/92 and of 2 April 1993.

[30] At this stage India also wishes to register for the record that it does not agree with the EC that the word 'impact' has a negative connotation. Webster's New World Dictionary, 3rd College Edition 1994 defines the noun 'impact' as: "1 a striking together; violent contact; collision; 2 the force of a collision; shock; 3 the power of an event, idea, etc. to produce changes, move the feelings, etc." Clearly, in the context of the ADA the first definition is not relevant. The other two are not necessarily negative. India does agree with the EC that the interpretation of Article 3.4 must be based on the ordinary meaning of its terms in their context and in the light of the object and purpose of the ADA. However, in this context India notes the opening words which are *not* (as implied by the EC at para 257) "impact" but "the *examination of* the impact". The word "examination" conveys an investigation *whether or not* there is an impact. [Webster's New World Dictionary, 3rd College Edition 1994 defines "examination" as 1 an examining or being examined; investigation; inspection; checkup; scrutiny; inquiry; testing; 2 means or method of examining; 3 a set of questions asked in testing or interrogating; test.] The examination of the impact must include "an evaluation of all relevant factors and indices (etc.)". The word "evaluation" again conveys an *analysis* of "all" (i.e. *each of*) these relevant factors and indices.

> *"312. For the reasons explained elsewhere in this Report in connection with the Panel's analysis of the preliminary affirmative finding made in April 1992 by the Brazilian authorities, the Panel was of the view that in its review of the final determination in Administrative Order No. 569 it could not properly take account of reasons presented by Brazil before the Panel but not discernible either from the text of Administrative Order No. 569 or from a statement of reasons issued in a different form by the Brazilian authorities at the time of their final finding. 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."* [emphasis added]

The newly advanced logic, not discernible from the public record, should therefore be disregarded.

3. Article 3.4: Picking and choosing of the domestic industry for injury determination (Claim 15)

83. The first submission of India contained three arguments showing the inconsistency in the injury determination:

- The EC explicitly determined that the domestic industry consisted of 35 companies [the complainants according to the EC], but relied in its injury determination on companies outside this group of 35.

- The EC chose a sample from the domestic industry, but it did not consistently rely on it;

- The EC chose to rely on different 'levels' of industry for different injury indices without any apparent reason other than goal-oriented 'picking and choosing of injury'.

84. India maintains that the arguments put forward by the EC in its First Written Submission and its First Oral Statement do not refute the claims made by India in India's First Written Submission *at all*. Moreover, India objects to the newly introduced concept by the EC [as far as we understand it] that within one and the same investigation a Member may use either of the alternative definitions of the domestic industry contained in Article 4.1 of the ADA, suited to its needs. Such innovative 'right' of picking and choosing the most desirable definition whenever a choice is available runs contrary to the concepts of consistency and predictability. One may also wonder how such innovative approach fits with Article 17 (6) (i) which provides that establishment of the facts must be proper and the evaluation must be unbiased and objective.

85. In paragraph (57) of the provisional Regulation, subsequently endorsed, the EC noted that:

> *"The remaining 35 companies, which cooperated with the enquiry and are located in France, Germany, Italy, Spain, Portugal, Austria and Finland, represented a major proportion of total Community production in the investigation period. These companies were therefore deemed to make up the Community industry under the terms of Article 4 (1) of the basic Regulation."* (Emphasis added).[31]

86. In paragraph 317 of its first submission the EC reiterates that its finding of injury is not based on the EC producers as a whole but on the Community industry. For this purpose the EC quotes recital (40) of the Definitive Regulation. The Definitive Regulation refers back to the sample companies. The sample of 17 producers however contained at least one company [Luxorette] that does not belong to the Community industry. The EC is therefore contradicting itself: how can one

[31] This finding was confirmed in paragraph 34 of the definitive Regulation. If--notwithstanding this explicit determination--other companies were also part of the domestic industry, the provisional and definitive Regulations suffer at least from an Article 12 problem.

allegedly not be looking outside the Community industry when, for the purpose of analyzing the situation of the Community industry, one is partly relying on a sample which consists of companies not part of the Community industry.[32]

87. Further, the EC argued in its First Oral Statement at paragraphs 134 and 138 that it is allowed to and in fact did look at the whole of the EC producers to make an injury determination for the domestic industry, defined as the 35 producers: *"It is true that in the case of some injury factors the EC looked to the whole industry to make this [injury] determination [for the Community industry]"*. The EC clarified in its answer to India's question 32 that it did not rely on a double definition of the domestic industry and only considered the 35 producers as the Community industry. India therefore has a problem with the EC finding injury for the domestic industry, while partly relying in this determination on companies *outside* this domestic industry. In the view of India this is inconsistent with Article 3.4 ADA.

88. In paragraph 318 of its first submission the EC suggests that *"India 's arguments appear to rest on the notion that all factors . . . must indicate injury."* This mistaken 'interpretation' by the EC is reiterated by the EC in paragraph 128 of its First Oral Statement. For the record, India denies having ever relied on such notion. The EC is misrepresenting India's arguments and the statements of the EC are inconsistent with the facts. As per India's First Submission it is clear that what the EC states is not what India has been arguing. See, *e.g.*, India's First Written Submission at paragraph 4.126: *". . . in the final analysis not all factors will have to point towards injury, as long as, objectively seen, the investigating authorities could reasonably conclude that on the whole material injury existed and was caused by the 'dumped imports'."*.

89. Therefore, as India has argued all along, an objective weighing process needs to take place. However, in this weighing process of positive and negative factors, the EC cannot simply disregard the positive injury factors *during* the IP with a justification that company closures occurred *before* the I.P. How can company closures from *before* the IP be caused by dumped imports which occurred only *after* their closure? By doing so, the EC has without justification disregarded positive factors that existed in the IP and has incorrectly considered the exit of companies from the Community industry before the IP as evidence of injury during the IP. Moreover, why does the EC automatically assume that the closures were caused by the dumped imports? When EC company A disappears to the benefit of EC company B, then why is the exporting company C then automatically assumed to be the guilty one? It could well be that A has disappeared because of B's competition. In India's view, the EC' s approach amounts not to 'injury investigation' but what to could appropriately be called 'injury speculation.' It lacks even a shred of scientific or objective validity.

90. [Moreover, while assuming automatically that the companies disappeared prior to I.P. on account of dumped imports, the EC has also assumed incorrectly that imports prior to the IP were also dumped (see claim 19 *infra*)].

91. As regards sampling of the domestic industry, India maintains that once the EC selected a sample from the domestic industry, it was not entitled to subsequently deviate from that sample in order to find injury. India rejects the assertion contained in paragraph 136 of the EC' s First Oral Statement that this claim from India is *"mysterious."* India's claim is not mysterious at all but very straightforward. India notes that the EC in its First Written Submission does not deny having looked at information outside the sample. Indeed, the EC again in its First Oral Statement confirms that it is entitled to deviate from the sample if it wants to find injury. India rejects the suggestions put forward by the EC [paragraphs 326-327 First Written Submission; paragraph 136 First Oral Statement] that

[32] And, conversely, one may wonder what this Community industry represents if it includes a producer which was excluded from the original sample-19 because it was not representative. [This is the French producer Claude which was excluded from the sample-19 (see India Exhibit-82) for the reasons set forth in recital 61 and 54 of the PR, but which still continued to form part of the Community industry].

once it had selected a sample it could still use information outside the sample if available. [*But*, according to EC, *only* if such information points towards injury, because the EC considers that information that does not point towards injury loses it relevance (EC answer to Panel question 20, second last sentence)]. Such approach distorts the very purpose of a sample and cannot, contrary to what the EC suggests in its paragraph 327, be considered '*unbiased and objective'*.

92. As regards the 'picking and choosing' of the preferred level in order to establish injury India notes that the EC does not deny the facts as summarized by India. Indeed, the EC even seems to acknowledge that it has used various injury factors from the preferred level so long as this would support an injury determination. This understanding by India of the EC's 'pick and choose' injury determination is again confirmed by paragraph 134, 136, and 137 of the EC's First Oral Statement. India underlines that such a 'pick and choose' approach cannot be considered unbiased and objective by any stretch of imagination.33 The ADA does not contemplate that an authority will at its discretion use one industry definition for one factor and another definition for another factor.

93. India at this stage recapitulates some of the 'unusual' aspects of the EC's injury determination for the Community Industry. According to EC the Community industry may be defined at any stage during the proceeding and it is possible, but not necessary, that two definitions of this industry apply simultaneously [para 309 EC FWS]. For the purposes of determining injury for this Community Industry, producers *outside* this group may also be taken into account [para 134 EC FOS]. For the purposes of determining injury of the Community Industry a sample may also be established which however is non-binding and can be abandoned at any time [para 136 EC FOS]. The sample is not relevant in case it would not point towards injury [para 136 EC FOS, *j°* price development of the sample (increase of 3.2 per cent) *j°* market share of the sample (increase by volume and value), *etc*.]. Indeed, and in any event, injury factors are only relevant if they point towards injury; positive factors lose their relevance and need therefore not to be discussed [EC answer to Panel question 20]. The EC's position appears to be that where only *two* factors out of 18 point towards injury at *one* of the three levels to be decided only *after* seeing the result for each level, *then* injury for the Community Industry under Article 3.4 ADA is determined.

94. In the view of India these views of the EC on the determination of injury are absurd and inconsistent with Article 3.4 of the ADA. Again, one of the most fundamental principles of any scientific or fact-finding determinations is that cause and effect should be determined according to consistent parameters and, as also pointed out in India's First Written Submission: the grocer should not be allowed to *"tip the scale "* during the weighing process.

4. Articles 6.10 and 6.11: No statistically valid sampling (Claim 16)

95. As pointed out by the preliminary ruling of Panel, India is still permitted to present arguments concerning Article 6.10 and 6.11.

96. India underlines that for a sample to be statistically valid it must fairly represent the entire underlying population from which the sample was taken. India contends that to take a sample only from the pool of the complaining domestic producers does not meet the requirements of a 'statistically valid' sample. Alternatively, however, in case the sample is supposedly taken to represent only the Community industry, *i.e.* the complaining producers as the EC seems to argue, then it should not be allowed to contain companies from outside that industry.[34] Further, if companies are removed from the sample because they are no longer representative they can no longer form part of the main group.[35]

[33] A pick and choose approach will also lead to an 'injury finding' which no longer reflects the domestic industry because the findings are inferred from various levels, *de facto* at random.

[34] The company Luxorette was part of the sample but did not belong to the Community industry.

[35] The company Claude was removed from the original sample, *de facto* because it was not representative; however, it continued to form part of the Community industry.

Indeed, if the sample *would* have been statistically valid then why has it been necessary to deviate from the sample at certain points: a perfectly statistically valid sample should have produced the same results as the source from which the sample was drawn. This makes it even more suspect that the EC jumps back and forth between the sample, the Community industry and EU-15. The EC's behaviour is in fact exactly tantamount to admitting that the sample was not statistically valid.

5. Dumped imports before I.P. (Claim 19)

97. India considers the assertion of the EC contained in paragraph 343 where it now denies having ever considered as *"dumped"* all imports of bed linen from India in the years preceding the investigation period as factually incorrect. In this connection India recalls, to give just one example, paragraph 67 of the provisional Regulation, endorsed by the definitive Regulation, which states:

> *"dumped imports from the three countries concerned increased from 33,825 tonnes in 1992 to 46 656 tonnes during the investigation period i.e. an increase of 12,831 tonnes or 38 per cent. During the same period their market share increased from 16.9 per cent to 25.1 per cent"* [emphasis added].

This view of the EC is repeated at other places. For example, in recital (81) of its Provisional Regulation the EC states that *" . . . the Community industry represented those companies which were strong enough to survive the competition of dumped imports. . ."*.[36]

98. In the light of this India is surprised to read paragraphs 344 and 345 of the EC's First Written Submission, which contradict its statements in the Official Journal on this point. Clearly, India is not *'in confusion'* at all [EC paragraph 345] but is merely relying on the text of the Regulation published in the *Official Journal* .

99. Accordingly, India reiterates that the EC practice to automatically consider as *'dumped"* all imports of bed linen from India in the years preceding the investigation period is inconsistent with Article 3.4. In particular, EC could not attribute the alleged closures of the 29 companies in the period from 1992 up to the I.P. to the *"dumped imports"* during the I.P., since these imports occurred only after the alleged company closures.

100. Second, the statements contained in paragraphs 346 through 350 of the EC's First Written Submission contradict and try to explain away the EC's very own injury analysis as published in the Official Journal. In this connection India refers for example to recitals (91) and (92) of the Provisional Regulation, maintained in recitals (40) and (41) of the Definitive Regulation. The statements now made by the EC in its first submission, alleging for example that India's arguments are *"misplaced"* [paragraph 348], are completely contradicted by the published statements in the Official Journal.

6. Article 3.5: No consideration of other factors (Claim 20)

101. India believes that the EC acted inconsistently with Article 3.5 by automatically considering all imports of bed linen from India in the period 1992-30 June 1995 as *"dumped"* and thereby causing injury *"through the effects of dumping"*.

102. For the same reasons as explained by India above under claim 19, the statements of the EC contained in paragraph 352 of its First Written Submission are not borne out by the facts. The

[36] Or, also explicitly in its answer 19 to the Panel: "If it appears that the domestic industry was already suffering injury before the IP, this may help to confirm that dumping is causing injury. This may involve a presumption that the dumping found in the IP was also present before the IP."

Regulations imposing provisional and definitive duties are clear and form the basis on which this dispute is to be adjudicated. Indeed, as the Panel held in *Brazil-Milk*:

> *"it could not properly take account of reasons presented by Brazil before the Panel but not discernible either from the text of Administrative Order No. 569 or from a statement of reasons issued in a different form by the Brazilian authorities at the time of their final finding. 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."*[37]

103. The clear language of the EC Regulations cannot be waived away by suggestive statements that India's claim is based on a *"misunderstanding of the EC's practice"* [EC paragraph 354].

V. ARTICLE 15: NO DEVELOPING COUNTRY STATUS (Claim 29)

104. India first of all rejects the inaccurate suggestion by the EC in its First Written Submission that no undertaking was offered within the time limits set. This suggestion from the EC is factually incorrect. Exhibit-72 shows that India did make such an offer on time. Furthermore, India rejects the EC's averment in its First Oral Statement that the EC was *"willing to explore"* an undertaking because, as India has clearly shown[38], the EC authorities did not express this willingness at any stage, and did not take any initiative but rejected the offer made by Texprocil. In fact India would also like to bring to the Panel's notice that on the contrary, in answer to its repeated suggestions on undertakings in October 1997 the standard answer from the EC was always that Bed Linen was *"too complicated a product for undertakings"*.

105. India also rejects the suggestions of the EC in its answers to the Panel that undertakings cannot be offered and accepted at the provisional stage. These suggestions from the EC are factually incorrect. Undertakings *can* be offered and *can* be accepted at the provisional stage in EC anti-dumping proceedings.[39]

106. India recalls that the objective of Article 15 ADA is to provide special and differential treatment under the ADA to developing countries. To achieve this purpose *"special regard"* ***must*** be given by developed country Members to the *"special situation"* of developing country Members and possibilities of constructive remedies shall be explored.

107. Unfortunately however the EC chose to ignore this Article altogether. The EC did not explore any possibility of any constructive remedy at all and did not even take the trouble to address the requests made by Indian exporters throughout the proceeding. During the consultations, and now again in reply to question 30 of the Panel, the EC has replied that the EC had in fact accorded special treatment to Indian exporters in three manners:

- Simplified questionnaires;
- Acceptance of responses beyond stated deadlines;
- Individual treatment of newcomers.

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[37] At 312.

[38] And the EC has also admitted in its answer to question 29 of the Panel: *"The EC made no specific communication of this fact to India."*

[39] *For example, Polypropylene Binder Or Baler Twine* from Poland, Czech Republic, Hungary, and Saudi Arabia, where undertakings were accepted at the provisional stage for the Hungarian exporters: [1998] O.J. L267/7. Or, even more recently, *Urea and Ammonium Nitrate* from Algeria, Belarus, Lithuania, Russia, and Ukraine, where an undertaking was accepted at the provisional stage for the Algerian exporter: [2000] O.J. L75/3.

108. In its first submission, India has already proven this alleged "*special treatment*" to be factually incorrect. Exhibits India-63, India-64, India-65 and India-66 prove that the bed linen questionnaires were similar to questionnaires used in a case against OECD members Hungary, Poland and Mexico and in two cases against Taiwan. India is not aware of any special flexibility as regards deadlines (India's first submission paragraphs 6.34-6.38) and furthermore recalls the EC's reply to a question by the Panel during the First Meeting with the Panel that India was given the bare statutory ten days' minimum period to offer a price undertaking. Last, the 'special' newcomers provision is not special at all (India's first submission, paragraphs 6.39-6.41), unless of course one considers Norway or Poland a developing country to whom such a provision was also applied. India therefore rejects that "*these measures go beyond the requirements of Article 15*" [EC's answer to panel question 30]. India also notes the 'logic' put forth by the EC in response to the Panel's question No. 38 in the context of the obligations imposed by Article 15 that 'where developing countries are experienced in such proceedings, or where their exporters are professionally represented, there is no need for such action.' It is for the first time that India is hearing such an argument that the obligations under a GATT/WTO Agreement are dependent on the experience that a Member may have in respect of that Agreement, and that a special provision for the protection of developing countries in the ADA could, by any stretch of imagination, contain such a restriction; nor does any valid manner of treaty interpretation justify the kind of logic the EC is putting forth.

109. Finally, as the Panel in *Cotton Yarns* already pointed out: measures *during* the process of establishing dumping and injury [such as the alleged special questionnaires or special deadlines] do not constitute constructive remedies within the meaning of Article 15 since the Article only comes into play *once* the authorities determine that dumping and injury exist. Article 15 applies to the examination of constructive remedies before imposing provisional or definitive duties, which the EC did not do.

110. Furthermore, Article 15 clearly puts the initiative for exploring constructive remedies with the importing country authority, as has been elaborated upon by India in its response to the Panel's question 13, and the in third party submission made by Egypt.

111. India is aware of the Panel report in *EC-Imposition of anti-dumping duties on imports of cotton yarn from Brazil*.[40] However, as the following excerpt shows, the situation in that case was quite different:

> *"The Panel notes that in Section M entitled "UNDERTAKINGS" of the Definitive Determination the EC had stated*
>
> *"Both the Turkish and Brazilian authorities, having been informed on the essential facts and considerations on the basis of which it was intended to recommend the imposition of definitive duties, offered, on behalf of the exporters concerned, a form of undertaking.*
>
> ...
>
> *As regards the Brazilian offer which provides for voluntary quantitative export restrictions, the Commission was not satisfied that its acceptance would eliminate the injurious effects of the dumping.*
>
> *The Council noted that for these reasons both these offers of undertaking have, after consultation, been rejected."*

[40] ADP/137 (4 July 1995).

> *In the view of the Panel at the stage of considering the application of anti-dumping duties, the EC had considered whether it could enter a quantitative undertaking and had considered that such an undertaking would not eliminate the injury caused by the dumped imports. The Panel recalled that it had concluded in paragraph 584 that there was no obligation to enter into the constructive remedies, merely to consider the possibility of entering into constructive remedies.*
>
> *Based on its conclusions in paragraphs 585, 587 and 589, the Panel dismissed the claim by Brazil that the EC had breached Article 13 of the Agreement by not giving "special regard" to the "special situation" of Brazil and not exploring the possibility of constructive remedies proposed by Brazilian exporters."*

112. Thus, in the *Cotton Yarns* case, the EC had in fact considered the acceptance of undertakings, as is clear from the published record in that case. However, in the present case the exporters were discouraged from seeking such remedy and the EC did not even take the trouble to address the repeated concerns of India.

113. India therefore regrets that the EC has not only blatantly ignored its responsibilities under Article 15 but has the audacity to make inaccurate statements and to advance legally untenable and ludicrous arguments. The issue of special and deferential treatment does not only affect India, but all developing country members alike, all of whom are looking with anticipation to the Panel ruling on this important issue.

VI. ARTICLE 12.2.2: NO/INSUFFICIENT EXPLANATIONS (Claims 3, 6, 13, 18, 22, 25, 28, AND 31)

114. India rejects the *'logic'* put forward by the EC at various parts in its First Written Submission that it is in fact only obliged to react to *relevant* arguments and that for the rest it does not have to explain its actions or decisions. This reasoning of the EC becomes especially doubtful when it automatically decides that when an argument or a fact point against, for example, injury such argument becomes not relevant. Thus, the EC stated in its answer to the question 20 of the Panel:

> *" . . . factors which might otherwise have been expected to reveal injury were indicating an apparently healthy industry (PM rec. 92; DR rec. 41). It could be said that they had lost their relevance, or at least their direct relevance, to the conclusion on injury."* [EC answer to Panel question 20, third paragraph]

115. Apparently, since these factors were no longer relevant they did not warrant any discussion by the EC. As noted before, India rejects this unique logic for a number of reasons: it means that any valid argument or valid fact, which seriously points against an argument or fact on which the administrator wants to base its determination would automatically be judged irrelevant. It therefore renders any serious discussion or analysis completely meaningless. It further provides the authorities *carte blanche* discretion not to discuss anything, under the pretext that it is not relevant. India is of the view that it is up to the authorities to explain why a factor or argument is irrelevant, rather than by showing its irrelevance by absence of discussing it. The EC's approach makes a mockery of Article 12 and Article 17.6(i).

116. The inappropriate results to which the EC's interpretation could lead can for example be illustrated with its reactions to India's concerns with EC's explanation regarding standing. The EC apparently takes the following--incomprehensible--views on Articles 12.1 and 12.2 in connection with standing:

As regards Article 12.1:

A. India should have brought a claim under Article 12.1.1 [answer to India question 5, second sentence] if it had any problems with the standing;

B. Article 12.1.1 in any event does not require the EC to address the standing determination [answer to Panel question 23, second paragraph].

As regards Article 12.2

A. India should have invoked 12.2 at the relevant time, *i.e.* not after initiation nor after provisional measures [EC paragraph 43 First Oral Statement]. Or, in other words, India's claims under Article 12.2 are in any event considered irrelevant [paragraph 43 EC's First Oral Statement] because they are made after initiation. The EC implicitly suggests therefore that India should *guess* when the proceeding will be initiated and should therefore make a claim *before* such initiation;

B. In any event, even if Article 12.2 is invoked the EC does not need to react [answer to Panel question 23 last sentence].

117. These answers from the EC therefore imply that *regardless of <u>when</u>* and *regardless of <u>under which Article</u>* India would have, has, or had, made any claims regarding standing, the EC is not under an obligation to react or explain whatsoever. This attitude is exacerbated by the latest answers of the EC to India's question regarding standing: *"given the advanced stage of the proceeding"* the EC does not have to answer [EC answer 2 to India's question]. Again therefore according to the EC: now it is too late, regardless of the fact that this is a WTO dispute settlement proceeding. In other words and in short: the EC's position is that it never has to explain anything to anyone. *"India [and the Panel] will just have to take the EC's word for it"*. In the view of India this attitude, interpretation, and application of Article 12 is inconsistent with the ADA.

118. Those familiar with anti-dumping and injury determinations in other jurisdictions, notably the United States and Canada, are often surprised at the scarcity of information provided in public determinations issued by the EC authorities. Contrary to, for example, the practice of the Commerce Department in the United States of addressing specific comments raised by parties in a section following the findings of the authorities, and the detailed ITC injury determinations, determinations in the EC are full of standard phraseology and summaries of selective EC findings, as the *Bed Linen* case witnesses.

119. The EC tries to brush aside the concerns raised by India on the ground that the importing country authorities have discretion to decide which matters of fact and law, arguments and claims are *relevant* within the meaning of Article 12.2.2 and that the arguments made by the Indian exporters in the course of the proceeding were not relevant. Such interpretation is illegal and unwarranted and constitutes a violation of Article 17.6 (i).

120. Furthermore, the structure of India's first submission, which was designed on purpose to show the close linkage between key arguments and insufficient explanation by the EC, negates the EC's apparent conclusions that India's claims and arguments were irrelevant for purposes of application of Article 12.2.2. The following table shows once more that on eight of India's substantive claims, the EC provided either no or extremely cursory information on public record:

Substantive claims	Explanation claims	
1-Article 2.2.2	3	Recital 18 addresses only 1 of 3 arguments, and very summary
4-Article 2.2 reasonable	6	Recital 18 does not address claim
11-3.4 factors	13	Not addressed
15-3.4 picking and choosing domestic industry	18	Four arguments raised not addressed
20-Pre-IP imports	22	Not addressed
23-5.3 examination	25	Not addressed
26-5.4 standing determination	28	Not addressed
29-15-developing country	31	Not addressed

121. India acknowledges that this table has been slightly modified from the comparable table provided in its First Oral Statement to take into account the Panel's valid observation that one claim (all imports dumped) was not made during the administrative proceeding. As explained in its oral reply to the question by the Panel, India did not raise this claim during the administrative proceeding because it knew from experience that the EC would routinely reject such claim.

122. To sum up, the explanation in the definitive Regulation, which incorporates parts of the provisional Regulation suffering from the same defects, was self-serving and the EC failed to address virtually any of the claims and arguments made by Indian exporters in the proceeding. In view of this systematic and repeated pattern of ignoring claims and arguments made by Indian exporters in the proceeding, India requests the Panel to send a strong message to the EC: that selective self-serving explanations which do not address the claims and arguments made by exporters in the course of the proceeding do not meet the standards of Article 12.

ANNEX 1-8

ORAL STATEMENT AND CONCLUDING REMARKS OF INDIA

SECOND MEETING OF THE PANEL

(6 June 2000)

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1. India thanks the Panel and the Secretariat for its continued attention to this case. Mr Chairman, we intend to be brief since we have already highlighted our concerns in our first submission, first oral statement, and subsequent rebuttal submission. However, we would make certain observations and react to some arguments that have been stressed in the EC's Second Written Submission. This does not in any way imply that India accepts EC's arguments on the issues which India does not address today. Obviously India adheres to its earlier arguments and does not want to repeat them today;

I. ARTICLE 5.4: STANDING

2. The Panel is well aware of India's concern about the removal of fax headers from the declarations of support on standing. After initially remaining silent on the issue and in fact expressing indignation on what it referred to as *"India's barely concealed accusations"*, EC has finally admitted that the fax headers *were* indeed removed by its own officials;

3. India thanks the EC for finally providing declarations of support, including the fax headers as Exhibit EC-5 that were until very recently not provided by the EC in what it termed *"the advanced stage of the proceedings"*.[1] In any event, India has the following comments and observations to make on these documents;

4. Firstly, India regrets that it has taken the EC three and a half years, and the initiation of a WTO Panel proceeding, to finally provide something as simple as fax headers which could have helped to clarify the chronology of events much earlier. However, it is surprising that in none of the documents, copies of which have now been submitted by the EC, the exact date on which these were faxed by *Eurocoton* is clearly visible. Moreover, in some of the documents, there appears to be a discrepancy between the stated date of dispatch and the recorded date of receipt of the fax, which makes India concerned that these Exhibits, if anything, do not show that the EC did check standing before the initiation. For instance in the expression of support conveyed by the Portuguese company Foncar [page 6 of EC-5] the fax appears to have been sent by Eurocoton on some unknown date in

[1] One wonders why the very documents that had been requested time and again could not be provided a mere five days before they were finally made available.

September 1996, while the same fax transmission appears to have been received in EC on Monday 29 July 1996. It is not clear to us how this can happen;

5. Secondly, India continues to have reservations on the *reasons* adduced by the EC for the removal of headers. As the Panel is aware, the EC delegation initially stated that these had been removed on the ground of confidentiality. However, when it was pointed out to the EC delegation that the telephone and fax numbers of the companies that they were seeking to protect by removing the fax headers was in fact the very information that the producers had been asked to submit in the non-confidential questionnaire responses and was in fact printed elsewhere on the declaration itself, the EC retracted its statement and tried to project that India was unnecessarily making an issue out of a non-issue. Mr Chairman, if the telephone and fax numbers of the concerned companies were already a part of the non-confidential portion of the documents, then India wonders what information other than the date on which the faxes were sent, the EC sought to protect;

6. Thirdly, even though EC has provided what it states to be the original fax headers, India would like to point out to the Panel that the regular administrative stamp for the chron-in log is still missing on the all faxed declarations themselves. By contrast, India refers, for example, to page 906 of India Exhibits, or recent Exhibit EC-6 and EC-7. We leave it to the Panel to conclude as to why Exhibit EC-5 does not contain the chron-in log which is otherwise customarily present on all documents received in the EC;

7. Finally, India still does not understand as to how the EC had on 12 September 1996 [Exhibit India-59, page 1035] the uncanny ability to pre-determine support for the complaint on the basis of an amount of production from 38 companies [Exhibit EC-4 and Exhibit India-59]. Exclusion of companies from the 46 complainants took place only *after* initiation [EC Answer to India question 40] and the questionnaires were sent out and total production quantity was not known until at least on or after 13 September 1996 [Exhibit India-82]. This contradiction in the chronology of events continues to be unexplained by the EC;

II. DUMPING

8. Mr Chairman, India considers that the EC's example regarding the *'Indian cricket team'* in the context of dumping is instructive in that it is misleading. To continue the metaphor, first of all, the EC's 'team' of 35 producers, was established in full co-ordination with the complainants and even before the match started.[2] The 'Indian team' including its reserve players, by contrast, was not selected by India but was <u>*unilaterally imposed*</u> by the EC with the refusal - despite repeated requests - to include Standard in the field. Even when it *'appeared'* that one of the field members did not have sufficient domestic sales, *i.e.* Anglo-French, the EC still refused to replace it with Standard which was already a part of the Indian team.[3] Mr Chairman, cricket or no cricket, the basic point that India is making is that Standard was part of the overall sample and that if EC had taken it into account, which for reasons best known to them it did not, the results would have been more representative and consistent with the requirements of Article 2.2.2(ii);

9. Furthermore, the EC's most recent explanation that Standard's response *"would have had no effect on the profit margin"* is another *ex-post facto* explanation [EC's Second Written Submission §26]. Indeed, since this current explanation differs with the earlier *ex-post facto* explanation [that 'a

[2] Apparently it was already known on 12 September 1996 that a number of companies of the complaint were to be excluded from the investigation since they did not count towards standing.

[3] The EC implied in the Regulation imposing definitive duties [recital (18)] that the investigation 'revealed' that only one company [Bombay Dyeing] had sufficient domestic sales. From India's First written submission, paragraphs 3.73 through 3.76, it is clear that the EC had known this fact from the start [Anglo-French never had enough domestic sales to meet the 5 per cent rule]. Nevertheless, even once this fact was 'revealed' the EC refused to replace the field player.

mere share of 14 per cent of India's domestic sales would not have influenced the domestic profit margin'], India wonders what the *real* reason for the exclusion was. It cannot be both reasons since they are mutually exclusive: if it had been known from the start that Standard had no profitable sales then its alleged 'small' 14 per cent size of the domestic market is irrelevant. Clearly therefore the determination of the absence of profitable sales is *ex-post facto*. In any event, no reason is apparent from the published determinations or otherwise, and it is the view of India that *ex-post facto* explanations should not be permitted to repair irrational past behaviour. Mr Chairman, we therefore strongly feel that EC acted inconsistently with the requirements of Article 2.2.2.(ii).[4]

III. INJURY

10. Mr Chairman, as far as, the determination of injury is concerned, India disagrees with the EC's interpretation of Article 3.4 as presented in section IV.2 of its Second Written Submission, that it was not required to evaluate all the factors, for the following reasons;

11. Firstly, an *"objective examination"* as required by Article 3.1 encompasses those factors tending to support an injury investigation as well as those tilting against it. The EC has argued that Article 3.4 only requires consideration of factors that show injury. As pointed out on earlier occasions, India disagrees with this view. For example, as the Panel held in *Korea Resins*, the investigating authority could not focus solely on factors supporting a conclusion that the domestic industry was likely to encounter difficulties, while disregarding other factors.[5] Mr Chairman, allow me to further elaborate;

12. India has never advocated a mere *'checklist'* approach to Article 3.4, as the EC seems to be suggesting. The overall balance of the factors listed in Article 3.4, after having been evaluated, may tilt towards injury or no injury--but it will be necessary to evaluate all factors to ensure that the overall balance of factors is correctly established. This is however a minimum position: the list of factors in Article 3.4 is *"not exhaustive, nor can one or several of the factors give guidance."* Furthermore, the evaluation of the factors must be coherent. In any event, the list is not *'simplistic'*, as asserted by the EC. Article 3.4 has been carefully drafted taking into account the structure of the ADA itself. In this connection India disagrees with the 'interpretation'[6] of the EC that the role of Article 3.4 is limited to an examination of the price and volume effects of dumping as described in Article 3.1[7], and which the EC now labels as the *'true'* injury factors.[8] Article 3.4 elaborates part (b) of Article 3.1 and as such, it is part of the obligations which must be upheld by the investigating authorities. The analogy with the Safeguards[9], Anti-Dumping[10], and SCM Agreements, and Article 6(3) of the 1979 Anti-Subsidies

[4] Contrary to the EC's assertions [paragraph 105 Second Written Submission] that India did not make a related Article 12 claim in connection with the inconsistency with Article 2.2.2(ii), it is clear from India's First Written Submission at paragraph 3.117 that this claim was made: *"The first argument is that contrary to Article 12.2.2, the EC has not provided a sufficient explanation as to why it decided to apply an option for which the requirements were not fulfilled."* The EC's assertion regarding the absence of an explanation claim on this issue is therefore inconsistent with the facts.

[5] Korea— Anti-dumping duties on imports of Polyacetal resins from the United States, Report of the Panel, ADP/92 and Corr.1 of 2 April 1993.

[6] EC's paragraph 58 SWS.

[7] The interpretation of the EC misreads [the structure of] Article 3. Article 3.1, it may be recalled, mandates an objective examination of (a) volume of dumped imports and effect of dumped imports on prices *and* (b) the consequent impact of those imports. Article 3.2 provides further details as to how point (a) volume and prices need to be investigated. Article 3.4 sets forth in detail how the impact of the dumped imports is to be examined. To attribute the role of Article 3.2 to Article 3.4, which the EC appears to be doing, is a misreading and misinterpretation of Article 3.

[8] Does this imply that the EC considers the other Article 3.4 as 'not true'?

[9] Argentina —Safeguards Measures on Imports of Footwear, Report of the Panel adopted on 25 June 1999, WT/DS121/R.

Code[11], cannot be denied as the EC appears to be doing. This is especially pertinent since the other factors, to the extent that they were evaluated, did not point towards injury [as admitted in recital (62) of EC's second written submission];

13. India disagrees with the repeated assertions of the EC that it *"did examine"* all factors [recital 64 EC Second Written Submission], although it *"found"* nearly all of them *"not to be a significant independent factor"* [recital 255 EC First Written Submission]. Thus far, the EC has never explained when and how this examination took place, especially since these factors were considered not relevant in the first place. Apparently, the EC is now so convinced by its continued assertions that it *"did examine"* all factors, that it now assumes they are true. India believes that, under a proper construction of the ADA, it must be possible for a Panel to determine whether the investigating authorities have done the evaluation under Article 3.4. The EC seems to take the position that other countries (and indeed, the Panel) have to take its word that it has fulfilled its obligations under the ADA, and that its failure to publicize its examination should not be construed as a presumption that it acted inconsistently with the ADA. India believes such an interpretation would make Article 3.4 [and Article 12] practically redundant;

14. Indeed, as regards the continued conundrum posed by the EC as to how authorities can decide whether a factor is relevant before evaluating it, India fails to understand the EC's repeated 'justification': *''Relevance is a matter of degree rather than of 'yes or no'. In some cases it will be immediately apparent, even before the initiation of an investigation, that certain factors are not relevant and in others this may not be apparent until much later, so that the process of determining the relevance of a factor may be little different from that of evaluating it".*[12] Apart from the question to which *'degree'* the EC is referring to and the overall incomprehensibility of the EC's statement, India fails to understand how, ***"even before the initiation of an investigation"***, it could be apparent that certain factors are not relevant. Perhaps it was this same prophetic power of the EC which enabled it to establish, *even before initiation*, that it was going to calculate standing on the basis of a restricted number of producers, while exclusion of a number of companies still had to take place;

15. India reiterates for the record that the EC's *"explanation"* clarifying that the company Luxorette was not part of the Community sample is simply incompatible with the published determinations and the non-confidential file [*e.g.* Exhibit India-82]. India also refers to its Second Written Submission. It is regrettable that almost four years after the selection of the sample and the Community industry, the EC still seems unable to indicate with certainty in a manner corresponding to the public record which companies were part of it and why;

16. India disagrees with the EC's statement in paragraph 71 of its Second Written Submission where it appears to argue that companies which disappeared [for *whatever* commercial reason] as separate entities, years before the investigation period, should automatically be counted as 'victims of alleged dumping' during the investigation period. Since these *dumped imports* occurred only after the alleged company closures, the EC cannot attribute the closures to the dumped imports;

17. India fails to understand the EC's statement (paragraph 85 EC's Second Written Submission) that *"it is open to Indian exporters to argue that they were actually dumping greater volumes in earlier years."* India similarly fails to understand the EC's assertion in paragraph 86 that, *"[a]s far as*

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[10] Korea—Anti-dumping duties on imports of Polyacetal resins from the United States, Report of the Panel, ADP/92 and Corr.1 of 2 April 1993 at § 254; Mexico—Anti-dumping investigation of high fructose corn syrup (HFCS) from the United States, WT/DS132/R of 28 January 2000.

[11] Brazil—imposition of provisional and definitive countervailing duties on milk powder and certain types of milk from the EC (SCM/179).

[12] This 'explanation' is an answer to a question from the Panel and is now repeated in the EC's second written submission.

import volume is concerned, the only assumption that the EC could be accused of making is not that imports were being dumped, but that they were not being dumped";

18. In conclusion, Mr Chairman, it is quite clear that the EC has acted inconsistently with Article 3 on a number of counts, and more specifically has acted inconsistently with Article 3.4. The EC has admitted in writing that *"indications of injury were almost entirely concentrated in two areas: profits and prices."* [EC Second Written Submission at §61]. Indeed, the EC stated that the *"industry is continuing to operate normally except for these two vital factors. This normality was notably apparent in the volume of sales, and of production, factors that were investigated by the EC."* Clearly, the EC did not examine numerous other factors, as required by Article 3.4 and suggested to it in the course of the proceeding, and has therefore incorrectly established injury based on merely two factors. This type of approach has been consistently and prudently rejected by earlier Panels since in an injury investigation the authorities cannot solely focus on factors supporting a conclusion that the domestic industry is encountering difficulties, thereby disregarding other factors.[13]

IV. DEVELOPING COUNTRY STATUS OF INDIA

19. Mr Chairman, for India, issues related to Article 15 are extremely sensitive and important. As repeatedly highlighted by us, this Article provided the balance and equity, as well as the safeguard that developing countries had sought during the Uruguay Round. It was specifically recognized and therefore mandated in Article 15 that developed country members shall give special regard to the situation in developing countries and that they should explore alternative constructive remedies before applying anti-dumping duties against developing countries. It is extremely unfortunate that the EC authorities did neither;

20. The EC has throughout these proceedings tried to evade this issue and has presented illogical arguments about their perception of the obligations imposed by Article 15. Mr Chairman, there can be no doubt that the onus of exploring constructive remedies was on the EC. Firstly, the EC did not at any stage of the proceedings either indicate their willingness to explore such alternative remedies (rather the contrary), or as they should have done, presented the Indian exporters with any concrete alternative possibilities which could be explored. Secondly, when the Indian exporters through Texprocil made such an overture, the EC officials flatly refused to consider it on the ground that it had been received on the last day. India does not agree with the factually incorrect suggestion made by the EC that Indian exporters were not willing to accept an undertaking. If this was true the Indian exporters would have never put forward the offer that they did to the EC authorities, through its letter dated 13 October 1997;

21. The alleged difficulties with undertakings in the Textile Sector as asserted by the EC are not borne out of the facts. The EC suggests (in its second written submission) that its last undertaking in the Textile Sector was in 1991. India attaches as Exhibit India-85 an example of an undertaking given by exporters in the textile sector in other countries to the EC in October 1998. This recent undertaking was in fact accepted at the *provisional* stage itself.[14] Mr Chairman, this very clearly establishes two facts. Firstly, contrary to what the EC has continuously stated, constructive remedies can, and have been adopted at the stage of provisional duties. Secondly, it is also abundantly clear that for reasons again best known only to EC, it did not even remotely try to explore similar alternative possibilities before levying anti-dumping duties on Indian exports. In fact, it did not even constructively consider the alternative of a price undertaking that the Indian exporters requested the EC to consider;

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[13] *See, for example*, Korea— Anti-dumping duties on imports of Polyacetal resins from the United States, Report of the Panel, ADP/92 and Corr.1 of 2 April 1993 at § 254; Mexico—Anti-dumping investigation of high fructose corn syrup (HFCS) from the United States, WT/DS132/R of 28 January 2000.

[14] In fact, in EC anti-dumping practice, many undertakings take effect from the provisional stage as also pointed out in India's Second Written Submission. See by way of further illustration *Steel Stranded Ropes and Cables* from Hungary, Poland, [1999] OJ L 45/1; *Flat Wooden Pallets* from Poland, [1999] OJ L 150/4.

22. India also refers to the EC's efforts to seek an undertaking in the second *Unbleached Cotton Fabrics from India* proceeding which involved many more exporters than the Bed Linen proceeding and many more types of product. Clearly in *that* case the number of exporters or the vast variety of product types did *not* form an obstacle to the EC exploring an undertaking [see page 1361 of India's Exhibits]. We are therefore surprised by the EC's assertion that it was not possible to seek a similar undertaking in this case, an assertion that is evidently inconsistent with the facts and EC's past practice;

23. As regards the handloom sector, India had indeed at some point suggested its exclusion. However, as India also pointed out in its First Written Submission, the exclusion of handloom products was sought because the handloom products could not be classified as a 'like product' and since these handloom products were also excluded from the coverage of the EC-India Textile Agreement. Hence the exclusion of handloom products by the EC was not made in the context of Article 15 [see India's paragraphs 6.42-6.45 of First Written Submission], a fact specifically acknowledged by the EC in paragraph 96 of its Second Written Submission. It is therefore rather surprising and contradictory for the EC to now suggest that the handloom exclusion was in fact based on India's developing country status while simultaneously it declares that the exclusion was not made on this basis. In any event, *ex post facto* explanations cannot mitigate the fact that the EC did not make any endeavour to fulfil its obligations under Article 15. The EC's assertions are inconsistent with the facts and it is more than clear that no special regard was given to the special situation of India as a developing country;

V. EXPLANATIONS

24. Mr Chairman it is illuminating to note the EC's remarks in paragraph 112 of its Second Written Submission that the request of the exporters for an explanation *"was a waste of their money and of the [EC] authorities' time."* This shows that the EC's attitude towards requests for an explanation of decisions is that these are to be treated as wastage of time and money. Given the context that in the EC anti-dumping practice the investigating authority is the only party with access to all information, there is an additional obligation cast upon such authority to provide for explanations as requested by the exporters as they are in a weak position vis-à-vis such authority;

25. Mr Chairman, the suggestion by the EC that it does not have to react to arguments pertaining to WTO rules is preposterous [EC Second Written Submission §108]. If this suggestion were to be seriously considered, importing country authorities would be exempted from reacting to any arguments pertaining to WTO law, which is simply unacceptable. Article 18.4 of the ADA requires that the AD legislation and procedures of the EC comply with WTO rules;

26. Mr Chairman, limiting explanations to arguments pertaining to domestic rules deprives Article 12 of its meaning and leaves an enormous black hole in the ADA. For example, the EC's domestic legislation does not contain a mirror provision to Article 15 ADA. The EC's approach would imply that any arguments pertaining to Article 15 ADA can simply be ignored, as in fact has happened in the *Bed Linen* case. *In any event*, throughout the administrative proceeding the EC did *not* react to repeated arguments pertaining to its domestic legislation *either*, such as the arguments made by exporters in connection with Article 2 [dumping], 3 [injury], and 5 [initiation]. Thus, even if Article 12 is limited to arguments pertaining to domestic legislation--*quod non*--the EC acted inconsistently with Article 12 ADA on many counts;

27. The EC's qualification of India's claims as relating to WTO rules is also factually incorrect [EC SWS §107]. The EC anti-dumping legislation provides a framework with the Administering authorities vested with enormous amounts of discretion to apply the law, as they deem fit. That the Indian exporters made these claims in the course of the administrative proceeding bears testimony to the fact that the EC anti-dumping law and practice is not as clear as the EC would like the Panel to

believe. The exporters sought explanations during the course of the proceedings on issues of vital concern to them. However, the EC not only rejected these claims but felt that the exporters were wasting their money and the EC's time, thereby apparently liberating itself from any obligation to even explain the rationale behind the rejections;

28. Finally, as a matter of record, India registers its disagreement with the table contained in EC paragraph 105 as the table is inconsistent with the facts. For example, as regards line D India *did* raise its claim [as pointed out earlier in this Statement]. As regards line K and L it is clear that Article 12 *did* form part of the terms of reference. Thus, the assertions of the EC are inconsistent with the facts and the EC acted inconsistently with Article 12;

VI. CONCLUSIONS

29. Mr Chairman, we now wish to conclude this brief Second Oral Statement by reiterating by from the time of initiation, through the provisional and definitive findings and even during the consultation process, India expected fairness, transparency and accountability which has been totally denied, by the EC authorities. India has during the course of the proceedings clearly demonstrated that the EC authorities initiated investigations in the present case without sufficient support among the EC to justify the initiation of the case. Till date no company-specific production output has been provided to sustain this. Moreover, the whole issue of removal of fax headers continues to remain unclear;

30. Mr Chairman, India has also demonstrated that the EC did not calculate the dumping margin as provided for by the ADA. In order to find dumping it relied on only one unique producer instead of including a more representative second producer of the like product. Moreover, even for this single and non-representative producer, the EC excluded its below cost sales and came up with an extraordinary profit margin. Finally, the EC determined the dumping margin by not properly accounting for the non-dumped sales;

31. Mr Chairman, we have also conclusively shown that injury was determined by focusing the examination solely on two factors, clearly disregarding the mandatory language of Article 3.4. Indeed, even while examining only these two factors, the EC repeatedly juggled between the sample, the Community industry, and the total EU producers in order to find injury. Disappearance of companies *before* the investigation period was wrongly attributed to dumping *during* the investigation period. At the same time EC also wrongly assumed that *all* imports were dumped;

32. Finally, before applying anti-dumping measures the EC chose to completely ignore the developing country status of India and did not explore any alternative constructive remedies as mandated by the ADA. In fact, as India has demonstrated, the EC even did not constructively consider the offer of price undertaking that was made by the Indian exporters;

33. Mr Chairman, India believes it has presented the facts as accurately as possible in order to enable the Panel to reach a fair decision. India remains at the full disposal of the Panel should it require any further explanations or assistance. Further, in the context of EC's Second Written Submission and the answers it has provided to the questions raised by the Panel and India, India would like to seek certain clarifications from the EC. India believes that the Panel will get considerable assistance in its work by obtaining responses from the EC on the clarifications sought by India;

34. Mr Chairman, these points seeking clarifications have been listed as an Annex to this Second Oral Statement. In order to save time, and with the Panel's indulgence, these questions may be treated as read, unless the Panel desires otherwise. India hopes that the EC would co-operate in the matter and provide the requisite answers and clarifications to the Panel by a suitable date to be determined by the Panel.

Annex with Questions for EC

1. Could the EC explain what it means with its statement in its answer to India's question 15: *" . . . it is not worse that [sic] not giving credit to a complaint which later turns out as having been supported by a major proportion of the industry."*

2. Could the EC explain, with detailed production figures, its statement in paragraph 21 of its second written submission that India's calculation of the 25 per cent threshold figure is erroneous because it involves *"double-counting"*?

3. It is the practice of the EC, and especially Directorates I.C and I.E, to register incoming and outgoing written communications by date and with a number. This was also the case with documents in the *Bed Linen* proceeding, with the sole exception of the declarations of support. Why were the declarations of support never registered?

4. Why were the fax headers and fax footers from *Eurocoton* removed while its fax number is even printed on the front page of the complaint?

5. The EC has stated in its reply to question 40 of India, that at the time of initiation, 46 producers supported the complaint, that seven were excluded after initiation, that three more were excluded after the questionnaires were sent (10-11/96) and that one more was excluded after verification. However, Exhibit EC-4 which, according to the EC, 'froze' the situation at the moment of initiation, as well as the declarations of support of individual producers, *c.q.* trade associations, refer only to 38 producers. Could the EC provide the declarations of support of the eight--later supposedly excluded--companies which, at the moment of initiation, must have filed such declarations in order for a legal standing determination to have been effected?

6. How could the EC, at the time of initiation, already know that it was later going to exclude the eight companies?

7. Could the EC explain the situation of the German company Luxorette and the French company Claude? More specifically, once the EC went from 19 producers to 17, in recital (61) of the provisional Regulation, Luxorette was still in the sample of 17. To come from 19 to 17 the EC used as one reason the stated reason as per recital (54). The situation of Luxorette remains therefore unclarified. Similarly, why was Claude excluded from the sample of 19, but not from the Community industry?

8. In paragraph 22 of its second written submission, the EC states that it *"… has in any case established that producers responsible for over 34 percent of EC production expressly supported the complaint"*. But this 34 per cent can be reached only if one accepts the declarations of support of the French, Spanish, and Austrian textiles Federations because the EC, thus far, has not submitted individual declarations of support from French, Spanish, and Austrian textiles producers. Is this correct?

9. Does the EC agree that its logic in paragraph 76 and 77 of its Second Written Submission conveniently fails to mention, first, that – through the inclusion of non-dumped exports - the overall volume of 'dumped' imports will in all cases be higher than it otherwise would have been. Does the EC agree, second, that the mitigating effect on the price undercutting will occur only if the prices of the non-dumped exports are in fact higher than the prices of the dumped exports? In other words, that where dumping or non-dumping are caused by different patterns on the normal value side, the mitigating effect will not occur?

10. In paragraph 84 the EC posits that *"[a]t any rate, the investigating authorities would have been entitled to assume, in the absence of evidence to the contrary, that dumping existed for some*

time before this. In fact, such an assumption was relevant to the bed linen case." Could the EC provide any legal basis in the ADA for such an assumption? Could the EC also confirm for the record that it follows from the last sentence that the EC did in fact assume that pre-investigation imports were dumped, as is in fact also clear from the published Regulations (but as has been denied by the EC in the course of the Panel proceedings).

11. Why would Indian exporters wish to argue that *"…they were actually dumping greater volumes in earlier years"*, especially where they would not have an inkling that they were dumping in the first place because they could not conceivably know that the EC would apply an 18+ per cent profit to their non-existent domestic sales?

12. In paragraphs 104-115 the EC attempts to rebut the explanation claims made by India by differentiating between a member's obligations under the ADA and that same member's obligations under its domestic law and practice and arguing that an interested party's claims under the ADA would not be relevant claims (and therefore need not be addressed by an investigating authority) under such authority's law and practice where the latter were different. Would the EC not agree that this logic, *ceteris paribus*, would mostly benefit members which strayed furthest from the ADA, because such members then would have the least explaining to do, a bizarre and unwarranted result?

INDIA's CLOSING STATEMENT OF 6 JUNE 2000

1. Mr Chairman, India thanks the Panel for providing India the opportunity to make its closing statement. India believes that all that needed to be said has been said in written and oral submissions and that there is perhaps no need to further reiterate those issues in this closing statement;

2. Mr Chairman, the case that India has presented rests on the following facts:

- That EC failed to take into account information available to it at the time of initiation, pointing to lack of material injury caused by imports from India in a proceeding terminated a mere twenty days earlier;

- That the EC did not determine standing before initiating the investigation. Indeed, in response to a question today, the EC admitted that certain companies were already excluded at the time of standing, while EC had previously explained that standing had been determined on the basis of 46 companies;

- That the EC unilaterally imposed the sample for India and did not accept India's request to include companies which would have made the sample more representative, as should have been done in accordance with Article 2;

- That in the determination of dumping an unreasonable profit margin of over 18 per cent was applied, leading to artificially inflated dumping margins, especially since in the EC system exclusion of below cost sales tends to increase the profit margin, but not the margin of SGA;

- That the dumping margins were further inflated through the use of a skewed weighted-average to weighted-average comparison instead of taking into account non-dumped sales;

- That the EC, during the course of injury determination, did not evaluate all the relevant economic factors as provided for in Article 3, and whose evaluation had already been held to be mandatory by previous Panels;

- That by selectively picking two of these economic factors and ignoring the others, the EC made a wrong determination of injury;

- That, the EC initially determined that the domestic industry consisted of 35 companies, but thereafter relied on companies outside this group, in order to determine injury. Thus, the EC chose a sample from the domestic industry, but did not base its injury determination on this sample;

- That the EC wrongly considered all imports as dumped and even attributed the closure of companies *before* the investigation period, to subsequent exports;

- That, finally before the application of anti-dumping measures, the EC neither took special regard of India as a developing country, nor did it explore constructive remedies as was mandated on EC as a developed country member by Article 15 of the ADA;

3. Mr. Chairman, all these issues were raised during the investigation, but were simply ignored by the investigating authority. If these genuine concerns had been addressed by the EC, Indian exporters and Indian exports would not have been subjected to anti-dumping action and duties, the way they were;

4. Mr Chairman, before I conclude my closing statement I think it is my duty to draw the Panels' attention to some broader aspects of this case. As all of us are aware, during the Uruguay Round negotiations the ADA was negotiated as a supplement to Article VI of GATT, primarily with the objective of tightening the procedural requirements for taking anti-dumping action so as to introduce a certain amount of discipline into the unfettered use of anti-dumping measures, and to thereby prevent major trading partners from misusing the anti-dumping provisions. Hence, EC assertion that the ADA provides choices to investigating authorities, whether in the determination of injury by picking and choosing which factors it would evaluate, or in the calculation of dumping, by again picking and choosing that method which results in the greatest margin of dumping, goes entirely against both the letter and spirit of the ADA;

5. Mr Chairman, it is more than obvious that the EC has no t complied with the procedural requirements laid down in the ADA, in the present case. What is even more unfortunate is that EC seems to feel that these procedural requirements are either a waste of time or can be complied with *ex-post facto*. Obviously, EC's approach undermines the very basic foundation of the ADA. I would also like to add that EC in the present case took anti-dumping action with respect to products, which were already subjected to quantitative restrictions. It would be extremely unfortunate if major trading players such as the EC were allowed to so blatantly violate the provisions of the ADA, as they have done in this case, since then the very benefits which should have otherwise accrued to developing countries from the Uruguay Round would get impaired through these non-tariff barriers.

ANNEX 1-9

INDIA'S QUESTIONS TO THE EUROPEAN COMMUNITIES

(7 June 2000)

1. The EC in its closing statement on 6 June mentioned that it had "never" stated that it relied on 46 companies to determine support for the complaint. However, in its written answer to India's question No.40, EC had stated that "there were 46 companies, which supported the complaint before initiation". Could the EC explain this contradiction?

2. The EC in its closing statement on 6 June, also stated that their domestic regulation provided wide 'discretionary powers' to the investigating authority:

(a) Could the EC explain how the use of such 'discretionary powers' is consistent with the ADA, which in fact attempts to limit this very discretion.

(b) In this context, could the EC also explain how it uses these 'discretionary powers' in choosing the methodology for calculating the dumping margin, specially in case where two methodologies lead to different findings.

3. The EC, again in its closing statement, stated that they could during a panel proceeding, provide 'ex-post facto justification' for actions taken during the investigation. Could the EC clarify as to how this 'ex-post facto justification' of actions taken earlier is compatible with Articles 2, 3 and 5 of the ADA, which specifically prescribe the conditions to be satisfied and the procedure to be followed before initiation of an investigation and for the determination of injury and the dumping margin.

4. Can the EC indicate how many EC companies were contained in the sample drawn from its Community industry and could the EC provide details of their individual production of the like product.

ANNEX 1-10

RESPONSES OF INDIA TO QUESTIONS FROM THE PANEL
FOLLOWING THE SECOND MEETING OF THE PANEL

(8 June 2000)

Questions for India

1. What factual conclusion does India wish the Panel to draw based on its arguments concerning the fax headers? Does India believe that the letters of support were in fact not received before the initiation?

— India would respectfully request the Panel to conclude that

(1) the documents contained in Exhibit India-59, as well as any later variations or versions of those documents (with or without, or with varying fax headers) do not show that the EC has examined standing before initiating the anti-dumping proceeding. As a result, India would respectfully request the Panel to conclude that the EC acted inconsistently with Article 5.4, a fatal error that cannot be cured retroactively later in the proceeding;

(2) the EC's actions, including the admitted removal of the fax headers and its presentation of different 'versions' of the Foncar declaration, would suggest that the EC has been trying to conceal its mistake of not examining standing before initiating the proceeding;

— India indeed believes that at least some of the letters of support were not, received by the EC before initiation of the proceeding.

India would like to explain in detail how it arrived at these conclusions:

(a) The fax header dispute might at first sight seem to be trivial . However, it is an important issue, since it goes to the core of the standing in this dispute. In order to put the matter in perspective and explain its importance with reference to Article 5.4, India would like to recall (b) the basic sequence of events (c) explain in detail the facts of the matter and (d) recall the legal relevance of the issue.

(b) *Basic sequence of events*: During the administrative proceeding that followed the initiation on 13 September 1996, the Indian exporters, bearing in mind the events of the first Bed linen anti-dumping proceeding[1], questioned whether in fact the EC authorities had made a proper standing determination in accordance with Article 5.4 of the ADA. On 8 January 1997 the EC responded by making available the "non-confidential standing file" , which consisted of the documents attached as Exhibit India-59. The fax headers on the declarations contained in Exhibit India-59 had been removed. This made it impossible for Indian exporters to verify whether the EC had examined standing *before* initiating the proceeding.

[1] See para 5.54 of India's first submission to the Panel.

When the Indian exporters during their injury hearing queried[2] as to *why* the fax headers were removed, the EC reacted with indignation and refused to answer the question (a reaction still reflected in para. 83 of the EC's first submission to the Panel). In its answer of 19 May 2000 to India's question 9, the EC noted that it considered:

> *"to have indicated the dates at which it received declarations of support by producers a sufficient number of times (copies of faxed declarations of support in the non-confidential file, . . .)".*

It follows therefore, that the EC relies on the dates typed or written on the faxed declarations as proof that it examined support for the complaint *before* initiation.

In its Second written submission (para. 19), however, the EC changed its defence and admitted that the fax headers had indeed been removed *"at the request of producers to protect information they regarded as confidential"*. The EC did not provide any evidence showing that producers had indeed asked this. The fax headers contained fax number of the sender, and the date of sending and receipt of the faxes. The fax numbers of the senders (the companies or Eurocoton) is hardly confidential since it was on the body of the faxes anyway, and in the non-confidential questionnaire responses of the Community producers. The headers would have been the best evidence to prove that the faxes had arrived on time. But they were removed with no convincing reason. India doubts that confidentiality of a fax number was the real reason for the removal of fax headers. Rather, there is reason to believe that the EC authorities removed the fax headers in order to make it impossible for any party to verify the exact date of receipt of the declarations of support.

The removal of the fax headers greatly impaired the usefulness of these declarations as evidence. Thus it is doubtful whether the proceeding had indeed been initiated in accordance with Article 5.4[3], especially since the EC relied on those declarations. For this reason, India requested the EC to submit the original fax copies, which—it expected—would, in accordance with European Commission practice, be marked with a 'chron-in' stamp but, inexplicably until now (15 June 2000), the EC has declined to do so.[4]

(c) *Facts of the matter*: During the second meeting with the Panel the EC handed over what it alleged to be the correct copy of Foncar's declaration of support, although it did so only after India had pointed out that there existed inconsistencies of which it gave the example of Foncar. However, as India then showed to the Panel, *at least* part (the footer) of the 'correct copy' was inconsistent with the document that was previously presented. Thus the authenticity and the veracity of the documentation remains questionable. Obviously, the document footer could well have been prepared after the initiation of the administrative proceeding, for the purpose of the Panel proceeding.

India therefore summarises several instances where the evidence presented by the EC simply cannot be correct:

- ***Foncar***: The Foncar declaration which was *sent by Eurocoton in September 1996 was according to its fax footer received in the same fax transmission by the EC in July 1996*. When it was pointed out during the second meeting with the panel that this is logically impossible, the EC

[2] The Indian exporters later put their concerns on record (see e.g. Exhibit India-54 at 955). As far as India is aware, the EC did not during the administrative proceeding respond to the arguments concerning this issue in writing.

[3] Moreover, India believes the Panel could draw inferences from the fact that the EC went through great trouble to cover the dates on the faxes.

[4] Examples of such stamps can be seen in Exhibit India-53 at 906, Exhibits EC-6, and EC-7.

reacted by providing a new version of the same document, this time with the allegedly 'correct' footer (all three declarations are now re-attached for convenience of the Panel as Exhibit India-86). Clearly, in the view of India this casts serious doubts on the veracity of the document. The only conclusion which India can draw is that *at the very least*, the fax footer on Foncar's declaration was added *post facto*, and incorrectly at that.[5]

- ***the other Portuguese producers' declarations***: When Eurocoton sent a fax to the European Commission, the print-out of the fax would contain a fax header, showing the date when Eurocoton sent the fax, the text *"from Eurocoton 02 2303622"* and a page number of that particular fax transmission in the top-right corner (please refer to Exhibit EC-5). Simultaneously, the European Commission's fax machine would add a footer showing the date of receipt (which should logically correspond with the header's date of sending), and the batch number of that particular fax transmission. It is thus logically impossible for any two pages to have identical footers and headers; even if two pages were sent in the same batch, the Eurocoton fax header would show a different page number;

  Nevertheless, the reception date/time, batch *and page* numbers of several Portuguese declarations [as supplied in Exhibit EC-5] are identical to those of German producers. This concerns at least the following instances (indicated in italics):

Company:	Header date:	Time:	Header page nr	Footer date:	Time:	Footer batch nr:
Foncar	?-Sep-96	10:31	2	29-Jul-96	17:19	6936
Bierbaum	***?-Jul-96***	***15:40***	***3***	***29-Jul-96***	***17:19***	***6936***
Lameirinho	***??-Jul-96***	***12:07***	***3***	***29-Jul-96***	***17:19***	***6936***
Meckelholt	***29-Jul-96***	***15:48***	***4***	***29-Jul-96***	***17:19***	***6936***
Incotex	***??-Jul-96***	***12:08***	***4***	***29-Jul-96***	***17:1?***	***6936***
Kettelhack	29-Jul-96	15:49	5	29-Jul-96	17:19	6936
Erbelle	??-Jul-96	15:49	6	29-Jul-96	17:19	6936

  The EC's batch number identifies pages that were part of the same fax transmission. These pages should have different (subsequent) page numbers added by Eurocoton's fax machine. Instead, in two instances (Bierbaum/Lameirinho and Meckelholt/Incotex) the same batch and page numbers feature. This, however, is logically impossible unless the fax machines had been re-programmed and re-dated; or the fax headers and footers were cut and pasted from one fax onto another declaration);

- The copy of the declaration of the ***Syndicat Général de l'Industrie Cotonnière Française*** which was made available on 8 January 1997 in the non-confidential file contained on the top right corner the words *"Annexe 2"* (India Exhibit-59 at 1061). On the copy with the fax header presented by the EC as Exhibit EC-5, the fax header runs *through* the words *"Annexe 2"*. This is not possible, unless the fax header was applied *after* the copy provided in the non-confidential file was made.[6] For the convenience of the Panel, India attaches a copy of the original declaration

[5] India notes that, also pointed out during the discussions in the second Round of consultations, throughout this proceeding, the EC has had the tendency to produce new ex-post facto explanations, tailored to meet India's legal points [even if the explanations provided by the EC contradicts earlier evidence and explanations (such as in the case of the Foncar declaration)].

[6] The EC has never during the administrative or Panel proceedings challenged the copies that India submitted as Annex India-59.

and of the one with the fax headers, as well as magnified copies of the same [Exhibit India-87].[7] This clearly shows that the fax header was applied afterwards.

It follows that at least those of the fax headers/footers of the declarations mentioned above cannot have been authentic. In view of the above-noted discrepancies, it is not impossible that all fax headers presented during the second meeting with the Panel could have been applied *post facto* (but India has no means of checking this). It is for this reason that India had requested further information by means of the EC's chron-in log.

In any event, the EC's reply of 19 May 2000 to India's question 9 that it correctly informed the Panel of the date of submission is factually incorrect; in the case of Foncar this is very explicitly clear. For the other companies (at least Lameirinho and Incotex, as well as the Syndicat Général de l'Industrie Cotonnière Française)[8] the EC admitted that the fax headers were removed, and India concludes that later new fax headers were added. While EC admitted the removal, the second act is a logical conclusion which any reasonable person would arrive at, given the facts of the case. Considering the effort the EC went through to amend the evidence in its files, India believes that none of the declarations presented by the EC from any company or association can be unquestionably relied on as having been submitted before initiation.

(d) *Legal relevance of the issue*: Why is this issue material? The EC has admitted in its First Written Submission that it relied on the declarations for standing purposes:

> *"[t]he evidence on which the EC authorities relied at the time when the decision to initiate the investigation was made is set out in details in Exhibit EC-4. It consisted of the following: . . . Forms issued by Eurocoton (the European producers association) and completed by individual producers, indicating support for the complaint and giving production in 1995 . . ."*[9]

India accepts that the soliciting and obtaining of declarations of support from producers would indeed be one possible form of *"examination of the degree of support"* under Article 5.4. Since such examination must take place *before* initiation, the standing file that has been presented to Indian exporters should then contain sufficient evidence showing that the declarations of support were received (at the latest) on the day of initiation.

Since at least part of these declarations seems contradictory, India believes there is no genuine positive evidence that the EC checked standing before initiation. If anything, the supply of conflicting documents by the EC would suggest the opposite, i.e., that the EC did not have information from at least the Portuguese companies Foncar, Lameirinho and Incotex when it initiated the proceeding. The same could be true with respect to the declarations from other companies in Exhibit India-59 when it initiated the proceeding.

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[7] For the sake of clarity, the very original (as it was copied from the non-confidential file on 8 January 1997) is attached as the transparent on top of the version with fax header. As a result of the photocopying process of India's Exhibits, the copies submitted as Exhibit India-59 were cut off at the very top, although only with respect to the letter 'A', and not for the distinctive '2'. Indeed, even if Exhibit India-59 itself is compared with the version submitted as EC-5, the problem clearly remains since the new header runs through the distinctive digit '2'. It is also evident from a comparison of these enlarged copies that India did not 'redraw' the letter A in *"Annexe 2"*. (India can provide the very original, as copied on 8 January 1997, to the Panel, if required). India notes that the document 'Annexe 2' also formed part of Exhibit India-51 [page 686 of Exhibits] as page 35 of those disclosure comments.

[8] India notes that in any event, it does not believe that a declaration by an association of producers can be evidence of support by individual producers. India mentions the specific case of this Syndicat Général de l'Industrie Cotonnière Française because it raises concerns as the reliability of the remainder of Exhibit India-59.

[9] The EC repeated this in para. 40 of its first Oral Statement.

2. The EC has stated that based on information from various sources, prior to initiation the investigating authorities estimated total EC production of cotton type bed-linen in 1995 to be between 123,917 and 130,218 tonnes. Based on the information in Exhibit 4 of the EC's first submission, producers who directly submitted a document of support to the EC (producers in Finland, Germany, Portugal, and Italy, as listed in Exhibit EC-4) prior to 13 September 1996, accounted for, collectively, 34,756 tonnes in 1995, or 26.7 per cent of total EC production of 130,218 tonnes in that year. Does India agree that if these data are accepted as facts, the requirement of support by domestic producers accounting for at least 25 per cent of total production of the like product was met in this case?

If indeed these data were accepted as facts, the 25 per cent threshold would have been met in retrospect. However, India submits that the data cannot be accepted. Additionally, *even if* the data would be accepted as facts, failure to make the standing examination *before* initiation cannot be repaired retroactively. The arguments underlying India's conclusions are the following:

The EC's data referred to in the question as "facts" are anything but facts (point (a) below) and can therefore not be accepted. Moreover, India believes that the question does not address one fundamental problem, *i.e.* the timing (point (b) below).

(a) The EC seems to argue that in any event on 13 September 1996 it possessed evidence from individual companies amounting to more than 25 per cent of Community production. But this is not factually correct: as explained in India's reply to the Panel's question number 1, above, the 'fax header issue' affects at least three, but possibly more Portuguese companies.[10] Since, using the figures of the Panel's question, support by domestic producers would stand at 26.7 per cent on the basis of the Portuguese, Italian, German and Finnish producers listed in Exhibit EC-4, discounting the three Portuguese companies would already bring the total level of support well below the Article 5.4 threshold. In addition, as explained above, India is not convinced that the other Portuguese producers' declarations were indeed provided before initiation. Since (according to Exhibit EC-4) the Portuguese producers represented by far the largest national production volume, discounting them would mean the EC on 13 September 1996 had at best received the support of the Italian, German and Finnish producers listed in Exhibit EC-4. This means that the standing test revealed that at most at 14 per cent of Community production supported the complaint.[11]

(b) Quite apart from how many companies did in fact support the complaint, there is the question of *timing*. As a legal matter, India considers the logic of the Panel in United States—imposition of anti-dumping duties on imports of seamless stainless steel hollow products from Sweden compelling: *" an anti-dumping investigation shall normally be initiated upon a written request 'by or on behalf of the industry affect.' The plain language in which this provision (Article 5.1) is worded, and in particular the use of the word 'shall', indicates that this is an essential procedural requirement for the initiation of an investigation to be consistent with the Agreement. This is underlined by Article 1 of the Agreement. … The panel considered, in the light of the nature of Article 5.1 as an essential procedural requirement, that there was no basis to consider that an infringement of this provision could be cured retroactively."*[12]

[10]Foncar (whose declaration of support was clearly altered); and Lameirinho and Incotex, whose declaration's headers are identical to those of two German companies (please refer to the Annex to these replies).

[11] (5,905 [Italy] + 11,280 [Germany] + 1,010 [Finland]) ÷ 130,128 [total EC production] = 14.0 per cent.

[12] ADP/47 at 5.20.

On 13 September 1996 the EC initiated the proceeding on the basis of the assertions in the complaint. As analysed above, the EC never made *"an examination of the degree of support for, or opposition to, the application expressed by domestic producers of the like product"* before initiating the proceeding. Even if in retrospect it turned out that more than 25 per cent supported the complaint (as the EC tried to show with its Exhibit EC-4) this is too late. According to India, the EC was indeed too late: Exhibit EC-4 has already been stated to have been drawn up recently; the EC's Note for the file of 12 September 1996 could not possibly have been drawn up before initiation, as will be shown in India's answer to question 3.

3. Could India clarify its argument about exclusion of producers from the domestic industry after initiation and the relationship of such exclusion (if any) to the standing determination?

India will hereby try to clarify its argument.

The replies to question 2 above, as well as in its earlier submissions, India already noted that Article 5.4 requires the standing determination to be made prior to initiation. This is, in the words of the Swedish steel panel, an *"essential procedural requirement"* which cannot be *"cured retroactively"*.

The EC has explained in its reply of 19 May 2000 to Panel question 40 that *"there were 46 companies which supported the complaint before initiation"*. At the time, however, the only list of 46 companies was contained in the complaint. It is furthermore evident from EC's own admissions that exclusions from those 46 took place only after initiation: *"[c]ertain companies were eliminated from the list of 46 companies in the course of the investigation, namely after initiation"* (EC' s reply to question 40), after the EC had contacted the companies listed in the complaint and a number of them made it clear that they did not support the proceeding: *"After elimination from the list of companies included in the complaint of seven of them found not to be complainants . . ."* (Recital 52 of the provisional Regulation). One other company was in fact relying on imports and was also excluded (recital 54).

This brought the number of companies, after initiation, to (46 –7 –1 =) 38 (the companies listed in Exhibit EC-4). Even later the EC eliminated three more companies because they either no longer produced bed linen[13] or did not respond to requests for information (Recital 56). Thus the final number of companies belonging to the Community industry was established at (38 –3 =) 35. It is clear from the EC's own statements to the Panel that the determination of the 38 companies, and later the 35 companies, only took place well *after* initiation.

As is evident from Exhibit India-58, the non-confidential standing file on 8 January 1997 also contained a "Note for the non-confidential file" drawn up by the European Commission services, dated 12 September 1996 (one day before initiation), stating that:

> *"[t]he sum of the 1995 production figures contained in the following documents, which corresponds to the companies actively supporting the complaint, is 45952 tonnes."*

This amount of 45,952 tonnes corresponds with the production data of the Exhibit EC-4[14] companies from Italy, Portugal, France, Germany, Finland, Spain, and Austria.[15] It follows that the

[13] This admission in Recital 56 in itself suggests that the EC checked standing only after initiating the proceeding. How could the EC have determined that a company was entitled to support the complaint when it did not even produce the product concerned?

[14] India notes that the EC has admitted that Exhibit EC-4 was prepared for the purposes of the panel proceeding.

note dated 12 September 1996 refers to the 38 companies listed in Exhibit EC-4, and that the EC in January 1997 tried to justify its standing determination as having been made on the basis of those companies. This information is inconsistent with reply 40 of the EC replies to India of 19 May 2000.

Even more seriously, since it is evident from the foregoing that the EC only arrived at the list of 38 companies *well after* the initiation, it could not possibly have known on 12 September 1996 that *after the initiation* (after 13 September) it would eliminate those 7+1 companies. It logically follows that the drafter of the note in the non-confidential standing file may not have been entirely accurate in dating it on *"12 September 1996"*; the note can logically only have been produced *after* initiation. In summary, that note cannot be relied on as evidence that the EC determined standing before initiation—on the contrary, it seems to support India's conclusions as noted in its reply to question 1. Therefore, the standing determination, which purportedly hinged on that Note for the file, was in fact absent.

4. On what basis does India conclude that, as stated at the second meeting with the Panel, the requirement in Article 15 to "explore constructive remedies under this Agreement" obligated the EC to "present Indian exporters with any concrete alternative proposals which could be explored" or "indicate their willingness such alternative remedies"?

As India understands, there are two elements to the question: first, whether there are constructive remedies other than undertakings (a), and second who is under an obligation to take the initiative (b).

(a) India believes that there seems to be common ground among the parties to this dispute that proposals other than price undertakings could also constitute *"constructive remedies"*. Indeed, in the consultations and in its Second Written Submission the EC itself gave a number of examples which it considered *remedies* other than an undertaking [which, however, India proved not to be correct as constituting a constructive remedy]. Since EC refused to "explore" the price undertaking desired by the Indian exporters, EC was under an obligation to explore other constructive remedies.

(b) In the view of India the obligation to indicate the willingness stems from the words *"shall explore."* India believes that *"explore "* evokes a positive action. According to *Webster's New Collegiate Dictionary*[16] *"explore"* means: *"to seek for or after; to examine minutely; to make or conduct a systematic search"*. The common element here is that the person exploring is the one taking initiative. This brings the matter to the question as to *who* should explore possibilities of constructive remedies. It would logically follow that this can only be *"developed country Members"*; a reading supported by the wording of the first sentence of Article 15.

It follows from the foregoing that the investigating authorities in developed country Members should take action; they should *examine* the possibilities for constructive remedies. The initiative thus lies with the EC.

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[15] Taking the data from Exhibit EC-4: according to footnote 3 on that document, the "[s]upport declared on the basis of a document directly emanating from individual companies amounts to 44187 MT, or 34 per cent of the total." This 44,187 is the total of the production figures for Italy (5,905) + Portugal (16,550), France (9,442), Germany (11,280), and Finland (1,010). If to this 44,187 the amounts alleged for Austria (215) and Spain (1,550) are added, it adds up to (44,187 + 215 + 1,550 =) 45,952 MT featuring in the note for file dated 12 September 1996.

[16] Webster's new Collegiate Dictionary, 1975 Edition.

5. Could India explain what relevance it attributes to the acceptance of undertakings in other cases to the question of whether the "constructive remedies under this Agreement" were "explored" in this case? Is India of the view that "explore" requires the EC to accept a remedy that may be explored?

India believes that the obligation to *"explore"* is a positive one, which does not alter per country, per case. However, a comparison of the Bed linen proceeding with current EC practice may be useful to determine whether the EC discharged its obligations under the second sentence of Article 15 in good faith. India does not believe that "explore" includes the obligation to accept an undertaking at any price.

India would like to set out the arguments underpinning its replies:

(a) According to experienced EC anti-dumping experts,

> *"[a]n undertaking can be proposed by the exporter concerned. In accordance with Article 8(2), the Commission may suggest to an exporter that it proposes an undertaking. Article 4(3) explicitly provides that in regional anti-dumping cases, exporters shall be given an opportunity to offer an undertaking; the same applies with regard to anti-dumping proceedings concerning CEECs* [Central and Eastern European countries] *and Turkey."*[17]

In practice, when the Commission considers undertakings feasible and desirable for policy reasons, it will work out the text of the undertaking. In most cases the undertaking is sent to the companies concerned 'ready for signature'; in politically more complicated cases occasionally the final text is the result of negotiations between the exporters and the Commission staff.

In the past, if the European Commission needed an undertaking, it was prepared to offer one, even though it concerned textile products and the product variety and number of exporters concerned was far larger than in *Bed linen*. For example, when the vote in the EC Council of Ministers on the proposed anti-dumping duties on *Unbleached cotton fabrics from inter alia India* was debated, European Commission pleaded strongly with the Indian exporters to sign an undertaking (Exhibit India-77, page 1361). The Commission was so eager that it pre-empted the actual existence of an undertaking by suggesting to the EC Member States in the disclosure document that undertakings had already been concluded before even one had been signed (Exhibit India-77 page 1360). The EC's enthusiasm for undertakings in *Cotton fabrics* is all the more remarkable since that proceeding covered more countries than *Bed linen*, involving vast numbers of exporters in the targeted countries, and a vast array of different product types. Under these circumstances the EC's explanations to the Panel in the *Bed Linen* case[18] look implausible.

India notes that, when the European Commission for domestic policy reasons desperately needed an undertaking in *Cotton fabrics*, it had no qualms to offer one. This clearly shows that the EC has the practical ability to accept an undertaking concerning textile products from developing countries when it genuinely seeks to explore this.

(b) As to the second question, India does not believe that "explore" includes the obligation to accept an undertaking at any price. There may indeed be technical reasons why it is impossible for the investigating authorities to accept an undertaking.[19] But the second sentence of Article 15 *does* in India's view obligate

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[17] Müller, Khan, Neumann, *EC Anti-Dumping Law—A Commentary on Regulation 384/96*, Wiley, Chichester 1998 at 298-299 (Exhibit India-88).

[18] EC's second written submission at paras. 91-93.

[19] In this case, however, India sees no such technical difficulties that could not have been overcome.

> the investigating authorities to at least examine in some form or way the possibilities of an undertaking.[20] Rejecting an undertaking for bed linen outright, without any exploration whatsoever, on the basis that it is *"too complicated a product for undertakings"* is, in India's view compatible with neither the letter nor the spirit of Article 15.

According to Webster's New Collegiate Dictionary[21] "explore" means: "to seek for or after; to examine minutely; to make or conduct a systematic search". The common element is that the person exploring is the one taking initiative. "Explore" implies positive action. In the Bed linen case, the EC officials made it clear up-front that the EC would not be in a position to accept an undertaking. The EC never examined in good faith whether an undertaking would be feasible. No exploration ever took place.

6. Does India take the view that the EC is required to explain in each instance that it has applied its domestic law and regulations, when a party argues during the course of the investigation that the EC should act in a different manner or on a different basis? Or is India arguing that having applied its domestic law and regulations in this case, the EC acted inconsistently with its WTO obligations?

Regarding the first question, India is of the view that relevant claims and arguments made by exporters and importers must be addressed in the Regulation imposing definitive duties ex Article 12.2.2 of ADA.

India recalls the text of Article 12.2.2 which provides in relevant part that the public notice imposing definitive duties must contain the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters or importers. Particularly the fact that this Article refers only to exporters and importers (and not to domestic producers) clarifies that this Article was included for the protection of exporters and importers.

There are only a limited number of claims that in a given anti-dumping proceeding are likely to be made by exports and importers. Typical claims will pertain to procedural issues, the costs and profit calculations where constructed normal values are used, the refusal to grant adjustments, and the injury analysis. Claims falling in these categories are made in virtually every case that India is aware of. An authority could reply to each raised claim that it has applied its domestic law and regulations[22] (indeed, which authority would volunteer that it did *not* apply its domestic law and regulations?). However, in India's view this would amount to a *non-sequitur* answer. Article 12.2.2, read with Article 17.6(i), purports to lay down a minimum standard of fair play. India disagrees with the EC's attempt to circumvent the Article 12.2.2 obligation by arguing that it is sufficient for an authority to respond that it has applied its domestic law. In this context India emphasizes the choice of words throughout Article 12.2.1 and 12.2.2 in clarifying the obligations of the investigating authorities: *"…sufficiently detailed explanations…"; "…all relevant information on the matters of fact and law…"; "…the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters or importers…"* Article 12 obliges the authorities to provide specific and adequately detailed responses to arguments and claims made. To simply respond that domestic law was applied fails to meet this requirement. Indeed, one litmus test that demonstrates the inadequacy of such a response is that the very same reply could be given to any and all arguments and claims, on any issue, in any case, without variation: *"The EC applies its domestic legislation."*

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[20] Or, if they exist, other solutions conforming to the WTO Agreement.

[21] Webster's new Collegiate Dictionary, 1975 Edition.

[22] India notes that, contrary to some other jurisdictions such as the United States, EC does not in fact have public regulations.

In the light of EC's position in other cases, it is surprising that the EC is following this line of reasoning in the present case. Thus, as two authors have argued:

> *"Equally important, authorities will have to document their investigation. Two GATT panels in the countervailing duty area [Brazil-milk powder; US-Bismuth steel] have already expressed their doubts about the sufficiency of the evidence in the record, concerning determinations…*
>
> *No authority seems safe from the rather sweeping use of the requirement of an " adequate explanation" in the written determination (i.e. notwithstanding whether adequate support can be found in the record), as evidenced by the US use of this weapon against Korea in the panel on Polyacetal Resin, followed by the successful use of the doctrine by the EU against the US in Bismuth Steel and against Brazil in Milk Powder."*[23] [Emphasis added; footnotes deleted]

Indeed in the Bismuth steel case, the EC itself argued that *"…the obligation to explain the rationale for a decision was case-specific, no matter how long-standing a practice may be, the guidelines required an administering authority to deal with the merits of each challenge to it. "*[24]

In its second submission to the Panel, India has explained in detail, first, that, contrary to the allegations of EC, virtually all of its claims made before the Panel were also made before the EC during the administrative proceeding and, second, that the claims were also valid under EC law. In this respect, India recalls, for example, that it has proffered undisputed evidence that inter-model zeroing is applied by the EC in some cases, but not in others, including bed linen. The effort by EC to make it seem as if EC in the bed linen case simply applied its law is therefore factually incorrect. The EC did *not* apply its domestic legislation.

In reply to the second question, India considers that the EC acted inconsistently with its WTO obligations on the numerous counts, set out in detail in India's first submission to the Panel, and, in most of these cases, also in violation of its own legislation, as applied in practice, as detailed in India's second submission.

7. Did Indian producers or exporters offer undertakings or discuss the possibility of undertakings with the EC prior to the imposition of provisional measures? If so, please provide details, including copies of any documents, regarding relevant communications.

The provisional anti-dumping duties were imposed per 14 June 1997.[25] At that time, no formal request for an undertaking or offer was made because the Indian exporters still hoped to be able to convince the EC authorities to revise their extreme dumping determination and to seriously re-consider the incorrect injury determination.

8. Could India indicate the legal basis for the asserted obligation on a Member to explain to a party during the course of an anti-dumping investigation "how" it carried out the examination of the "accuracy and adequacy of the evidence provided in the application" under Article 5.3? Could India further indicate the legal basis for the obligation it asserts a Member has to explain to a Panel in dispute settlement "how" it carried out this task, in the absence of evidence or argument

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[23] Horlick, Clarke, Standards for Panels Reviewing Anti-Dumping Determinations under the GATT and WTO, 315, at 316 in International Trade Law and the GATT/WTO Dispute Settlement System (Kluwer 1997).

[24] United States, Imposition of countervailing duties on certain hot-rolled lead and bismuth steel products originating in France, Germany and the UK, Report of the Panel, 15 November 1994 (SCM/185), at para. 298.

[25] Article 3 of the provisional Regulation.

to suggest that the result of that examination, a determination that "there is sufficient evidence to justify the initiation of an investigation", was not proper in light of the facts?

With regard to the first part of the question, Article 5.3 imposes a pre-initiation examination obligation on the authorities. In the EC anti-dumping system (contrary to, for example, the United States system), complaints are confidential and a non-confidential version of the complaint will be provided to interested parties only after the case is initiated. As a consequence, exporters can criticize aspects of the (pre-) initiation, including perceived deficiencies in the Article 5.3 examination and the Article 5.4 standing determination, at the earliest after initiation. This in fact also happened in the bed linen case where comments by the Indian and other countries' exporters were submitted in the injury submissions. India considers that any such claims and arguments made by exporters must then be addressed in the notices imposing provisional or definitive duties ex Articles 12.2.1 and 12.2.2. In this regard, these Articles oblige the investigating authority to refer to, or explain, the reasons of fact and law for accepting or rejecting arguments advanced by the exporters or importers. In the view of India, since the procedural requirements related to initiation are critical components of an investigation leading to a provisional or final determination, if arguments are advanced that pre-initiation requirements have not been met, such arguments fall within the ambit of Article 12 and the investigating authority must refer to or explain the reasons for such arguments being accepted or rejected.

The EC position would seem to be that a simple statement by the authorities that they did "examine", be it to exporters or to a WTO Panel, is sufficient to satisfy the Article 5.3 obligation. In the view of India such interpretation renders the Article 5.3 obligation meaningless.

As regards the second question, India notes that any evidence related to the pre-initiation examination is exclusively in the hands of the EC authorities. As has been noted in India's second submission to the Panel[26], WTO Panels have emphasized the "rule of collaboration" incumbent upon parties to WTO dispute settlement proceedings. Thus, once the claimant has done its best to secure evidence and has actually produced some evidence in establishing a *prima facie* case, the respondent has the obligation *"to provide the tribunal with relevant documents which are in its sole possession."*

Until today, India believes that the EC did not conduct the pre-initiation examination and took the complaint at face value. However, India cannot conclusively prove this because the evidence is in the hands of the EC authorities. EC has argued that it could only prove that it did conduct the examination if it were to have videotaped the examination. With all due respect this argument appears silly. As in any developed bureaucracy, the European Commission has a chain of command. India understands that, as part of the chain of command, both the Cabinet of the Commissioner in charge of the Trade Directorate as well as the Commission's Legal Service must normally give an opinion on the initiation of an anti-dumping proceeding. In addition, India would expect that there are internal written documents which would evidence that a pre-initiation examination, if any, did in fact take place. EC, however, has not submitted such documents, if they exist, and thereby has acted inconsistently with the rule of collaboration.

Questions for both parties

15. In several instances, the AD Agreement gives Members a free choice of methodology on a particular issue. One such issue is the choice of whether to determine normal value on the basis of a constructed value, or the export price to a third country, under Article 2.2, another is the choice of comparing a weighted average normal value to the weighted average of all comparable export transactions, or comparing normal value and export prices on a transaction-to-transaction basis. It appears evident that in some cases, depending on the particular facts, the choice of one methodology would result in a determination of dumping, while the choice of another methodology

[26] Second submission of India to the Panel, paras. 32-34.

would result in a determination of no dumping. Could the parties please explain whether, in their view, this is a reasonable understanding of the AD Agreement in this regard? Further, could the parties please comment on how the choice of methodology is or may be determined in these instances, given that the results of application of either possible methodology will not be known until after it is applied. Are there any considerations that must be brought to bear on the choice of methodology? May the choice of methodology be resolved by policy? Is a Member free to choose the methodology to be used in a particular case without any reasons at all?

India agrees with the Panel that the ADA sometimes gives the authorities a choice of methodology. However, this choice is often *qualified*. Thus, in the case of the examples given by the Panel, third country export prices may be used, provided that the prices are *representative*. Constructed normal value may be used, provided that the amounts of SGA and profits are *reasonable*. The Article 2.4.2 comparison is subject to the provisions governing *fair comparison*. These qualifications are overarching requirements that the authorities must comply with to avoid patently unreasonable results.

Article 17.6(i) of the ADA in turn instructs Panels to determine whether the authorities ' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. While drafted in the form of instructions to WTO Panels, the provision obviously simultaneously requires the authorities to properly establish facts and to evaluate such facts in an unbiased and objective manner.

Applying these initial observations to the questions raised by the Panel, India considers that where choices are provided in the ADA, such choices are not unqualified. Furthermore, facts must be evaluated objectively and in an unbiased manner. While India agrees with the Panel's observation that a certain choice may in some cases lead to higher dumping margins than other choices, the overarching requirements noted above may then militate against using such choice, depending on the facts (for example, whether the difference between various methodologies is minor or major). Furthermore, in India's view, where a certain choice would *systematically* lead to higher dumping margins than another choice, adoption of that choice, whether on an incidental basis or as a matter of policy, this would violate Article 17(6)(i) because the result would become biased. In India's view, under the ADA the "job description" of authorities applying anti-dumping laws is not "to find dumping", but rather to determine "whether dumping exists". Systematic choices favouring dumping findings are in violation of the ADA.

16. India indicated, in its rebuttal submission at paragraph 104, that it made "repeated suggestions on undertakings in October 1997" but that the answer from the EC was "always that Bed Linen was "too complicated a product for undertaking". Could the par ties please provide specific details concerning any communications pertaining to undertakings between India and the EC in October 1997, or prior to that date. Copies of any relevant correspondence should be provided in this regard as exhibits. If in fact such discussions took place, could India indicate what additional facts would be required, in order for the Panel to conclude that "constructive remedies " were "explored"?

Relevant correspondence is submitted as Exhibits, with accompanying explanations below.

As regards the last question, India believes that the Commission was under an obligation to discuss in good faith with Indian exporters the possibilities and difficulties of an undertaking. India only had ten days to work out an undertaking. The EC had an obligation to assist India in working out an undertaking, and an obligation to take initiatives in this regard.

When the Indian exporters received the definitive disclosure on Friday, 3 October[27], it became clear that the EC was going to impose definitive anti-dumping duties on the basis of (in India's view) exaggerated dumping and distorted injury determinations. The Indian exporters then asked their lawyers to work out the possibility of an undertaking. The Indian exporters had 10 days [which included two weekends] to work out an offer encompassing the whole Indian bed linen industry.[28] After telephonic contacts between the lawyers and the Cotton Textiles Export Promotion Council (Texprocil), and representatives of the Indian Mission, the former on Tuesday 7 October sent fax 27642 [Exhibit India-89] to Texprocil.

Texprocil checked with its members and came back to the lawyers on Thursday, 9 October (fax 27702 [Exhibit India-90]). This led to telephone discussions between the lawyers and Texprocil on the possible organisation of an undertaking. The lawyers followed this up with a more detailed written advice of the same date, suggesting the basic outlines of an undertaking (Fax 27722 [Exhibit India-91]). Notably, the lawyers suggested an undertaking roughly based on the model adopted by the EC in the anti-dumping concerning *Flat wooden pallets from Poland*, which had also been a sample case with a large variety of product types and where the same lawyers had also helped to negotiate and conclude the undertakings.

Therefore, on Monday, 13 October 1997 the lawyers, on the instructions of Texprocil, sent a fax to the Commission:

> *"communicat[ing] the desire of our Client Texprocil and its Members to offer price undertakings . . .*
>
> *Our Client is working on a detailed formula concerning the practical aspects of this offer. Such detailed formula might be necessary since the product concerned can be divided in a number of items/models. We will be relaying the proposed formula implementing the practical details of the offer as soon as this has been worked out in detail.*
>
> *In the meantime, we look forward to your favorable reaction concerning the offer of our Clients. We hope that the offer can be given due consideration especially in light of Article 15 of the WTO Agreement* [sic] . . ." (fax 27817 and 27818 [Exhibit India-92])

This fax offering the undertaking was therefore made on time and comprised the very explicit invitation to seriously negotiate.

Despite this fax, whether before or after it, the EC at no point showed any interest in negotiating an undertaking. The EC never contacted the representatives of the Indian exporters to discuss the possibility of undertakings nor were any positive signals received whatsoever.

Indeed, when Texprocil's lawyers contacted the Commission by phone, the up-front (oral) reaction from the Commission case handler was that bed linen was *"too complicated a product for undertakings"* (Fax 27870 [Exhibit India-93]). The EC did nothing to explore anything.

On the contrary, once the deadline for offering an undertaking had expired, the EC simply sent a formalistic one-page fax to the effect that:

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[27] 3 October 1997 (Exhibit India-56 at 1009).

[28] Article 8(2) of the EC basic anti-dumping Regulation provides in relevant part that "[s]ave in exceptional circumstances, undertakings may not be offered later than the end of the period during which representations may be made pursuant to Article 20(5)." (Exhibit India-1 at 14). Since that period was set at 10 days (Exhibit India-56 at 1009), the deadline for the undertaking offer was ten days.

"[y]our fax reached the Commission services the last day of the above mentioned period but no detailed offer of price undertakings has been made yet.

Given that the investigation shall be concluded within 15 months of investigation, the Commission services will not be in a position to consider any offer of undertakings which your client may be considering at this stage." (Fax 28213 [Exhibit India-94]).

This concluded the discussions and prevented India from further pursuing to seek an undertaking. It takes two to tango, but when the party who should invite is the one who repeatedly declines there can be no dance.

As regards the last question of the Panel, India believes that the Commission was under an obligation to discuss in good faith with Indian exporters the possibilities and difficulties of an undertaking. India could only start working out a meaningful price undertaking offer when it knew the dumping calculations (normal value data). It was only apprised of those on Friday, 3 October 1997.

Taking those difficult circumstances into account, the European Commission—which had all calculations computerized and was the party best equipped to suggest a production categorisation and method for minimum price calculation—was under an obligation to at least be forthcoming with information. As India has argued in its reply to Panel questions 4 and 5, it believes the EC had an obligation to take the initiative. In any event, the formalistic conclusion that India did not come forth within ten days with a *full* proposal, falls short of the obligation to actively examine the possibilities for concrete remedies.

17. Assume that a Member has a policy that it will not accept undertakings in an anti-dumping investigation involving a particular product. Could the parties comment on whether the application of that policy in the case of an investigation of imports of that product from a developing country would be sufficient to satisfy the requirements of Article 15, or whether there must be a consideration of the specific circumstances in question? Could the EC indicate whether its view regarding the difficulties of concluding undertakings in non-commodity textile products is a matter of general policy. If so, was this general policy applied in this case? Whether or not a general policy was ultimately applied in this case, was consideration given to the possibilities of undertakings in the particular circumstances of this case regardless of general policy?

India believes that the obligations flowing from the Anti-Dumping Agreement cannot be different between WTO Members on the basis that some of them have certain policies. The second sentence of Article 15 applies to all developed WTO Members equally, whatever their policies. If a WTO Member generally does not wish to use undertakings for a particular product, it is entitled to do so, but within the constraints of the Anti-Dumping Agreement (including Article 15).

Although India does not wish to exclude the possibility of "constructive remedies" other than undertakings, in practice the undertaking will be one of the best-suited vehicles for a "constructive remedy". If a WTO Member does not allow other possible constructive remedies[29], and it excludes the possibility of an undertaking *a priori*, then it is difficult to see how it can comply with the letter and spirit of the second sentence of Article 15.

18. Dumping investigations generally cover a period of investigation of six to 12 months. One effect of this is to smooth out, to some degree, minor or erratic price changes over that time-period in the determination of dumping. Zeroing detracts from this "smoothing out" effect. Could the

[29] India would not be aware of other WTO-conform instruments currently in use by WTO parties to implement Article 15.

parties comment on this proposition and its relevance, if any, to the understanding of Article 2.4.2 of the Agreement?

India agrees with this proposition.

India recalls, as EC has also admitted, that Article 2.4.2 was inserted in the ADA at the behest of victims of anti-dumping actions who wanted to put a halt to biased dumping margin calculation methods.[30] As part and parcel of the package deal, the EC and other users of anti-dumping action accepted the Article 2.4.2 restraint. However, the inter-model zeroing practiced by the EC in the Bed linen case, emasculates the first sentence of Article 2.4.2 significantly, as the facts of the bed linen case show.

[30] Koulen, The New Anti-Dumping Code Through Its Negotiating History, 151, at 171, in The Uruguay Round Results (European Interuniversity Press 1995), at 171:

"More contentious, however, was the question of the application of averaging techniques in the c omparison between export prices and normal values. Many delegations regarded the practice followed by major users of anti-dumping of comparing average domestic prices to individual export transactions at prices below the average domestic price as one of the most obvious methodological <<tilts>> in favour of affirmative findings of dumping and as fundamentally inconsistent with the <<fair comparison>> requirement in Article 2.6…

In the course of the negotiations, an understanding emerged that a new agreement would include a general rule requiring that export prices and domestic prices normally be compared on an identical basis, i.e. either on a weighted-average-to-weighted average basis or on a transaction-to-transaction basis, but that in specific circumstances an average normal value could be compared with individual export prices. What remained unresolved was the precise definition of those circumstances."

And at 212:

"There has been some criticism in the literature of the definition in the second sentence of this clause of the conditions under which margins of dumping can be established on the basis of a comparison of a weighted average normal value to individual export prices. It would appear that some of this criticism overlooks that these conditions need to be interpreted in the context of Article 2.4.2 as a whole, the first sentence of which clearly states that the normal rule is that in an investigation margins of dumping must be established on a weighted average-to-weighted average basis or on a transaction-to-transaction basis."

Exhibit India-86: Three versions of the Foncar declaration as made available

Exhibit India-87: 'Annex 2'

Exhibit India-88: Relevant copy of Dr Muller's Book regarding undertaking

Exhibit India-89: Fax 27642

Exhibit India-90: Fax from Texprocil

Exhibit India-91: Fax 27722

Exhibit India-92: Fax 27818 and 27817

Exhibit India-93: Fax 27870

Exhibit India-94: Fax from EC

ANNEX 1-11

COMMUNICATION FROM INDIA IN RESPONSE TO THE
EUROPEAN COMMUNITIES' COMMUNICATION OF 22 JUNE 2000

(27 June 2000)

I refer to EC's letter of 22 June 2000 offering "to show to the Panel, in the presence of India, the original …documents" i.e., faxes containing declarations of support by the EC producers, "in order to resolve" the issue of standing "once and for all."

India welcomes this positive gesture of EC and requests the Panel to direct EC to submit all the original documents at a meeting specially convened to consider these documents.

It may be noted that India and its exporters have been seeking clarifications on this issue for a long time now. India is g lad that EC is forthcoming with the offer of showing the originals to the Panel and India. In the spirit of Article 3.10 of DSU, India hopes that EC would note/clarify the following points relating to these documents on standing issue while submitting the originals to the Panel:

(a) It would be helpful if the EC could provide the original declarations of support of the eight producers, who were excluded after initiation, but (India believes) were relied upon in making the standing determination prior to initiation;

(b) It would also be useful if the EC could clarify the following discrepancies noted by India in the declarations of support submitted thus far:

- how there could be two different versions of the *Foncar* declaration, each with different fax footers;
- why there are no EC fax footers on the declarations of the *Fédération Française de l'Industrie Cotonnière*;
- how it is possible that the Portuguese and the German declarations have the same footers;
- how it is possible that the fax header on Annexe 2 of the *Fédération Française de l'Industrie Cotonnière* declaration runs through the triangle on the upper left corner, although this triangle was completely visible on the copy given to India and its producers on 8 January 1996;
- concerning the same page, how it is possible that the fax header runs through the words "Annexe 2" although these words were complete on the copy given to India and its producers on 8 January 1996;

(c) In order to allay India's concerns, the EC could also show the chrono-in entries, as well as the cover pages of the faxes with the declarations.

India believes that Eurocoton's fax number could not have been confidential (it is for example contained in the complaint (Exhibit India-6 at 75)). India would therefore be grateful if the EC could indicate:

(i) why the *producers* would have wanted this fax number to be removed (as implied by the EC's answer of 16 June 2000 to India's question 4);

(ii) why the EC removed the *footers* with the date of receipt as well; and

(iii) EC could provide evidence for its statement that "*the removals* (of the fax headers and footers) *were made in response to the requests of producers*";

India notes that these covers, according to the EC's reply of 16 June 2000 to Indian question 3, "*were registered on receipt, with the exception of one producer which had an output of only 5 mt*"; It would be useful if the EC could explain why one fax was not registered, and identify that company (with the output of 5 mt);

(d) The EC's reply of 16 June 2000 to Panel question 13 unfortunately has caused some confusion. It would be useful if the EC could explain how it could exclude *Luxorette* (together with 7 other companies) from the 46 companies to arrive at 38 companies, even though *Luxorette* features as one of those 38 companies (Exhibit EC-4);

(e) For helping India's understanding of the matter, it would be useful if the EC could explain why the recital 8 of the provisional Regulation lists <u>different</u> EC sample companies than the EC's reply of 16 June 2000 to Indian question 4.

ANNEX 1-12

COMMENTS OF INDIA ON THE DESCRIPTIVE
PART OF THE PANEL REPORT

(3 July 2000)

Annexes - Table of Contents

The following documents may be added:

Annex 1: Submissions of India

Annex 1-10 *Responses of India to the questions of the Panel following the Second Meeting of the Panel*
Annex 1-11 *Letter dated 27 June 2000 from India in response to the letter from the EC of 22 June 2000 on standing issues*

Annex 2: Submissions of the European Communities

Annex 2-8 *Responses of the European Communities to the questions of the Panel following the Second Meeting of the Panel*
Annex 2-9 *Responses of the European Communities to the questions of India following the Second Meeting of the Panel*
Annex 2-10 *Letter from European Communities dated 22 June 2000 concerning standing issues*

I. INTRODUCTION

India would suggest to add:

"1.8 On 22 June 2000, the EC requested an additional meeting with the Panel. In its letter of 27 June 2000, India, in a spirit of co-operation did not object to such a meeting."

II. FACTUAL ASPECTS

Paragraph 2.5: India would suggest to add at the end: *"The Indian exporters did not agree with the sample thus selected by the EC since in their view the selection criteria were not met. Despite their disagreement all seven companies provided a questionnaire response to the EC."* (Please refer to Exhibit India-21).

Paragraph 2.6: India would suggest changing in the last sentence the words *"weighted average constructed normal value by type"* into *"constructed (normal) value by type".*

Paragraph 2.7: India would suggest to change the paragraph as follows: *"The Commission initiated the anti-dumping proceeding on the basis that the complaint alleged support by 46 companies. After initiation, the Commission eliminated seven companies found not to be complainants, one company determined to rely on exports, and three companies determined either not to be producing bed linen or not to be co-operating. The Commission then found that the remaining 35 companies represented a major proportion of Community production of bed linen and were, therefore, deemed to make up the "Community industry" (domestic industry)."* (Please refer to the EC's reply of 19 May 2000 to India's question 40). After last sentence India would suggest to add:

"The names of these 35 companies constituting the Community industry were made available during the second round of consultations on 15 April 1999."

Paragraph 2.8: After the first sentence India would suggest to add: *"after consultation and agreement with the complainant Eurocoton"*. (Please refer to recital 61 of the provisional Regulation). In the second sentence India would suggest to change the beginning into: *"This sample comprised 16 of the 35 companies from within the Community industry and one company outside the Community industry."* (Please refer to Exhibit India-84 and India's second written submission at pages 23-25.)

Paragraph 2.10: After last sentence India would suggest to add: *"Indian producers made final disclosure comments and offered a price undertaking within the deadline imposed by EC. The EC did not explore such offer for an undertaking and stated that the Indian exporters had missed the deadline for offering undertakings."*

Paragraph 2.11: India would suggest to add before the second last sentence: *"Because of its different physical characteristics, handloom products were . . . "* (see recital (7) definitive Regulation).

Paragraph 2.11: India would suggest to change the last sentence: *"Provisional duties were not definitively collected because the EC had not imposed such duties within the deadlines prescribed by its domestic law."*

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

Paragraph 3.1: India would suggest to reformulate Claim 20 as follows: *"Claim 20: Inconsistency with Article 3.5, by taking account of injury allegedly caused by imports before the investigation period, which imports were not determined to be dumped;"* (please refer to India's first submission at 180-181).

Paragraph 3.7 at 4: India would suggest adding a footnote stating that: *"India has presented a letter from the company involved expressly allowing it to use Exhibit India-49 in the panel proceeding."*

Finally, without prejudice to India's well-known position on amicus curiae briefs, the Panel may have to explain in its final report as to how it has dealt with the brief submitted by the Foreign Trade Association.

ANNEX 1-13

COMMENTS OF INDIA ON THE
INTERIM REVIEW OF THE PANEL REPORT

(7 August 2000)

India thanks the Panel for its very diligent work in this complicated and multi-faceted panel proceeding.

Pursuant to Article 15.2 of the DSU India wishes to make the following comments on the interim report of the Panel issued to the parties on 31 July 2000:

- *Claim 1*: It is respectfully submitted that India's claim 1 is referred to in the interim report as a claim made under Article 2.2 (both in the table of contents as well as in the text). In fact, it would be clear from India's First Written Submission that claim 1 pertains to Article 2.2.2;

- Further, instead of the explanatory title of this claim, that it pertains to 'calculation of a reasonable amount for profit', it is suggested that it should be rephrased as 'inconsistency with Article 2.2.2". This is because three arguments had been brought forward with respect to claim 1, all pertaining to the inconsistency of EC's action with Article 2.2.2; claim 4, by contrast, challenged the reasonability of the profit rate determined by the EC;

- *Standing (Article 5.4)*: India believes that the evidence it brought before the Panel can only lead to the conclusion that the EC made its standing determination *after* initiation of the antidumping proceeding. In this context India refers to its replies dated 16 June 2000 to the second round of questions (Annex I.10 to the panel report, at 1-3 and to its response to EC's letter of 22 June 2000);

- *Para. 6.215*: In the third sentence of this para, the phrase "and in certain of cases with the copies submitted earlier" should be added at the end, since in a number of cases the dates in the fax headers and footers of the documents were inconsistent with dates of copies of their very documents submitted earlier;

  Further, in the last sentence of Para 6.215 it should be clarified that EC offered to submit the originals of the faxes only <u>after</u> the second substantive meeting with the Panel;

- *Footnote 89*: It is suggested that this footnote may be modified to read that "India has made no claim or arguments in this regard, *since the injury margin exceeded the dumping margin for each company (rec. 131 provisional regulation)*

Apart from these minor observations, India has no further comments to make at this stage. However, India reserves its right to respond to any comments that may be made by EC on interim report.

ANNEX 2-1

FIRST SUBMISSION AND REQUEST FOR PRELIMINARY RULINGS
OF THE EUROPEAN COMMUNITIES

(27 March 2000)

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I. INTRODUCTION

1. The European Communities (hereafter "the EC") welcomes this opportunity to present its views in the case brought by India against the initiation of an anti-dumping a-proceeding, the imposition of provisional duties and the imposition of definitive anti-dumping duties by the EC on imports of bedlinen originating in India.

2. At the outset of this proceeding, the EC wishes to thank the members of the Panel for agreeing to serve in this dispute, and for the diligence with which it is sure they will discharge their functions. The EC wishes also to acknowledge the considerable work that will be required of the Secretariat in assisting the Panellists to perform their task.

3. The case at issue is rather complex and has resulted in a number of claims by India. In order to assist the Panel in resolving this dispute, the EC will highlight in this submission the main reasons why India's approach is wrong. In order to do so, the EC will first address some preliminary concerns caused by India's course of action (Section II), to then focus on the issues raised by India in relation to the initiation of the anti-dumping proceeding (Section III), the determination of dumping (Section IV) and injury (Section V). Finally, the EC will deal with the issue of the status of India as a developing country (Section VI). The EC reserves its right to articulate more detailed arguments in its Rebuttals Submission.

4. Before entering into the core of the case, the EC would like to turn its attention to some initial points that deserve a clarification.

5. First of all, the EC notes that a number of claims that were mentioned in India's request for the establishment of a panel have not been included in India's First Written Submission. In particular, India does not claim in the Submission that:

- inconsistently with Article 12.1 Anti-dumping Agreement, the EC did not adequately respond to queries from India's exporters on the issues of standing (Panel request, point 1);

- inconsistently with Article 12.1 Anti-dumping Agreement, did not make available any record of its examination of the allegations contained in the complaint and of its consideration at the time of initiation of information pointing to lack of injury (Panel request, point 2);

- inconsistently with Article 12.1 Anti-dumping Agreement, the EC failed to state in a public notice the reasons why provisional measures were judged necessary (Panel request, point 3);

- inconsistently with Article 12.1 Anti-dumping Agreement, the EC refused to grant a level-of-trade adjustment (Panel request, point 8);

- inconsistently with Article 12.1 Anti-dumping Agreement, the EC was "comparing similar sales channels for the determination as to whether ASG expenses are similar, while comparing different sales channels for the determination as to whether the profits on branded goods were higher" (Panel request, point 9);

- inconsistently with Article 12.1 Anti-dumping Agreement, the EC discriminated between exporting countries with respect to the treatment of state-owned companies (Panel request, point 10).

6. In the light of the Panel's working procedures, the EC assumes that these matters are not being pursued.

7. Second, India's Submission contains many assertions of fact and law which are not specifically associated with its 'Claims'. Because they appear to be irrelevant to the subject matter of this dispute the EC has ignored them. The EC reserves its position on these assertions, and its silence should not be taken as acceptance.

8. Third, the EC notes the documents presented as exhibits by India. Some of these emanate from India or the exporters. The fact that the EC does not comment on one or other of these documents in this Submission should not be taken as an acceptance by the EC of the accuracy of any of the statements that it contains.

9. Finally, with regard to the company-specific information included in India's Submission, the EC assumes that India has received the authorisation to disclose by the exporting companies concerned and that this authorisation also allows use of that information by the EC.

II. PRELIMINARY ISSUES

10. In light of paragraph 13 of the Panel's Working Procedure, in this Section the EC will address the issues on which it requests a preliminary ruling by the Panel.

A. CLAIMS NOT MENTIONED IN THE PANEL REQUEST

11. The EC objects to the inclusion in India's First Written Submission of claims that were not mentioned in its Panel request (Exhibit EC-1). These include claims that the EC has acted inconsistently with the following provisions of the Anti-dumping Agreement:

- Article 1 (Section VII.B - Requests, para. 7.3);
- Article 3.4, as regards the allegation that the EC assumed that imports before the Investigation Period were dumped (Claim 19, paras. 4.198 et seq.);
- Article 3.6 (Claim 8, para. 4.35, and Section VII.B - Requests, para. 7.3);
- Article 6.2, 6.4 and 6.9 (Claim 14, paras. 4.87 to 4.92); and
- Article 6.10 and 6.11 (Claim 16, paras. 4.158 et seq.).

The same stricture applies to India's apparent contention (paras. 3.106 to 3.107) that the EC Basic Regulation (Exhibit India-1) is inconsistent with Article 2.2.2 of the Anti-dumping Agreement.

12. It is well-established in WTO law that a complainant Member may not introduce a claim during the course of panel proceedings that is not mentioned or referred to in the terms of reference set by the DSB.

13. The rules applicable to the present dispute are set out in Article 17.4 of the Anti-dumping Agreement:

> If the Member that requested consultations considers that the consultations pursuant to paragraph 3 have failed to achieve a mutually agreed solution, and if final action has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties or to accept price undertakings, it may refer the matter to the Dispute Settlement Body ("DSB"). When a provisional measure has a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7, that Member may also refer such matter to the DSB.

14. As a "special or additional rule or procedure" (defined in DSU Article 1.2), this takes priority over the normal rule in DSU Article 6.2. However, on this point the two provisions are in harmony. Thus, the Appellate Body has said:[1]

> the word "matter" has the same meaning in Article 17 of the *Anti-Dumping Agreement* as it has in Article 7 of the DSU. It consists of two element: The specific "measure" and the "claims" relating to it, both of which must be properly identified in a panel request as required by Article 6.2 of the DSU

15. The panel in *Mexico – HFCS* observed that:[2]

> In considering the arguments relating to Article 17.4 of the AD Agreement, we note first that Article 17.4 does not, in our view, set out any further or additional requirements with respect to the degree of specificity with which claims must be set forth in a request for establishment challenging a final anti-dumping measure.[3] Therefore, a request for establishment that satisfies the requirements of Article 6.2 of the DSU in this regard also satisfies the requirements of Article 17.4 of the AD Agreement.

16. Article 6.2 of the DSU states that:

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.

17. In the *European Communities – Bananas* case the Appellate Body said:[4]

> 142. We recognize that a panel request will usually be approved automatically at the DSB meeting following the meeting at which the request first appears on the DSB's agenda.[1] As a panel request is normally not subjected to detailed scrutiny by the DSB, it is incumbent upon a panel to examine the request for the establishment of the panel very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU. It is important that a panel request be sufficiently precise for two reasons: first, it often forms the basis for the terms of reference of the panel pursuant to Article 7 of the DSU; and, second, it informs the defending party and the third parties of the legal basis of the complaint.
>
> _____
>
> [1]. DSU, Article 6.1.

18. Likewise in Brazil – Desiccated Coconut it said:[5]

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[1] Report by the Appellate Body on *Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico*, AB-1998-6, WT/DS60/AB/R, 2 November 1998, at paragraph 76 (footnote omitted).

[2] Report by the Panel on *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, 28 January 2000, at paragraph 7.14.

[3] We note that Article 17.4 does not refer to "claims".

[4] Report by the Appellate Body on *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, AB-1997-3, WT/DS27/AB/R, 9 September 1997.

> A panel's terms of reference are important for two reasons. First, terms of reference fulfil an important due process objective -- they give the parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant's case. Second, they establish the jurisdiction of the panel by defining the precise claims at issue in the dispute.

19. Regarding the degree of precision with which the complainant must specify the WTO provisions that it invokes, the Appellate Body in *Korea – Dairy Safeguard* explained the interpretation that it had given in earlier cases:[6]

> 123 Thus, we did not purport in *European Communities – Bananas* to establish the mere listing of the articles of an agreement alleged to have been breached as a standard of precision, observance of which would *always* constitute sufficient compliance with the requirements of Article 6.2, *in each and every case*, without regard to the particular circumstances of such cases. If we were in fact attempting to construct such a rule in that case, there would have been little point to our enjoining panels to examine a request for a panel "*very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU*". Close scrutiny of what we in fact said in *European Communities – Bananas* shows that we, firstly, restated the reasons why precision is necessary in a request for a panel; secondly, we stressed that claims, not detailed arguments, are what need to be set out with sufficient clarity; and thirdly, we agreed with the conclusion of the panel that, in that case, the listing of the articles of the agreements claimed to have been violated satisfied the *minimum* requirements of Article 6.2 of the DSU. In view of all the circumstances surrounding that case, we concurred with the panel that the European Communities had not been misled as to what claims were in fact being asserted against it as respondent.
>
> 124 Identification of the treaty provisions claimed to have been violated by the respondent is always necessary both for purposes of defining the terms of reference of a panel and for informing the respondent and the third parties of the claims made by the complainant; such identification is a minimum prerequisite if the legal basis of the complaint is to be presented at all. But it may not always be enough. There may be situations where the simple listing of the articles of the agreement or agreements involved may, in the light of attendant circumstances, suffice to meet the standard of *clarity* in the statement of the legal basis of the complaint. However, there may also be situations in which the circumstances are such that the mere listing of treaty articles would not satisfy the standard of Article 6.2. This may be the case, for instance, where the articles listed establish not one single, distinct obligation, but rather multiple obligations. In such a situation, the listing of articles of an agreement, in and of itself, may fall short of the standard of Article 6.2.

20. The terms of reference[7] of the Panel established by the DSB do not contain, either explicitly or by reference,[8] any mention of the claims listed in paragraph 11 above. In most instances (regarding

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[5] Report by the Appellate Body on *Brazil - Measures Affecting Desiccated Coconut*, AB-1996-4, WT/DS22/AB/R, 21 February 1997, at sec. VI.

[6] Report by the Appellate Body on *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, 14 December 1999, (footnote omitted).

[7] The terms, as reported in document WT/DS141/4 (Exhibit EC-3), are as follows:

> To examine, in the light of the relevant provisions of the covered agreements cited by India in document WT/DS141/3, the matter referred to the DSB by India in document WT/DS141/3, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.

Article 1, Article 3.6, and Article 6) there is no mention of the relevant provision in the terms of reference. In one (regarding Article 3.4) the provision is mentioned in relation to a quite different claim. The fact that India has not clearly stated to which of the multiple obligations in the above-mentioned articles its claims refer has prevented the EC from properly preparing its defence, and has denied third parties their right to be alerted to the issues that are the subject of this panel.

21. Consequently, in line with the clear jurisprudence established on this point, the EC requests the Panel refuse to entertain

- the claims regarding Article 1, Article 3.6 and Article 6 because undoubtedly outside the terms of reference of the Panel ; and

- the claim regarding Article 3.4 because India has failed to clearly identify this issue in the request for the establishment of the Panel and thus has violated Article 6.2 DSU, preventing the EC from properly preparing its defence and denying third parties their right to be alerted to the issues that are the subject of this panel.

B. CLAIMS IN RELATION TO THE PROVISIONAL REGULATION

22. Many of India's claims concern alleged defects in the Provisional Regulation. Such claims are beyond the Panel's jurisdiction for two reasons.

23. Firstly, Article 17.4 (quoted at paragraph 3 above) defines the circumstances in which a provisional measure may be referred to the DSB. These are when it "has a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7".

24. In this instance India has not contended that the Provisional Regulation had a "significant impact", and has presented no evidence in support of such a contention.

25. Consequently, no claims in respect of the Provisional Regulation may be considered by the Panel.

26. Secondly, India's claims regarding the Provisional Regulation are also beyond the Panel's jurisdiction because they are moot.

27. This Regulation expired in November 1997.[9] No anti-dumping duties were collected under it because the Definitive Regulation contained no provision for the retroactive collection of duties (such as is permitted by Article 10.2 of the Anti-dumping Agreement) and authorised the release of any duties secured by way of the provisional anti-dumping duty imposed by the Provisional Regulation.

28. Furthermore, the status of the Definitive Regulation under the Anti-dumping Agreement is in no way affected by any possible defects in the Provisional Regulation.

29. Consequently there is no meaningful remedy that India can obtain in respect of the Provisional Regulation.

30. Article 19.1 of the DSU states that (footnotes omitted):

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[8] Through the Request for the establishment of a Panel of the Government of India (Exhibit EC-1), which is referred to in the DSB's decision.

[9] In accordance with EC law and practice, aspects of the text of the Provisional Regulation are adopted by references in the Definitive Regulation. In so far as there are any differences between the texts of the two Regulations, that of the Definitive Regulation prevails.

> Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. …

31. As India tacitly admits when listing the recommendations that it requests from the Panel (para. 7.4), the Provisional Regulation, since it is no longer in force, is not a measure that can be brought into conformity with the Anti-dumping Agreement.

32. Likewise, Article 3.7 of the DSU states that

> … In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. …

33. In the case of the Provisional Regulation there is no measure to withdraw.

34. The principle that panels should decline to make a ruling in such situations is supported by a number of rulings.

35. The panel in *United States – Gasoline* was faced with a rule that had ceased to have effect before its terms of reference were established. It observed that:[10]

> it had not been the usual practice of a panel established under the General Agreement to rule on measures that, at the time the panel's terms of reference were fixed, were not and would not become effective.

36. The panel noted that the measure in question had not been specifically mentioned in the terms of reference and was not likely to be renewed.[11] This contrasted with the 1980 *Chile Apples* case in which a measure was considered despite the fact that it had terminated before establishment of the terms of reference, but when those terms specifically included the measure, which was seasonal in nature.[12]

37. In the passage quoted in paragraph 17 above, the Appellate Body in the *Bananas* case noted that it was the normal practice of the DSB to automatically approve requests for panels, and not to subject them to detailed scrutiny. It concluded that it was therefore incumbent on a panel to examine the request very carefully to ensure compliance with both the letter and the spirit of DSU Article 6.2 (see paragraph 16 above).

38. This passage was cited by the panel in *Argentina – Footwear*,[13] which adopted the same approach as the *Gasoline* panel (paragraph 35 above). The panel also noted that the Appellate Body has warned against dispute bodies making law outside the context of resolving a particular dispute, and has enjoined panels to address only those claims that must be addressed in order to resolve the matter in dispute.[14]

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[10] Report by the Panel on *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, 29 January 1996, at paragraph 6.19.

[11] Ibid.

[12] Report by the panel on *EEC - restrictions on imports of apples from Chile*, BISD 27S/98, adopted on 10 November 1980. The respondent seems not to have challenged the panel's jurisdiction over the issue.

[13] Report by the Panel on *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R, 25 November 1997, at paragraphs 6.6 et seq.

[14] Report by the Appellate Body on *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, AB-1997-1, WT/DS33/AB/R, 25 April 1997, at sec. vi.

39. In *Guatemala – Cement* the Appellate Body interpreted Article 17.4 of the Anti-dumping Agreement to mean that a Complainant invoking this Agreement may attack three kinds of "measure" only: the final imposition of anti-dumping duties or acceptance of a price undertaking, and provisional measures (in certain circumstances).[15] Since the Provisional Regulation is outside the jurisdiction of the Panel, and there was no price undertaking in this case, the only measure that may be challenged by India is the Definitive Regulation.

40. The EC is therefore not responding to India's claims regarding the Provisional Regulation, and it asks the Panel not to address them. It requests a preliminary ruling to exclude these claims from the scope of these proceedings.

41. Those claims in India's Submission are as follows: Claims 2, 5, 8 (in part), 9, 11 (in part), 12, 15 (in part), 17, 19 (in part), 21, 24, 27, 29 (in part), and 30.

C. VERBATIM REPORTS OF CONSULTATIONS PRODUCED AS EVIDENCE BEFORE THE PANEL

42. Verbatim reports of WTO consultations, drafted by one party and lacking the endorsement of the other, are intrinsically unreliable, and as such are not evidence that should properly be submitted to a panel. Were they to be admitted they would encourage a dispute with the other party's version of the same consultations, which would be incapable of resolution and therefore pointless.

43. For the record, the EC states that it does dispute the accuracy of important elements of the reports presented by India.

44. The EC therefore requests the panel to declare such reports inadmissible.

D. OTHER MATTERS

45. Regarding Annexe 49 of the Indian Submission, the EC notes the use of what is apparently a dumping calculation made by the EC authorities in the course of a separate investigation. If this is indeed what it is, the EC condemns the breach of confidentiality, and is not prepared to comment on the substance of the document. The Panel is requested to rule that the document is not part of the proceedings.

E. PRELIMINARY RULINGS REQUESTED

46. On the basis of paragraph 13 of the Panel's Working Procedures, and in view of the arguments substantiated above, the EC request the <Panel to issue the following preliminary rulings:

- that India's claims regarding Article 1, Article 3.6 and Article 6 are dismissed because outside the terms of reference of the Panel;

- that India's claim regarding Article 3.4 is dismissed because India has failed to clearly identify this issue in the request for the establishment of the Panel in violation of Article 6.2 DSU;

- that India's Claims 2, 5, 8 (in part), 9, 11 (in part), 12, 15 (in part), 17, 19 (in part), 21, 24, 27, 29 (in part), and 30 are excluded from the scope of the proceedings;

- that the verbatim reports of the consultations submitted as evidence by India are inadmissible and will be disregarded;

[15] Report by the Appellate Body on *Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico*, AB-1998-6, WT/DS60/AB/R, 2 November 1998, at paragraphs 77 et seq.

that the document submitted by India as Annex 49 is not part of these proceedings.

III. CLAIMS REGARDING INITIATION

A. CLAIM 23: ALLEGED INCONSISTENCY WITH ARTICLE 5.3

47. India alleges (in paras. 5.17 to 5.31) that the EC has infringed Article 5.3: "the investigating authorities, according to their own published statements, did not 'examine' the allegations in the complaint on the state of the domestic industry before initiating the anti-dumping investigation."[16]

48. Article 5.3 states that:

> The authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation.

49. India contends (para. 5.20) that the evidence provided in a complaint can in itself never be the only element to justify the initiation of an investigation. It also suggests that the word "examine" in Article 5.3 implies "action on behalf of the investigating authorities", a definition that is so vague as to be useless. India evidently wishes to argue that the investigating authorities must acquire some evidence in addition to that constituted by the complaint.

50. None of India's proposed interpretations is justified by the text of Article 5.

51. To arrive at the proper interpretation of the Article 5.3 it is necessary to look at the ordinary meaning of its terms in their context. Article 5.2 is an important part of this context since it appears to suggest that evidence will be adequate if it covers the topics listed there, and will be accurate if it is sufficiently credible. Regarding the standard of proof required in this decision it has been observed that it is less than that appropriate to a preliminary or final determination of dumping, but more than mere allegation or conjecture.[17] Furthermore, in regard to injury, there is no need for the investigating authority "to have or consider information on all the Article 3.4 factors".[18]

52. India's assertion that evidence in addition to the complaint is always required is not supported by the text, or by the extract from the *Guatemala – Cement* panel report that is cited in its favour. That panel was denying that evidence that satisfied the criterion of "such information as is reasonably available" in Article 5.2 would necessarily satisfy that of "sufficient evidence" in Article 5.3. It did not deny that, in a particular case, it might satisfy this test.

53. India's view assumes that the evidence presented in the complaint is inherently unreliable, but this view has no basis in the text. Furthermore, it implicitly undermines the crucial role of the Complaint, which is evident both in practice and in the text of Article 5. In any case, India's suggestion is unworkable, because it does not say how much additional evidence should be obtained, and from where it should come. The concept is artificial, and would be meaningless in practice.

54. Once it is accepted that there is no specific duty on the investigating authorities to collect evidence additional to that in the complaint, the specific allegations of India in paragraphs 5.23 and 5.24 collapse, since all are dependent on its eccentric interpretation of the term "examine" in Article 5.3.

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[16] Although this is described as the "first" argument in the claim, this appears to its clearest expression.

[17] Report by the Panel on *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, 28 January 2000, at paragraph 7.94.

[18] Ibid., para. 7.97.

55. In accordance with their ordinary practice, the EC authorities examined the Complaint in the light of the requirements of Article 5.2 and 5.3, and with the benefit of their considerable experience in dealing with such documents. As is usually the case, some of the information in the complaint derived from publicly-available sources, and could therefore be checked, whereas some was known only to the complainants. The Community authorities, who have no interest in initiating investigations that are likely to fail later for lack of evidence, reached a positive conclusion. This was recorded in the Notice of Initiation (Exhibit India-7): "having determined that … there is sufficient evidence to justify initiation of the proceedings …". This demonstrates that the authorities examined the information contained in the Complaint and found it sufficient.

56. In paragraph 5.26 India alleges that the EC investigating authorities have not published or maintained on file a record suggesting that they have examined the evidence contained in the complaint. It seems to be implied that the Anti-dumping Agreement requires the EC to have done one or both of these things.

57. In paragraph 5.27 India asserts that the EC was obliged to publish the results of its examination or make a separate report available to the Indian exporters.

58. In neither of these paragraphs is it clear whether India is employing the peculiar interpretation it has given to the word "examine" (para. 49 above), or whether it is using the word in its proper sense. In so far as it is the former, the EC rejects any suggestion of WTO inconsistency in its actions, since there can be no obligation to publish, etc., a determination based on fallacious notion.

59. On the assumption that India might be using the word "examine" in its correct sense it is necessary to look more closely at the allegations in the two paragraphs.

60. India implies that the legal authority for the supposed obligations is Article 5.3, and quotes from the report of the panel in *Korea – Polyacetal Resins*. This case concerned the 1979 Anti-Dumping Code, and the panel was addressing an aspect of the injury determination in the definitive measures. The rules on publication in the Anti-dumping Agreement are much more detailed than those of the Code, and the position of the initiation decision is very different from that of the measure imposing duties.

61. A more apposite precedent is provided by the recent decision on *Mexico – HFCS* where the issue was the same as that in the present dispute – the degree of explanation to be provided in regard to an initiation decision. The panel summed up its analysis by saying:[19]

> In our view, Article 5.3 cannot be interpreted to require the investigating authority to issue an explanation of how it has resolved **all** underlying questions of fact at initiation. That is a requirement that arises at later stages of the proceeding, and is explicitly set forth in Article 12.2.

62. In any event, in that case the complainant alleged that the Mexican authorities had failed to respect Article 12.1 of the Anti-dumping Agreement, which deals explicitly with the issue of giving public notice of the initiation decision. It states that (footnote omitted):

> 12.1 When the authorities are satisfied that there is sufficient evidence to justify the initiation of an anti-dumping investigation pursuant to Article 5, the Member or Members the products of which are subject to such investigation and other interested parties known to the investigating authorities to have an interest therein shall be notified and a public notice shall be given.

[19] Report by the Panel on *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, 28 January 2000, at paragraph 7.110.

> 12.1.1 A public notice of the initiation of an investigation shall contain, or otherwise make available through a separate report, adequate information on the following:
>
> (i) the name of the exporting country or countries and the product involved;
>
> (ii) the date of initiation of the investigation;
>
> (iii) the basis on which dumping is alleged in the application;
>
> (iv) a summary of the factors on which the allegation of injury is based;
>
> (v) the address to which representations by interested parties should be directed;
>
> (vi) the time-limits allowed to interested parties for making their views known.

63. In the present dispute India has chosen not to invoke this provision. It cannot now circumvent that decision by seeking to find a parallel obligation to publish within Article 5.3.

64. In so far as India implies that, irrespective of publication, the EC authorities should have supplied a report on the initiation decision directly to the Indian exporters, the EC cannot see any such obligation in Article 5.3. In any case, it is not until sometime after the initiation decision that those authorities are able to identify these exporters with confidence.

65. Finally, as regards maintaining a file, the EC of course maintains records, but it cannot see how this fact relates to the obligations of Article 5.3, nor has India provided any explanation.

66. In paragraphs 5.28 to 5.31 India alleges that when the EC authorities initiated the investigation they had information in their possession concerning the previous bedlinen investigation which strongly indicated that the industry might not be suffering injury, and this required the authorities to carry out a further investigation, which they failed to do.

67. A number of points can be made in response to this allegation.

68. Firstly, the information that was obtained by the EC authorities in the first investigation into bedlinen related to the relevant investigation period, i.e., the year 1993, whereas that for the present investigation was 1995/96. Thus, even had the previous investigation indicated that injury had not occurred, it would not be relevant.

69. Secondly, the earlier investigation did not lead the authorities to conclude that the domestic industry was not suffering injury. Had it done so the investigation would have been terminated in accordance with Article 5.8. Furthermore, the fact that the previous complaint was withdrawn could hardly be said to indicate a conviction on the part of exporters that they were not suffering injury, when, at the very same time, they were giving their support to a new complaint which contained just such a claim.

70. Nevertheless, information gained during the previous investigation was available to the investigating authorities when they considered the issue of "sufficient evidence" in the second complaint, and thereby facilitated a better-informed decision on initiation.

71. In conclusion, the EC observes that the standard of review that the Panel must exercise in considering the actions of the EC authorities is set out in 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 was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;

72. The panel in *Mexico – HFCS* endorsed the *Guatemala – Cement* panel, which said that "the approach taken by the Panel in the Softwood Lumber dispute is a sensible one and is consistent with the standard of review under Article 17.6(i)."[20] This approach consisted in not conducting a *de novo* review, by evaluating anew the evidence and information before the national authority, but in considering "whether an unbiased and objective investigating authority evaluating that evidence could properly have determined" the issue in question.[21]

73. Even the non-confidential version of the Complaint (Exhibit India-6) is a substantial document, with a wide-range of information. The EC submits that the initiation of an investigation on the basis of evidence identified in this version would satisfy the standard of Article 17.6(i), in that "the authorities' establishment of the facts was proper" and "their evaluation of those facts was unbiased and objective".

74. The remarks made by the EC (at paragraph 86 below) regarding the appropriate standard of proof to be applied by the authorities are also relevant in this context.

B. CLAIM 24: ALLEGED INCONSISTENCY WITH ARTICLE 12.2.1

75. India alleges (paras. 5.32 to 5.44) that inconsistency with Article 12.2.1 in regard to the Provisional Regulation.

76. As explained at paragraph 22 above, claims regarding the Provisional Regulation are not within the Panel's jurisdiction.

C. CLAIM 25: ALLEGED INCONSISTENCY WITH ARTICLE 12.2.2

77. India states (paras. 5.46 to 5.47) that the EC was "obliged to provide in the definitive Regulation 'the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers".

78. Before responding specifically to this claim, the EC notes that India's approach to Article 12, as manifested in this and, for example, Claim 28 (at paragraph 103 below), fails to take proper account of its structure. This is quite straightforward. Initiation issues are dealt with by paragraph 1, while paragraph 2 is covers the measures adopted during and after the investigation (that is provisional measures, definitive measures and undertakings).

79. Regarding Claim 25, the "arguments or claims" to which India is referring are apparently those made in the context of Article 5.3. Although the Submission is not at all clear what these consist of, it is assumed that they concern the alleged inadequacy of the initiation decision.

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[20] Report by the Panel on *Mexico — Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, adopted 24 Feb. 2000, para. 7.94, quoting Report by the Panel on *Guatemala — Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/R, adopted 25 November 1998, para. 7.57, which in turn was referring to Report by the Panel on *United States — Measures Affecting Softwood Lumber from Canada*, SCM/162, adopted 27 October 1993, BISD 40S/358, para. 332.

[21] This quotation is taken from *Guatemala – Cement*, para. 757. In this and in *Mexico – HFCS* the issue concerned the sufficiency of evidence to commence an investigation, which is examined specifically in this Submission at para. 82.

80. The Definitive Regulation was issued in accordance with Article 9 of the Anti-dumping Agreement. Consequently, the issues with which it deals are the substantive ones of dumping and injury causation. This is reflected in the requirements of Article 12.2.2. As the quoted extract makes clear, the obligation on the Member concerned is to deal with "*relevant* arguments or claims". India's allegations regarding the initiation of the investigation are not relevant to the definitive measure.

81. In any event, India appears to be under a misunderstanding regarding the nature of the investigating authorities' responsibilities during the course of the investigation. It was not the task of those authorities (any more than it is the task of the Panel now) to review the initiation decision *with benefit of hindsight*. For example, if, during the course of the investigation, information became available which caused the authorities to conclude that they had been mistaken regarding the sufficiency of the evidence for the purposes of the initiation decision, that would not in itself be a basis for halting the investigation. Such a termination would be appropriate only if they concluded that, on the information available *at the time of initiation*, the initiation was unjustified. Consequently, arguments directed to issues of the first type could never be relevant.

D. CLAIM 26: ALLEGED INCONSISTENCY WITH ARTICLE 5.4

82. India alleges (paras. 5.48 to 5.108) that the EC investigating authorities failed to make the standing determination required by Article 5.4 of the Anti-dumping Agreement.

83. The claim follows a 'Facts' Section which is distinguished by its barely concealed accusations that EC officials have falsified records and deceived the exporters in a fraudulent attempt to demonstrate that they have complied with WTO rules.

84. Article 5.4 states as follows:

> "An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed[13] by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry.[14] The application shall be considered to have been made "by or on behalf of the domestic industry" if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.
>
> [13] In the case of fragmented industries involving an exceptionally large number of producers, authorities may determine support and opposition by using statistically valid sampling techniques.
>
> [14] Members are aware that in the territory of certain Members employees of domestic producers of the like product or representatives of those employees may make or support an application for an investigation under paragraph 1."

85. Various questions can be raised about the interpretation of this provision, but for the purposes of this dispute, the contentious issues are relatively few. Before considering them a general comment on standard of proof is appropriate.

86. The tone adopted in India's Submission gives the impression that, when applying Article 5.4, the investigating authorities should adopt an approach to factual determinations equivalent to that of a

court of law when it is trying a defendant on a criminal charge. Some jurisdictions describe this as "proof beyond reasonable doubt". In any event, it implies a particularly high degree of certainty.

87. There is no basis in the Agreement for demanding such a high standard of proof regarding the matters that the investigating authorities have to establish under Article 5.4. The relevant phrase in Article 5.4 is "the authorities have determined". The ordinary meaning of these words does not indicate what standard of proof should be applied, so account must be taken of their context, and of the object and purpose of the Anti-dumping Agreement.

88. One WTO panel has made the following observations:

> The object and purpose of the initiation requirements of Article 5 as a whole, and of Article 5.3 in particular, is in our view to establish a balance between the competing interests of "the import competing domestic industry in the importing country in securing the initiation of [an] investigation and the interest of the exporting country in avoiding the potentially burdensome consequences of [an] investigation initiated on an unmeritorious basis".[22]

89. The notion of a balance struck between competing interests is common to much of the Anti-dumping Agreement. In the present context it suggests that anti-dumping proceedings are more akin to civil than to criminal proceedings in the domestic sphere, since the interests of both exporters and domestic producers will be affected by the outcome. As such, the appropriate standard of proof is not the high one that is usually required when the result may be the conviction of the defendant as a criminal. Furthermore, Article 5.4 relates merely to the commencement of an investigation, not the imposition of measures. A misjudgement by the investigating authorities regarding the degree of support would normally be automatically corrected, because an inadequate level would usually be reflected in a no-injury finding. This is not to deny that, as part of the initiation decision, the determination of the level of support is critical to the status of the ensuing investigation, and of any anti-dumping measures that are imposed.[23] The point being made here concerns solely the standard of proof applied in determining that level of support.

90. India suggests (para. 5.89) that the support referred to in Article 5.4 is *expressed* "by a deliberate act on behalf of the entity whose support is examined", which merely begs the question what it means by "a deliberate act". More significantly it argues (para. 5.90) that support must be "expressed *by* domestic producers" and not "on behalf of" them (as is permitted in the making of the application). It interprets this as meaning that the support must be expressed by the producer itself, and, in particular, not by an association of producers.

91. Article 5.2 of the Anti-dumping Agreement provides some of the context for interpreting Article 5.4 according to the international law rules. It lists the matters that are to be included in an application for an investigation. The following passage, since it deals with the identification of the applicant and the domestic industry, is particularly relevant:

> …The application shall contain such information as is reasonably available to the applicant on the following:

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[22] Report by the Panel on *Guatemala — anti-dumping investigation regarding Portland cement from Mexico*, WT/DS60/R, adopted 25 November 1998, para. 7.52, quoting from Report by the Panel on *United States — measures affecting softwood lumber from Canada*, SCM/162, adopted 27 October 1993, BISD 40S/358, para 331.

[23] See, e.g., Report of the Panel on *Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico*, AB-1998-6, WT/DS60/AB/R, 2 November 1998, at paragraph 8.5 (This report was found to be largely irrelevant by the Appellate Body); Report by the Panel on *United States -Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, SCM/153, adopted on 28 April 1994, at paragraph 225.

> (i) the identity of the applicant and a description of the volume and value of the domestic production of the like product by the applicant. Where a written application is made on behalf of the domestic industry, the application shall identify the industry on behalf of which the application is made by a list of all known domestic producers of the like product (or associations of domestic producers of the like product) and, to the extent possible, a description of the volume and value of domestic production of the like product accounted for by such producers

92. When applications are made "on behalf of" the domestic industry, the application may list merely the associations of domestic producers rather than the producers themselves. This supports the view that the expressions of support might come from the associations of producers rather than from their member-producers.

93. Furthermore, it is hardly the object and purpose of the Anti-dumping Agreement to create unnecessary uncertainties for firms wishing to lodge complaints. By presenting the argument in a negative form India avoids some awkward questions in this respect. Business enterprises can take many different forms, in both legal and practical contexts. Does a company express its views only by its board of directors or its principal officers? Suppose it is a subsidiary of another company. Can it not express its views via its parent? Can two companies not a establish a special body to handle various common interests? Furthermore, the notion of agency is inextricably embedded in business practice. Is the Anti-dumping Agreement to be taken to cut across the voluntary arrangements that businesses make and insist on a particular form of expression? When these considerations are taken into account, the distinction suggested by India is seen to be unworkable.

94. Again, India's proposed interpretation discriminates against small firms, who have particular difficulty addressing issues such as these, and join trade associations for that very reason. The values reflected in Article 6.13 of the Anti-dumping Agreement indicate that the special concerns of such firms are respected by the Anti-dumping Agreement.

95. Therefore, when the phrase "expressed *by* domestic producers" is considered in its context, and in the light of the object and purpose of the Agreement, there is no doubt that it is capable of including expression by a trade association.[24] Whether that is true in a particular case will depend on the circumstances. But in reviewing a Member's assessment of the circumstances, the Panel should have in mind the standard laid down in Article 17.6(i) of the Anti-dumping Agreement (explained at paragraph 71 above).

96. It should be noted that there have been several GATT/WTO dispute proceedings in which the anti-dumping measures at issue were initiated at the instance of trade associations. In none of them was this fact challenged.[25]

97. Article 5.4 speaks in various places of support for (or opposition to) an application being expressed by domestic producers (or by a portion of the domestic industry). It does not define to whom that support should have been directly expressed, and in particular it does not say that the support must be expressed directly to the investigating authorities (although it obviously has to be brought to their attention). Furthermore, the provision explicitly envisages that the *application* may be made *on behalf of* the domestic industry. Thus the ordinary meaning of paragraph 4 allows for the

[24] Footnote 14 to Article 5.4, which allows trade unions to express support on behalf of their members, also undermines India's arguments.

[25] For example, Report by the Panel on *United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, ADP/87, 27 April 1994; Report by the Panel on *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, 28 January 2000.

possibility that the support might have been expressed to a trade association, for example, which then presents a complaint to the authorities, accompanied by the expressions of support.

98. The evidence on which the EC authorities relied at the time when the decision to initiate the investigation was made is set out in details in Exhibit EC – 4.[26] It consisted of the following.

- Forms issued by Eurocoton (the European producers association) and completed by individual producers, indicating support for the complaint and giving production in 1995.

- Faxes sent by national producers to a national association giving production data for 1995, in response to a request from the association for information to support the complaint.

- Various other communications from producers associations indicating the nature and degree of support for the complaint.

99. Producers in the first two categories alone accounted for the production of more than 44,000 tonnes in 1995. On the basis of the information they had received from various sources, the authorities estimated the total EC production in 1995 to be between 123,917 and 130,128 tonnes. The support provided by these two categories of producers alone represented therefore at least 34 per cent of the highest figure of total EC production.

100. Consequently, even without entering the disputed area of the validity of support expressed by a trade association, it is clear that the EC authorities satisfied the 25 per cent threshold set in Article 5.4.

E. CLAIM 27: ALLEGED INCONSISTENCY WITH ARTICLE 12.2.1

101. This claim is made in paragraphs 5.109 to 5.116 of India's Submission.

102. As explained at paragraph 22 above, claims regarding the Provisional Regulation are not within the Panel's jurisdiction.

F. CLAIM 28: ALLEGED INCONSISTENCY WITH ARTICLE 12.2.2

103. In this claim (paras. 5.118 to 5.120) India contends that the EC is in breach of Article 12.2.2 for failing to give "reasons for the acceptance or rejection of relevant arguments" made by the exporters regarding the degree of support for the original complaint in the bed linen investigation.

104. The obligation in Article 12.2.2 is to respond to *relevant* arguments. The arguments presented by the exporters were not relevant in the present case at the point at which they were posed because the determinations imposing provisional and definitive measures do not constitute appeals from the initiation decision. The focus of these determinations is on the issues of dumping and injury causation. The grounds for terminating an investigation are set out in Article 5.8:

> An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case.
> …

[26] The EC authorities had at their disposal further expressions of support which they decided not to utilise because they were either received too late or expressing only passive support or coming from companies which had in the meantime closed down.

105. Thus, India could have pursued the very similar issue of whether the domestic producers examined by the EC did not satisfy the definition of "domestic industry" in Article 4 of the Anti-dumping Agreement.

106. It is in Article 12.1 that the Anti-dumping Agreement deals with the obligation to publicise details of the initiation decision, and the justification for it. If that does not require details of the level of support it can hardly be the intention of the Agreement that they should have be to supplied under Article 12.2.2.

107. The points made by the EC in response to Claim 25 are also relevant to this Claim.

IV. CLAIMS REGARDING DUMPING

A. CLAIM 1: ALLEGED INCONSISTENCY WITH ARTICLE 2.2.2

1. Argument that the requirements for the application of Article 2.2.2(ii) were not met.

108. This argument is presented in paragraphs 3.54 to 3.77 of India's Submission.

109. Irrespective of its results, the EC takes issue with the method of treaty interpretation reflected in paragraphs 3.56 and 3.57 of India's Submission.

110. Article 17.6(ii) of the Anti-dumping Agreement explicitly requires the Panel to "interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law". Articles 31 and 32 of the Vienna Convention on the Law of Treaties are now invariably acknowledged to state rules of customary international law on treaty interpretation.

111. The method adopted by India presents the methodology of Article 31 of the Convention as a process of 'pick and mix'. The logic behind its approach is that any interpretation which is compatible with one or more dictionary definitions is acceptable.

112. As evidenced by the reports of the Appellate Body, the approach required by Article 31 is much more rigorous. In particular, it relies on the ordinary meaning of the words of the treaty *in their context* and in the light of the treaty's *object and purpose*. India's Submission ignores both the context of the words it is purporting to interpret and the object and purpose of the Anti-dumping Agreement.

113. India alleges (para. 3.59) that "the word 'average' relates to the fact that more than one parameter needs to be summarised". In this respect it appears that India is arguing that provisions containing this word (or the words "weighted average") become in some way inapplicable if the circumstances are such that the class of data that is to be averaged contains only one item. (For the purpose of the point being made by India, whether the average is weighted or simple is irrelevant).

114. Of course, the use of this concept (whether simple or weighted average) suggests that the class of items that is being considered usually contains more than one item. However, India seems to be suggesting that, unless the text contains a clause such as "or the amount of the single item, if there is only one", it becomes inapplicable in such a situation. One does not have to look far in the Anti-dumping Agreement to see the improbability, even impossibility, of such an interpretation. Article 2.4.2 of the Anti-dumping Agreement uses the notion of "a weighted average normal value with a weighted average of prices of all comparable export transactions". There is no reason to think that the formula could not be applied if either the side of the comparison contained only one sale.

115. India seeks (para. 3.61) to apply its unrealistic interpretation to Article 2.2.2 of the Anti-dumping Agreement by focusing on the use of the word "amounts" rather than amount. In fact, the use

of this word is more complex than India allows. The first sentence of the chapeau of Article 2.2.2 states that

> For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation.

116. Since this sentence refers to an individual "exporter or producer" (i.e., in the singular), it would be surprising if there were more than one amount for "administrative, selling and general costs" and one amount for "profits". Therefore, the word "amounts" most plausibly reflects the fact that there would be two amounts (one of each type) for each exporter or producer.

117. In the remaining words of the chapeau ("When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:") it is evidently this pair of amounts that is referred to.

118. Turning to Article 2.2.2(ii), this provides that

> 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;

119. In this provision the word "amounts" is plural in two senses. Firstly, in the sense of the pair of amounts for each exporter or producer. Secondly, because in many cases there will be more than one other exporter or producer, as is also envisaged by the reference to "other exporters or producers".

120. It is clear that both in ordinary speech, and in carefully drafted legal texts, a phrase of the form "other _____s" (i.e. the word "other" followed by a plural noun) is often used with the intention of including the case where there is only one such person or thing.

121. For example, in Article 2.2.1.1 of the Anti-dumping Agreement, the clause preceding Article 2.2.2, one finds the phrase "in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and *other development costs*." It is not plausible to suggest that the phrase would not apply if there were only one other development cost.

122. Again, Article 4.1 of the Anti-dumping Agreement states that

> "For the purposes of this Agreement, the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that:
>
> (i) when producers are related to the exporters or importers or are themselves importers of the allegedly dumped product, the term "domestic industry" may be interpreted as referring to the *rest of the producers*;"

123. It would be absurd to prevent the operation of this provision merely because there was only one other producer.

124. Similarly in Article 7.4 of the Anti-dumping Agreement

> "The application of provisional measures shall be limited to as short a period as possible, not exceeding four months or, on decision of the authorities concerned,

> upon request *by exporters* representing a significant percentage of the trade involved, to a period not exceeding six months. …"

125. It would likewise be absurd to prevent a single exporter making such a request if it represented a significant percentage of the trade.

126. Consequently the ordinary meaning of "other exporters or producers" is capable of including the situation where there is only one other such exporter or producer.

127. One can go further and say that, absent a special factor, this would be the meaning usually ascribed to such a phrase. If that were not so, legal drafts would be littered with ungainly phrases such as "by other exporter(s) or producer(s)", or "by other exporters or producers, or by another exporter or producer if only one such existed", or "by other exporter/exporters or producer/producers", or "by one or more other exporters or producers", in order to avoid the possibility that they might be interpreted so as to include the plural only.

128. It is the phrase "other exporters or producers" in Article 2.2.2(ii) that is the central element of all this discussion. Obviously, in many cases where this provision is applied there will be more than one exporter or producer. However, even if the possibility of there being more than one such entity were slight, there would nevertheless be a need to produce an average (of some kind) of the data. By starting its discussion with the topic of averages India has put the cart before the horse, and not surprisingly created confusion. The same effect is manifested in paragraph 3.66 of its Submission. In terms of what India seeks to prove, the mention of "average" adds nothing to the use of the plural in phrase "exporters or producers".

129. Further confusion is created by India's aspersions (in paragraph 3.63) against the drafting of recital 18 of the Definitive Regulation:

> "(18) . . . Moreover, the reference in Article 2(6)(a) of the basic Regulation to a weighted average amount for profits determined for other exporters or producers, does not exclude that such amount can be determined by reference to a weighted average of transactions and/or product types of a single exporter or producer . . . "

130. The dark purpose that is alleged is nowhere apparent. The "amount" in the phrase "weighted average amount" is obviously not the same concept as the "amounts" in the phrase "amounts incurred and realized by other exporters or producers".

131. In paragraphs 3.67 *et seq.* of its Submission, India protests against the consequences of allowing the phrase "other exporters or producers" to include the case where there is but one such entity, but adds little to explain why the normal usage of the phrase should not apply in this case.

132. Thus, it is alleged that reliance on data from a single exporter or producer is peculiarly likely to distort the outcome, or is incompatible with the standard of reasonableness contained in the chapeau of Article 2.2. These allegations imply that the use of data from "other exporters and producers" is controlled by an implicit or explicit criterion. All such arguments can best be discussed in the context of Claim 4, where India raises them explicitly. However, the EC wishes to emphasise that the use of data relating to a single exporting producer in the context of Article 2.2.2(ii) does not in itself create a distorted result.

133. It is also alleged (paras. 3.72 *et seq.*) that the choice of companies to form the sample that was investigated was in some way rigged by the EC authorities to produce an untypical outcome. The Anti-dumping Agreement rules on the choice of the sample are contained in Article 6.10, which (see paragraph 11) is not at issue in this dispute.

134. When the words "other exporters or producers" are considered in the light of the object and purpose of the Anti-dumping Agreement it will be seen that the evident purpose of this part of the agreement is to secure data that are independent of the company in question, but are nevertheless limited to the sales of like products. There is no intrinsic reason why the use of data from a single firm could not achieve this goal.

2. Argument that the EC did not observe the requirements of Article 2.2.2(ii)

135. In this argument (paras. 3.78 to 3.96) India continues its blinkered and legally-unfounded approach by insisting on a literal interpretation of the individual words of Article 2.2.2(ii) without that consideration of their context, and of the treaty's object and purpose, which is required by the rule enshrined in Article 31 of the Vienna Convention.

136. The specific words that are being interpreted are those in Article 2.2.2(ii): "the actual amounts incurred and realized by other exporters or producers subject to investigation".

137. The issue is whether the EC authorities were correct to put certain limits on what data they would consider for the purposes of constructing the normal value. The excluded classes of data are, in the case of SG&A, data from sales that were unrepresentative, and in the case of profits, those derived from sales that were unrepresentative and/or unprofitable. These classes correspond to the concepts mentioned in the opening clauses of the paragraph in which they are contained – Article 2.2:

> When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, [footnote omitted]

138. Thus, the first class consists of sales which, because they are in low volumes, "do not permit a proper comparison". They are described here as *unrepresentative*.

139. The second class consists of those seals which, because they are made at a loss, are "not in the ordinary course of trade". They are referred to here as *unprofitable.*

140. Article 2.2 makes clear that one object and purpose of this part of the Anti-dumping Agreement is to avoid reliance on sales that fall into either of these categories.

141. (India does not deny that the Community has accurately applied these criteria, the only dispute is about whether it should have applied them in the context of Article 2.2.2(ii).)

142. In this respect, Article 2.2 is itself a development of Article 2.1 which introduces the notions of sales "in the ordinary course of trade" and of prices that are "comparable".

143. This object and purpose is reflected in the interpretation adopted and the actions taken by the EC authorities.

144. In contrast, India proposes an interpretation that conflicts with the ordinary meaning of this provision, and would produce results that verge on the bizarre.

145. Suppose there were a group of exporters, all selling at below cost on the domestic market. In accordance with Article 2.2, a constructed normal value would be calculated. According to the interpretation proposed by India, in applying Article 2.2.2(ii) the normal value calculated for each company would be based on profit data for the other companies. But the profit level derived from such prices would be zero, or less than zero, so that the resulting constructed price would as distorted

(or almost as distorted) as that resulting from using the below-cost sale prices to determine the normal value, the very outcome that Article 2.2 seeks to avoid.

146. Another, quite plausible, scenario reinforces the point. Suppose exporter A has significant loss-making sales, but not enough to justify basing normal value on sales prices, so that only profitable sales are used to establish normal value. At the same time, two or more other exporters have sales that are all loss-making. If we follow the approach suggested by India, exporter A (whose sales could still be used in order to determine normal value) would clearly be at a disadvantage as compared to the rest. It could not 'benefit' from its loss-making sales for the purposes of determining the normal value, while the other companies, to whom A's overall profit margin would be applied, could do so.

147. Similarly perverse results would arise from the use of SG&A data from unrepresentative sales.

148. India is evidently suggesting that the drafters of this Article did not object to normal value being based on unprofitable or unrepresentative sales as long as that data came from other producers or exporters.

149. Such an interpretation is not the one that emerges from a consideration of "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". Even if it were, it would merit resort to the interpretative principles listed in Article 32 of the Vienna Convention on the ground that it was "manifestly absurd or unreasonable".

150. Consequently the elaborate exercise undertaken by India in paragraphs 3.84 *et seq.* of its submission is a pointless endeavour.

151. In paragraph 3.86 India again indulges in 'pick and mix' among the dictionaries in order to conclude that the "basis" of something must always be something that it does not consist of. Would it therefore insist that an expression such as "the basis of bread is flour, water and yeast" is ungrammatical or illogical? In paragraph 3.87 from the premise that the formula in the chapeau of Article 2.2.2 cannot be used, India draws the improbable conclusion that the authorities should therefore abandon the principles reflected in that provision, and in Article 2.2, when applying Article 2.2.2(ii).

152. India assumes (in paragraph 3.88 *et seq.*) that the EC authorities, when requiring that the data used in applying Article 2.2.2(ii) should be subject to the "ordinary course of trade" principle, is relying on the chapeau to Article 2.2.2. It is true that the chapeau reflects this principle, but the basic principle is expressed in Article 2.2. In fact, it is a two-part principle: data associated with sales that are *unprofitable*, or are *unrepresentative*, are not reliable. For reasons of consistency, this principle applies to all the provisions coming within Article 2.2, including Article 2.2.2(ii).

3. Argument that the EC has wrongly inverted the order required by Article 2.2.2

153. This argument, contained in paragraphs 3.97 to 3.107 of India's Submission, suggests that options (i), (ii), and (iii) in Article 2.2.2 must be attempted in that order.

154. In paragraph 3.98 India seeks to establish the priority of option (i) over option (ii) by emphasising the importance of the particular exporter or producer. No doubt that is an important element, but so is that of the particular product. In fact, from an economic point of view the commonality of products is more important than that of persons because market forces, that is to say competition, operate most strongly between products of the same kind. In other words, the prices that one producer charges for his products have an effect on the prices charged by other producers for that product, but have no particular effect on the prices that the same producer charges for his other

products. Furthermore, the direct costs of producers within the same country are unlikely to vary greatly. Thus, option (ii) is at least as economically realistic as option (i).

155. There is also the fact that option (i) could lead to discrimination because the SG&A and profit level of a company would depend on whether or not it also had sales of the same general category of products.

156. India draws attention (in paragraph 3.99) to certain disadvantages for the exporter/producer of adopting option (ii) or (iii). The implication of this argument is that the drafters would have sought to avoid such disadvantages. This is a reference, presumably, to the supposed objects and purposes of the treaty, which can influence the interpretation of its terms. Protecting these interests of the exporter/producer is arguably one of the purposes implicit in the Anti-dumping Agreement , but there are others that are equally plausible. For example, compared to option (ii), the use of option (i) would involve much greater investigative effort, with consequent inconvenience and delays for all concerned, because it requires entirely new data to be collected. In contrast, the data relevant to option (ii) will already be in the hands of the investigating authorities. Article 6.13 of the Anti-dumping Agreement requires investigating authorities to "take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested". Given this variety of considerations, rather than draw India's conclusion, it is more in accordance with the object and purpose of the Anti-dumping Agreement to conclude that the text leaves Members free to decide whether to give priority to option (i) or option (ii).

157. In any event, one should not examine the object and purpose of the Anti-dumping Agreement without also looking at the ordinary meaning of its terms, in their context.

158. The ordinary meaning of Article 2.2.2 indicates no priority between the three options. The three subparagraphs contain no features (such as the words "if that is not possible") indicating that one is to be applied in preference to another. Nor is any preference inherent in the nature of the three options, or at least of the first two. Both of these involve an enlargement of the pool of data that may be taken into account. The first broadens the data to include not merely like products, but sales of the "same general category". The second retains the like products limit, but extends the data to include that of other exporters or producers.

159. The context favours the interpretation proposed by the EC. Where the Agreement intends a priority it makes that fact clear. For example: Article 2.3[27] (alternatives to export price), Article 2.4.2 (calculation of margin, below), and Article 2.2.2 itself (the chapeau states the first priority).

160. Consequently, according to the correct interpretation of Article 2.2.2, WTO Members have a complete discretion to choose between the options.

161. The EC chooses to exercise this discretion in favour of option (ii).

162. This situation is not unprecedented. A similar discretion is conferred on Members regarding the choice between a constructed value and a third-country price that is allowed in Article 2.2 for determining normal value when the exporter's sale prices are unavailable or unusable. Here again the EC, as a matter of practice, uses one of the options.

[27] Article 2.3:
In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.

163. In paragraphs 3.101 *et seq.* India addresses the drafting of Article 2(6) of the EC's basic Regulation, in particular the fact that options (i) and (ii) are set out in the opposite order. The EC assumes that India is not requesting the Panel to condemn this Regulation, because if that were the case the EC would strongly object to the introduction at this stage of the dispute of a claim that is outside the Panel's terms of reference, and is therefore not a "matter" that has been referred to the Panel for consideration (see paragraph 11).

164. In paragraph 3.104 India accuses the EC authorities of failing to consider which option would be most reasonable. No obligation of the Anti-dumping Agreement is mentioned in this context, and it is not clear that India asserts that any such obligation exists.

165. India gives a mistaken analysis of EC law (para. 3.105) in order to assert that this requires consideration of the options in the order specified in the basic Regulation.[28] India does not explain how past EC practice in this area is relevant to its complaint in this dispute.

166. To conclude, India has presented a series of irrelevant or mistaken arguments to support its contention regarding the existence of a mandatory order among the options listed in Article 2.2.2(ii). It has made no attempt to apply the accepted rules of treaty interpretation. Were it to do so, the threadbare nature of its logic would be more easily revealed. Consequently, no inconsistency with Article 2.2.2 has been established.

B. CLAIM 2: ALLEGED INCONSISTENCY WITH ARTICLE 12.2.1 REGARDING APPLICATION OF ARTICLE 2.2.2

167. This claim is covered by paragraphs 3.108 to 3.112 of India's Submission. It asserts that "the EC acted inconsistently with Article 12.2.1 by failing to sufficiently explain why and how it applied Article 2.2.2 in the Provisional Regulation" (para. 3.109).

168. As explained at paragraph 22 above, claims regarding the Provisional Regulation are not within the Panel's terms of reference.

C. CLAIM 3: ALLEGED INCONSISTENCY WITH ARTICLE 12.2.2 REGARDING APPLICATION OF ARTICLE 2.2.2

169. This claim is covered by paragraphs 3.113 to 3.121 of India's Submission. In similar fashion to the previous claim, it asserts "the EC has acted inconsistently with Article 12.2.2 by failing to sufficiently explain why and how it applied Article 2.2.2 in the definitive determination".

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[28] The judgements to which it refers (Case C-105/90, *Goldstar Co. Ltd v. Council*, [1992] ECR I-677 (paragraph 35); Case C-69/89, *Nakajima All Precision Co. Ltd v. Council*, [1991] ECR I-2069 (paragraph 61)) were concerned with the then basic Regulation (Reg. 2423/88 of 11 July 1988, OJ L 209, 1988, p. 1) under which a priority was explicitly established:

> Art. 2(3)(b)(ii) … The amount for selling, general and administrative expenses and profit shall be calculated by reference to the expenses incurred and the profit realized by the producer or exporter on the profitable sales of like products on the domestic market. If such data is unavailable or unreliable or is not suitable for use they shall be calculated by reference to the expenses incurred and profit realized by other producers or exporters in the country of origin or export on profitable sales of the like product. If neither of these two methods can be applied the expenses incurred and the profit realized shall be calculated by reference to sales made by the exporter or other producers or exporters in the same business sector in the country of origin or export or on any other reasonable basis.

170. As the EC has already explained, there is no obligation on a Member to explain its choice between the options listed in Article 2.2.2. Consequently there can be no obligation to publish such an explanation under the provisions of Article 12.2.

171. None of the three arguments presented by India addresses this issue.

172. The first and second arguments seem to accuse the EC of failing to explain why it has infringed the rules. This seems to be the WTO equivalent of a defendant being asked 'When did you stop beating your wife?' The EC denies infringing any rules. On this basis no explanation is necessary.

173. In paragraph 3.119 it is asserted that the EC authorities did not explain why the profit so established was reasonable. This claim appears to be identical with that in Claim 6, and is dealt with in that context.

174. The third argument assumes that controversy about the choice of option creates an obligation to explain it. There is no basis in the Anti-dumping Agreement to support such a thesis. The EC does not need to explain why it exercised in a particular way the complete discretion that is conferred upon it by the Anti-dumping Agreement. Any such obligation would deny that discretion.

D. CLAIM 4: ALLEGED INCONSISTENCY WITH ARTICLE 2.2

175. India's fourth claim (contained in paras. 3.122 to 3.139) is that "the EC has acted inconsistently with Article 2.2 of the Anti-dumping Agreement by not adding a 'reasonable' amount of SG&A and for profits".

176. It is evident that the methods for calculating SG&A and profits that are set out in the options in Article 2.2.2 fall under the aegis of the standard of "a reasonable amount for administrative, selling and general costs and for profits" that is enunciated in Article 2.2. But in describing these options as "procedural" (paras. 3.125 to 3.127) India is merely being tendentious. They represent particular and detailed formulations of what constitute reasonable amounts.

177. India is also completely mistaken in suggesting that the proviso set out in the third option – "provided that the amount for profit so established shall not exceed …" – applies to the other two.

178. Such an interpretation is completely at odds with the ordinary meaning of Article 2.2.2. Had the draftsmen wished to apply this proviso to all the options they would no doubt have attached it to the chapeau of Article 2.2.2 (or they could have inserted it in each option). The natural reading of the text is that the proviso applies to option (iii) only. Furthermore, it is not even a proviso that defines what is reasonable, since the text assumes that there might be a "reasonable method" that did not satisfy the proviso.

179. Stepping back from the text and examining it in its context, and in the light of the object and purpose of the Anti-dumping Agreement, reveals nothing that changes this conclusion. The object of this part of the Agreement is evidently to provide different methods of arriving at the "reasonable amount" set out in Article 2.2. The rules contained in these options are not cumulative.

180. The EC therefore rejects the conclusions of paragraphs 3.130 to 3.132 of India's Submission.

181. The EC also rejects the observation (para. 3.133) that the text gives no indication (other than the false one suggested by India) of the substance of what is reasonable. Options (i) and (ii) are evidently formulae that produce reasonable solutions.

182. It was obviously the intention of the draftsmen that the application of the formulae in options (i) and (ii) will always produce figures for profits and for SG&A that meet the standard of reasonableness specified in the last sentence of the chapeau of Article 2.2.

183. This is evident from the ordinary meaning of the wording of option (iii), which commences with the words "any other reasonable method", i.e., other than the methods described in the preceding options (i) and (ii) which are in themselves reasonable, and do not need to be qualified as such.

184. It is also evident from the context, that is provided by the structure of this part of Article 2. Article 2.2, which provides a chapeau for the following sub-paragraphs, introduces the notion of "a reasonable amount for administrative, selling and general costs and for profits". This is elaborated in Article 2.2.2 by means of formulae by which these amounts may be derived. Only for the last of these formulae, that in option (iii), is it necessary to repeat the criterion of reasonableness, and that is because, unlike the others, it does not specify a formula.

185. Even supposing, for the sake of argument, that it were not accepted that these options definitively produce reasonable results, their wording at least implies that those results are presumed to satisfy this standard. The question that then arises is: What kind and weight of evidence would be required to overturn the presumption?

186. This is not a question that need be pursued very far in this dispute because India had presented no relevant evidence to rebut the presumption.

187. Although strongly wedded to its mistaken notion that the principle of reasonableness is expressed in the proviso to option (iii), India also implies (para. 3.138) that a less precise notion of reasonableness applies. It seems to say that the profit figure determined for Bombay Dyeing (and applied to all Indian exporters) was unreasonable because its size was anomalous. It was, for example, three times greater than the figure determined for other exporting countries.

188. Profit margins of different companies in different countries are not normally identical. In particular, profit margins will vary with the levels of competitiveness in the various markets. Therefore a margin is not unreasonable merely because it is higher than the margins of other companies.

189. If a notion of reasonableness is to be developed in this context it would be one derived from the object and purpose of the Anti-dumping Agreement. On this basis it could be argued that the three options in Article 2.2.2 are intended to produce approximations of the amounts that would emerge from applying the formula in the chapeau, that is to say the profits and SG&A of a producer selling in its own market. This, in its turn, is intended to arrive at a constructed value that is as close as possible to the normal value that would have been established on the basis of domestic prices, had there been comparable sales in the ordinary course of trade.

190. Apart from the arguments about relying on a single exporter or producer (made in its first Claim) India does not attack the methodology adopted by the EC authorities. It does not deny that the investigating authorities have correctly determined the level of profit being obtained by Bombay Dyeing. By definition, this company has representative sales on the Indian market. Since Bombay Dyeing has almost 80 per cent of the domestic market for bedlinen there was not very much doubt on that score. That one producer can have 80 per cent of its domestic market and make a profit of over 18 per cent, while the numerous other producers ignore this market and devote themselves to exporting, may be an uncommon situation. But that does not make the use of data from this company unreasonable. Rather, it would have been unreasonable to ignore this company and choose another source, which would inevitably be less typical of sellers in that market. (Because of Bombay Dyeing's dominance of the domestic market the inclusion of data from another producer that did sell in the domestic market would have had little effect on the resulting figures). In any event, there is nothing to

suggest that other companies selling on the Indian market could not have earned profits similar to those of Bombay Dyeing.

191. Consequently not only did the Indian exporters fail to provide evidence of a sufficient weight to overturn the presumption of reasonableness, they provided no evidence whatsoever that was relevant to this purpose.

192. As a result, even if the presumption of reasonableness that is attached to option (ii) is viewed as rebuttable, India has failed to show any grounds for thinking that the EC authorities failed to properly apply this rule.

193. In any event, even if it were accepted that the exporters had presented relevant evidence on this issue, which the EC authorities had found unconvincing, in examining this question the Panel has to bear in mind the appropriate standard of review that it should exercise over the decisions of the EC authorities (explained at paragraph 71 above).

E. CLAIM 5: ALLEGED INCONSISTENCY WITH ARTICLE 12.2.1 REGARDING APPLICATION OF ARTICLE 2.2

194. Under this heading (paras. 3.140 to 3.142) it is claimed that "the EC has acted inconsistently with Article 12.2.1 by failing to sufficiently explain in the provisional Regulation or the disclosure document why and how it applied Article 2.2, and especially, why it considered the uniquely established and exceptionally high profit margin 'reasonable'."

195. As explained at paragraph 22 above, claims regarding the Provisional Regulation are not within the Panel's terms of reference.

F. CLAIM 6: ALLEGED INCONSISTENCY WITH ARTICLE 12.2.2 REGARDING APPLICATION OF ARTICLE 2.2

196. It is claimed (paras. 3.143 to 3.145) that "the EC has acted inconsistently with Article 12.2.2 by failing to explain why and how it applied Article 2.2".

197. Recitals 18 and 19 of the Definitive Regulation address various matters that were raised by the exporters.

198. The amounts derived from the application of Article 2.2.2(ii) are reasonable *per se*, and so do not require justification. Furthermore, since the profit margin established in accordance with the system was not "uniquely established and exceptionally high", and no evidence (as opposed to assertion) was presented to the investigating authorities to this effect, the EC had no need to make the explanation suggested by India.

199. In any event, the obligations in Article 12.2.2 concern publication of decisions that are taken by the investigating authorities. As India has acknowledged in its Submission (para. 3.106), the use of option (ii) in Article 2.2.2 is a matter of EC practice, and is not decided on a case-by-case basis by the investigating authority.

200. In so far as India contends that the EC's Basic Regulation is inconsistent with Article 2.2.2, the EC requests the Panel to reject the claim since this issue is not within its terms of reference (see paragraph 11 above).

G. CLAIM 7: ALLEGED INCONSISTENCY WITH ARTICLE 2.4.2 – ZEROING

201. In this claim India (in paras. 3.146 to 3.172 of the Submission) contends that "the EC acted inconsistent with Article 2.4.2 by zeroing negative dumping amounts on a per-type basis".

202. Article 2.4.2 of the Anti-dumping Agreement states that:

> Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

203. EC practice in this matter is straightforward.

204. In comparing export prices with the normal value in accordance with the first option presented by Article 2.4.2 the EC carries out a weighted average comparison of products of the same type (that is to say, of the same model or product line). It usually happens that an investigation covers several such types, the boundaries of which are set by the definition of the product concerned in the notice of initiation.

205. In order to determine a single dumping duty that is appropriate for all types of product within these boundaries it is necessary to draw the individual product-type dumping margins into a single figure. This is also done by weighting the individual margins. Since the process is directed at dumping, it focuses on those product types where dumping has been found. However, in the case of any product types for which there is no dumping (i.e. the dumping margin is zero or less than zero), for the purposes of this calculation the dumping margin is treated as zero.

206. The types of products that are found in the first stage to have margins less than zero (and which therefore are not being dumped), are nevertheless kept in the calculation (albeit at notional zero margins), and thereby reduce the overall dumping margin determined for that product.

207. The EC's methodology is in accordance with the ordinary meaning of Article 2.4.2. Under the first option presented by this provision, "the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions". A central element of this formula is expressed in the word "comparable". This exactly characterises the process carried out by the EC, since it observes the principle of comparing weighted averages for those products that are comparable.

208. The phrase "the existence of margins of dumping" reinforces this conclusion by making clear that the process of comparing weighted averages will normally conclude with more than one dumping margin.

209. The process of determining a single dumping duty from these margins is a separate one, which does not fall within the express terms of Article 2.4.2, but is left to the discretion of Members. This is confirmed by the fact that Article 2.4.2 applies only in order to "establish the existence of the margins of dumping *during the investigation phase*". Yet, under a "retrospective" system, the amount

of the anti-dumping duty is not determined on the basis of "the dumping margins during the investigation phase". Instead, it is determined at a later stage on the basis of the dumping margin calculated for each particular consignment by comparing its export price to the normal value calculated in the initial investigation. Thus, India's interpretation would have the anomalous result that one and the same provision would have a different scope depending on whether a Member assesses anti-dumping duties on a prospective or on a retrospective basis. A Member applying anti-dumping duties prospectively would be required to calculate the amount of the duties in accordance with the rules prescribed in Article 2.4.2. In contrast, a Member applying duties retrospectively would have discretion to use a different method.

210. In paragraph 3.171 India asserts that the method applied by the EC will always lead to a higher dumping margin than would have been the case if the so-called 'zeroing' had not taken place. This is not necessarily so. Apart from the exception noted by India, the complexities of anti-dumping law can result in zeroing having the opposite effect. This is illustrated by the facts of the present case (see Table 2). If no zeroing had taken place in the calculation of the duty, the dumping margin calculated for the exporter with the lowest margin would have qualified as *de minimis* and would therefore have been disregarded in calculating the average margin for the exporters that were sampled.[29] It is on this average margin that the duty applicable to the non-sampled exporters is calculated, which would as a consequence increase (by several percentage points in the present case).

211. The EC's methodology, and the contrasting methodologies that might theoretically be used, are demonstrated by the following tables, which illustrate the second stage of the calculation. In each table the crucial element is the 'Dumping margin' calculated for each exporter

212. The total/average dumping margin is applied in setting the dumping duty for co-operating companies that were not included in the sample, i.e. 60% of Indian exports. Table 1 shows the results of applying the EC's methodology.

Table 1 – Summary of EC's dumping calculation for definitive duty[30]

	Dumping amount	**Dumping margin**	**c.i.f. value**
Anglo French	31266339	24.72%	126464037
Bombay Dyeing	7842226	7.77%	100924637
Madhu	31169522	17.03%	183063049
Omkar	30328190	14.25%	212877521
Prakash	8412131	2.67%	314529134
Total/average	109018408	**11.62%**	937858378

213. The effects of applying the methodology proposed by India are shown in Table 2. The reason for the increase in overall margin is that the company with the lowest margin has disappeared from the calculation, its dumping margin being *de minimis*. The EC does not wish to imply that this would happen on every occasion that the methodology was used. It would of course depend on the relevant figures.

[29] In accordance with Article 9.4 of the Anti-dumping Agreement

[30] The 'total/average' dumping margin is applied to co-operating companies not included in the sample, i.e. 60% of Indian exports.

Table 2 – Summary of dumping calculation according to India's proposed methodology

	Dumping amount	Dumping margin	c.i.f. value
Anglo French	30799409	24.35%	126464037
Bombay Dyeing	5612587	5.56%	100924637
Madhu	30898430	16.88%	183063049
Omkar	28025198	13.16%	212877521
Total/average	95335624	**15.29%**	623329244

214. It is also worth noticing the effect (shown in Table 3) of entirely excluding non-dumped types from the calculation.

Table 3 – Summary of dumping calculation excluding non-dumped types

	Dumping amount	Dumping margin	c.i.f. value
Anglo French	31266340	25.18%	124188642
Bombay Dyeing	7842226	11.11%	70600090
Madhu	31169522	17.20%	181231246
Omkar	30328190	16.51%	183679947
Prakash	8412131	4.80%	175146076
Total/average	109018409	**14.84%**	734846001

V. CLAIMS REGARDING FINDING OF INJURY CAUSED

A. CLAIM 8 ALLEGED INCONSISTENCY WITH ANTI-DUMPING AGREEMENT ARTICLES 3.1, 3.2, 3.4, 3.5 AND 3.6

215. In this claim (paras. 4.13 to 4.35) India contends that "the failure of the EC to examine dumped transactions only for the purpose of the injury determination in the Bed linen II proceeding is inconsistent with Articles 3.1, 3.2, 3.4, 3.5, and 3.6 Anti-dumping Agreement" (para 4.35).

216. Since claims in respect of the Provisional Regulation are not properly before the Panel (See paragraph 22 above), the EC regards this claim as a challenge to the consistency of the Definitive Regulation.

217. For the reasons stated at paragraph 11 above, the EC objects to the inclusion of a claim under Article 3.6.

218. India has also expressed its claim by saying that it "considers the EC determination to automatically assume that all imports of bed linen from India during the investigation period were dumped to lead to a finding inconsistent with Article 3.1" (para. 4.13).

219. It appears that, whichever way it is expressed, the claim is based on the notion that, in the various paragraphs of Article 3 where it occurs, the term "dumped imports" should be taken as

referring to only those *transactions* that are dumped. The EC will show that, on its correct interpretation, this term includes all the imports of the product in question, from the country that is found to be dumping. (The EC, and it would seem India, assumes that the terms has the same meaning throughout Article 3).

220. According to the principle expressed in Article 31 of the Vienna Convention, a treaty is to 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 lights of its object and purpose.

221. As regards the term "dumped imports", the ordinary meaning proposed by the EC is straightforward. In contrast, that proposed by India raises immediate doubts because of its uncertainty. If each transaction is be allocated to a dumped or non-dumped classification there is no provision to cope with the situation where an exporter conceals the volume of dumping by varying the prices from one consignment to another, perhaps in collusion with the importer. Thus, there would need to be a sub-categorisation by exporter, or perhaps by particular exporter-importer links. Furthermore, it is not unknown for exporters to work together to evade the consequences of anti-dumping measures. Of course, an ordinary meaning does not cease to be such merely because it is complex. But there is a real question whether India's interpretation has not moved beyond complexity into confusion. (The issue of *needless* complexity is considered in the context of the Anti-dumping Agreement's object and purpose, below).

222. A consideration of context is particularly important in regard to the term "dumped imports". There are several features of the Anti-dumping Agreement which indicate that dumping and injury-causation issues are to be analysed on a product and country basis, rather than on a transaction basis.

223. The EC agrees with India[31] that Article 2.1 Antidumping Agreement is relevant context. It disagrees however with India's conclusion. Article 2.1 (following Article VI GATT) states that:

> For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if 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.

224. This makes perfectly clear that the *existence of dumping* is to be determined for a country at the level of the *product* under investigation, referred to as the "like product".

225. Article 2 goes on to set out detailed rules on how dumping is to be determined and measured for the product under investigation from a country. If these rules, correctly applied, give rise to a finding of dumping for a certain product from a particular country that is the "dumped product" for the purposes of Article 3.

226. It is true that Article 2 allows (or may even require) the product under investigation from a country to be divided up by exporter and type in *calculating the margin* of dumping. But the determination of dumping is still made for the product under investigation and the country (and if a duty is ultimately imposed, at least the general – or residual – duty will be on that same product from that country).

227. A determination of injury caused by dumped imports has to be made, according to Article 3.1, for the domestic market for, and the domestic producers of, the *like product*. This can only result from an overall assessment. It is not possible to isolate the effects of individual transactions in a single product market. The market situation is determined by the overall impact of imports.

[31] See paragraphs 4.18-4.19 of India's First Written Submission.

228. The fact that it is all the imports of the "like product" from a particular exporting country that are referred to under the notion of "dumped imports" is also apparent in the drafting of Article 3.3, which deals with the cumulation of imports from several countries. There are no corresponding rules to cover the problem of cumulation of imports from several exporters, or of imports of a particular model of product, although this would be just as necessary if the term "dumped imports" were taken to require separate consideration of the products of different exporters or of different models.

229. The EC's position is also supported by Article 5.7 of the Anti-dumping Agreement which requires 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 than the earliest date on which in accordance with the provisions of this Agreement provisional measures may be applied.

230. Since injury has to be investigated before it is established which transactions are dumped, it is clear that the term "dumped products" used in connection with the injury provisions of Article 3 must be referring to all imports of the product under investigation (although the finding of injury is, of course, conditional upon dumping being found).

231. As a further aspect of the context of Article 3, one should consider the rules on countervailing duties in Article 15 of the Agreement on Subsidies and Countervailing Measures. These run parallel with Article 3 of the Anti-dumping Agreement except, of course, that the SCM Agreement uses the expression "subsidised imports" instead of "dumped imports". However, it is not possible to distinguish between consignments in relation to subsidies. If there is a subsidy it benefits all exports of the product in question, so the investigators always take into account all imports of the product. The reports of the *Salmon* panels (below) reflect an assumption that the parallelism extended into the meaning of these terms.

232. Further context supporting this parallelism is provided by the Ministerial Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures, where Ministers

> Recognize, with respect to dispute settlement pursuant to the Agreement on Implementation of Article VI of GATT 1994 or Part V of the Agreement on Subsidies and Countervailing Measures, the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures.

233. The EC's interpretation of "dumped imports" is also supported by a consideration of the object and purpose of Article 3 of the Anti-dumping Agreement.

234. The term is used in most of the paragraphs of Article 3, but it is only in regard to those that concern causation that the question of interpretation discussed here is important. Thus, in Article 3.4 and 3.6, where the focus is on the condition of the domestic industry rather than causation, the precise interpretation of "dumped imports" is not significant.

235. Thus, India would have to argue that Article 3 pursued its object and purpose with a needlessly complex notion of "dumped imports". The unlikelihood of such an interpretation is reinforced when one considers the first sentence of Article 3.2. Here the Anti-dumping Agreement evidently intends the national authorities to gather information covering a lengthy period, since the investigation period used to assess dumping (typically one year) would hardly be enough to detect volume changes. Article 3.2 is manifestly for the benefit of exporters because it sets conditions that

must be satisfied before causation is established. Nevertheless, on India's interpretation, in order to apply this provision the exporters would have to provide not just one, but several years' price data. Far from benefiting exporters, such an interpretation would in many cases make this provision unworkable. It would impinge directly on the obligation in Article 6.13 for the authorities to "take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested, and shall provide any assistance practicable", and would substantially obstruct the objective of expeditious procedures set out in Article 6.14.

236. India seems to acknowledge this objection in paragraph 4.28 where is says: "It is granted that the EC cannot review the overview of 'dumped imports' from the period preceding the investigation period up to the investigation period, simply because the EC has no information on the level of any 'dumped imports' in the years preceding the investigation period."

237. India argues (para. 4.34) that according to the EC's methodology, one dumped model out of a hundred would lead to all one hundred being classified as dumped imports. It is not clear what Anti-dumping Agreement's provision India has in mind in this case, but it seems most likely to concern the issue of causation, probably Article 3.5. However, in such a case the effect of including all the imports would be to reduce the undercutting margin, and thereby work against a finding of causation. Also, the unusual circumstances hypothesised by India would only arise where the product under investigation has been defined in an inappropriate manner or where there are other factors causing injury. In any event, such circumstances are not present in this case.

238. The interpretation of the term "dumped imports" in Article 3 has received relatively little attention from dispute bodies. In the *Salmon* cases (decided under the Anti-Dumping and Subsidies Codes, which used the same term) the Panels used the phrase "imports under investigation" as a synonym for "dumped imports". Thus, in discussing the requirement (that is now in Article 3.5 of the Anti-dumping Agreement) to examine causes other than the "dumped imports", such as "the volume and prices of imports not sold at dumping prices", it contrasted these with "the imports under investigation".[32] Thus, "dumped imports" were regarded as all imports of the product under investigation coming from the country found to have been dumping. Furthermore, the Panels assumed that this interpretation applied to the earlier paragraphs of Article 3.[33]

239. According to Article 31(3) of the Vienna Convention, there shall be taken into account together with the context of a treaty "(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". As far as the EC is aware, no party to the Codes,[34] and no Member of the WTO has ever applied the term "dumped imports" in the manner suggested by India. Nor, until now, does it seem to have ever been seriously proposed. This practice can reasonably be said to amount to the kind of practice referred to in the Convention.[35]

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[32] Report by the Panel on *United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, ADP/87, 27 April 1994, at paragraph 552; Report by the Panel on *United States -Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, SCM/153, adopted on 28 April 1994, at paragraph 316.

[33] Ibid., paragraphs 555, and 321.

[34] While practice under the Codes is not directly pertinent to an interpretation of the ANTI-DUMPING AGREEMENT, it is nevertheless relevant because in establishing the meaning of the Codes it influences the interpretation of terms, such as "dumped imports", that were carried into the ANTI-DUMPING AGREEMENT.

[35] It is significant that the argument was not raised by the exporters during the investigation. On the contrary, they demonstrated that they implicitly accepted the EC's approach by submitting evidence regarding import volumes over a period of several years. E.g., The *Post-hearing brief submitted on behalf of Texprocil* by Vermulst & Waer, 6 February 1997, pages 9-10 (Exhibit India-54) contains data on EC quota restrictions on certain textile categories for the years 1995 through 1997 as evidence that the import volume had not increased significantly.

240. Furthermore, if the meaning is still regarded as ambiguous, one is entitled, under Article 32 of the Convention to look at supplementary means of interpretation, including the circumstances of the treaty's conclusion. The circumstances of the Anti-dumping Agreement's conclusion, and of the Anti-Dumping Code that preceded it, seem to have been that no country applying anti-dumping measures used the interpretation proposed by India. Furthermore, the panel reports in the *Salmon* cases (above), which established that "dumped imports" had the meaning proposed by the EC, were decided and adopted during the course of the WTO negotiations. The drafters of the Anti-dumping Agreement nevertheless chose to use the same term, without alteration or qualification.

241. This analysis shows that the term "dumped imports" in Article 3.1, 3.2, 3.4, 3.5 and 3.6 Anti-dumping Agreement refers to all imports of the product in question from the country found to be dumping. Consequently, the EC is not in breach of the provisions of Article 3 for failing "to examine dumped transactions only for the purpose of the injury determination", as alleged by India.

B. CLAIM 9: ALLEGED INCONSISTENCY WITH ARTICLE 12.2.1.

242. In this claim (paras. 4.36 to 4.39) India contends that in respect of the Provisional Regulation the EC has failed to publish the fact that in applying Article 3 it took into account of only those imports that were dumped.

243. As explained at paragraph 22 above, claims regarding the Provisional Regulation are not within the Panel's jurisdiction.

C. CLAIM 10: ALLEGED INCONSISTENCY WITH ARTICLE 12.2.2

244. This claim (contained in paras. 4.40 and 4.41) is vague, and does not indicate which obligation in Article 12.2.2 the EC is alleged to have infringed.

245. In the *Bedlinen* investigation the EC's methodology was that described in paragraph 217 et seq. This methodology is the EC's standard practice and, in the absence of any argument on the point by one of the interested parties to the investigation, the EC sees no need to publish details of it in every decision that it makes.

D. CLAIM 11: ALLEGED INCONSISTENCY WITH ARTICLE 3.4

246. This claim is contained in paragraphs 4.56 to 4.76 of India's Submission, and alleges that "the EC has acted inconsistently with Article 3.4 by not evaluating all relevant economic factors and indices mentioned in Article 3.4 of the Anti-dumping Agreement" (para. 4.76). It is evident that India is relying on the supposedly compulsory nature of the evaluation of these factors. India is not arguing that it is because of the circumstances of this particular case that the factors should be evaluated.

247. In so far as claims in respect of the Provisional Regulation are outside the panel's jurisdiction (see paragraph 22 above), the EC regards this claim as a challenge to the consistency of the Definitive Regulation.

248. Article 3.4 of the Anti-dumping Agreement states 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.

249. In the following paragraphs the EC presents three defences to India's claim. Firstly, it points out that the factors listed in Article 3.4 were evaluated during the investigation. Secondly, it shows how the factors listed in Article 3.4 are ones that are solely negative in character, and as such were properly evaluated during the investigation. Thirdly, and subsidiarily, it puts forward various reasons for concluding that Article 3.4 does not require that every one of the listed factors need be evaluated in every investigation.

1. The examination of injury factors in the bedlinen investigation

250. The EC's evaluation of the "factors and indices" mentioned in Article 3.4 is reflected in the Table 4. (For convenience, "factors and indices" are usually referred to as "factors" in this account).

251. The individual factors are set out in the first column. The second shows from where the EC obtained the relevant information, for example from the Questionnaire (Exhibit EC-2) sent to the domestic producers. In the case of some factors, where the necessary information could be derived from other data, it was not necessary to include a specific request. Thus, for several of the factors, the data could be derived from the exporters' accounts, which were obtained along with the answers to the Questionnaires. For example, 'return on investments' is apparent from a company's balance sheets and profit and loss accounts; 'cash flow' and 'growth' are evident from the balance sheets; and 'wages' are an element in cost of production.

252. The third column indicates the evaluation accorded to each of the factors. Specific details are given regarding those directly addressed in the Provisional and Definitive Regulations, and at which 'level' the EC producers' data are presented (this is relevant to India's Claim 15, below).[36]

253. In a number of instances it is recorded that the factor is 'Found not to be a significant independent factor'. The word 'independent' reflects the interconnection between the factors. Where a decline in one factor is an automatic consequence of that in one or more of the others, it would encourage double-counting to claim that as an additional support for a finding of injury. (This is not to argue that certain factors in the list are redundant. Whereas a finding on factor A may flow automatically from one on factors B and C, the contrary is not necessarily true).

254. The fourth column indicates those factors which India alleges were not evaluated.

255. The information set out in the table demonstrates that the Definitive Regulation (which incorporates the explanations in the Provisional Regulation) satisfies the requirements of Article 3.4 by containing an evaluation of all the factors listed there.

Table 4 – Consideration of injury factors

Anti-dumping Agreement Art. 3.4	Source of Information	Evaluation	Indian list
actual and potential decline in sales	Information explicitly requested in questionnaire Eurocoton/CITH	Volume (PR82) EU-15 Sample Value (PR83) EC industry	

[36] EU-15 means all producers in the EU; EC-industry means the all producers in the 'domestic industry'; Sample means all producers in the sample.

Anti-dumping Agreement Art. 3.4	Source of Information	Evaluation	Indian list
		Sample	
Profits	Information explicitly requested in questionnaire Eurocoton/CITH	Sample (PR89)	
Output	Information explicitly requested in questionnaire Eurocoton/CITH	EU-15 (PR81) EC industry (PR81)	
market share	Derived from other requested information	Volume (PR84) EU-15 Sample Value (PR85) EU-15 EC industry Sample	
Productivity	Derived from other requested information	Found not to be a significant independent factor	/
return on investments	Derived from other requested information	Found not to be a significant independent factor	/
Utilization of capacity	Information explicitly requested in questionnaire	Found not to be a significant independent factor	/
factors affecting domestic prices	Information explicitly requested in questionnaire Eurocoton/CITH	Sample (PR86-87)	/
Magnitude of the margin of dumping	Derived from other requested information	Found not to be a significant independent factor	
actual and potential negative effects on cash flow	Derived from other requested information	Found not to be a significant independent factor	/
Inventories	Information explicitly requested in questionnaire	Found not to be a significant independent factor	/
Employment	Data and information requested in questionnaire. Eurocoton/CITH	EC industry (PR91)	
Wages	Derived from other requested information	Found not to be a significant independent factor	/
Growth	Derived from other requested information	Found not to be a significant independent factor	/
ability to raise capital or investments	Derived from other requested information	Found not to be a significant independent factor	/

2. The examination required by Article 3.4 – negative character of factors

256. The interpretation of Article 3.4 must be based on the ordinary meaning of its terms in their context and in the light of the object and purpose of the Anti-dumping Agreement.

257. The first stage in this process is a close examination of the terms of Article 3.4, in particular the factors and indices listed there. One feature that stands out in such an examination is that these factors are explicitly concerned with indications of injury, not the absence of injury. Thus the first seven are prefixed by the phrase "actual and potential *decline* in", and most of the remainder by the phrase "actual and potential *negative effects* on". Of fifteen factors and indices, only two are not qualified by the words "decline", or "negative effects". Furthermore, one of these two (magnitude of the margin of dumping) might be said to be inherently negative.[37] Whether the remaining item ("factors affecting prices") is to be taken to be subject to the same qualification, or to have been deliberately accorded different treatment, is not an issue that need be addressed here since India has not accused the EC authorities of failing to evaluate it.

258. This interpretation of the factors listed in Article 3.4 is reinforced by a consideration of the opening phrase, which speaks of the "*impact* of the dumped imports". The word "impact" carries a negative aspect, which is not present, for example, in the phrase "the effect of the imports" in the corresponding provision of Article 6 of the Agreement on Textiles and Clothing (ATC).

259. There is nothing in the context of Article 3.4 to contradict this "ordinary meaning" of its terms, and the object and purpose of this part of the Anti-dumping Agreement – which is evidently to provide a regime for the determination of injury – reinforces it. The purpose of the examination under Article 3.4 is to determine what is wrong with the domestic industry, not what is right with it.

260. Although parallels can be drawn between Article 3.4 and provisions in the Safeguards Agreement and in the ATC, in neither of these Agreements are the listed factors qualified in this negative fashion.

261. The EC does not wish to defy common sense by implying that non-negative factors can have no relevance. In fact, in the bed linen investigation considerable attention was given to certain positive factors. However, in this Claim India seeks to establish that Article 3.4 requires investigating authorities to evaluate in an explicit fashion all the fifteen factors and indices that are listed there. Since this argument (which the EC rejects) is based on the wording of Article 3.4, it must respect that wording. The wording quite explicitly refers almost exclusively to negative factors. Consequently, what might be called the 'comprehensive evaluation' requirement (if it exists) applies only to such factors.

262. In the bedlinen investigation, two principal negative factors (profits and prices)[38] were identified by the EC authorities, and were thoroughly examined and evaluated. No other plausible negative factors were suggested to them or otherwise came to their attention. None has been suggested by India.

3. The examination required by Article 3.4 – must all listed factors be evaluated?

263. Irrespective of its arguments regarding the negative nature of the factors in Article 3.4, the EC also rejects the notion that all those factors must be explicitly evaluated in every investigation.

[37] India has not included this factor on the list of allegedly disregarded factors.

[38] See recital 40 of the Definitive Regulation. As mentioned above, "prices" might be the one factor on the list that is not negatively qualified.

264. This interpretation is also based on the ordinary meaning of the terms of this paragraph, in their context, in the light of the Anti-dumping Agreement's object and purpose.

265. Firstly, according to Article 3.4, economic factors and indices need be evaluated only if they are "relevant", and "have a bearing on the state of the industry", which implies that those factors that are relevant may differ from one investigation to another. This, hardly controversial, conclusion is reinforced by the last sentence of the paragraph which states that the "list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance". Consequently, among the factors listed in Article 3.4 there may be some that, in a particular case, are not relevant, and so do not need to be evaluated.

266. To insist that the listed factors must be evaluated in all circumstances, would be to require the evaluation of a factor that has already been found to be irrelevant, which is nonsense.

267. Secondly, the notion that the word "including" should be read as meaning "at the very least" is undermined by the nature of the list that follows. This is broken into parts by semi-colons, and the word "or" is used to indicate that not all of the factors need be considered. If all the factors and indices listed in Article 3.4 had to be evaluated, the Members would have used the conjunction "and", as they had not hesitated doing in many other contexts. (For example in the lists in the Safeguards Agreement and ATC).

268. The fact that it is not necessary to consider all the factors listed in the first sentence of Article 3.4 is made perfectly clear by the second sentence which states that:

> This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

269. The use of the words "nor … necessarily" (meaning "need not but may") in the second part of this sentence means that sometimes one or several, and thus not all, of the listed factors can give "decisive guidance". Since a single factor can thus give "decisive guidance", it is clear that in these cases the investigating authorities are not required to look further.

270. Thirdly, in the EC's view not only do the factors listed in Article 3.4 differ in importance from case to case, but it is possible to deduce that certain of them are inherently likely to be more significant than others and that findings on some may make findings on others superfluous. For example, how can a calculation of return on investments possibly be relevant or even meaningful in the case of an industry that is making losses? This is another reason why evaluation of all the factors cannot be regarded as compulsory.

271. A fourth consideration in this context is that the obligation in Article 3.4 to consider relevant injury factors does not exist in isolation. In particular, account must be taken of Article 6.13 and 6.14:

> 6.13 The authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested, and shall provide any assistance practicable.
>
> 6.14 The procedures set out above are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating an investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with relevant provisions of this Agreement.

272. As regards Article 6.13, the European producers in the bedlinen investigation were undeniably small companies.

273. The obligation in Article 6.13 places limits on the information, etc., that may be demanded of companies according to the level of difficulty that such demands create for those companies. It is a balance to be decided in each case by the investigating authorities. As the phrase "take due account" indicates, exercising that decision is a matter of judgement.

274. The domestic producers are the best, and sometimes the only source of information on the factors relevant to injury. Consequently, Article 6.13 implicitly sets limits on the duty in Article 3.4 to evaluate the various injury factors that it lists, because that evaluation is necessarily constrained by any limitation on the information available to the authorities. In other words, aspects of the evaluation that is required by Article 3.4 may have to be limited in the interest of the values expressed in Article 6.13. Once again, the decision on such limits is a matter of judgement that must be exercised by the investigating authorities.

275. In theory this judgement could be made by reducing by an equal proportion the attention paid to gathering information relevant to each of the factors listed in Article 3.4. Such an approach has only to be stated for its illogicality to become apparent. The illogicality has two bases. In the first place, in any particular investigation some factors will almost certainly be more important than others.

276. In the second place, the difficulties for companies will vary between the factors depending on whether they keep appropriate records. It might seem, to those inexperienced in these matters, that one has but to direct a question at a company in order to obtain any business information that is needed. In fact, companies have very clear ideas of what factors are important to them. These vary from industry to industry, although an overall pattern is apparent. As regards the other factors, small companies, in particular, may keep no records other than raw data that would require extensive processing in order to be usable.

277. Thus, these two explanations are connected. Some factors are more important than others in investigations, and companies keep better records of the information that is most critical to their well-being. The initial Complaint presented by domestic producers is a prime indicator of those factors that are most important.

278. In addition to those arising from Article 6.13, potential limits are set to the extent of the examination carried out under Article 3.4 by the goal of an expeditious procedure that is laid down in Article 6.14.

279. The conclusion that flows from this consideration of Article 6.13 and 6.14 is that the obligation in Article 3.4 to consider injury factors cannot in principle be absolute in character. This adds further support to the view that the evaluation of all of those factors is not compulsory.

280. Against the four considerations set out above, India relies for support on some simple readings of the text of Article 3.4, and on a series of supposed precedents.

281. Regarding the precedents, as India’s Submission relates, there have been a number of disputes in which GATT (or Code) and WTO bodies have applied themselves to the interpretation of provisions of this kind. They have emphasised the requirement to examine all the listed factors.

282. The EC disagrees that the ATC and Safeguards Agreement precedents support India’s position. First, the wording and context of the corresponding provisions of the ATC and Safeguards Agreement are entirely different. In particular, the "injury factors" listed in those agreements are not so extensive and they are not joined with the word "or".

283. Second the standard of adverse effects required in those agreements is higher than the "material injury" required under the Antidumping Agreement. As the Appellate Body stated most recently in *Argentina – Footwear*,[39]

> "The application of a safeguard measure does not depend upon "unfair" trade actions, as is the case with anti-dumping or countervailing measures. Thus, the import restrictions that are imposed on products of exporting Members when a safeguard action is taken must be seen, as we have said, as extraordinary. And, when construing the prerequisites for taking such actions, their extraordinary nature must be taken into account."

284. The Appellate Body went on to emphasise the high standard of injury required under that agreement, saying:[40]

> We note, in this respect, that there is a definition of "serious injury" in Article 4.1(a) of the *Agreement on Safeguards*, which reads as follows:
>
> > "serious injury" shall be understood to mean a *significant overall impairment* in the position of a domestic industry. (emphasis added)
> >
> > And we note that, in its legal analysis of "serious injury" under Article 4.2(a), the Panel made no use whatsoever of this definition.

285. In addition, the EC would point out that injury caused by dumping is distinguishable from the injury targeted by the ATC and the Safeguards Agreement in that dumping is an essentially price-based practice and the analysis of injury under Article 3.4 of the Antidumping Agreement is made in circumstances where the investigating authority will have already determined, pursuant to Article 3.1 and 3.2, that dumping has had an effect either on the volume of the dumped imports or on prices in the domestic market.

286. According to Article 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.

287. The analysis which is required by Article 3.4, and which India is complaining has not been correctly conducted, is the *additional analysis* referred to in point (b) of Article 3.1 of the *consequential* impact on the domestic industry of the primary effect of dumping which is the effect on import volumes or prices in the domestic market.

288. The only precedent relating to the WTO Antidumping Agreement is the panel in *Mexico – HFCS* that said, "the text of Article 3.4 is mandatory".[41]

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[39] Report by the Appellate Body on *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, 14 December 1999, at paragraph 94.

[40] *Id.* paragraph 138.

[41] Report by the Panel on *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, 28 January 2000, at paragraph 7.128:

> In our view, this language makes it clear that the listed factors in Article 3.4 must be considered in all cases. There may be other relevant economic factors in the circumstances of a particular case, consideration of which would also be required. In a threat of injury case, for

289. However, the panel in *Mexico – HFCS* did not address several of the arguments developed here. In particular, there was no discussion of the negative character of the factors in Article 3.4, the use of the word "or", the differences between the factors listed in the various WTO agreements, and the significance of Article 6.13 and 6.14 but rather a simplistic reliance on the inappropriate precedent of the safeguard cases.

4. Conclusion

290. It will be recalled that India's claim is that "the EC has acted inconsistently with Article 3.4 by not evaluating all relevant economic factors and indices mentioned in Article 3.4 of the Anti-dumping Agreement". Thus, it is not a general claim that the EC has failed to apply Article 3.4 properly.

291. In response to India's claim the EC has put forward three defences, set out in the preceding paragraphs, which are to some extent alternatives. In summary, they are as follows. Firstly, in part (a) the EC has argued that the factors listed in Article 3.4 were evaluated during the investigation. Secondly, in part (b) it has shown how the factors listed in Article 3.4 are ones that are solely negative in character, and as such were properly evaluated during the investigation. Finally, in part (c) it has put forward various reasons for concluding that Article 3.4 does not require that every one of the listed factors need be evaluated in every investigation.

292. If any of these defences is successful, India's claim will fail. It is not necessary for the EC to establish that its injury finding was in general satisfactory (although that is the case).

293. On this basis, the EC concludes that its authorities did not fail to satisfy the requirements of Article 3.4 of the Anti-dumping Agreement in the way alleged by India.

E. CLAIM 12: ALLEGED INCONSISTENCY WITH ARTICLE 12.2.1

294. This claim is covered by paragraphs 4.77 to 4.83 of India's Submission. It is alleged that, in respect of various factors listed in Article 3.4, the EC has not referred to "the matters of fact and law which have led to arguments being … rejected" in the "public notice" imposing provisional measures.

295. As explained at paragraph 22 above, claims regarding the Provisional Regulation are not within the Panel's jurisdiction.

F. CLAIM 13: ALLEGED INCONSISTENCY WITH ARTICLE 12.2.2

296. India alleges (paras. 4.84 to 4.86) that the EC failed to provide the explanations and reasons required by Article 12.2.2.

297. Article 12.2.2 requires the public notice of a measure imposing definitive duties to contain "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures" and in particular "the information described in subparagraph 2.1". The relevant item in subparagraph 2.1 refers to "considerations relevant to the injury determination as set out in Article 3".

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instance, the AD Agreement itself establishes that consideration of the Article 3.7 factors is also required. But consideration of the Article 3.4 factors is required in every case, even though such consideration may lead the investigating authority to conclude that a particular factor is not probative in the circumstances of a particular industry or a particular case, and therefore is not relevant to the actual determination. Moreover, the consideration of each of the Article 3.4 factors must be apparent in the final determination of the investigating authority.

298. In recitals 40 to 41 of the Definitive Regulation the EC gave a detailed account of the factors considered in its examination, including those listed in Article 3.4 that were relevant to its determination. The identity of the relevant factors is explained in the EC's response to Claim 11, above.

299. As regards "relevant arguments or claims made by the exporters" Article 12.2.2 requires the public notice to contain "reasons for [their] acceptance or rejection".

300. India quotes (para. 4.45) the *Post-hearing Brief* (Exhibit India-54) submitted on behalf of the exporters to the EC authorities in February 1997, which contained criticisms of the domestic industry's Complaint for failing to include information on all the factors listed in Article 3.4. However, this was the last occasion when the exporters raised this issue. Following the publication of the Provisional Regulation (2 June 1997), they confined their comments to the particular factors that were explicitly considered in that Regulation, and did not advert to the other factors listed in Article 3.4.[42] Nor was this matter raised in later communications from the exporters.[43] Thus, the exporters' concerns were directed at the original Complaint, and as such were not arguments relevant to the decisions made by the EC authorities. Consequently, there was no requirement under Article 12.2.2 for reasons to be given for their acceptance or rejection.

G. CLAIM 14: ALLEGED INCONSISTENCY WITH ARTICLE 6

301. This claim by India (in paras. 4.87 to 4.92) alleges that the EC has infringed Article 6.2, 6.4 and 6.9 of the Anti-dumping Agreement.

302. As explained in Section II.A of this Submission, this claim lies outside the jurisdiction of the Panel.

H. CLAIM 15: ALLEGED INCONSISTENCY WITH ARTICLE 3.4

303. India alleges (in paras. 4.93 to 4.157) that the EC has infringed Article 3.4 in various ways connected with the selection of data to establish injury.

304. As explained at paragraph 22 above, claims regarding the Provisional Regulation are not within the Panel's jurisdiction. The explanations of the Provisional Regulation are adopted by the Definitive Regulation in so far as that is necessary for the determination, but the text of the latter takes priority.

1. Reliance on companies outside "domestic industry"

305. The first allegation of India is that the EC relied "on companies outside the domestic industry in order to find injury".

306. In the Anti-dumping Agreement, the basic definition of domestic industry is found in the chapeau of Article 4.1:

> For the purposes of this Agreement, the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products …

[42] Thus the *Second Post-hearing Brief*, dated 17 July 1997 (Exhibit India-55) referred to the 'Production of the Community industry', 'Sales (value) of the Community industry', 'Employment situation of the Community 'industry', 'Market share of the Community industry', and 'Prices'.

[43] See *Disclosure comments submitted on behalf of Texprocil*, 13 October 1997 (Exhibit India-60).

307. India's introduction (paras. 4.115 to 4.120) to this part of its claim concentrates on the definition of domestic industry for the purposes of the Anti-dumping Agreement. However, it focuses on the terms "producers" and "like products", neither of which is relevant to India's Claim. Rather, it seems that India is concerned about references in the Provisional Regulation to production of producers who were not among those defined for the purposes of the investigation as the domestic industry.

308. Throughout this investigation the EC applied the option in Article 4.1 of defining the domestic industry as a group of producers whose collective output constituted a "major proportion of the total domestic production" of the products in question.[44]

309. This approach provides the basis for the following arguments. However, although it is permitted by the Anti-dumping Agreement, it is not required, and the actions taken by the EC authorities in the bedlinen investigation are also justifiable on the basis that a Member may use both definitions of the domestic industry in the course of a single investigation.

310. In this and other aspects of India's arguments there appears to be confusion between, on the one hand, evidence, and, on the other, the conclusions drawn from evidence. As regards injury, the conclusions drawn from evidence must ultimately concern the domestic industry as defined in the investigation. However, there is no intrinsic limit to the types of evidence that may be used to arrive at such conclusions.

311. In particular, it surely cannot be excluded *ab initio* that the condition of EC producers as a whole may provide evidence of the condition of those producers who comprise the domestic industry.

312. In its comments on production data, India attacks (paras. 4.123 to 4.130) the analysis presented in recital 81 of the Provisional Regulation. However, the point that is made here is simply that the increase in production of the "domestic industry" producers between 1992 and 1995/96 was not a symptom of good health, but is explained by the disappearance of a great number of Community producers during that period. It is explained in recital 41 of the Definitive Regulation.

313. India remarks (para. 4.130) that the evidence set out in the EC Regulations indicated "the Community industry companies thrived". If companies with a profit level of 1.6 per cent can be described as thriving, one wonders what word India uses to describe the profit levels achieved by companies selling in its own market.

314. India similarly confuses evidence and conclusions in its comments on sales figures (paras. 4.131 to 4.133). In the textile industry sales and production figures are closely related. Producers do not allow stocks to build up. Consequently what is true for production is usually true for sales.

315. In its discussion on market share (paras. 4.134 to 4.136) India in essence merely repeats the points made in the preceding paragraphs about production and sales.

316. India returns to the same point in its discussion of employment data (in paras. 4.137 et seq.) and again in discussing "Allegedly disappeared companies"[45].

317. All these allegations that the EC authorities based the finding of injury on the condition of EC producers as a whole are explicitly denied in recital 40 of the Definitive Regulation where it is stated that

[44] See recitals 52 to 57 of the Provisional Regulation.

[45] Despite its use of this phrase, it seems that India does not deny the fact that companies did disappear from the business.

> the principal basis for the finding of material injury was the reduced profitability and price suppression of the Community industry as observed among the sampled companies.

318. India's arguments appear to rest on the notion that all the factors listed in Article 3.4 must indicate injury. In reality, the nature of the injury suffered by the domestic industry will to some extent depend on the way in which that industry responds to unfairly-priced imports. If it maintains existing prices it is likely to suffer a decline in sales. If it lowers prices to match those of the imports it may maintain sales volume and market share, but its profitability will suffer. Although what usually occurs is something between these two scenarios, the facts of the present case fell markedly towards the lost-profit end of the spectrum.

2. Sampling

319. In paragraphs 4.145 to 4.150 India raises various points about the sampling method applied to domestic producers in this investigation. Although various provisions of the Anti-dumping Agreement are cited, it seems that what India is alleging is that the EC has failed to make an "unbiased and objective"[46] evaluation of the factors and indices listed in Article 3.4. It contends that as a consequence the EC is in breach of Article 3.4.

320. India expressly states in paragraph 4.145 of its First Written Submission that it

> … takes no issue with the EC's right to resort to sampling of the domestic industry for the injury determination.

321. The EC, for its part, accepts that in assessing the impact of dumped imports on the domestic industry in accordance with Article 3.4, a Member's authorities are obliged to evaluate the established facts in an unbiased and objective manner.

322. However, the allegations made by India create no suspicion of a failure by the EC authorities to respect this standard.

323. In the first place India implies (para. 4.146) that there is some fault in the fact that a sample of the producers constituting the "domestic industry" (in this investigation this was based on the "major proportion" principle in Article 4.1) is likely to be "tilted" in comparison with the domestic producers as a whole. India does not explain the nature of this tilt, or explain how it constitutes an infringement of Article 3.4.

324. Secondly, it suggests (paras. 4.147 to 4.148) that the sampling of the domestic industry was in some way more favourable than that of the Indian exporters. The lack of agreement with the latter is mentioned, as is (again) the issue of consideration of information on all domestic producers rather than merely those in the "domestic industry". The implementation of sampling in regard to dumping is of no relevance to the method used to determine the impact of dumped imports under Article 3.4. The relevance of this provision to the range of companies whose data were taken into account has already been considered (paras. 310 et seq.).

325. India also suggests that the application of sampling was "rigorous and mechanical" in the case of the exporters but not with respect to the domestic industry. India does not substantiate this allegation and in particular does not explain in what way the EC could have, but did not, take account of data concerning exporters not part of the sample nor what difference this would have made. In any event, it is clear that the calculation of the dumping margin, as a precise calculation, has to be

[46] See paragraph 4.150 where India refers to Article 17.6(i) Antidumping Agreement.

"rigorously and mechanically" limited to the sampled companies. An assessment of injury requires a broader range of information to be assessed; it is not a mechanical calculation.

326. It is said (paras. 4.149 and 4.150) that the EC should have confined its enquiry to the companies in the sample. A sample was undertaken to give an indication of the condition of the "domestic industry". When the authorities have information relating directly to the condition of that industry it could be said that a possible infringement of Article 3.4 would arise not from using it but rather from refusing to use it.

327. In any event, for reasons that have already been explained, notably in Section (a) above, the EC was entitled under Article 3.4 to refer to the different levels of industry. It cannot therefore be accused of failing to carry out an unbiased and objective evaluation. India puts forward no other basis on which the EC might be found to have conducted a biased and unobjective evaluation.

3. Explanation of relevant level

328. India's third basis for alleging that the EC infringed Anti-dumping Agreement Article 3.4 is that it "at no point has indicated or made clear why exactly it relied on which industry level for each injury factor" (paras. 4.151 to 4.157).

329. In this accusation India rehearses the complaints that have already been examined under this claim. The EC's response is likewise a repetition. In recitals 40 and 41 of the Definitive Regulation the EC summed up the peculiar features of this investigation. In particular, the fact that, on some criteria, the condition of the domestic industry, rather than suffering injury, appeared to be improving slightly. In order to demonstrate the reality – that this improvement concealed price suppression and a serious deterioration in profitability – it was necessary to look at the broader picture, in particular the significant contraction in the overall number of domestic producers between 1992 and 1996. Thus it could be said that the injury to the producers comprising the "domestic industry", which was demonstrated by price suppression and declining profitability, was not offset by increasing sales, market share, etc., because those increases were a consequence of the contraction in the total number of EC producers.

330. The significant feature of the table summarising the data provided in the Provisional Regulation, which is presented by India in paragraph 4.151, is that in respect of each injury factor there is a figure for the "sample" and/or the "domestic industry". Recital 58 of the Provisional Regulation explained that the sample was used "[B]ecause of the number of companies in the Community industry". However, what a sample produces is always an approximation to the true figure for the domestic industry, so there can be no objection to presenting data for that industry when it is available.

4. Conclusion

331. In conclusion it can be observed that none of the three bases put forward by India in this Claim establishes any inconsistency with Article 3.4 in respect of the EC authorities' use of data from different levels of the bedlinen industry.

332. Finally, the EC repeats the point it made at the outset, that the Anti-dumping Agreement does not prevent a Member using the alternative definitions of domestic industry envisaged in the chapeau to Article 4.1 in the course of a single investigation, should it choose to do so.

I. CLAIM 16: ALLEGED INCONSISTENCY WITH ARTICLES 6.10 AND 6.11

333. In this claim (paras. 4.158 to 4.161) India invokes provisions of Article 6 of the Anti-dumping Agreement.

334. As explained in Section II.A of this Submission, this claim lies outside the jurisdiction of this Panel.

J. CLAIM 17: ALLEGED INCONSISTENCY WITH ARTICLE 12.2.1

335. India alleges (paras. 4.163 to 4.170) that the Provisional Regulation did not satisfy the publication requirements contained in Article 12.2.1.

336. As explained at paragraph 22 above, claims regarding the Provisional Regulation are not within the Panel's jurisdiction.

K. CLAIM 18: ALLEGED INCONSISTENCY WITH ARTICLE 12.2.2

337. In this claim India alleges (paras. 4.171 to 4.177) that the Definitive Regulation did not satisfy the publication requirements of Article 12.2.2.

338. Since the explanations that the EC has provided to satisfy the requirements of Article 3 regarding injury were set out in the Definitive Regulation either directly, or by reference to parts of the Provisional Regulation, those explanations also satisfy the requirements of Article 12.2.2.

339. Regarding the response in the Regulation to the comments made by the exporters, the claim in paragraph 4.177 of the Submission is too vague to enable the EC to respond.

L. CLAIM 19: ALLEGED INCONSISTENCY WITH ARTICLE 3.4

340. India asserts (para. 4.194) that "the EC practice to automatically consider as *"dumped"* all imports of bed linen from India in the years preceding the investigation period, is inconsistent with Article 3.4." India is evidently referring to the period from 1992 to 1996.

341. As explained at paragraph 22 above, claims regarding the Provisional Regulation are not within the Panel's jurisdiction. The explanations of the Provisional Regulation are adopted by the Definitive Regulation in so far as that is necessary for the determination, but the text of the latter takes priority.

342. Furthermore, as explained in Section II.A of this Submission, the whole of this claim lies outside the jurisdiction of the Panel.

343. In any event, the EC rejects India's assertion. There is no statement indicating such a practice in either Regulation, nor have the authorities made any other statement that expressly or implicitly supports such a view.

344. In addition, the statements attributed to the EC in paragraphs 4.189 and 4.190, even assuming they are accurately recorded, do not support the contention that the EC authorities, having determined dumping during the Investigation Period (usually one year), assumed that *all* imports during the preceding period (usually 3 or 4 years) that were examined for certain injury data were also dumped. Imports in previous years were examined in order to put the situation during the Investigation Period into relief. The longer period is referred to by the EC as the 'injury investigation period'. But this term of art does not, contrary to India's assertion (para. 4.192), imply dumping during that period.

345. India appears to be in confusion over the notion of "dumped imports", which is considered in paragraphs 215 *et seq.* In the contested measure, as in the Anti-dumping Agreement, this term is shorthand for "imports of products found to be dumped (in the Investigation Period)".

346. Most of the points made by India under this Claim refer to the use made by the EC authorities of data concerning disappeared companies.

347. Thus, India asserts (para. 4.207) that the EC "at several instances puts great emphasis on companies allegedly disappeared from the EC market in the period 1992-IP". However, India chooses not to mention the single most explicit statement in the Regulations concerning the existence of injury:

> the principal basis for the finding of material injury was the reduced profitability and price suppression of the Community industry as observed among the sampled companies.[47]

348. Consequently, all India's arguments that the EC authorities relied on the fact that many EC companies ceased production in the years immediately preceding the Investigation Period are misplaced. As the EC has repeatedly emphasised in this Submission, the EC authorities faced a situation where, on some indicators, the health of the domestic industry was apparently improving. The exporters would have looked askance if these facts had been ignored, and the conclusion had been reached solely on the basis of profitability and price considerations. The information on the contraction in the number of producers showed that what might otherwise have seemed a contradiction was in fact a realistic scenario.

349. In paragraphs 4.208 to 4.212 India quotes from a number of recitals in the Provisional and Definitive Regulations which contain statements to the effect that that the disappeared companies should be taken into account in the injury analysis. None of these contradicts the fact that the EC authorities found injury principally because of the domestic industry's reduced profitability and price suppression, and that the data of the disappeared companies was relevant to explaining the improved position of the industry in regard to sales and market share.

350. It must therefore be concluded that India has provided no basis for its claim that the EC has infringed Article 3.4.

M. CLAIM 20: ALLEGED INCONSISTENCY WITH ARTICLE 3.5

351. India alleges (paras. 4.217 to 4.220) that "the EC acted inconsistently with Article 3.5 by automatically considering all imports of bed linen from India in the period 1992-30 June 1995 as *"dumped"*."

352. Since the EC authorities (as explained under the preceding claim) did not automatically consider all such imports to be dumped, this claim must also fail.

353. In any event, the EC authorities addressed the issue of causation by the dumped imports in recitals 95 to 99 of the Provisional Regulation. These reveal no inadequacy in the use of the concept of dumped imports, which in all cases is used to apply to imports during the Investigation Period. The issue of the inclusion within this term of imports at non-dumped prices is addressed in paragraphs 215 *et seq.*, above. The relationship of volume and price described there is directly applicable to the issue of causation covered in Article 3.5 through the reference to Article 3.2, which concerns both of these factors.

354. It is remarkable that, for all its individual complaints about the measures taken by the EC authorities, the only claim that India can make is one based on a misunderstanding of the EC's practice.

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[47] Definitive Regulation, recital 40.

N. CLAIM 21: ALLEGED INCONSISTENCY WITH ARTICLE 12.2.1

355. It is contended (paras. 4.221 to 4.229) that the EC failed to comply with Article 12.2.1.

356. As explained at paragraph 22 above, claims regarding the Provisional Regulation are not within the Panel's jurisdiction.

O. CLAIM 22: ALLEGED INCONSISTENCY WITH ARTICLE 12.2.2

357. This claim is addressed in paragraphs 4.230 to 4.234 of India's Submission.

358. It seems to be claimed (para. 4.232) that the EC failed to respond to the allegation that a takeover of one company by another was not a sign of injury if production overall expanded. Recitals 40 and 41 of the Definitive Regulation identified the principal bases of the injury finding (loss of profitability and price suppression), and explained how the increase of production and sales of the "domestic industry" did not vitiate this conclusion. They therefore implicitly indicate that the issue of takeovers was irrelevant to the EC authorities' conclusion, and that the fact of increased production was not determinative of the question of injury in this investigation. The requirements of Article 12.2.2 regarding "relevant information" and "reasons for the … rejection of relevant arguments" are therefore satisfied.

359. The point raised in paragraph 4.233 regarding restructuring is revealed, in the footnote, to be essentially one about employment. In the recitals cited above, the Definitive Regulation makes clear that employment was not a factor on which the EC relied in concluding that the domestic industry was suffering injury. Consequently, the exporters' "argument" on this point was not "relevant", and therefore not one that need be addressed by the EC.

360. As regards the assertion in paragraph 4.234, since the EC did not regard imports prior to the Investigation Period as constituting "dumped imports", it had no duty under Article 12.2.2 to explain such a point in the Definitive Regulation.

361. Consequently, the EC denies any inconsistency with Article 12.2.2 in respect of this claim.

VI. CLAIMS REGARDING STATUS OF INDIA AS A DEVELOPING COUNTRY

A. CLAIM 29: ALLEGED INCONSISTENCY WITH ARTICLE 15

362. India contends (paras. 6.1 to 6.53) that "the EC acted inconsistently with Article 15 of the Anti-dumping Agreement by not exploring possibilities of a constructive remedy and by not even reacting to arguments from Indian exporters pertaining to Article 15" (para. 6.1).

363. Article 15 reads as follows:

> 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.

364. In so far as India alleges (para. 6.51) that the Provisional Regulation was in breach of the requirements of Article 15, the EC recalls that, as explained at paragraph 22 above, claims regarding the Provisional Regulation are not within the Panel's jurisdiction.

365. India acknowledges (para. 6.22) that the first sentence of Article 15 "does not seem to create a rock-solid legal obligation", and founds its claim on the second sentence.

366. The EC agrees that the second sentence does impose a legal obligation on Members.

367. It is not disputed that bedlinen producers are part of the textile industry, that this is an "essential interest" of India, and that anti-dumping duties would "affect" this interest.

368. The practice of the EC when developing countries are involved in an anti-dumping investigation is to give special consideration to the possibility of accepting undertakings from their exporters. Unfortunately, the difficulty that frequently arises in relation to undertakings, that of effective supervision, can also apply in the case of developing countries.

369. However, in this investigation, contrary to India's assertion in paragraph 6.52, the immediate reason why no undertaking was accepted was that none had been offered by the exporters within the time limits set by the EC Basic Regulation.[48] These time limits are a reflection of those imposed by Article 5.10 of the Anti-dumping Agreement, and the general obligation to manage investigations expeditiously (Article 6.14 of the Anti-dumping Agreement).

B. CLAIM 30: ALLEGED INCONSISTENCY WITH ARTICLE 12.2.1

370. This claim is made in paragraphs 6.54 to 6.58 of India's Submission.

371. As explained at paragraph 22 above, claims regarding the Provisional Regulation are not within the Panel's jurisdiction.

C. CLAIM 31: ALLEGED INCONSISTENCY WITH ARTICLE 12.2.2

372. India claims (paras. 6.59 and 6.60) that the EC failed to properly explain its reasoning, and to react to the exporters' arguments.

373. The practice of the EC in regard to Article 15, described in paragraph 368, is well-known to exporters and their legal advisors. As India acknowledges (para. 6.52), the matter was discussed with the exporters. The EC denies that every detail of the anti-dumping investigation need be included in the public notice of determinations. The authorities have to strike a balance, and there is less need to include details that have been explained to the interested parties during the course of the investigation. On this basis the EC contends that, in regard to this claim, it has satisfied the requirements of Article 12.2.2.

VII. CONCLUSIONS AND REQUESTS

374. The EC recalls its requests for preliminary rulings set out in Section II above.

375. For the rest, the EC requests the Panel to reject the requests for recommendations made by India for the reasons set out above.

[48] See the fax sent by the EC authorities to the exporters' legal representatives on 22 October 1997, reproduced in Exhibit India-52.

ANNEX 2-2

RESPONSE OF THE EUROPEAN COMMUNITIES TO PRELIMINARY RULINGS REQUESTED BY INDIA

(5 May 2000)

Following India's request for preliminary ruling, the European Communities welcome the opportunity to present their comments to the Panel.

It is the belief of the European Communities that India's request for preliminary ruling is inadmissible. In its letter of 11 April 2000, in fact, India fails to explain what decision is actually seeking from the Panel and limits itself to express its lack of understanding of the origin of the document marked as Exhibit EC-4.

The document in question, as expressed in its heading, is a "summary", a recapitulative table of the declarations of support that the European Communities' industry had communicated to the European Communities before its initiation of the anti-dumping investigation on imports of bedlinen from India. As such, Exhibit EC-4 does not constitute new evidence. On the contrary, it simply systematises the evidence on which the European Communities based its standing determination and which, as indicated in the document's last column, has always been available to India in a form or another as part of the non-confidential file (to the point that India has been able to produce such evidence as Exhibit India-59). The aim of this document in this proceeding is purely to help the Panel understanding the lack of foundation of India's claims on standing.

This said, the European Communities wish to further point out that nothing in the WTO Agreements prevents the European Communities from presenting to the Panel in the course of the current procedure evidence not made available during an anti-dumping proceeding.

In light of the nature of the preliminary rulings requested both by India and by the European Communities, we expect that the Panel will rule on them no later than at the First Substantive Meeting with the Parties.

ANNEX 2-3

ORAL STATEMENT OF THE
EUROPEAN COMMUNITIES

FIRST MEETING OF THE PANEL

(10-11 May 2000)

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I. INTRODUCTION

1. The case at issue is rather complex and has resulted in a number of claims by India. However, the European Communities (to which we will from now on refer to as "the EC") believes to have clearly highlighted in its First Written Submission the reasons why India's claims are unfounded and should be rejected.

2. Today, therefore, the EC will limit its intervention to a recapitulation of the main aspects of the present case. In particular,

- I will deal with the preliminary issues and with the initiation phase of the EC anti-dumping investigation;

- Mr Vidal Puig will address the determination of dumping effectuated by the EC;

- and Mr White will deal with the finding by the EC of injury caused.

3. In addressing these topics, the EC will take into account the valuable contribution offered by the Third Parties' interventions.

4. Before moving on to the procedural issues, the EC would like to briefly recall one initial point.

5. The EC notes that India has persisted in not addressing a number of claims originally mentioned in its request for the establishment of a panel. In light of the Panel's working procedures, the EC considers that these matters are now outside the scope of the present Panel. Incidentally, the EC wishes to apologise for the typing errors contained in paragraph 5 of its First Written Submission and provides the correct references to the articles of the WTO agreements in a footnote to the written text of this presentation.[1]

II. PRELIMINARY RULINGS

6. On the preliminary rulings requested, the EC welcomes the invitation of the Panel to present its comments on India's response to its request for preliminary rulings.

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[1] Paragraph 5 of the First Written Submission of the European Communities should read:

"First of all, the EC notes that a number of claims that were mentioned in India's request for the establishment of a panel have not been included in India's First Written Submission. In particular, India does not claim in the Submission that:

- inconsistently with Article 12.1 Anti-dumping Agreement, the EC did not adequately respond to queries from India's exporters on the issues of standing (Panel request, point 1);
- inconsistently with Article 12.1 Anti-dumping Agreement, the EC did not make available any record of its examination of the allegations contained in the complaint and of its consideration at the time of initiation of information pointing to lack of injury (Panel request, point 2);
- inconsistently with Article 12.2 Anti-dumping Agreement, the EC failed to state in a public notice the reasons why provisional measures were judged necessary (Panel request, point 3);
- inconsistently with Article 2.4 Anti-dumping Agreement, the EC refused to grant a level-of-trade adjustment (Panel request, point 8);
- inconsistently with Article 2.4.2 Anti-dumping Agreement, the EC was "comparing similar sales channels for the determination as to whether ASG expenses are similar, while comparing different sales channels for the determination as to whether the profits on branded goods were higher" (Panel request, point 9);
- inconsistently with Article I of GATT 1994, the EC discriminated between exporting countries with respect to the treatment of state-owned companies (Panel request, point 10)."

1. Claims not mentioned in the panel's request

7. With regard to its first request of preliminary ruling, i.e. that the Panel should dismiss India's claims not mentioned in the Panel's request, the EC would like to make the following general observation.

8. The norm that sets the standards for the request for the establishment of a panel is Article 6.2 of the Dispute Settlement Understanding. This norm provides, in the relevant part, that:

> "The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."

9. In *Korea - Dairy Products*[2], the Appellate Body has recently refined its previous findings on the exact requirements of Article 6.2 DSU. In *EC - Bananas*, in fact, it had held that it was sufficient for the complainants "to list the provisions of the specific agreements alleged to have been violated without setting out detailed arguments as to which specific aspects of the measures at issue relate to which specific provisions of those agreements".[3] In that occasion the Appellate Body had also specified that the panel request needs be "sufficiently precise" for two reasons: first, because it forms the basis for the terms of reference of the panel, and, second, because "it informs the defending party and the third parties of the legal basis of the complaint".[4] Now, returning on the same issue, the Appellate Body has clarified that the identification of the treaty provisions alleged to be violated is "always necessary" and constitute a "minimum prerequisite" to present the legal basis of the complaint. The Appellate Body has also specified that, if this might, in some cases, be enough to meet the standard of Article 6.2 DSU, in other cases, for instance when an Article contains more than one distinct obligation, the mere listing of articles of an agreement is likely to be not sufficient to inform the defending party and any third parties of the legal basis of the complaint.[5]

10. In the present case, the EC has requested the Panel to dismiss India's claims not mentioned in the request for the establishment of the Panel. India has agreed not to seek a ruling on Article 3.6 of the Anti-Dumping Agreement.

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[2] Report by the Appellate Body on Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products, WT/DS98/AB/R, 14 December 1999.

[3] Report by the Appellate Body on *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, AB-1997-3, WT/DS27/AB/R, 9 September 1997, at paragraph 141.

[4] *Ibid.*, at paragraph 142.

[5] Report by the Appellate Body on *Korea Dairy Products*, cited above, at paragraphs 114 ff.

(i) Claim 16 – Articles 6.10 and 6.11 of the Anti-Dumping Agreement

11. With regard to Articles 6.10 and 6.11 of the Anti-Dumping Agreement, India argues[6] that it had demonstrated its concern with these provisions during the consultation phases, and that its claim is linked with claims regarding selection in the context of Article 3.

12. But, as we have just seen, for the purposes of bringing a matter within the jurisdiction of the Panel, it is not sufficient merely to raise the topic during the consultation phase. The "always necessary" "prerequisite" is a "sufficiently precise" identification of the treaty provisions alleged to be violated.

13. It is quite common, in fact, for complainant Members to raise matters in the course of consultations, and not pursue them before the Panel. Thus, in the present case, as well as Article 6 of the Anti-Dumping Agreement, India had raised GATT Article VI in its consultation document (WT/DS141/1), but did not invoke it either in its Panel request or anywhere else.

14. Furthermore, the EC does not accept that the use of selection in the context of Article 3 can be used to bring any aspect of that notion within the jurisdiction of the Panel. Article 6 deals explicitly with the concept of selection in the context of exporters and producers.

15. The only sense in which the two points are 'linked', as alleged by India, is that they relate to the same general concept. The Agreement elaborates this concept in detail in the case of the dumping enquiry. It might be argued that some aspects of that elaboration should be read into the provisions on injury. However, this possibility is not now at issue. What is at issue is the objection raised by the EC that India has not included the question of selection in the injury investigation as one of its claims.

(ii) Claim 14 – Article 6 of the Anti-Dumping Agreement

16. With regard to the EC's request that the Panel does not consider India's claims relating to Article 6 of the Anti-Dumping Agreement, the EC understands that India[7] regards Claim 14 as merely part of the context of Claim 13, as merely supporting that Claim. These assertions are not explained, and their meaning is not evident in any of India's submissions, except that now it appears that India no longer regards 'Claim 14' as a separate head of claim.

17. It follows from this that India would not be prejudiced by and would not object to this claim being dismissed.

(iii) Claim 19 – Article 3.4 of the Anti-Dumping Agreement

18. Finally, on Article 3.4 of the Anti-Dumping Agreement, India regards a reference to Article 3, which explicitly directs attention only to paragraph 5, as sufficient to bring claims regarding any part of that Article within the Panel's jurisdiction. In citing the AB in *Bananas III,* India chooses to ignore the later observations of the AB in *Korea Dairy*, referred to before.

19. Article 3 of the Anti-Dumping Agreement includes a diverse range of obligations covering most of the issues that come under the rubric of injury. It would place an unreasonable burden on a defendant Member to require it to prepare responses to all those obligations so as to be able to deal with any aspect that the complainant may chose to pursue in its Submission. Furthermore, in the present case, in point 13 of its panel request India explicitly directed attention away from paragraph 4 towards another part of Article 3.

[6] See point 1.3.1 of Response of India to preliminary rulings requested by the European Communities.
[7] See point 1.3.2 of Response of India to preliminary rulings requested by the European Communities.

20. As a consequence, the EC's rights of defence have been prejudiced, and third parties have been denied due notice of the subject matter of the proceedings.[8]

21. Finally, the mere fact that a defendant Member attempts to provide an answer to a claim that is raised for the first time in a complainant's submission does not justify the conclusion that its rights of defence have been respected.

2. **Claims in relation to the provisional regulation**

22. The second EC's request for preliminary ruling regards India's claims in relation to the Provisional Regulation. India confirms in point 3 of its Response to preliminary rulings requested by the EC that its complaint is directed only against the Definitive Regulation. This is, as India states in paragraph 2 of its First Written Submission, the 'measure at issue'.

23. The EC agrees, for its part, that India can base arguments in support of its claims that the Definitive Regulation is inconsistent with the EC's WTO obligations on statements in the Provisional Regulation that are incorporated unchanged into the Definitive Regulation.

24. India has therefore agreed to drop claims 2, 5, 9, 12, 17, 21, 24, 27, and 30. For the remaining claims mentioned by the EC in this regard it is sufficient for the Panel to note that they are directed exclusively at the Definitive Regulation.

3. Verbatim reports of consultations

25. Thirdly, the EC requests the Panel to find that the verbatim reports of consultations, submitted as evidence by India, are inadmissible and will be disregarded.

26. On this point, and in response to India's assertions regarding the "absolute accuracy" of the so-called "verbatim reports", the EC can only reiterate that they do not reflect accurately the views expressed by the members of the EC delegation during the consultations. The reports were not provided to the EC delegation and have never been approved by any EC official. The disagreement between the two parties regarding the accuracy of the reports furnishes the best proof that they cannot be considered as reliable evidence. In substance, India's position amounts to saying that one party should be allowed to create its own evidence, a notion which is at odds with the most basic considerations of procedural fairness.

27. Furthermore, the EC denies India's unsupported allegations of lack of respect for the basic objectives of the consultation process. In any event, since India has made no claim in respect of such alleged lack of respect, the EC does not understand the relevance of the topic to the present proceedings.

4. Use of confidential documents

28. Finally, the EC is not in a position to comment on India's answer to its preliminary request that confidential documents be not considered part of this proceeding. In fact, the EC has not yet had a chance to see Exhibit India-81, which is supposed to contain the written approval of the producer concerned, and therefore to verify its authenticity.

[8] Report by the Appellate Body on *Brazil - Measures Affecting Desiccated Coconut*, AB-1996-4, WT/DS22/AB/R, 21 February 1997, at sec. VI.

III. CLAIMS REGARDING THE INITIATION OF THE INVESTIGATION

29. Moving on to the issues related to the initiation by the EC of the anti-dumping investigation, India has alleged infringements, on the part of the EC, of both Article 5.3 and Article 5.4 of the Anti-Dumping Agreement.

1. Examination of evidence in the complaint

30. With regard to Article 5.3, India claims that the EC has violated this norm because it has not 'examined' the allegations in the Complaint on the state of the domestic industry before initiating the investigation.

31. The EC has explained at length in its First Written Submission why India 's claims are unfounded with regard to both the facts of the case and the interpretation of the requirements of Article 5.3. Therefore, today the EC will only summarise some of its arguments.

32. In particular, the EC wishes to recall that the text of Article 5.3 states that:

> "The authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation."

33. From the ordinary meaning of the text of Article 5.3, read in conjunction with Article5.2, which constitutes its immediate context, it is clear that the evidence contained in a complaint has to be regarded as accurate and adequate for the purpose of initiating an anti-dumping investigation if it covers the topics listed in Article 5.2 and it is sufficiently credible. No duty exists on the investigating authorities to collect evidence additional to that in the complaint. In other words, the standard of proof required to initiate an anti-dumping investigation is more than a mere allegation or conjecture but it is less than that appropriate to a preliminary or final determination of dumping and injury.[9]

34. In the case at issue, the EC authorities examined the information contained in the complaint in light of the requirements contained in Articles 5.3 and 5.2. As is usually the case, some of the information in the complaint derived from publicly-available sources, and could therefore be checked, whereas some was known only to the complainants. The Community authorities determined that the evidence provided was sufficient to justify initiation of the proceedings. (It has to be noticed that, in the case at issue, information gained during a previous investigation on bedlinen was available to the investigating authorities when they considered the issue of "sufficient evidence", and this facilitated a better-informed decision.) In accordance with Article 12.1 of the Anti-Dumping Agreement, the decision taken was recorded in the Notice of Initiation.[10] The relevant language can be found under heading 5 of the Notice of Initiation, regarding "Procedure for determination of dumping and injury":

> "Having determined, after consulting the Advisory Committee, that the complaint has been lodged by or behalf of the Community industry and that there is sufficient evidence to justify the initiation of proceedings, the Commission has commenced an investigation pursuant to Article 5 of Regulation (EC) No 384/96."

35. No other action was required at this stage of the procedure from the EC authorities. In particular, contrary to India's assertion, no obligation exists in Article 5.3 of the Anti-Dumping

[9] Report by the Panel on *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, adopted 28 January 2000, at paragraphs 7.94 and 7.97.

[10] Notice of initiation of anti-dumping proceedings concerning imports of cotton-type bed linen originating in Egypt, India and Pakistan, in OJ No C 266, 13.9.96, p.2 (Exhibit India-7).

Agreement to maintain on file a record of the examination of the evidence or to make a separate report available to the Indian exporters (exporters which are identified only sometime after the initiation decision).

2. Public notice and explanation of determinations

36. On this regard, the EC feels it necessary to point out once again, for the benefit of India, that the issue of public notice and explanation of determinations are specifically dealt with by another norm of the Anti-Dumping Agreement, i.e. Article 12. The structure of this norm is quite straightforward. Initiation issues are dealt with by paragraph 1, while paragraph 2 covers the measures adopted during and after the investigation, that is provisional measures, definitive measures and undertakings.

37. In the present dispute India has chosen not to invoke Article 12.1. Now, it cannot circumvent that decision by seeking to find a parallel obligation to publish within Article 5.3. And, if there had ever been a doubt about this, this is now solved. The Panel in *Mexico – HFCS* clearly stated that[11]:

> "Article 5.3 cannot be interpreted to require the investigating authority to issue an explanation of how it has resolved all underlying questions of fact at initiation. That is a requirement that arises at later stage of the proceeding, and is explicitly set forth in Article 12.2".

38. Similarly, India's cannot find parallel obligations in Article 12.2.2 of the Anti-Dumping Agreement. This norm, in fact, only requires the Member concerned to deal, in the public notice of conclusion, with all *relevant* arguments or claims. And, India's allegations regarding the initiation of the investigation are not relevant to the definitive measure. This is clear from the fact that, even if, during the course of the investigation, information became available which caused the authorities to conclude that they had been mistaken regarding the sufficiency of the evidence for the purposes of the initiation decision, that would not in itself be a basis for halting the investigation. This is confirmed by Article 5.8 of the Anti-Dumping Agreement which specifies the instances in which an investigation is to be terminated.

3. Determination of standing

39. Moving on to analyse the issue arising under Article 5.4 of the Anti-Dumping Agreement, India claims a violation of this norm on part of the EC for failing to determine the standing of the domestic industry.

40. Contrary to India's claim, and as evidenced both by the Notice of Initiation and by the non-confidential file of the investigation, the EC authorities did check the standing of the domestic industry. In particular, the evidence on which the EC authorities relied at the time when the decision to initiate the investigation was made consisted of the following:

- Forms issued by Eurocoton (the European producers association) and completed by individual producers, indicating support for the complaint and giving production in 1995;

- Faxes sent by national producers to a national association giving production data for 1995, in response to a request from the association for information to support the complaint;

- Various other communications from producers associations indicating the nature and degree of support for the complaint.

[11] *Ibidem*, at para. 7.110.

41. On the basis of the production levels, the EC authorities estimated that the support provided by the first two categories of producers alone represented at least 34 per cent of the highest figure of total EC production. Consequently, it is clear that the complainant did satisfy the 25 per cent threshold set in Article 5.4.

42. This said, the EC considers unnecessary to debate here, today, the issue of the validity of the support expressed by a trade association. However, the EC wishes to reaffirm that there is no doubt that when the phrase "expressed *by* domestic producers" in Article 5.4 is considered in its context, and in the light of the object and purpose of the Agreement, this is capable of including expression of support by a trade association. In this regard, the EC believes to have clearly highlighted in its First Written Submission the reasons why India's interpretation of Article 5.4 not only is wrong, but also discriminates against small firms who join trade associations with the precise aim to be able to address issues as complex as anti-dumping.

43. India tries to find obligations related to the decision on standing also in Article 12.2.2. As explained before, the obligation in Article 12.2.2 is to respond to *relevant* arguments. The arguments presented by the exporters regarding the degree of support for the original complaint in the bed linen investigation were not relevant in the present case at the point at which they were posed because the determinations to impose provisional and definitive measures do not constitute appeals from the initiation decision.

44. It is in Article 12.1 that the Anti-Dumping Agreement deals with the obligation to publicise details of the initiation decision. That provision does not require details of the level of support. And if this level of details is not required by Article 12.1, it can hardly be the intention of the Agreement that they should have be to be supplied under Article 12.2.2.

IV. CLAIMS REGARDING THE DETERMINATION OF DUMPING

45. India has submitted three main claims regarding the determination of dumping made by the EC authorities :

- the first claim is that the EC authorities determined the amount for SGA and profit included in the constructed normal values inconsistently with Article 2.2.2;

- the second claim is that the EC authorities acted inconsistently with Article 2.2 by including an "unreasonable" amount for SGA and profit in the constructed normal values;

- the third claim is that the EC authorities acted inconsistently with Article 2.4.2 by "zeroing" the dumping margin for those product types for which the dumping margin was zero or less when calculating the overall dumping margin.

46. In addition, India has raised a number of ancillary claims under Article 12.2 of the Anti-Dumping Agreement. We do not purport to address those claims in our statement. As shown in our written submission, those claims are unfounded. In addition, those based on Article 12.2.1 are outside the terms of reference of the Panel.

1. Alleged inconsistency with Article 2.2.2

47. India has put forward three different arguments in support of its claim under Article 2.2.2

48. India's first argument is that the method set out in Article 2.2.2(ii) does not allow the use of SGA and profit data from a single company.

49. India's argument relies on a purely literal interpretation of individual words of Article 2.2.2(ii) such as «average» and «other producers and exporters» (in the plural). That approach is at odds with the basic principles of treaty interpretation enshrined in Article 31 of the Vienna Convention. When the terms invoked by India are read in their context and in light of the object and purpose of the Anti-Dumping Agreement, it becomes evident that Article 2.2.2(ii) does not require a minimum number of companies to be used.

50. An «average » is normally based on more than one figure. This does not mean, however, that Article 2.2.2 (ii) becomes inapplicable whenever the circumstances of a case are such that the pool of data to be averaged happens to contain just one item.

51. Similarly, the examples provided by the EC and by the US evidence that the term «exporters or producers» cannot be read as excluding a single exporter or producer without creating absurd results throughout the Anti-Dumping Agreement. Indeed, India has admitted as much this morning, and now argues, rather unconvincingly, that it is the presence of a "triple plural" which requires a different reading in this case.

52. India is aware that its literalistic approach is unconvincing. Thus, it makes a failed attempt to provide some logical rationale for its contrived interpretation of Article 2.2.2 (ii) by asserting that the use of data from two companies is intrinsically more «reasonable» than the use of data from one single company. That proposition is clearly unsustainable. More important than the absolute number of exporters is whether the exporters are representative of the conditions prevailing in the domestic market for the product concerned. For example, a weighted average of the profit margins obtained by two exporters with less than 1 per cent each of the domestic market would be, if anything, less representative, and therefore less «reasonable», than the profit margin of a single company which, like Bombay Dyeing, accounts for almost 80 per cent of the domestic market. (In comparison, Standard accounted for 14 per cent of that market. Standard was excluded from the sample, because its exports to the EC were minor)

53. India's second argument is that the method set forth in Article 2.2.2(ii) does not allow the exclusion of sales not made in the ordinary course of trade in calculating the amount for SGA and profits.

54. India's argument relies largely on a mere *a contrario* inference. Unlike the method set out in the chapeau, Article 2.2.2 (ii) contains no express requirement to the effect that sales not made in the ordinary course of trade must be excluded from the calculation. From this, according to India, it would follow that those sales should be included. India also makes much of the fact that Article 2.2.2 (ii) uses the terms «actual amounts incurred or realized» instead of «actual data».

55. Neither argument, however, is persuasive. The simple truth is that the ordinary meaning of Article 2.2.2 (ii) does not require either the inclusion or the exclusion of sales not made in the ordinary course of trade.

56. In addition to not being required by the ordinary meaning of Article 2.2.2 (ii), India's interpretation is at odds with the overall operation of Article 2 and would produce absurd results.

57. The exclusion of the sales not in the ordinary course of trade is part of the basic definition of dumping contained in Article 2.1 of the Anti-Dumping Agreement.

58. Consistent with that definition, Article 2.2 provides for the construction of normal values where there are no domestic sales in the ordinary course of trade. Article 2.2.2 then lays down specific rules for calculating the amount for SGA and profits to be included in the constructed value. Those rules purport to arrive at a result which is as close as possible to the normal value that would have been determined on the basis of domestic prices, had there been sufficient sales in the ordinary

course of trade. Therefore, it is only logical if those rules exclude sales not made in the ordinary course of trade from the calculation of the amount for SGA and profits.

59. India's interpretation would have the perverse consequence that, although the absence of sales in the ordinary course of trade is one of the reasons for constructing the normal value, the constructed normal value could be based on sales not made in the ordinary course of trade. In other words, India's interpretation would lead to the very outcome which Article 2.2 seeks to avoid.

60. Furthermore, India's interpretation would produce the bizarre result that the profit margin included in the normal value of an exporter with sales in the ordinary course would be higher than the amount for profit contained in the constructed value of those exporters without sales in the ordinary course of trade.

61. The example provided by India at paragraph 49 of its Oral statement does not refute this. India's example only goes on to demonstrate the obvious proposition that, had the EC used a lower profit margin, the dumping margins would have been also lower.

62. India's interpretation implies that the use of sales not in the ordinary course of trade is not objectionable as long as the data come for other producers or exporters. That distinction, however, has no rational basis whatsoever: sales not in the ordinary course of trade are just as unreliable when they are made by the exporter concerned as when they are made by another producer or exporter. Indeed, it is significant that India has not even attempted to provide a rationale for its interpretation of Article 2.2.2 (ii), beyond the purely textual arguments mentioned before.

63. India's third argument is that the options set out in subparagraphs (i), (ii) and (iii) of Article 2.2.2 must be attempted in that order.

64. This argument finds no support whatsoever in the wording of Article 2.2.2. The three sub-paragraphs of Article 2.2.2 contain no feature suggesting that one is to be applied in preference to another. In contrast, Article 2.2.2 lays down an explicit hierarchy between the chapeau and the three alternatives that follow.

65. The absence of any textual support for this argument is implicitly acknowledged in India's nebulous claims to the effect that the EC «violates the spirit and structure of Articles 2.2.2 and 2.2 » or that the existence of a preference is clear « from the context of the Article and the very concept of dumping».

66. More specifically, India seeks to establish the priority of subparagraph (i) by arguing that dumping is a «highly producer-specific » concept. Dumping determinations, however, are not only producer-specific but also product-specific. Dumping margins are determined, and anti-dumping duties are imposed, with respect to imports of a like product, and not with respect to the complete range of products manufactured by a given producer. This is reflected in the chapeau of Article 2.2.2, which expresses a preference for the use of actual data of the producer or exporter under investigation concerning sales of the like product.

67. If anything, for the reasons explained in our written submission, the option in subparagraph (ii) would be more realistic from an economic point of view, since the level of profits for a certain product is determined to a large extent by market factors affecting equally all the producers, rather than by producer-specific factors.

2. Alleged inconsistency with Article 2.2

68. Let me turn now to India's second substantive claim, i.e. that the EC authorities acted inconsistently with Article 2.2 by including an «unreasonable» amount for SGA and profits in the constructed normal values.

69. Contrary to what is argued by India, Article 2.2 does not establish a supplementary «reasonability» test, different from that embodied in Article 2.2.2.

70. Article 2.2 enounces the general requirement that the amount of SGA and profit included in the constructed normal value must be «reasonable». That requirement is elaborated in Article 2.2.2, which sets out a series of specific formulae for arriving at that reasonable amount.

71. The amounts for SGA and profit established pursuant to the method set out in the chapeau and in subparagraphs (i) and (ii) of Article 2.2.2 are always "reasonable". This is not a refutable presumption, but rather a presumption *iuris et de iure*. This is confirmed by the wording of subparagraph (iii) which commences with the words "any other reasonable method". Those words imply necessarily that the preceding methods are "reasonable" per se.

72. India contends that Article 2.2.2 only purports to regulate the "procedural" aspects (how SGA and profits are to be established) and not the "substantive" aspects (whether those amounts are reasonable). That interpretation, however, is refuted by the structure of Article 2. Article 2.2.2 is subordinated to Article 2.2 (Article 2.2.2 commences with the words « For the purpose of paragraph 2 (of Article 2.2)»). Therefore, it is clear that the obligations imposed by Article 2.2.2 are not cumulative to the general reasonability requirement set out in Article 2.2. Rather, they are a development of that requirement. Furthermore, what could be the purpose of defining purely «procedural » rules for calculating the amount for SGA and profits?

73. India is also completely mistaken in suggesting that the proviso set out in the third subparagraph applies also to the other two subparagraphs. Such an interpretation is completely at odds with the ordinary meaning of Article 2.2.2. That proviso has been inserted in the third subparagraph because, unlike the chapeau and the first two subparagraphs, the third subparagraph does not specify a formula for calculating the reasonable amount. That the drafters considered it necessary to attach the proviso only to the third subparagraph provides further confirmation of the intrinsic reasonability of the preceding methods.

74. Even assuming for the sake of argument that the presumption that the method set out in subparagraph (ii) is reasonable per se could be overturned, India has presented no relevant evidence to that effect.

75. Profit margins may vary considerably from one country to another, as well as among different product markets, depending on the prevailing competitive conditions. Therefore, a profit margin is not "unreasonable" simply because it is higher than the margins obtained in other markets.

76. The «reasonability» of the amount for profit should not be considered in the abstract, but rather in the light of the object and purpose of Article 2.2.2, which, to repeat, is to arrive at a constructed value as close as possible to the normal value that would have been determined on the basis of domestic prices, had there been comparable sales in the ordinary course of trade.

77. What matters, therefore, is whether the amount for profit is representative of the conditions prevailing in the market concerned. The representativity of the margin used by the EC authorities is beyond question, since Bombay Dyeing accounted for almost 80 per cent of the sales in the domestic market.

3. Alleged inconsistency with Article 2.4.2

78. We will conclude this section of our statement by addressing India's claim under Article 2.4.2, i.e. that the EC authorities acted inconsistently with Article 2.4.2 by "zeroing" the dumping margin for those product types for which the dumping margin was zero or less when calculating the overall dumping margin.

79. This claim rests on a basic misunderstanding of the scope of the obligations imposed by Article 2.4.2. The simple answer to India 's claim is that the «zeroing » practice to which India objects is not covered by Article 2.4.2.

80. The first option presented by Article 2.4.2 does not require a comparison of the weighted average normal value with the weighted average of all export sales of the product under investigation. Instead, Article 2.4.2 requires a comparison « with a weighted average of prices of all comparable export transactions ». This is precisely what the EC authorities did in this case: they compared the weighted average normal value for each product type with the weighted average price of all exports sales of the same product type. The « zeroing » took place only at the subsequent stage of combining the dumping margins determined for each type in accordance with Article 2.4.2 into a single dumping margin. That stage of the calculation, however, is not subject to Article 2.4.2.

81. India's interpretation would read out of Article 2.4.2 the term «comparable». Moreover, India's interpretation of Article 2.4.2 would upset the finely balanced compromise achieved by the negotiators of the Anti-Dumping Agreement. As confirmed by the *Audio Cassettes* report[12], there is nothing inherently "unfair" about "zeroing". In spite of that, Article 2.4.2 purports to give partial satisfaction to those Members which, like Japan, had objected to the average-to-transaction methodology used by some other Members, such as the EC or the US. It would be a mistake, however, to assume that simply because Article 2.4.2 now provides for the use of an average-to-average methodology at the first stage of the dumping margin calculation, the same methodology should be extrapolated to the entire process.

82. As a final comment, the EC would like to note that the example provided by India this morning as Annex to its Oral Statement totally misrepresents the method applied by the EC in this case. Contrary to what is misleadingly stated in India's example, the EC did not compare the weighted average normal value to the "transaction by transaction export price". The EC compared the weighted average normal value to the weighted average export price of all sales of the same type. India's example seeks to obfuscate the difference between those two methods by presenting the Panel with an example in which there is just one transaction of each model.

V. CLAIMS REGARDING INJURY

83. We now come to the claims concerning injury (Claims 8 – 22). These have been discussed in some detail by the EC in its First Written Submission. For the purposes of this meeting, the EC will concentrate on three sets of issues :

- First whether the use of the term "dumped imports" in Article 3 means that an investigating authority must try to ascertain whether material injury is being caused exclusively by *transactions* which are dumped or whether it requires an examination of overall imports of the *product under consideration* which is found to be the subject of dumping;

- Second, whether it is necessary in assessing the impact of dumping on the domestic industry to evaluate all the possibly relevant factors listed in Article 3.4 of the Agreement;

[12] Panel report on *EC – Anti-dumping Duties on Audio Tapes in Cassettes originating in Japan*, ADP/136, distributed on 28 April 1995, unadopted, at paras. 347-366.

- Finally, for what part of the domestic industry must material injury be established.

1. The meaning of the term "dumped imports"

84. The first difference between the EC and India arises from the fact that India understands the term "dumped imports" in Article 3 *Antidumping Agreement* as referring to dumped imports of *particular items of merchandise.* Accordingly, it claims that an investigating authority must somehow determine that material injury is being caused by certain *transactions.* The EC however, understands this term as referring to dumped imports of *a product of a certain description* and that it is therefore only necessary to show that a product of a certain description is dumped and is causing material injury.

85. The EC has provided in its First Written Submission many arguments why its interpretation is correct. I will not repeat them, but just try to illustrate them with some further remarks.

86. The first point to make is rather systemic in nature. It is that an antidumping investigation as envisaged in the *Antidumping Agreement* and carried out by the EC is opened into imports of a *product of a certain description* from a certain country or countries in respect of which there is reason to believe that they are occurring under conditions of dumping. This imported product is termed the "product under consideration" in Article 2.6 *Antidumping Agreement* but is sometimes, rather inaccurately, termed the "like product," – a term which is more properly reserved for the equivalent products sold on the domestic market of the exporter or produced by the importing country's domestic industry. In any event, the investigation is not into a single item of merchandise or even a series of articles of merchandise (transactions), but into this "product under consideration," that is a product of a certain description. It is only this that can cause injury and for which a dumping determination is necessary, *not* the individual items of merchandise or transactions.

87. Individual transactions are of course investigated for the purpose of establishing and measuring this dumping. The purpose of the investigation is to establish whether dumping of the product under consideration is taking place that is causing material injury to the domestic industry producing the " like product" and the level of offsetting antidumping duty that is appropriate.

88. As the EC has explained in its First Written Submission, this is clear from the terms used in Article 3 but also from the context. Article 2.1 *Antidumping Agreement* makes perfectly clear that the *existence of dumping* is to be determined for a country at the level of the *product* under consideration. This product is to be compared with the *like product* destined for consumption in the exporting country. A like product can only be a product of a certain description, not an individual item of merchandise.

89. Against this, it has been objected that a *product* under consideration or "like product" cannot have an export price and that therefore Article 2 must be referring to dumping of individual items of merchandise so that dumping has to be established at least for each transaction. Such reasoning ignores however the context of the rest of Article 2 which explains in some detail how to make this comparison for the entire category of product under consideration.

90. Article 2 allows (or may even require) the product under consideration (i.e. investigation) from a country to be divided up by exporter and type in *calculating the margin* of dumping. But the determination of dumping is still made for the product under investigation and the country.

91. The second point that the EC would make here is that the approach advocated by India is in any event quite impossible to follow.

92. Most obviously, a determination of material injury caused by dumped imports has to be made, according to Article 3.1, for the domestic market for, and the domestic producers of, the *like product*. This can only result from an overall assessment. The market situation is determined by the overall impact imports.

93. Also Article 5.7 of the Anti-Dumping Agreement requires that:

> The evidence of both dumping and injury shall be considered simultaneously

The fact that injury has to be investigated before it is established which transactions are dumped, further confirms that the term "dumped products" used in connection with the injury provisions of Article 3 must be referring to all imports of the product under consideration.

94. Finally on this point, the EC would point out that the interpretation advanced by India now has never, as far as the EC is aware, ever been applied by any Member of the WTO or any party to the Codes. Nor, until now, does it seem to have ever been seriously proposed.

95. Indeed, in the *Salmon* cases (decided under the Anti-Dumping and Subsidies Codes, which used the same term) the Panels used the phrase "imports under investigation" as a synonym for "dumped imports". Thus, in discussing the requirement (that is now in Article 3.5 of the Anti-Dumping Agreement) to examine causes other than the "dumped imports", such as "the volume and prices of imports not sold at dumping prices", it contrasted these with "the imports under investigation".[13] Thus, "dumped imports" were regarded as all imports of the product under investigation coming from the country found to have been dumping. Furthermore, the Panels assumed that this interpretation applied to the earlier paragraphs of Article 3.[14]

96. This analysis shows that the term "dumped imports" in Article 3 Anti-Dumping Agreement refers to all imports of the product in question from the country found to be dumping. Consequently, the EC is not in breach of the provisions of Article 3 for failing "to examine dumped transactions only for the purpose of the determination", as alleged by India.

2. Is it necessary in assessing the impact of dumped imports on the domestic industry to evaluate all the possibly relevant factors listed in Article 3.4 of the Agreement.

97. India claims[15] that "the EC has acted inconsistently with Article 3.4 *Antidumping Agreement* by not evaluating all the economic factors and indices mentioned in that provision. It considers that there exists a general obligation in all cases to evaluate all of these factors. It is not arguing that it is because of the circumstances of this particular case that the factors should be evaluated.

98. The EC has explained in its First Written Submission:

- Firstly, that the factors listed in Article 3.4 were evaluated during the investigation.

- Secondly, how the factors listed in Article 3.4 are negative in character, and as such were properly evaluated during the investigation.

[13] Report by the Panel on United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, ADP/87, 27 April 1994, at paragraph 552; Report by the Panel on United States -Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, SCM/153, adopted on 28 April 1994, at paragraph 316.

[14] Ibid., paragraphs 555, and 321.

[15] Paragraphs 4.56 to 4.76 of India's First Written Submission.

- Thirdly, and subsidiarily, that Article 3.4 does not require that every one of the listed factors need be evaluated in every investigation.

99. The EC will not dwell orally on the first point – that all the factors were evaluated. This is most conveniently illustrated in Table 4 and the accompanying text to the EC's First Written Submission.[16]

100. This first point already disposes of India's claim. But the EC also attaches importance to the second and third points because they are relevant to a proper understanding of other claims and because the EC would like to ensure that the incorrect interpretation of Article 3.4 which have been advanced be decisively rejected. Article 3.4 must be properly interpreted according to the ordinary meaning of its terms in their context and in the light of the object and purpose of the Anti-Dumping Agreement.

101. The first point to make is that Article 3.4 does not contain a list of injury factors in the same way as Article 4.2 of the Safeguards Agreement and Article 6 of the Agreement on Textiles and Clothing (ATC).with which it is often compared. The injury factors to be examined in an antidumping investigation are listed in Article 3.1 of the Agreement. Article 3.4 is merely providing guidance for conducting one element of the injury analysis. This analysis is the *additional analysis* referred to in point (b) of Article 3.1 of the *consequential* impact on the domestic industry of the primary effect of dumping which is the effect on import volumes or prices in the domestic market.

102. This is why, the factors mentioned in Article 3.4 are, as the EC explained in its First Written Submission, all negative in character. An examination of the factors listed in Article 3.4 is not intended to serve the purpose of ensuring that injury caused by other factors is not attributed to dumping (as is the case of the above mentioned safeguard provisions).

103. In the *Antidumping Agreement* this is a separate and subsequent exercise set out in Article 3.5. This provides that :

> 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.

104. The "other factors" examination is *subsequent* because Article 3.5 says that it must be examined if they are not also causing injury and it is separate because Article 3.5 contains its own list of potential factors *separate from* that in Article 3.4. The EC notes that India has nowhere claimed that the EC failed to conduct an "other factors" analysis as required by Article 3.5 *Antidumping Agreement*.

105. As the EC explained in its First Written Submission, the purpose of the examination under Article 3.4 is to determine what is *wrong* with the domestic industry, not what is *right* with it.

106. Indeed, since the purpose of Article 3.4 is to determine the extent to which *dumped imports* are having a negative impact on the domestic industry, even if India were correct in its complaint that the EC did not evaluate all the relevant Article 3.4 factors, this could only mean that the EC had failed

[16] Paragraphs 250 – 255 of the EC 's First Written Submission.

to examine evidence that would have further confirmed its finding of adverse impact. The EC fails to see how this helps India.

107. The EC recalls that two principal negative factors (profits and prices)[17] were identified by the EC authorities in this case, and were thoroughly examined and evaluated. No other plausible negative factors were suggested to them or otherwise came to their attention. None has been suggested by India.

108. The fact that Article 3.4 does not require that all the factors must be explicitly evaluated in every investigation is clear from its wording.

109. Firstly, according to Article 3.4, economic factors and indices need be evaluated only if they are "relevant", and "have a bearing on the state of the industry", which implies that those factors that are relevant may differ from one investigation to another. This, hardly controversial, conclusion is reinforced by the last sentence of the paragraph which states that the " list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance". Consequently, among the factors listed in Article 3.4 there may be some that, in a particular case, are not relevant, and so do not need to be evaluated.

110. To insist that the listed factors must be evaluated in all circumstances, would be to require the evaluation of a factor that has already been found to be irrelevant, which makes no sense.

111. Secondly, the notion that the word "including" should be read as meaning "at the very least" is undermined by the nature of the list that follows. This is broken into parts by semi-colons, and the word "or" is used to indicate that not all of the factors need be considered. If all the factors and indices listed in Article 3.4 had to be evaluated, the Members would have used the conjunction "and", as they had not hesitated doing in many other contexts. (For example in the lists in the Safeguards Agreement and ATC).

112. The fact that it is not necessary to consider all the factors listed in the first sentence of Article 3.4 is made perfectly clear by the second sentence which states that:

> This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

113. The use of the words "nor … necessarily" (meaning "need not but may") in the second part of this sentence means that sometimes one or several, and thus not all, of the listed factors can give "decisive guidance". Since a single factor can thus give "decisive guidance", it is clear that in these cases the investigating authorities are not required to look further.

114. Thirdly, not only do the factors listed in Article 3.4 differ in importance from case to case, but it is also possible to deduce that certain of them are inherently likely to be more significant than others and that findings on some may make findings on others superfluous. For example, how can a calculation of return on investments possibly be relevant or even meaningful in the case of an industry that is making losses? This is another reason why evaluation of all the factors cannot be regarded as compulsory.

115. Perhaps the most superficially attractive of India's arguments is the existence of the supposed "precedents " which it invokes. The argument is illusory and the precedents unpersuasive.

[17] See recital 40 of the Definitive Regulation.

116. First, as we have seen, the wording and context of the corresponding provisions of the ATC and Safeguards Agreement are entirely different. They have different contexts, serve different purposes and the "injury factors" listed in those agreements are not so extensive and they are not joined with the word "or".

117. Second the standard of adverse effects required in those agreements is higher than the "material injury" required under the Antidumping Agreement. The Appellate Body has always emphasised in its decisions on safeguards the importance of the fact that the application of a safeguard measure does not depend upon "unfair" trade actions as is the case with anti-dumping measures.[18] In *Argentina – Footwear* the Appellate Body criticised a panel for not taking account of the high standard required by the definition of "serious injury" (a *significant overall impairment* in the position of a domestic industry).[19]

118. The only precedent relating to the WTO Antidumping Agreement is the panel in *Mexico – High Fructose Corn Syrup* that said, "the text of Article 3.4 is mandatory".[20]

119. However, that panel did not address many of the arguments developed by the EC here today (or the other arguments contained in the EC's First Written Submission) and is, on this point, with all due respect to those involved, wrong. The EC firmly rejects the notion that it should be bound by an insufficiently considered or reasoned position taken in a previous panel in which in addition it was not involved.

(i) Conclusion

120 For these and the other reasons set out in the EC's First Written Submission, India's claim is that the EC has acted inconsistently with Article 3.4 by not evaluating all relevant economic factors and indices mentioned in Article 3.4 of the Anti-Dumping Agreement is unfounded and must be rejected.

3. For what part of the domestic industry must material injury be established (Claim 15)

121. The next important issue concerning injury which the EC will address today relates to the question of what "domestic industry" must be found to be injured under the *Antidumping Agreement* and was found to be injured in this case.

122. The EC finds itself in the comfortable position of being in the middle of two conflicting and contradictory positions presented by India and the US. India complains that the EC was wrong in considering some of the factors to look beyond the circle of complaining and co-operating producers and the US considers that the EC erred in confining any part of its investigation to those complaining and co-operating producers.

123. Before explaining why they are both wrong and the EC was right, let me first dispose of the issue of the EC's Basic Antidumping Regulation. Both India and the US base arguments on what they believe is mandated or required by that Regulation.

124. India seems to preface its whole reasoning on the contention[21] that:

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[18] Most recently in *Argentina – Footwear*. Report by the Appellate Body on *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, 14 December 1999, at paragraph 94.

[19] *Id.* paragraph 138.

[20] Report by the Panel on Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States, WT/DS132/R, 28 January 2000, at paragraph 7.128:

[21] Paragraph 4.94 of India's First Written Submission.

> under EC law, the 'domestic industry' is defined by reference to the standing determination

125. The US also alleges[22] that

> The EC's action in this case appears to have been mandated by its Anti-dumping Regulation, which defines the domestic industry as those producers who filed the "complaint."

126. However Article 4.1 of the EC's Antidumping Regulation is virtually identical to Article 4.1 *Antidumping Agreement.* Apart from the quite immaterial one that "domestic industry" in the Agreement becomes "Community industry" in the Regulation, the only difference is that Article 4.1 of the Regulation refers to the initiation requirements of Article 5.4 for the purpose of explaining what is meant by "a major proportion".[23]

127. The EC's Basic Antidumping Regulation neither mandates nor allows with respect to "domestic industry" anything that the *Antidumping Agreement* does not. There is no question of any inconsistency between the EC's Basic Antidumping Regulation and the *Antidumping Agreement*. Even if one were to consider that the term "a major proportion" in the *Antidumping Agreement* means something different than the meaning given to it in the EC Regulation (and the EC does not), the EC notes that India is not contesting that 35 per cent of all producers constituted "a major proportion".

128. The EC will turn in a moment to India's substantive complaints concerning the definition of domestic industry. But it is first useful to put them into perspective. This perspective is provided recital 40 of the Definitive Regulation where it is stated that

> the principal basis for the finding of material injury was the reduced profitability and price suppression of the Community industry as observed among the sampled companies.

129. This reduced profitability and price suppression was established exclusively on the basis of the Community industry as defined by the EC and from the data provided by the sample. None of India's complaints on domestic industry which we will examine and dismiss below affect these essential findings of reduced profitability and price suppression. They are, the EC submits, sufficient in themselves to justify a finding of material injury.

130. Indeed India's arguments appear to rest on the notion that all the factors listed in Article 3.4 must indicate injury and thus to depend on the success of its other complaint based on the need to evaluate all of the factors in Article 3.4, which we examined a moment ago.

131. The EC will now discuss India's substantive complaints. These are two. They are conveniently expressed by India[24] as follows:

- First, the EC relied on companies outside the domestic industry in order to find injury.

- Second, the EC, once it selected a sample from among the domestic industry, was not entitled to subsequently deviate from that sample in order to find injury.

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[22] Paragraph 80 of US' third party submission.

[23] The US refers in a footnote to paragraph 34 of the Definitive Regulation in this case in support of its view of what EC legislation "mandates". However, this paragraph is merely recalling that the domestic industry may be considered to be constituted by the co-operating and complaining producers since these constitute a major proportion of the whole industry.

[24] In paragraph 4.121 of India's First Written Submission.

132. We will also deal with the conflicting US allegation[25] that

> The EC acted inconsistently with the Agreement by not including all Community producers in the domestic industry

133. The basic provision of the Anti-Dumping Agreement on which these allegations are based is Article 4.1 which states that:

> For the purposes of this Agreement, the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products …

134. For the EC the meaning of this provision is perfectly clear. The "domestic industry" for which material injury need be found is **either** the domestic producers as a whole **or** those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products. Either one or the other suffices. The fundamental reasons for this is also clear for the EC. It is twofold. First, different parts of a domestic industry may be injured in different ways and to different extents. Second it may not always be possible to obtain the necessary data from all the producers as an investigating authority may not have the means of ensuring that disinterested producers provide the necessary accurate information. However it is considered that protective measures against dumping are justified if what is called "a major proportion" of the producers are materially injured.

135. The EC finds no basis in the *Antidumping Agreement* for India's contention that an investigating authority must make an irrevocable choice at the beginning of an investigation (or at any other point in the investigation for that matter) for basing its findings on the whole or a major proportion of the producers. If the investigating authority established that either the whole or a major proportion are injured, protection against dumped imports is justified.

136. In this case, the EC found material injury to "a major proportion." It is true that in the case of some injury factors the EC looked to the whole industry in order to make this determination and gave reasons why it thought this was more appropriate. However, if there is material injury for the producers as a whole then this is surely persuasive evidence that there is also material for a major proportion?

137. Even if this were shown not to be true, the EC still fails to see how India's arguments can be considered to undermine the EC's measures. A finding of material injury for only a major proportion of the producers is permitted but not required by the Anti-Dumping Agreement. The actions taken by the EC authorities in the bedlinen investigation are also justifiable on the basis that a Member may use both definitions of the domestic industry in the course of a single investigation.

138. India's second claim (relating to sampling) is even more mysterious. It is that, once the EC selected a sample from among the domestic industry, it was not entitled to subsequently deviate from that sample in order to find material injury. The EC finds no basis for this in the *Antidumping Agreement*. The purpose of taking a sample is that it is not possible or impracticable to investigate all producers. The sample represents the whole of the major proportion of the producers which constituted the Community Industry. Where data is available for that whole why cannot it be used? It is surely better to use the more complete data when this is available than the sample?

[25] Paragraph 89 of US' third party submission.

139. As the EC observed in its First Written Submission, in this and other aspects of India's arguments there appears to be confusion between, on the one hand, evidence, and, on the other, the conclusions drawn from evidence. As regards injury, the conclusions drawn from evidence must ultimately concern the domestic industry as defined in the investigation. However, there is no intrinsic limit to the types of evidence that may be used to arrive at such conclusions.

140. In particular, it surely cannot be excluded *ab initio* that the condition of EC producers as a whole may provide evidence of the condition of those producers who comprise the domestic industry.

(i) Conclusion

141. For these and the other reasons set out in its First Written Submission, the EC considers India's claims concerning the EC evaluation of the factors listed to in Article 3.4 *Antidumping Agreement* to be unfounded.

VI. CONSTRUCTIVE REMEDIES FOR DEVELOPING COUNTRIES

142. Last but by no means least, the EC wishes to remind the Panel of its position on India's treatment as a developing country.

143. The EC takes seriously the obligation to explore constructive remedies in the case of developing countries. It is quite untrue to suggest that the EC rejected India's overtures about undertakings. It was willing to explore this. However, in this investigation, contrary to India's assertion in paragraph 6.52, the reason why no undertaking was accepted was that none had been offered by the exporters within the time limits set by the EC Basic Regulation.[26] These time limits are a reflection of those imposed by Article 5.10 of the Anti-Dumping Agreement, and the general obligation to manage investigations expeditiously (Article 6.14 of the Anti-Dumping Agreement).

VII. CONCLUSIONS

144. If needed, the European Communities will articulate more detailed arguments in the remaining course of the procedure and will be happy to address any remaining doubt the Panel might have.

[26] See the fax sent by the EC authorities to the exporters' legal representatives on 22 October 1997, reproduced in Exhibit India-52.

ANNEX 2-4

QUESTIONS FROM THE EUROPEAN COMMUNITIES TO INDIA, EGYPT AND THE UNITED STATES

(15 May 2000)

To India

1. INITIATION QUESTIONS

(1) According to India, what type of evidence has to be evaluated in order to determine whether or not to initiate an anti-dumping investigation under Article 5.3 of the Anti-dumping Agreement? Could India illustrate its answer with examples taken from its own anti-dumping practice?

(2) Could India provide an example of how public notice of examination of evidence prior to initiation of an investigation has to be given? Does India consider that issues relating to evidence provided in the industry's complaint and examined for purposes of initiation should be dealt with in the public notice of conclusion? Could India illustrate its answer with examples taken from its own anti-dumping practice?

(3) According to India, how should the domestic industry's standing requirement be assessed for purposes of initiation? What is the standard of proof that the India considers necessary under Article 5.4 of the Anti-dumping Agreement? In its anti-dumping practice, does India only accept complaints for which support is expressed explicitly by individual domestic producers? In case of affirmative answer, could India provide actual examples of this expression of support? In case of negative answer, could India explain in which cases it considers that complaints filed on behalf of the domestic industry are acceptable?

(4) Could India explain how public notices of initiation should be formulated with regard to the initial standing determination, if possible also by way of actual examples? Does India consider issues relating to the initial standing determination in the public notice of conclusion of an investigation?

2. INJURY QUESTIONS

(5) Does India, in its own anti-dumping practice, attempt to determine that material injury is being caused only by those transactions that are dumped? The EC would refer India to the following examples of its practice:

> Hydrodesulpherisation Catalyst (HDS), Zinc Oxide Desulpherisation Catalyst (ZnODS), High Temperature Shift Catalyst (HTS), Low Temperature Shift Catalyst (LTS), Secondary Reforming Catalyst (SR), Methanation Catalyst (Meth) from Denmark – Preliminary findings. ADD/IW/39/95-96, Ministry of Commerce, 7 May 1997 (esp. paras. 18, 23) (Confirmed in Final Findings);
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> Sodium Cyanide from United States of America, Federal Republic of Germany (FRG), Czech Republic, Korea RP and the Territory of European Union – Preliminary Findings, No. 8/1/99-DGAD, Ministry of Commerce, 20 Oct. 1999. (pp. 19, 21) (Confirmed in Final Findings).

(6) Does India, in its own anti-dumping practice, evaluate all the factors listed in Article 3(4) *Anti-dumping Agreement* or only those that appear relevant? At the meeting with the Panel, the EC

referred India to paragraph 19 of its recent Final Findings dated 6 March 2000 in the *Anti-dumping investigation concerning imports of Sodium Cyanide from the USA, European Union, Czech Republic and Korea Republic*. 8/1/99-DGAD.

(7) Does India, in its own anti-dumping practice, attempt to determine whether dumping was occurring during the whole of the injury investigation period or does it assume that there was either dumping or no dumping in the period immediately prior to the investigation period (for dumping)? The EC would refer India to the following examples of its practice:

> Oxo Alcohols from Poland, South Korea, Indonesia, Saudi Arabia, Russia, Iran, US and the European Union – Preliminary findings No. 15/1/99-DGAD, Ministry of Commerce, Directorate General of Anti-Dumping & Allied Duties, Notification, 3 Dec. 1999. (see pp 41, 66, 70);
>
> Hydrodesulpherisation Catalyst (HDS), Zinc Oxide Desulpherisation Catalyst (ZnODS), High Temperature Shift Catalyst (HTS), Low Temperature Shift Catalyst (LTS), Secondary Reforming Catalyst (SR), Methanation Catalyst (Meth) from Denmark – Preliminary findings. ADD/IW/39/95-96, Ministry of Commerce, 7 May 1997 (esp. paras. 1-o, 18, 21-a, 23). (Confirmed in Final Findings)
>
> Sodium Cyanide from United States of America, Federal Republic of Germany (FRG), Czech Republic, Korea RP and the Territory of European Union – Preliminary Findings, No. 8/1/99-DGAD, Ministry of Commerce, 20 Oct. 1999. (pp. 5, 21) (Confirmed in Final Findings)

3. PROCEDURAL QUESTIONS

(8) On page 79 (para 3.135) of its First Written Submission, India reveals the profit margins of companies in other countries. Where did India obtain this highly confidential information?

(9) In Exhibit 16 a letter from the Indian government agency responsible for export licensing of the products under consideration reveals that there are 287 Indian exporters. During the investigation, the EC was told that only of 84. The export volumes indicated are also inconsistent with those given to the EC. Can India please explain these discrepancies?

<u>To the US</u>

1. INITIATION QUESTIONS

(1) According to the United States, what type of evidence has to be evaluated in order to determine whether or not to initiate an anti-dumping investigation under Article 5.3 of the Anti-dumping Agreement?

(2) What is the standard of proof that the United States considers necessary for purposes of initiation of an anti-dumping investigation under Article 5.3 of the Anti-dumping Agreement?

(3) The US has maintained that Article 5.4 of the Anti-dumping Agreement allows associations of producers to bring a complaint on behalf of the domestic industry. Could the United States illustrate what type of enquiry they consider necessary on the part of the investigative authorities to satisfy themselves that the complaint is in fact brought "on behalf of" the domestic industry?

(4) Does the US consider that an investigating authority should close an anti-dumping proceeding that it has initiated if it should determine, during the course of an investigation and on the basis of

information that was not available to the authority before the investigation was initiated, that the domestic producers expressly supporting the application do not account for at least 25 per cent of total domestic production?

2. INJURY QUESTIONS

(5) Article 4.1 *Anti-dumping Agreement* provides that the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products.

Why does the US consider that

> "The EC acted inconsistently with the Agreement by not including all Community producers in the domestic industry for the purposes of evaluating other factors such as price and impact under Articles 3.1, 3.2, 3.4 and 3.5."[1]

(6) The US states that India has not made a claim that the EC should have defined the Community Industry as all the producers. Need the Panel therefore consider these comments of the US?

(7) How does the US interpret the term "a major proportion" of the industry?

(8) Does the US consider that the only cases where less than all producers may be considered to be the domestic industry are those set out in sub-paragraphs (i) and (ii) of Article 4.1? If so, why does not Article 4.1 say this? If not, what are the criteria which, according to the US, allow less than all producers to be considered to constitute the domestic industry?

(9) Does the US consider that an investigating authority must irrevocably choose at the beginning of an investigation its definition of "domestic industry"?

(10) The US argues in paragraph 93 that the sample of domestic producers must be "statistically valid". In this context, does "statistically valid" mean the same as "representative"? The US criticisms of the EC sample of domestic producers seem to derive exclusively from its view that it was wrong to define the complaining and co-operating producers as the "Community industry". Is this correct?

(11) The US invokes Article 6 in support of its view that the EC should have looked at all the Community Industry. The EC does not deny that an excluded domestic producer is an 'interested party' within the meaning of Article 6 and is entitled to defend its interests, i.e., present information to the investigating authority. But is the US really arguing that this means that all interested parties must be investigated ?

(12) In paragraph 96 of its submission, the United States states that it considers that "all enumerated factors [in Article 3.4] must be evaluated". On what basis does the US construe an obligation to evaluate all *relevant* factors (the terms of Article 3.4) as an obligation to evaluate all factors, even if it is apparent at the outset that some factors are not relevant? The US seeks to defend the HFCS panel discussion of this issue. Where in its report did the panel in that case consider the EC's arguments presented in its First Written Submission and its Oral Statement (which the US now has)? The US also refers to the *Korea – resins* report.[2] Where in that report is there any statement

[1] Paragraph 89 of US' third party submission.

[2] Korea – Anti-Dumping Duties on Imports of Polyacetal Resins from the United States (Korea-Resins), BISD 40S/205, adopted 27 April 1993.

that all factors must be evaluated, whether relevant or not, or any consideration of the arguments that the EC has made in this case?

To Egypt

(1) The EC notices that, both in the Written Submission and in the Oral Statement, Egypt refers to a figure of 15 per cent as the share of total EU production passively supporting Eurocoton complaint. Could Egypt identify the source of this data?

ANNEX 2-5

RESPONSES OF THE EUROPEAN COMMUNITIES TO QUESTIONS
FOLLOWING THE FIRST MEETING OF THE PANEL

(19 May 2000)

Questions from the Panel for the EC

14. Under what circumstances would the EC go from the option of a calculation based on Article 2(6)(a) of its Basic Regulation to a calculation based on Article 2(6)(b)? Has the EC ever done so?

The EC will use the option in Article 2(6)(b) rather than that in Article 2(6)(a) if the latter cannot be used. Such occasions are so uncommon that no general practice can be described. An example is Commission Decision of 20 March 1998 terminating the anti-dumping proceeding concerning imports of tungstic oxide and tungstic acid originating in the People's Republic of China (OJ L 87, 21.3.98, p. 24):

> (19) The cost of manufacture was obtained by adding all costs, both fixed and variable, for materials and manufacturing in the country of origin. In the absence of data specific to oxide/acid for other producers/exporters in the country of origin, as far as SG&A are concerned they were calculated by reference to SG&A on sales of tungsten metal powder, that is, the same general category of product, by Metek on its domestic market during the investigation period, in accordance with Article 2(6)(b) of the Basic Regulation.

15. Would the EC take the position that the ordinary course of trade would not include sales between related parties? In other words, is the decision that sales are in the ordinary course of trade based on the question of profitability alone, or, for instance, does it also include consideration of whether sales are made between related parties?

The issue of related parties usually arises when export prices are being determined (ADA Article 2.3), whereas that of sales 'in the ordinary course of trade' concerns the determination of domestic sales that can properly be used in making a comparison with the export prices. However, it can also happen that domestic sales are made between related parties. The EC's treatment of such sales (in arriving at the normal value) is regulated by Article 2(1) of the Basic Regulation:

> Prices between parties which appear to be associated or to have a compensatory arrangement with each other may not be considered to be in the ordinary course of trade and may not be used to establish normal value unless it is determined that they are unaffected by the relationship.

Thus the EC does include consideration of whether sales are made between related parties in deciding whether domestic sales are made 'in the ordinary course of trade'.

16. Would the EC apply the 'ordinary course of trade' principle if it applied Article 2(6)(b) of the Basic Regulation.

Yes. It is contained in the text of this clause.

17. Is the EC of the view that sales not in the ordinary course of trade may, at an investigating authority's discretion, either be included in or excluded from the category of sales from which data concerning profit are derived for purposes of the subparagraphs of Article 2.2.2?

The 'ordinary course of trade' criterion is part of Article 2.2.2(i) and (ii), but, as illustrated in the answer to question 15, when it is not satisfied Members are permitted rather than obliged to exclude data.

18. Does the EC not exclude from volume, for the purposes of its injury analysis, imports from companies, that is, investigated foreign producers or exporters, found <u>not</u> to be dumping or having *de minimis* dumping margins?

No. The EC has addressed this issue in its first written Submission (paragraphs 215 et seq), and will make additional arguments in its Rebuttal Submission on the meaning of the term 'dumped imports'.

19. Could the EC explain how it takes into account, in the context of analyzing injury and causation during the 'period of investigation', (which the Panel understands to be the period over which the dumping determination is made), the analysis and conclusions concerning the domestic industry over the 'injury investigation period'.

The state of the domestic industry and the existence of injury is assessed over a longer period ("the injury investigation period") than that for which dumping is investigated (the investigation period" or "IP"). This is done so as to put the situation of the domestic industry into perspective and to reveal the trends to be

The data collected during the 'injury investigation period' relate to changes during that period in both the condition of the domestic industry (as measured in factors such as profits and prices), and in the volumes and prices of imports, which provide evidence of causation. However, the conclusions regarding injury and causation relate principally to the IP – normally the last year of the injury investigation period.

Thus, a finding that the condition of the domestic industry was significantly worse during the IP than in previous years will incline the authorities to conclude that it was suffering injury. If the volumes of dumped imports and/or price undercutting (or suppression, etc.) were significantly greater during the IP than in previous years, the authorities will be more inclined to find that the dumped imports were causing the injury.

If it appears that the domestic industry was already suffering injury before the IP, this may help to confirm that dumping is causing injury. This may involve a presumption that the dumping found in the IP was also present before the IP.

Of course, other potential causes of the injury would have to be considered before a final conclusion could be reached on causation.

20. What is meant by the phrase 'not a significant independent factor' as used by the EC in Table 4 of its first written submission with respect to certain of the Article 3.4 factors? Does it mean that the particular factor was considered and was found to not be significant, or that the particular factor was considered relevant, was evaluated, and was found not to indicate injury?

The interpretation to be given to the phrase 'an evaluation of all relevant economic factors and indices' must be flexible enough to cope with the enormous variety of circumstances that arise in investigations into injury and injury causation. Relevance is a matter of degree rather than of 'yes or

no'. In some cases it will be immediately apparent, even before the initiation of an investigation, that certain factors are not relevant and in others this may not be apparent until much later, so that the process of determining the relevance of a factor may be little different from that of evaluating it.

By using the terms 'significant' and 'independent' the EC sought to explain the application of these notions to the situation that was revealed by the investigation in the bed linen case.

In this case the investigators were faced with a situation where the disappearance of many businesses in the period leading up to the IP had removed competition from the market and had thus benefited the remaining producers (PM rec. 90). The result of this was that factors which might otherwise have been expected to reveal injury were indicating an apparently healthy industry (PM rec. 92; DR rec. 41). It could be said that they had lost their relevance, or at least their direct relevance, to the conclusion on injury. On the other hand, regarding two factors – profits and price – there were strongly indications of injury (PM rec. 93; DR, rec 40).

21. Did the EC authorities consider the exit of companies from the industry as evidence of injury by dumped imports or as evidence of the state of the industry?

Although there is mention in the Regulations of the notion that the exit of companies was an indicator of injury caused by dumped imports (DR rec. 41), the principal significance of the disappearance of companies is to explain how an affirmative determination of injury could properly be made when on all but two factors, the domestic industry was in an apparently healthy state (PM recs. 81, 90; DR rec. 41).

Without information regarding the exit of the companies the Regulations would have given a misleading picture of developments in the state of the industry during the 'injury investigation period'. In particular, this information supported the finding that some of the Article 3.4 factors were not relevant (i.e. meaningful) in this case (e.g. employment and production), or that the relevant information risked giving a distorted image of the industry's condition (e.g., sales volume and value, capacity, capacity utilisation, and inventories).

22. India suggests there were multiple 'definitions' of industry. Could the EC confirm that the Community industry was defined exclusively as the 35 cooperating complainants? Could the EC clarify the basis on which certain companies were apparently excluded from the Community industry as ' non-complainants'. Does the EC agree that one company (Luxorette) was in the sample but not in the Community industry? If not, could the EC explain the situation of this company?

Yes. The Community industry was defined exclusively as the 35 cooperating complainants? This is indicated in PR 57 and confirmed in DR 34.

AFTER initiation 11 companies were excluded from the list of complaining companies (see: recitals 52 (7 companies), 54 (1 company) and 56 (3 companies) of the Provisional Regulation.

The reasons for excluding them was that some were importing high volumes of Bed Linen, some were not producing the product concerned any longer, some were not focussed on the production of Bed Linen in the EC (this was the case of Luxorette) and some for lack of cooperation.

Luxorette was not in the Community industry and was not in the final sample. The situation is that Luxorette was intended to be included in the sample and, as indicated in Recital 8 of the Provisional Regulation, an on-the-spot verification visit took place at the premises of the company. However, as indicated in 54 of the Provisional Regulation, it was excluded from the Community industry and thus from the sample.

23. Is the EC of the view that, given the language of Article 12.1, an Authority, consistently with that provision, is not required to disclose or explain its conclusions regarding the standing determination under Article 5.4?

As the EC observed in its first written Submission (para. 5, as corrected in the oral Statement), although India invoked Article 12.1 in its panel request (points 1 and 2), it has not elaborated any claims under this provision in its Submission (other than asserting that the 'The initiation of the proceeding against Bed Linen from India by the EC is inconsistent with Article 12.1 of the ADA', paragraph 7.1.1). Furthermore, as regards the standing issue (point 1 of the panel request) India's complaint was that 'the EC has never during the investigation or in the published Regulations adequately responded to detailed queries from Indian exporters on this issue'. Thus no claim has been made regarding the disclosure, at the time of initiation, of the details of the standing determination.

Article 12.1 requires public notice of the authorities determination that they 'are satisfied that there is sufficient evidence to justify the initiation of an anti-dumping investigation'. The contents of this notice are listed in Article 12.1.1, but the list does not refer to the standing determination under Article 5.4.

Nevertheless, exporters are entitled to substantial disclosure on this matter. Under Article 6.1.3 they receive the text of the complaint. That text must (according to Article 5.2) include substantial information regarding the producers on whose behalf the complaint has been made. The right of confidentiality results in certain data being excluded, among which are the production volumes of the producers. Of course, such information is basic to calculating whether the application satisfies the support levels required by Article 5.4, so the extent to which the authorities can elaborate on the question of standing is limited.

In the bed linen case the EC complied with all its obligations regarding disclosure. It rejects the apparent view of India that the investigating authorities are under an obligation to respond throughout the investigation to repeated claims that they had not complied with those obligations.

24. At, *inter alia*, paragraphs 84, 86, 87, and 94 of its first oral statement, the EC refers to a determination of dumping for exports from a <u>country</u>. Could the EC clarify its position that, under the AD Agreement, the determination of dumping is country-specific, not specific to individual producers and/or exporters?

The country-based nature of anti-dumping determinations is apparent from several aspects of Article VI GATT and the *Antidumping Agreement* . In particular it is evident from Article 12.1.1 that investigations can only be opened as regards countries (the notice of initiation must contain a 'statement of the exporting country or countries and the product involved'). All exports of the product from the named country or countries are investigated in order to determine dumping and injury. Although dumping duties are as far as possible calculated for individual exporters (inter alia for reasons of effectiveness), there is normally always a general duty applicable to all unnamed exporters on a country-by-country basis.

25. Could the EC please explain its view that 'factors' under Article 3.4 are negative in character – what is 'negative' about production, output, sales, etc.? Does the EC mean that in evaluating the factors in Article 3.4, an investigating authority need only take into account those which show downturns, that is are 'negative' for the domestic industry, and that if the information concerning a particular factor is positive for the domestic industry, it need not be evaluated and taken into account at all? Can the EC reconcile the apparent contradiction between the views expressed at paragraphs 257 and 261 of its first written submission?

The point that the EC would like to make is not that the factors themselves are negative. As the Panel implies, these are intrinsically neither positive nor negative. However, Article 3.4 refers to particular aspects of these factors, and it is these that are negative. Thus, Article 3.4 does not refer simply to 'sales', but to 'actual or potential decline in sales' (and likewise for profits, etc.). Similarly, it does not refer simply to 'cash flow', or even to 'effects on cash flow', but to 'actual and potential negative effects on cash flow' (and likewise for inventories, etc.).

The view expressed by India, and unfortunately by the panel in *Mexico – High Fructose Corn Syrup*, is that the factors listed in *Antidumping Agreement* Article 3.4 constitute a compulsory checklist. Thus, to satisfy the requirements of the *Antidumping Agreement* , national measures imposing anti-dumping duties would have to work through this list, explicitly addressing each of the items on it. As the EC explained in its first written Submission (paragraphs 263 to 289), it believes that this apparently literal interpretation of Article 3.4 is incorrect, and when the words are read in their context in light of their object and purpose, they do not impose a compulsory list. However, if this interpretation is not accepted, then the EC argues that the literal approach must be applied consistently, and that, as explained above, the text refers, in almost all instances, exclusively to the negative aspects of the factors that are subject to the requirement. In paragraph 262 of its Submission the EC shows how its determinations in the bed linen case have explicitly examined all the negative aspects of the factors listed in Article 3.4, and have therefore satisfied such a requirement.

Finally, the EC emphasises that, as shown in the two Regulations, in the bed linen case consideration was not confined to these negative aspects, but included a wide range of factors both positive and negative.

26. Can the EC please explain on what basis any fact can have 'already been found to be irrelevant'? How is this possible without considering or evaluating that factor in some measure? Could the EC further explain how a Panel can assess whether an investigating authority has acted consistently with its obligations if the conclusion that a factor is not relevant must be assumed from the absence of any discussion of it?

The EC does not mean to suggest that a factor can be found to be irrelevant without any consideration whatsoever. However, in some circumstances the fact that particular categories of data will be irrelevant to the issue of injury may become apparent at an early stage in the enquiry, or, because of the experience of investigators, may be known even before it is opened.

For example, in the sector of the textile industry examined in this investigation, capacity utilisation is a factor of little if any significance to a finding of injury because capacity is so easy to adjust as assets are regularly bought sold and closed down. Indeed because of the large variety of products produced and the ease with which production can be switched from one to the other, there is no meaningful way to measure capacity. To burden producers with questions on this issue would therefore serve no purpose and conflict with the obligations expressed in *Antidumping Agreement* Articles 6.13 and 6.14 (as explained at paragraph 271 of the EC's first written Submission). Likewise, arguments for or against the existence of injury on the basis of data relating to capacity utilisation would almost certainly be fallacious.

Regarding the question concerning assumptions and relevance, the EC has sought to show (particularly in paragraphs 246 et seq. of its Submission, as elucidated in the answer to the previous question) that the obligation in Article 3.4 to evaluate all relevant economic factors and indices having a bearing on the state of the industry will not always require the completion of a checklist of investigations.

The point is illustrated by the circumstances on the bed linen industry. In that investigation an analysis of the industry showed, firstly, that the negative data on certain factors (profits and prices) justified an overall conclusion of injury, and secondly that (because of closures and consolidation)

data obtained on other factors could give a false impression of good health. In circumstances such as these it would not be unreasonable to conclude that the latter factors were not relevant, without examining them all. (Some examination would probably be necessary in order to confirm the overall analysis).

27. Assuming that the EC is correct that one of the Article 3 factors <u>can</u> give decisive guidance in the examination under that Article, how can a Panel evaluate such a determination without understanding how, that is in what manner, based on what reasoning or analysis, the investigating authority concluded that the single factor was decisive.

A panel must carry out this task by examining the situation of the industry as revealed in the determination and the arguments and explanations advanced by the parties to the dispute. The circumstances of the bed linen case are pertinent to the point that the EC wishes to make (that there were two decisive factors rather than one is not significant). As explained in the answer to the previous question, in the peculiar circumstances of the case, indications of injury were apparent in only two of the factors listed in Article 3.4, in other respects the industry was in an apparently healthy condition.

In the two Regulations the EC gave a full explanation of the circumstances giving rise to this unusual situation. This explanation consisted not of an examination of the other economic factors (although such factors were examined), but of an account of how recent developments in the industry (the exit of firms) had made those factors into unreliable indicators of injury. Of course, the Regulations also explained how data regarding the two decisive factors established the existence of injury.

In this way the Regulations provide a satisfactory basis for a Panel to exercise its power of review.

28. In paragraph 132 [112] of its first oral statement, the EC seems to suggest that the possibility that data will not be available from all producers somehow justifies declining to consider such producers as part of the domestic industry, without even asking for the relevant data first, and despite that they are producers of the domestic like product. If the Panel's understanding is correct, can the EC explain the legal justification for this position.

The second arm of the definition of 'domestic industry' in Article 4.1 permits Members to adopt a definition in terms of producers whose output constitutes a 'major proportion', etc. The Agreement contains no explicit rule regarding the choice between the two options presented in Article 4.1.

The EC notes that India has not called into question the EC's exercise of this choice. Furthermore, although India challenged the EC's sampling of the industry in its Submission (Claim 16, ruled by the Panel to be outside its terms of reference), and in its original panel request (point 14, not pursued other than in the context of Claim 16), it has never challenged the EC's application of the notion of 'major proportion'.

In the part of its oral statement to which the Panel refers, the EC was merely suggesting what motivations the drafters of the Agreement may have had in conferring upon Members a choice as to the definition of domestic industry. It was not suggesting that Members have to justify the way in which they exercise this choice.

29. Can the EC explain whether, and if so, how, the fact that the EC was 'willing' to explore constructive remedies under the AD Agreement was communicated to India?

The EC made no specific communication of this fact to India. From an early stage of the proceedings the EC was aware that the investigated exporters fully appreciated their rights under Article 15. For example, their legal representatives raised this issue in their brief of 25 October 1996 (Exhibit India-50, section 7).

30. Without prejudice to the EC's preliminary objection to consideration of evidence relating to the substance of the consultations, with regard to India's assertions as to what the EC represented to India during the consultations as actions taken in pursuance of the Article 15 obligation, (i) Are these among the aspects of the reports of the consultations that the EC challenges as inaccurate?; and (ii) Does the EC, in fact, assert that any of these actions was taken in fulfilment of its obligations under Article 15? If not, why did the EC take these actions (assuming it did)?

The EC believes it can most clearly respond by explaining in its own words what happened. In answer to India's questions during the consultations it said):

> It was pointed out that while specific concessions made to Indian firms in view of their location in a developing country were not spelled out in the published Regulations, the firms concerned were granted special treatment in a number of ways. The preparation of simplified questionnaires for exporters, the acceptance of responses beyond the stated deadline and consequent granting of co-operator status, and the individual treatment of newcomers despite the case having been based on sampling, are all examples of special consideration. (Follow-up to second round of consultations, 29 June 1999, Exhibit India-14, question 115.)

These measures go beyond the requirements of Article 15 because they concern procedures rather than 'constructive remedies'.

The EC endeavours to take account of the special situation of developing countries generally, not only to the extent that this is required by the *Antidumping Agreement*. This is why it also made the procedural concessions described in the above quoted text.

Having shown interest at an early stage of the proceedings in receiving special treatment as a developing country (briefs of 25 Oct. 1996, Exhibit India-50, and 6 Feb. 1997, Exhibit India-54), the exporters did not raise this issue again until after disclosure. Thus, the immediate reason why no undertaking was accepted by the EC was that none was ever offered by the exporters (Exchange of correspondence, Exhibit India-72).

31. Could the EC please provide the Panel with the dates on which the following occurred in the bed-linen investigation in dispute: (a) final disclosure to parties, (b) offer from Texprocil regarding price undertakings, (c) letter from the EC indicating that offers of undertakings would no longer be considered, (d) the date on which the Commission staff completed work and forwarded a recommendation or other relevant document to the decision-making authority, and (e) the date of the final determination by the Council. To the extent possible, could the EC provide the Panel with a 'standard' timetable for the above-listed events.

(a)	Final disclosure to parties (dumping margin calculation):	3.10.1997
(b)	Offer from Texprocil	13.10.1997
(c)	Letter from EC regarding offers:	22.10.1997
(d)(i)	Formal proposal presented to Commission	4.11.1997
(d)(ii)	Recommendation forwarded to Council:	14.11.1997
(e)	Final determination:	28.11.1997

Standard timetable:

Completion of investigation	0
Preparation of formal document	+10 days
Decision by Commission	+4 weeks
Adoption by Council	+1 month

Questions from the Panel for both parties

32. The Panel understands, from the statements of the Parties at the first meeting, that the EC authorities calculated SGA expenses on the basis of all sales, as opposed to only sales in the ordinary course of trade, and that India has posed no claim of violation with respect to this methodology. Could the parties confirm whether the Panel's understanding is correct, and that the parties agree that Article 2.2.2(ii) allows the calculation of SGA expenses on the basis of all transactions?

Since in the bed linen investigation the SGA expenses were the same for all sales, the question whether the calculation of SGA should be limited to sales in the ordinary course of trade did not arise.

33. Where an investigation involves multiple product types, investigating authorities will have different SGA expenses for each of them, not all of which product types may be sold for profit. As a result, if the investigating authority excludes from consideration sales of one or more product types as being not sold in the ordinary course of trade, it will have different data set for calculation of SGA expenses as compared to those for calculation of profit. In the view of the parties, would such a methodology fulfil the 'fair comparison' requirement of Article 2.4.

The EC notes that, as the Panel observed regarding the previous question, India has posed no claim of violation with respect to the EC's methodology regarding the calculation of SGA. Furthermore, as the EC said in its response to that question, since the SGA expenses were the same for all sales the use of different data sets had no consequence on the level of SGA that was determined.

34. Would the parties indicate whether, in their view, in a case in which there is information from more than one exporter or producer available for use in the calculation of profit amounts under Article 2.2.2(ii) (including the case in which a proper sample includes more than one exporter or producer), the investigating authorities may nonetheless choose to rely on the information concerning only one of those exporters or producers?

The EC has proceeded on the assumption that Article 2.2.2(ii), by referring to 'weighted average', requires Members to use data from all the eligible exporters or producers. The 'ordinary course of trade' criterion will apply in identifying those that are eligible. In addition, the selection would be subject to the limits imposed by sampling.

35. As the Panel understands it, India takes the position that in the case of multiple comparisons of weighted average normal value to weighted average export price, Article 2.4.2 specifically precluded 'zeroing', but that Article 2.4.2 does not address the question of 'zeroing' in the process of 'summing up' the results of multiple transaction to transaction comparisons of normal value and export price. The Panel notes that if a Member makes separate comparisons of weighted average normal value and weighted average export price for each quarter during the dumping investigation period, the same question of 'summing up' arises.

The EC agrees that Article 2.4.2 does not address the process of summing up the results of multiple transaction to transaction comparisons. This underlines the point made by the EC (in

paragraph 209 of its first written Submission) that Article 2.4.2 does not provide a guide for the second phase of the process of arriving at a single dumping margin for an individual exporter or producer.

The Panel is correct in pointing out that comparable sales are not defined solely by physical similarities. In fact, in addition to differences noted by the Panel regarding in the time of sale, there is at least one other category of differences that can prevent comparison: that of level of trade. Thus in some investigations it is necessary to distinguish the dumping margin on wholesale sales from that on retail sales. Of course, all three types of difference can occur in a single investigation, so that it might be necessary to calculate (by weighted averaging) dumping margins for 'Model A, 1st quarter, retail sale', and so on. However, in most investigations there are no differences of time or level of trade to be taken into account.

36. The Panel understands India to take the view that an investigating authority, having established a sample for the consideration of injury to the domestic industry, is limited to considering only information for that sample set, and must ignore other information concerning the condition of the domestic industry if it relates to producers outside the sample? Does this not conflict with India's suggestion that the EC was obliged to take account of Standard's information in calculating normal value despite the fact that it was not part of the sample established by the EC for the dumping calculation? Can the EC explain how its action in going beyond the sample in considering information on the question of injury to the domestic industry is consistent with its apparent view that it was precluded from, or at the minimum was not required to, go beyond the sample to take into account Standard's data for the calculation of the profit rate under Article 2.2.2(ii). Why did the EC authorities go beyond the sample data to data for the Community industry, and further to data for all EC bed-linen producers in considering some elements of their analysis under Article 3.4, and where are these reasons explained in the final determination?

The EC observes that in its Panel request, which sets the boundaries of the Panel's jurisdiction, India made no claim regarding the selection of samples, either in relation to exporters or producers when calculating the dumping margin, or in relation to domestic producers when investigating injury. The sole claim made by India in the context of sampling was that the EC was not consistent in its use of the sample chosen in the context of Article 3.4 (point 14).

Furthermore, India did not raise the question of inconsistencies in the selection of samples as between the dumping and the injury investigations.

In its first written Submission India launched an attack on the EC's selection of exporters and producers for the injury sample that was entirely based on ADA Article 6. That attack has been found by the Panel to be outside its terms of reference.

These introductory comments are relevant to the Panel's question because the arguments of India regarding Standard Industries have in all instances concerned its demand that the company be included in the sample of exporters and producers selected by the EC authorities for determining the dumping margin.

The EC regards that issue as quite different from the question whether, in considering injury, it is permissible to look at data for the whole of the domestic industry as well as that for the sample companies alone. The EC cannot see any way in which an interpretation of the rules defining how a sample should be constructed for a dumping investigation could have a bearing on the application of a sample used for the determination of injury. In fact, it is not obvious that there would be any connection even if both issues concerned the injury margin. Thus the rules governing the selection of companies for the purposes of determining an injury margin have no logical relationship with the application of that sample.

There is another distinction that can be drawn between the two concepts that are juxtaposed in the Panel's question. In the case of Standard Industries and the dumping margin the issue was whether one particular company should be added to the sample. The issue in the injury case might be represented as being whether the sample should be expanded, for certain purposes, from a selection of companies, to the entire class. A sample consisting of the entire class is, for statistical purposes, a perfect sample. To that extent its use has an inherent logic. The expansion of the dumping sample to include one more company has no such logic. It has to be justified on the particular facts of the case.

Therefore the answer to the Panel's penultimate question is that the situations presented by the Panel are not comparable, so the question of inconsistency cannot arise.

Regarding the Panel's final question, the EC notes that the ADA contains no explicit rules for sampling the domestic industry. Article 3.1 requires the EC authorities to make a determination of injury that is 'based on positive evidence and involve[s] an objective examination'.

In its Initiation decision (Exhibit India-7) the EC said that:

> The Commission intends to investigate injury to the Community industry by, on the one hand, examining the reliability of the sources of the information submitted in the complaint, and, on the other hand, by means [sic] questionnaires to be addressed to a sample of Community producers supporting the complaint.

The sample was to be based on the 'largest representative volume of production of Community industry which can reasonably be investigated in the time available'.

Thus at the outset the Community indicated that it did not intend to confine itself to information obtained in the sample.

In any event, the justification for using data for the whole Community industry, where they are available, is self-evident. As the EC noted in paragraph 330 of its first written Submission, a sample can at best give an approximation to the true figure. If the true figure is available it should be used. This mixing of data sources in no way subverts the validity of the investigation.

The use of data for all producers is justifiable in so far as it casts light on the condition of the domestic industry. The Regulations contain no indication that such data were used for any other purpose.

37. In the view of the parties, does the term 'anti-dumping duties' in the second sentence of Article 15 include provisional measures, or refer only to definitive duties? Could the parties, in their answers, refer specifically to the text of other provisions of the AD Agreement which relate to provisional and/or final duties and/or measures?

The applicable rule of interpretation is that of the ordinary meaning to be given to the terms of the Agreement, in their context, in the light of its object and purpose. The Panel's question implies that an examination of the terms used by the Agreement will be especially significant.

In the Anti-Dumping Agreement there are relatively few occurrences of the term 'anti-dumping duty' (or 'duties') where it is not also made clear which of these types of duty is intended. The Agreement often uses the explicit terms 'definitive anti-dumping duty (or duties)', 'definitive duties '), and 'provisional duty'. In other places different, but equally clear grammatical constructions are used to class the duty in question as either provisional or definitive.

It could be argued that in those few cases where the type of duty is not made obvious the intention of the Agreement is to cover both types of duty, because where the intention is to refer to one only, that is made clear in the text.

This is probably the case in Article 4.2 (duties applied to a geographical area only). In Article 9, many of the rules for the imposition and collection of anti-dumping duties appear appropriate for both kinds of duty. However, some are unlikely to be applicable to provisional duties, for example, the rules on refunds in Article 9.3.2, and on new-exporter reviews in Article 9.5.

Article 8.1 contains the phrase 'provisional measures or anti-dumping duties', so that it is clear that the anti-dumping duties in question are not provisional duties. However, because of the juxtaposition of the two terms it is evident that the second refers to definitive measures only, and to have included the word definitive would have been superfluous.

Thus, a purely textual analysis of the Agreement suggests that where the term 'anti-dumping duties' is unqualified, it refers to both kinds of duties, except perhaps in so far as there are practical reasons why it could not be so applied.

Bearing in mind the basic rule of interpretation, this construction of the term should not be applied to the second sentence of Article 15 without taking into account 'context', and 'object and purpose'.

The panel in *EC – Cotton yarn from Brazil* observed that whether the measure would affect essential interests 'could only be ascertained subsequent to the determination of the amount of anti-dumping duty to be applied' (ADP/137, adopted 30 Oct. 1995, para. 585).

The level of duties that is to be applied is not certain until the definitive measures stage of the investigation. Furthermore, in the EC, provisional duties are always implemented in the form of the giving of securities rather than the payment of duties. Such securities may be, and often are, released at the definitive stage. (This was the case in the bed linen investigation). In contrast, a price undertaking accepted at the provisional stage cannot be retroactively cancelled in any meaningful sense, since the exporter will have already respected its terms.

For these reasons, the EC does not consider that there was an obligation to explore the possibilities of "constructive remedies" at the provisional stage of the investigation.

38. In the view of the parties, does the fulfilment of obligations imposed by Article 15 go beyond the fulfilment of obligations under Article 8.3? If so, what would that involve? In particular, is it necessary for the investigating Member, for instance, to take the initiative to seek an understanding, and if so, how, and when, is that to be done? And again, if the fulfilment of obligations imposed by Article 15 does go beyond the fulfilment of obligations under Article 8.3, how did the EC authorities' actions in the context of the Bed Linen investigation go beyond the fulfilment of their obligations under Article 8.3.

It is generally accepted that the second sentence of Article 15 imposes an obligation on Members. Although the scope of that obligation remains uncertain, the EC accepts that, in principle, it goes beyond that in Article 8.3. For example, in the case of developing countries that are unfamiliar with anti-dumping proceedings, the EC recognises an obligation to ensure they are aware of the possibility of offering undertakings. However, where developing countries are experienced in such proceedings, or where their exporters are professionally represented, there is no need for such action. Thus, in answer to the Panel's second question, the EC believes the scope of the obligation will depend on the extent to which exporters in the developing country could be prevented by lack of experience, etc., from effectively defending their interests.

In the present case the record of the discussion regarding undertakings was described in the EC's first written Submission (paragraph 369), from which it will be seen that the exporters' representatives (who are obviously very familiar with EC anti-dumping proceedings) did not raise the possibility of giving undertakings in time for it to be dealt with.

In these circumstances the EC contends that it has fulfilled its obligations under Article 15.

In any event, India's claim (point 18 of the panel request, and paragraph 6.32 of the first written Submission) is that 'Inconsistently with Article 15 ADA, the EC failed to consider India's special situation of developing country Member before imposing provisional anti-dumping duties'.

In the EC's view, there can be very little opportunity for exploring possibilities of constructive remedies before the imposition of provisional measures. Despite the fact that Article 8 envisages the acceptance of undertakings at the stage of provisional measures, the EC has found such an option to be 'impractical' (as envisaged in Article 8.3), and no longer provides it. One of the principal characteristics of such measures is that they are made on the basis of partially-formed judgements on the issues of dumping and injury. Were the EC to accept undertakings from exporters at this stage, they would have to be limited to the period before the imposition of definitive measures because of the likelihood that further enquiries (permitted by Article 8.4) would lead to a revision of the authorities' conclusions. It is the EC's judgement that these arguments apply equally to exporters in developing countries. Furthermore, as already mentioned, undertakings cannot be retrospectively repealed.

In addition, in the present case, the EC has argued (paragraphs 22 et seq. of the first written Submission) that the Indian claims that challenge the EC's Provisional Regulation are not within the Panel's jurisdiction. Although India's claim regarding Article 15 does not attack the Provisional Regulation as such, it relates to a phase of the proceedings that leads to the adoption of provisional measures. Furthermore, the obligation that the EC is accused of infringing – that of exploring possibilities of constructive remedies – is explicitly linked to the application of provisional anti-dumping duties (see answer to Question 37). Consequently, it is this measure that is called into question if the obligation in Article 15 is not observed. Since the WTO-compatibility of this measure is not within the Panel's jurisdiction, the issue of an infringement of Article 15 also becomes moot.

Questions from India

Question 1

The EC states at paragraph 38 of its First Oral Statement that "even if, during the course of the investigation, information became available which caused the authorities to conclude that they had been mistaken regarding the sufficiency of the evidence for the purposes of the initiation decision, that would not in itself be a basis for halting the investigation." In light of this statement, could the EC please clarify whether it agrees with the past panels (Swedish steel; Mexican cement) that have held that the failure to effect a proper standing determination is a fatal error which cannot be cured retro-actively?

As this is not what happened in the present dispute, the EC considers the question theoretical.

Question 2

In its paragraph 34 of its First Oral Statement the EC acknowledges that in fact it has considered "information gained during a previous investigation on bedlinen." Can the EC please provide details of this information that it considered?

As the reference in paragraph 34 of the EC Oral Statement is only incidental, the EC does not consider this information as material for the current dispute. Given the advanced stage of the proceedings, the EC will give factual information of this kind only if the Panel believes it is necessary for the solution of the dispute.

Question 3

Similarly, Can the EC provide details of the "number of exchanges" that took place in the process of verification of standing, as referred to in the Footnote 1 of EC Exhibit-4. Can the EC provide details of other similar "exchanges", if any, between itself and producers [or Eurocoton and/or national associations] in the period between the termination of Bed Linen-I and the initiation of Bed Linen-II?

In the framework of the analysis of standing, the Commission Services were in contact both in writing and orally with associations and companies.

Question 4

In paragraph 41 of its First Oral Statement the EC implies to have relied on the 25 per cent test as the minimum required to determine standing. In view of the absence of any comments on the separate 50 per cent test, and India's Exhibit-79, is it factually correct that the EC did not in fact before 13 September 1996 consider the six Spanish companies not opposed to the initiation?

Yes.

Question 5

In paragraph 43 of its oral statement the EC explains that the arguments concerning the initiation were "not relevant at the point at which they were posed." Would the EC not agree that in the EC anti-dumping system it is not known when a complaint is filed and hence when a dumping case would be initiated? Could the EC indicate when the arguments should have been posed in order to have been considered relevant? Is it the EC's position that exporters should "guess" that a complaint has been filed and that a proceeding "could" start and that the only moment at which a comment is relevant is when such a " guess" is indeed made at the right moment?

Paragraph 43 of the EC Oral Statement answers the fact that India tries to find obligations related to standing also in Article 12.2.2 of the Anti-dumping Agreement, thus considering determinations to impose provisional and definitive measures as appeals from the initiation decision. The EC rejects this interpretation of Article 12.2.2 and sustains that, if India considered that the Notice of Initiation did not contain sufficient information on standing, it should have brought a claim under Article 12.1, which it failed to do. Further details on EC's views on disclosure and explanation regarding the adequacy of support for initiation are given in its answer to question 23 of the Panel.

Question 6

As agreed during the first meeting with the Panel, the EC will submit the original faxed copies of the producers' and national associations' declarations of support so that the dates of receipt by the EC of the declarations of producers' support can be verified. In reply to the question by the Chairman of the Panel why the fax headers were removed, the EC stated that the fax headers had been removed to protect the – apparently confidential – fax numbers of the EC producers. However, this information (that is the telephone and fax numbers) was as it is to

be supplied by the company expressing support. Could the EC therefore explain why the fax headers were removed?

See answer below.

Question 7

Moreover, under the EC system of confidentiality of information, it is incumbent upon the party supplying confidential information, to simultaneously provide a non-confidential version thereof (Article 19.2 EC Basic Regulation) that is to be placed in the non-confidential file. Failure to do so by an interested party will lead the EC to use best information available (Article 19.3). Why then did the EC, in violation of its own Basic Regulation and its standard practice, not follow this standard practice, and instead, of its own volition remove the fax headers?

The only standard practice of the EC in this context is that the specific form of non-confidential versions of documents are indicated by applicants.

Question 8

Would the EC agree that in other EC anti-dumping proceedings it does not normally remove fax headers? Would the EC also not agree that in other EC anti-dumping proceedings the declarations of support are normally contained in an Annex to the complaint rather than being separately obtained and filed in a non-confidential standing file?

No. The standard EC practice is to prepare a separate non-confidential standing file.

Question 9

The European Commission maintains a 'chron-in' log in which all incoming correspondence is recorded. Could the EC indicate on the basis of this chron-in log when the faxed declarations of producers' support were received by the EC?

The EC considers to have indicated the dates at which it received declarations of support by producers a sufficient number of times (copies of faxed declarations of support by producers in non-confidential file; Exhibit EC-4; EC oral answers to Panel's questions during First Substantive Meeting of the Panel). Given the advanced stage of the proceedings, the EC will give additional factual information on this point only if the Panel believes it necessary.

Question 10

Exhibit EC-4, appended to the first submission of the EC, now indicates that the declarations of support from the eight French producers were submitted. However, these eight declarations of support were never in the non-confidential file on 8 January 1997. When did the EC receive the declarations of support from these eight French producers?

See answer under question 9.

Why were these eight declarations of support not included in the non-confidential file?

See answer under question 7.

Did the EC rely on these declarations of support during any part of the standing determination?

Yes. The support of the individual French producers was reflected in the support expressed by the French producers association, details of which were always contained in the non-confidential file.

Could the EC provide the original faxed copies of these eight declarations of support?

No. Given the advanced stage of the proceedings, the EC will give additional factual information of this kind only if the Panel believes it necessary.

Question 11

Paragraph 3 of the working procedures indicates documents submitted to the Panel shall be kept confidential by all. In light of this confidentiality requirement, why did the EC not disclose producer-specific production-output details of EC Exhibit-4? Can the EC provide the individual producer-wise production-output details, not contained in EC Exhibit-4, but forming the basis for the country-wide figures?

Business confidential information can only be disclosed with the agreement of the industry concerned. Given the aggregated figures provided on a country basis, the EC does not consider that this additional "producer-specific" information would add anything to the present dispute.

Question 12

Can the EC confirm that the information on production output contained in Exhibit EC-4 was available at the time initiation and at the time of sample selection?

Yes.

Question 13

It has been argued that the German companies Irisette and Frankische Bettwarenfabrik are, respectively, a trader and a producer with production outside the EC. Can the EC provide an explanation on these assertions?

The EC does not understand where and by whom this has been argued.

Frankische Bettwarenfabrik (FB) and IRISETTE were included in the complaint and were supporting the complaint before and after initiation. They were also included in the list of 35 companies (making up the Community industry) which was provided to India during the previous consultations.

As far as IRISETTE is concerned, the company was taken over in 1994 by BIERBAUM-group (BIERBAUM was included in the definition of the Community industry and is a major player in the Community market with a production of Bed linen of around 5.000 Tons, i.e. around 4 per cent of total Community production). IRISETTE had a production activity notably via subcontracting activities with French producers.

The investigation showed that the main activity of IRISETTE in the BIERBAUM-group consisted in packing, handling and shipping, but continued with production notably via subcontractors during the IP.

The figures for the BIRBAUM-group were centralized by BIERBAUM. This explains why no figures were declared by IRISETTE while remaining included in the list of the Community industry.

FB is a very small company (production during the IP = 468 tonnes, or 0.3 per cent of total Community production), contrary to the 11 companies (including Luxorette) (see question 40 below) which were excluded from Community industry -non-cooperation, non production, imports of high volumes of BL from the countries concerned, its activity was not focussed on the product concerned - the evidence available during the investigation did not allow the investigation team to exclude FB from the definition of the Community industry.

Question 14

Why did it take four months from the date of initiation, for the EC to grant access to the non-confidential file?

Because access to the non-confidential file on standing had never been asked.

Question 15

The EC takes the position that the filing of an anti-dumping complaint by a trade association on behalf of domestic producers is in accordance with Article 5.4 ADA. Does the EC agree that the objective of Article 5.4 is the prevention of the filing of frivolous complaints? Would the EC agree that its position in this case may undermine that objective to the extent that it could occur that a trade association files a complaint which later turns out not to be backed by members of the association?

This is not what happened in the present dispute. However, the EC believes that on the contrary, particularly in case of a fragmented industry with a high number of small and medium enterprises, the fact that trade associations file a complaint on behalf of its members helps to prevent "frivolous complaints".

Would the EC agree that this has in fact occurred in several EC anti-dumping proceedings?

Other anti-dumping proceedings are outside the scope of this Panel and, if India has a problem with any of them, it should take appropriate action. In any event, the EC considers that the termination of an investigation is a fact inherent in the scope of an the investigation itself and it is not worse that not giving credit to a complaint which later turns out as having been supported by a major proportion of the industry. Complainants may also go to court for failure to open an investigation.

Question 16

Supposing, for the sake of argument, that the EC did 'examine' as per Article 5.3 the adequacy and accuracy of the complaint. Can the EC confirm whether it shares the view that such examination should take place before initiation? Can the EC confirm that in this Bed Linen proceeding such examination indeed took place before initiation?

The EC confirms that the examination of the adequacy and accuracy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of the investigation has to be done before initiating the investigation.

The EC also confirms what written in its Notice of Initiation that in the case at issue this examination took place before initiation.

Question 17

In paragraph 97 of its first written submission the EC acknowledges that support for (or opposition to) an application must be expressed by domestic producers. The EC then takes the position that the expressions of support from the domestic producers need not necessarily be expressed directly to the investigating authorities, but could be expressed to a trade association. India agrees with this argument. However, in examining standing, the authorities under Article 5.4 must examine the declarations of support of the domestic producers and it does not suffice to rely solely on declarations made by trade associations. Would the EC agree that, while declarations of support may indeed be addressed/expressed to or channelled through a trade association, Article 5.4 obliges the investigating authorities to examine the declarations of the domestic producers before the initiation?

No. The EC's view is that associations are capable of expressing support within the meaning of Article 5.4.

Question 18

In paragraph 99 of its first written submission the EC states that "on the basis of information they had received from various sources, the authorities estimated the total EC production in 1995 to be between 123,917 and 130,128 tonnes." Could the EC divulge to the panel which sources are referred to here? Assuming that this information came from the complainants, would the EC agree that such information might be self-serving? If so, could the EC explain which steps it took to verify the accuracy of the data provided on total EC production?

As usual, the Commission verified the figures originally provided in the complaint with information deriving from trade associations, national ministries, national statistical offices and Eurostat, previous cases on the same product, and the individual declarations by companies and associations provided in the framework of the standing analysis.

Question 19

Does the EC agree that the exclusion of sales below cost for Article 2.2.2(ii) purposes will by definition when not all sales are profitable lead to the calculation of a higher dumping margin than would otherwise exist?

The exclusion of sales not in the ordinary course of trade is part of the basic definition of dumping contained in Article 2.1. Accordingly, a calculation that would include those sales would not be an accurate measurement of the margin of dumping as defined in that provision.

Question 20

At paragraph 57 of its First Oral Statement the EC states that "ordinary course of trade is part of the basic definition of dumping contained in Article 2.1". At its paragraph 69 the EC states that "Article 2.2 enounces that . . . profit included in the constructed normal value must be 'reasonable'." Could the EC please explain why under Article 2.2.2(ii), which contains neither the words 'ordinary course of trade' nor the word 'reasonable' only the concept of 'ordinary course of trade' applies, and not the concept of 'reasonable' [other than that such approach invariably leads to a higher dumping margin].

The EC does not argue that the "concept of reasonable" does not "apply" to Article 2.2.2(ii). Rather, the EC's position is that the formulae contained in Article 2.2.2 specify that concept, with the consequence that the amounts determined in accordance with that Article are "reasonable" per se.

Question 21

At its paragraph 73 the EC in the context of…asserts that "India has presented no relevant evidence to that effect. " At countless times during the disclosure comments India has explained that 18+ per cent profit for Bed Linen is not reasonable, together with a variety of prima facie proof. Could the EC indicate what it means by 'relevant'? Were the arguments not relevant because they were posed at a wrong moment [such as suggested in paragraph 43 of its First Oral Statement]? Or was the evidence not relevant because it was not "significant independent factor" [such as in 253 of its First Written Submission]?

The evidence presented by India is not "relevant" because it is not apt to demonstrate that the profit amount used by the EC is "unreasonable". As already explained by the EC, profit margins may vary considerably from one country to another, as well as among different product markets, depending on the prevailing competitive conditions in each market. Therefore, a profit margin is not "unreasonable" simply because it is higher than the margins obtained in other markets.

Question 22

In paragraph 76 of its first oral statement the EC suggests that the profit margin of Bombay Dyeing calculated in the ordinary course of trade was representative beyond question because all of its sales nearly reached 80 per cent of the domestic market. Would the EC not agree that nearly half of the sales of Bombay Dyeing were loss making and that the profit margin so established was based on the profitable sales only?

Bombay Dyeing's non-profitable sales were disregarded in application of the rules contained in Article 2.2.1. The remaining sales are sufficiently representative of the conditions prevailing in the Indian market.

Question 23

At paragraph 78 of its first oral statement the EC states that "the 'zeroing' practice . . . is not covered by Article 2.4.2." This view is repeated in paragraph 79 of its oral statement where the EC states that "'zeroing' took place only at the subsequent stage of combining the dumping margins determined for each type in accordance with Article 2.4.2 into a single dumping margin. That stage of calculation, however, is not subject to Article 2.4.2." In light of these assertions could the EC please indicate, in the alleged absence of the applicability of Article 2.4.2, what Article of the ADA covers the zeroing practice and what Article covers of the ADA covers the 'subsequent stage' of determining a 'single dumping margin'?

It is not for the EC's to formulate India's claims in this case. The EC would recall, nevertheless, that the issue raised by India was addressed by the Panel in the *Audio Cassettes* case, which held that even, assuming *arguendo* that Articles 2.1 and 2.6 (now 2.4) applied to the practice of "zeroing", that practice would not be inconsistent with those provisions (Panel report on *EC – Anti-dumping duties on Audio Tapes in Cassettes originating in Japan*, ADP/136, 28 April 1995, unadopted, at paras. 347-366).

Question 24

The EC in paras. 144-148 of its first written submission tries to show with theoretical examples that the method advocated by India leads to "absurd" and "perverse" results. Would the EC not agree that in the real life situation presented by the case at issue the only reason why the EC was able to find significant dumping for all Indian exporters other than Bombay Dyeing and Anglo-French was through its use of an 18.64 per cent profit margin,

which itself was largely the result of the inflation of the real profit margin of Bombay Dyeing through exclusion of all below cost sales?

Bombay Dying's non-profitable sales were disregarded in accordance with the rules contained in Article 2.2.1. The EC, therefore, rejects any suggestion that the profit amount was "inflated".

A method is not "absurd" or "perverse" simply because it yields a less favourable result for the exporters than the methods proposed by the exporters.

On the other hand, the examples presented by the EC show that India's method is "absurd" and perverse" because it leads to a result that is at odds with the definition of dumping and the internal logic of Article 2 and moreover introduces an arbitrary and unjustifiable discrimination against those exporters which have sufficient sales in the ordinary course of trade.

Question 25

The EC in paragraph 156 of its first written statement tries to create the impression that one of the reasons why it prefers to use Article 2.2.2(ii) over Article 2.2.2(i) is to accommodate difficulties experienced by interested parties, in particular small companies. It is India's experience that exporters prefer use of their own data (method 2.2.2(i)) over use of other producers' data, particularly in EC anti-dumping proceedings, because under the EC system of confidentiality of information, method 2.2.2(ii) completely precludes companies from checking the dumping margin calculations of the EC (because the SGA and profit data of the other producer(s) used are considered as business proprietary). India appreciates the EC's apparent concern for small exporters, but has never seen any concrete evidence of this concern, either in the present anti-dumping case or in other EC anti-dumping cases. Could the EC produce such evidence?

It is the EC's experience that exporters always prefer the method which yields the lowest dumping margin in each case. Since that preference cannot be accommodated, the EC authorities attempt to make their choices on the basis of objective criteria which are equally valid in all cases.

One of the reasons why the EC gives preference to the method set out in Article 2.2.2(ii) is that it limits the amount of data to be provided by the exporters. The EC believes that this is in accordance with the principle enunciated in Article 6.13.

India has not submitted any claim under Article 6.13. Therefore, the EC fails to see the relevance of the evidence requested by India. The EC, nonetheless, is willing to provide that evidence if deemed necessary by the Panel.

Question 26

The Article 2.2.2(ii) option, especially after exclusion of sales below cost (as advocated by the EC), can lead to establishment of huge profit margins. Yet, the EC position is that any profit thus found is by its very nature reasonable. Suppose that a profit margin thus established would be 1,000 per cent; would this then be reasonable?

A profit margin is not unreasonable simply because it is high.

The EC doubts that "in the real world" to which India refers in other questions the profit margin realised by an exporter in respect of sales made in the ordinary course of trade and in sufficiently representative quantities will ever reach that level in any market.

In any event, why would it be "reasonable" to use a 1,000 per cent profit margin when that margin is based on the exporter's own sales, but "unreasonable" to use the same amount when calculating the constructed normal value for other exporters or producers? Or is India suggesting that the reference to the "ordinary course of trade" in the chapeau of Article 2.2.2 becomes inapplicable if it leads to a result which is "unreasonably high"?

Question 27

In paragraph 190 of its first written submission the EC states that where "…one producer can have 80 per cent of its domestic market and make a profit of over 18 per cent while the numerous other producers ignore this market and devote themselves to exporting, may be an uncommon situation." Does the EC agree that Bombay Dyeing did not in fact make 18.64 per cent profit on its domestic sales of bed linen, but that the 18.64 per cent profit quoted by the EC is the profit established by the EC after systematic exclusion of all domestic sales at a loss? Does the EC agree that the actual overall profit made by Bombay Dyeing on domestic sales of bed linen is only 12.09 per cent and its overall profit only 4.66 per cent?

Bombay Dyeing's non-profitable sales of the products under investigation were disregarded in accordance with the rules contained in Article 2.2.1.

Bombay Dyeing's "overall profit" for all its ales of all products is irrelevant for the purposes of Article 2.2.2 (ii).

Question 28

Does the EC agree that Article 2.4.2 provides for a two step analysis under which a mixing of methodologies for establishing normal value and export price comes into play only in the second step, i.e. where there is a pattern of differing export prices? Does the EC agree that the first step of Article 2.4.2 does not allow such mixing?

Article 2.4.2 does not provide for a two-step analysis. The two sentences of Article 2.4.2 apply alternatively and not sequentially.

The first sentence of Article 2.4.2 neither allows nor prohibits the "mixing" of methodologies when combining the dumping margins established in accordance with that provision into an overall dumping margin for the product under investigation. That stage of the calculation is simply not covered by Article 2.4.2.

Question 29

Suppose that a producer has been found not to have dumped, would the EC include such producer's exports for the purposes of the injury determination? If so, does this not mean that the causal link between dumping and injury is broken because injury cannot logically be caused by a non-dumping producer?

See the EC's answer to the Panel's question 18.

Question 30

If the EC persists in the argument that countries are dumping, then why has the EC on occasion initiated anti-dumping proceedings against specific producers (Orion and Funai) in a country (Japan)? Similarly why has the EC on occasion excluded specific dumping producers in a country from the injury determination (BASF: 23.1 per cent; Eastman Chemical: 9.9 per cent and Celanese Fibres: 9.2 per cent in Synthetic fibres of polyesters from the United States)?

The video recorder case which India refers to was an exception pre-WTO case.

The EC sees no contradiction between its position and the fact that specific companies may be excluded from the application of duties where this is warranted by the facts of the case.

Individual treatment of exporters is given in particular in order to improve the effectiveness of antidumping duties.

Question 31

If the EC persists in the argument that countries are dumping, then why has it on several occasions initiated company-specific reviews?

See the answer to the previous question.

Question 32

Similar to its First Written Statement [paragraph 309] the EC again presents its arguments concerning the permissibility of a double domestic industry definition within a single investigation [paragraph 135 First Oral]. In light of paragraph 308 of its First Written Submission and the statements during the First Meeting with the Panel can the EC confirm that it only used one of the permissible definition during the Bed Linen proceeding?

The EC did not rely on a double definition of the domestic industry.

Reference to the whole industry was made in order to clarify the actual situation in the Community market and thus not ignore the non-complainant. In this context, it should also be noted that reference is also made to a number of companies which disappeared during the "injury examination period" and also during the Investigation Period (PR 81 - DR 41).

As clearly indicated in the PR and DR the conclusion of the investigation was that the "Community industry" (as defined in PR 57 and confirmed in DR 34) suffered material injury.

Question 33

In paragraph 221 of its first written submission, the EC posits that the ordinary meaning proposed by the EC is straightforward. But would the EC not agree that the EC's reading of the term 'dumped imports' renders the word 'dumped' obsolete, and this throughout the entire Article 3?

No. The word "dumped" is necessary to indicate that it is imports of the product under consideration and that has been found to be dumped that are relevant rather than all imports of all products from the country or countries in question.

Question 34

Could the EC confirm that the theory of the "found not to be a significant independent factor" has been advanced for the first time in the first submission of the EC to this Panel? In other words, could the EC confirm that this theory has never before been communicated to the Indian exporters, either in the published Regulations or in any other communications to the Indian exporters?

The word "relevant" is in Article 3.4 for all to see. Clearly absence of significance or independence of factors are matters that can lead to the conclusion that certain factors are not relevant.

Also it should be noted that as indicated below (question 35) there are factors known not to be relevant by the industry as well as by all the operators working in the business. This include exporting producers and importers. All interested parties have the right to present evidence (on factors listed in 3.4 of ADA for instance) if they believe they are relevant to defend their rights.

Question 35

Could the EC explain the interconnection (paragraph 253 EC's first written submission) between on the one hand the 7 factors it did evaluate, albeit at varying levels, i.e. actual and potential decline in sales, profits, output, market share, factors affecting domestic prices, employment and, on the other hand, the 11 factors it did not address anywhere, i.e. productivity, return on investments, utilization of capacity, magnitude of margin of dumping, actual and potential negative effects on cash flow, inventories, wages, growth and ability to raise capital or investments?

The EC has already made clear that the examination of the impact of dumped imports on the "domestic industry" under Article 3.4 involved a consideration in one way or another of all the factors.

Some factors were of course found to either not be relevant for the purpose of the present investigation or "interconnected" to other factors which were fully examined and evaluated.

As already said, factors may be not relevant because of reasons known even by all the industry as well as by all the operators working in the business, e. g.:

(2)-inventories: because detailed records are not kept in many SME's because there are thousand of different types of the like product plus many other products they are manufacturing. In addition, when data is available its format is not compatible from SME to SME. No aggregation is possible for the domestic industry.

(3)-Capacity and (4) capacity utilization: because it is well known that a high flexibility of the available capacity render it impossible to make an assessment in particular when SME's are involved. Experience also showed that if the information is available, it is not homogenous and not consistent from company to company (product mix problem, method of calculation,…). No aggregation is possible.

(5)-wages (6)-growth (7) ability to raise capital: same problem with these factors in particular when SME's are involved.

As regard the "interconnection" of certain factors: the following examples can be given:

- profits are interconnected with (8) cash flow (and thus also ability to raise capital) (cash flow equates to profits plus depreciation);

- production and employment with (9) productivity (= production / number of personnel employed);

- production with capacity and capacity utilization.

Question 36

Does the EC interpret the word relevant in Article 3.4 as providing unlimited discretion to the administering authority to unilaterally determine which factors it considers relevant and to then base its injury determination on those factors only?

The *Antidumping Agreement* gives investigating authorities a certain discretion in assessing the state of the domestic industry but this is clearly not unlimited. The exercise of the discretion must be justifiable in the light of all the circumstances.

Question 37

Does the EC agree that in an ASCM case (Brazil-milk) the EC itself argued that the comparable ASCM provision should be interpreted as requiring an evaluation of all injury factors listed in the comparable provision?

The EC does not read the Brazil milk powder case in that way. In that case it appears that consumption figures were necessary in order to be able to calculate market share.

Question 38

Does the EC agree that its position taken in paras. 271 to 277 of its first written statement, would encourage domestic producers to provide information only on the factors that are beneficial to their case, as apparently happened in the bed linen case?

No. Pursuant to Article 5.3 of the *Antidumping Agreement*, the investigating authority will examine as the accuracy and adequacy of the information provided in the complaint.

Question 39

Would the EC agree that the company Luxorette was part of the sample? Would the EC also agree that Luxorette was not one of the 35 companies which were determined to make up the domestic industry? Would it be therefore correct to conclude that in any event EC relied on at least one company not part of the domestic industry for its injury finding?

Luxorette was not in the Community industry and was not in the final sample.

The situation is that Luxorette was intended to be included in the sample and as indicated in PR 8 an on-the-spot verification visit took place at the premises of the company. However, as indicated in PR 54, it was excluded from the Community industry and thus from the sample.

Question 40

Can the EC explain whether the sample was established before, after, or simultaneous with the date on which the Community Industry [the 35 producers] were established? More specifically: can the EC provide the dates on which it established the Community Industry and the EC sample (of 17 producers)?

It should be noted that there were 46 companies which supported the complaint before initiation. Given that the 35 companies making up the Community industry (CI) represented around 34 per cent of total Community production, the conditions set forth in Article 5.4 of the ADA were fulfilled before and after initiation.

As for the selection both the sample of Community industry and exporting producers, the method for the selection is clearly indicated in the notice of initiation (NOI) point 5. Consequently both samples were defined after initiation.

For establishing the CI sample, as indicated in the NOI, the EC requested information directly from the complainant (point 5.b. 2nd &), if necessary the individual companies and/or associations.

Certain companies were eliminated from the list of 46 companies in the course of the investigation, namely after initiation (see reply to question 13 above). Consequently, the reply to the question is that both the definition of the Community industry (35 companies) and the sample were thus established in parallel in various steps.

Indeed, exclusions of companies occurred in the course of the investigation when evidence indicating that they should be excluded was examined and a decision was reached by the investigating team. Evidence triggering the exclusion of a company was obtained during an on-the-spot verification (this is the case of Luxorette).

Both the final sample and the Community industry were established according to the following steps:

- Before initiation (before 13/09/96) 46 companies were supporting the complaint

- after initiation (after 13/09/96) -7 companies were eliminated from "CI"
  - 18 were likely to be included in the sample

- after questionnaires were sent (10 -11/96), 3 companies were eliminated (failure to cooperate, no production anymore),

- during the on-the spot verifications, 1 company (Luxorette) activity was found not to be not focussed on the product concerned in the Community.

- after evaluation of on-the-spot findings (from 10/96 to 011/97).

Question 41

Could the EC provide any support for its contention in paragraphs 309 and 332 that "a member may use both definitions of the domestic industry in the course of a single investigation"?

The contention is supported by the text of the provision.

Question 42

Would the EC agree that it only referred to trends of all EC producers or the complaining producers (as opposed to the sampled producers) where this benefited its conclusion that there was injury? Would the EC agree that this approach can be described as 'picking and choosing'?

No. The conclusions on material injury are clearly based on the findings made for the Community industry (PR 92 to 94 - DR 40)

Question 43

In paragraph 325 of its first written statement the EC states that "India does not explain in what way the EC could have, but did not, take account of data concerning exporters not part of the sample nor what difference this would have made." Would the EC agree that India explained this in great detail in Section III.A.1, paras 3.2 to 3.13, of its first submission to the Panel and that this statement is therefore factually incorrect?

The EC does not understand this question. Section III.A.1 explains the factual background and does not explain in what way the EC could have taken account of the information or what difference it would have made.

Question 44

The EC acknowledges in paragraph 349 of its first written submission that the Regulation imposing definitive duties repeatedly referred to companies that ceased production/disappeared in the years preceding the investigation period. As such statements were used to substantiate the finding of injury, does the EC then not agree that as a matter of pure logic, the EC is assuming that pre-investigation imports were also dumped because any other interpretation would break the causal link between dumping and resulting injury and the repeated statements would therefore be non-sensical?

The EC did not use the company closures to "substantiate the finding of dumping".
Although there is mention in the Regulations of the notion that the exit of companies was an indicator of injury caused by dumped imports (DR rec. 41), the principal significance of the disappearance of companies is to explain how an affirmative determination of injury could properly be made when on all but two factors, the domestic industry was in an apparently healthy state (PM recs. 81, 90; DR rec. 41).

Without information regarding the exit of the companies the Regulations would have given a misleading picture of developments in the state of the industry during the 'injury investigation period'. In particular, this information supported the finding that some of the Article 3.4 factors were not relevant (i.e. meaningful) in this case (e.g. employment and production), or that the relevant information risked giving a distorted image of the industry's condition (e.g., sales volume and value, capacity, capacity utilisation, and inventories).

Question 45

Article 15 of the Agreement specifically indicates that 'special regard must be given by developed country Members to the special situation of developing country member when considering the application of anti-dumping measures'. It is therefore clear that the onus of exploring constructive remedies is on the developed country Members. Can the EC explain how it fulfilled this obligation?

See the EC's answer to questions 30, 37 and 38 from the Panel.

Question 46

The EC states in paragraph 80 of its first submission that the (Article 12.2.2 ADA) obligation on the Member concerned is to deal with relevant arguments and claims. Is it the position of the EC that a Member can then ignore arguments and claims made by interested parties on the simple ground that the Member unilaterally judges such arguments and claims not relevant?

No. The investigating authorities conclusion that the argument is not relevant must be capable of justification in particular in the event of a dispute settlement proceeding.

ANNEX 2-6

SECOND WRITTEN SUBMISSION 0F THE EUROPEAN COMMUNITIES

(24 May 2000)

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I. INTRODUCTION

1. The European Communities (hereafter 'the EC') welcomes the opportunity to reply to the various arguments and issues that have been raised in oral statements and in answers to questions, and to rebut India's claims regarding the imposition of definitive anti-dumping duties by the EC on imports of bed linen originating in India.

2. Its comments are arranged in the order of its earlier presentations, except that the issues of public notice arising under Article 12.2 can best be dealt with under a separate heading (Section).

II. INITIATION

1. Adequacy of evidence – Article 5.3

3. India accuses the EC of failing to adequately examine the allegations in the complaint. It seeks to further its case by stretching the notion of examination, in particular by saying that examination of the complaint can never be the only element in such an examination. India's criticisms focus exclusively on one aspect of the matter to be examined by the authorities – the injury to the domestic industry.

4. Two points should be made at the outset. Firstly, the EC has never accepted that its examination was limited to the complaint, and, as explained in its Oral Statement to the First Meeting of the Panel[1], did in fact cross-check the data in the complaint with other information available to it. Secondly, India, despite various suppositions and hypotheses, has never presented evidence that it was so limited.

5. There is little direct guidance in Article 5.3 as to the nature of the examination that is required. However, Article 12.1.1, which states the information to be contained in the public notice of initiation, and is as such part of the context of Article 5.3, gives assistance. Regarding the issue of injury, what must be published is 'a summary of the factors on which the allegation of injury is based'. The provision on dumping is similar. What must be published is 'the basis on which dumping is alleged in the application' .

6. Consequently on all substantive issues relevant to the eventual establishment (or not, as the case may be) of injurious dumping, the notice of initiation has to address only the allegations in the complaint. If the Agreement intended the kind of investigation suggested by India one would have expected that this provision on injury to say something like 'a summary of the factors on which it was decided that injury might be occurring'.

7. India has repeatedly called in aid the comments of the Panel in the *Guatemala – Cement* case.[2] The EC countered that argument in its first written Submission[3], saying 'That panel was denying that evidence that satisfied the criterion of "such information as is reasonably available" in Article 5.2 would necessarily satisfy that of "sufficient evidence" in Article 5.3. It did not deny that, in a particular case, it might satisfy this test.' India has never attempted a refutation.

8. India explicitly accepts[4] that it bears the burden of proving that the EC failed in its obligations, but implicitly denies this by arguing that the EC has failed to provide evidence of compliance in its Notice of Initiation (In fact, the notice says: "Having decided … that there is evidence to justify the initiation of a proceeding …"). In other words, India accuses the EC, not of failing to comply with Article 5.3, but of failing to prove that it has complied with Article 5.3, while simultaneously accepting that the burden lies on itself to prove that the EC has not done so. And its supposed proofs consist of nothing but assertions.

9. India also appears to accept that the complainant party bears the burden of proving that, in a particular case, the investigators were under an obligation to look beyond the complaint.[5]

10. Even if the burden of proof did not lie on India, in the absence of a video showing its officials examining the various documents, the EC is unclear what proof India expects to find. The document

[1] Paragraph 20.
[2] E.g. India's answers to Panel questions, Questions 7.E, 8.A.
[3] Paragraph 52.
[4] India's answers to Panel questions, Question 7
[5] This is assumed in India's answers to Panel questions, Question 8.B.

that India presents as Exhibit India-82 reflects the early stages of the investigation itself. The fact that certain matters were examined further during the investigation does not mean that they were not examined as required by Article 5.3 at initiation. The EC authorities clearly had the means of complying with the obligations; and they recorded the fact of their compliance.[6] Against that India merely asserts the contrary. It provides no relevant answer[7] when the Panel asks how it is to assess whether a violation occurred, although it late[8] asserts that the Panel is confined to looking at public documents.

11. In fact, despite the various comments on the subject that India has made in its Oral Statement to the First Meeting of the Panel, and in its answers to questions from the Panel and the EC, nothing of substance has been added to its case. In particular, it has done nothing to answer the defence presented by the EC, rather it has chosen to ignore or misinterpret it, and to rely on mere assertion.

12. In its answer to the Panel's Question 7, India asserts that the EC failed to examine the accuracy of the evidence in the complaint, and had insufficient evidence to initiate an investigation. It presents no proof in support of this assertion. In its Oral Statement to the First Meeting of the Panel[9] it claims support from the fact that the Initiation Notice referred to the allegations in the domestic industry's complaint. However, according to Article 12.1 of the Agreement, it is precisely 'a summary of the factors on which the allegation of injury is based' that should be included in the Notice.

13. India has also taken the opportunity[10] to make what is in effect a criticism of the contents of the EC's Notice of Initiation, a matter regulated by Article 12.1 of the Agreement. If what India contests is the language or level of details with which the EC gave account of this examination of evidence in the Notice of Initiation, India should have claimed a violation of Article 12.1. India chose not to do so, and must abide by its decision.[11] In any event, the EC's Notice satisfied the requirements of Article 12.1.

14. In its Oral Statement to the First Meeting of the Panel[12] India says that the EC has made contradictory assertions as to whether the previous investigation found injury to exist. It apparently fails to see the difference between making a finding of injury and not making a finding of non-injury.

15. In its answers to the Panel's Question 8, India resorts to meaningless language to explain its arguments regarding the EC 's obligations under Article 5.[13] Thus, the obligation was 'rendered even more acute' – does this mean the obligation was modified? And India sought to 'stress [the EC's] lapse in the context of the previous investigations' – was this merely for dramatic effect?

16. India admits[14] that the question whether the authorities should look at the evidence of previous investigations depends on the circumstances of the case. The EC recalls that, under Article 17.6(i) of the Agreement, the role of the Panel is to review the assessments made by national authorities, not to substitute their own views. The EC notes that India has now been so convinced by its assertions that the EC authorities did not take into account data from its previous investigations that it now assumes they are true.

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[6] In the Initiation Notice, and in the Provisional Regulation, recital 2.
[7] Answer 7.D.
[8] Answer 7.E.
[9] Paragraph 10.
[10] India's answers to Panel questions, Question 7.E.
[11] See EC Oral Statement to the First Meeting of the Panel, paragraph 14; EC answer to Panel question 23.
[12] Paragraph 15.
[13] India's answers to Panel questions, Question 8.A.
[14] India's answers to Panel questions, Question 8.B.

2. Sufficient support for initiation – Article 5.4

17. India continues to throw doubts on the propriety of the EC's conduct at the time of initiation.[15] In light of these comments, the EC makes the following observations.

18. Firstly, as far as it is aware, no interested party that specifically requested access to the non-confidential file on initiation was denied access, nor was any delay imposed in allowing access, in the period following initiation. In October 1996 the exporters' representatives submitted a brief stating that 'Texprocil would expect that the Commission will make evidence available in the non-confidential file attesting …' [16] The EC is confident that, had this expectation been converted into a specific request, access would have been swiftly granted.

19. Secondly, the removal of headers from faxes was done at the request of producers to protect information they regarded as confidential. The versions of the faxes that include the headers are now being submitted (Exhibit EC-5).[17]

20. To facilitate the Panel's examination, the EC is providing, in an annex to this Submission, a list of the companies and associations that expressed support, along with the dates on which these declarations were received by the EC.

21. India's calculation[18] of the threshold figure on the supposition that the French producers' support should be disregarded is erroneous since it involves double counting.

22. Regarding the status of support expressed by producer associations the EC refers to its previous remarks.[19] The EC has in any case established that producers responsible for over 34 per cent of EC production expressly supported the complaint.

III. DUMPING

1. Exporters: choice of sample

23. Although India has no claim that addresses the issue, and as a consequence it is not in the panel's terms of reference, the choice of the sample of exporters continues to attract attention.

24. India has given a perverse response to the Panel's question[20] on the exclusion of Standard Industries. Apparently, no objection was taken to Standard's exclusion from the sample because it was a reserve for inclusion in the sample. Nevertheless it should have been included in the calculations (in other words included in the sample) for purposes of the profit calculation.

25. India also argues that Standard was more representative of domestic sellers than Bombay Dyeing, because it was 'less anomalous and less peculiar'. The EC cannot see how a company with 80 per cent of the market can be more anomalous and peculiar than one with only 14 per cent. The only basis given for this conclusion is that the Indian authorities 'genuinely believe' it.

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[15] Oral Statement to the First Meeting of the Panel, paragraph 18.
[16] Brief of 25 October 1996, point 1.2, Exhibit India-50.
[17] The non-confidential versions are contained in Exhibit India-59.
[18] Oral Statement to the First Meeting of the Panel, paragraph 21.
[19] First written Submission, at paragraph 82; Oral Statement to the First Meeting of the Panel, at paragraph 39.
[20] Number 5.

26. As it happens, the evidence from Standard's response to the EC authorities' questionnaire indicated that it had no domestic sales in the ordinary course of trade during the investigation period. Assuming that this fact would have been confirmed on verification, Standard's data would have had no effect on the profit margin.

27. Finally, India thinks that the companies should not be excluded from the sample before their data are examined. If that were the case there would be no point having a sample, because the authorities would have already examined all the data.

28. India also grasped other opportunities[21] to return to the issue of the exclusion of Standard Industries from the sample, but added nothing of substance. In order to distinguish its arguments on the exclusion of Standard from the use of different layers of producers in the analysis of injury it was forced to adopt the perverse position that being in the reserve for the sample meant that it actually was in the sample.[22] Perhaps it would also argue that being a reserve for the Indian cricket team is the same as being a playing member.

29. A sample is by definition less than the whole class from which it is taken. India has not criticized resort to a sample by the EC, but merely because one particular company was not included.

2. Article 2.2.2

(i) Reasonableness

30. The EC has explained at length[23] why there is no implicit requirement of reasonableness in Article 2.2.2(ii). In this section it examines in more detail India's arguments regarding how such a requirement would apply, were its existence accepted.

31. India accepts[24] that, even were Article 2.2.2(ii) subject to a standard of reasonableness, it would bear the burden of establishing a *prima facie* case of establishing that the standard was infringed.

32. India uses extravagant language to describe the application to other exporting companies of the 18.65 per cent profit margin calculated for Bombay Dyeing (e.g., 'contrary to any perception of reasonableness that can and may exist in and outside the textile industry')[25], but on closer examination its arguments as to what is meant by reasonableness are unimpressive.

33. Firstly, it quotes the claims made by the companies and their rejection by the EC, without indicating which of the claims it endorses.[26] Only two of these claims appear to be of significance. One concerned alleged differences between sales of branded and non-branded goods. The EC dealt with this in its Definitive Regulation:

> It should be noted that the profit margin used in constructing normal value corresponds to the weighted average profit realized on domestic sales of profitable types of branded and non-branded products by the Indian company concerned and that, had this claim been accepted, this would have been to the disadvantage of the

[21] India's answers to Panel questions, Question 34, 36.
[22] India's answers to Panel questions, Question 36.
[23] First written Submission at paragraph 175.
[24] India's answers to Panel questions, Question 1.B.
[25] India's first written Submission, paragraph 3.139.
[26] Ibid., at paragraph 3.5.

> producers, the profit margin used being lower than the profit margin realized by the same company solely on its domestic sales of non-branded products.[27]

34. The other is the allegation that the application of the 18.65 per cent profit margin to Anglo French was inappropriate because of its allegedly high labour costs. Even were such costs high, it does not make for an unreasonable result. Higher labour costs as a percentage of total cost of production (as alleged in the case of this company) do not mean necessarily that labour costs per unit are higher, nor that the manufacturing costs are higher (for example, depreciation and financial costs are likely to be lower). It is inevitable that there will be differences between the various companies operating in a market. If account were to be taken of each of them the methodology established in Article 2.2.2(ii) would break down, and be replaced by the investigators' view of what was reasonable. That is evidently not what the Agreement intends.

35. Secondly, India argues[28] that the 'same general category' criterion of Article 2.2.2(iii) applies, although the language of that provision clearly indicates that this criterion is used to set a limit to 'reasonable methods' in that provision, not as a general definition of what is reasonable.

36. Thirdly, it regards the 18.65 per cent figure as inherently unreasonable when compared to three other profit figures:

37. (a) that of sales of the 'same general category' of products among Indian producers criterion: the simple average of three producers profits is about 7 per cent. However, in the textile sector in particular an average of this kind is virtually irrelevant, since profit levels differ greatly between product lines, and between the various markets in which the products are sold.

38. (b) average profits for the like product in the other exporting countries, which (it is said by India) are 5.8 per cent and 7.4 per cent. Even supposing that these figures are correct, the same comment is relevant. Profit margins may vary considerably from one geographical market to another, depending on the prevailing competitive conditions. The EC would also like to draw attention to a feature of the investigation concerning the interrelationship of profits and SGA. The point was made in the course of correspondence between the EC and the Indian Embassy in Brussels in 1997 (Exhibit EC-6), where the EC said

> … it should be noted that the amount of SG&A expenses incurred by a company influence its profit and that the combined average amount of SG&A expenses and profits established for each of the exporting countries happened to be at a similar level.

39. (c) the reasonable profit (5 per cent) imputed by the EC to the EC industry for the purposes of calculating the injury margin.[29] However, this figure is not an estimate of the profit level in the EC market, but the 'minimum amount of profit required to ensure the viability of the Community industry'.[30]

40. In any event, in making the comparisons proposed by India it should be remembered that the 18.65 per cent figure is based on profitable sales only, in accordance with the rules (disputed by India) of Article 2.2.[31] Thus India is not comparing like with like.

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[27] Recital 18.
[28] First Indian written Submission, at paragraph 3.131.
[29] Ibid., paragraphs 3.134 et seq.
[30] Provisional Regulation, recital 130.
[31] EC first written Submission, at paragraph 137.

41. Nor does India say anything useful about the market for bed linen in India, which if anything would help explain the significance of the figures. It merely asserts that Bombay Dyeing, 'is a peculiar company in India possessing an established position in the market for over one-hundred years'.[32]

42. Fourthly, India observes (possibly regarding reasonableness) that the profitable sales on which the 18.65 per cent figure was based were only half its total domestic sales.[33] However, this basis for calculating profit is explicitly envisaged in Article 2.2.1 and footnote 5 of the Agreement.

43. India[34] cites the panel report in the *Audiocassettes* case in support of its argument. However, the passage in question refers to Article 2.4 of the 1979 Anti-Dumping Code, which contained a much simpler set of rules for constructing prices. The formula was

> 'the cost of production in the country of origin plus a reasonable amount for administrative, selling and any other costs and for profits. As a general rule, the addition for profit shall not exceed the profit normally realized on sales of products of the same general category in the domestic market of the country of origin.'

44. The panel's observation quoted by India is therefore irrelevant to the current dispute. The panel no doubt appreciated that if it had not adopted this interpretation it would have rendered the word 'reasonable' redundant.

45. The reference to the Code draws attention to the effect of the 1994 Anti-Dumping Agreement in introducing much greater precision in the rules, both in general, and in particular regarding what is now Article 2.2. This can be seen as one of the 'objects and purposes' of the Agreement. It would be undermined by adopting India's criterion of reasonableness, which would confer on investigating authorities a discretion that is at odds with the precisely drawn terms of the text.

46. The question whether a test of reasonableness is to be imposed on top of the text of Article 2.2.2(ii), is quite distinct from the question whether it incorporates the criterion of the 'ordinary course of trade'. It is notable that India does not regard this criterion as incompatible with reasonableness in the chapeau of Article 2.2.[35]

47. Finally, it may be noted that India is unable to explain[36] how the reasonableness criterion in Article 2.2.2(iii) extends to sub-paragraphs (i) and (ii).

(ii) More than one exporter or producer

48. India has argued that, as used in Article 2.2.2(ii), the use of words in their plural form means that data from a single company may not be taken into account. It has not attempted to answer the EC's refutation[37], but has sought to shore up its arguments by describing this provision as a 'triple plural'.[38] Each word of the phrase has to be capable of covering the plural, in case there are more than one exporters and/or producers. However, this does not detract from the fact that it is equally applicable to a single exporter or producer.

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[32] India Oral Statement to the First Meeting of the Panel, paragraph 33.
[33] Ibid., paragraph 37.
[34] Ibid., paragraph 40.
[35] India's answers to Panel questions, Question 2.A.
[36] India's answers to Panel questions, Question 4.
[37] EC first written Submission, at paragraph 108.
[38] Oral Statement to the First Meeting of the Panel, paragraph 43.

49. The notion that the methodologies provided by Article 2.2.2 impose cumulative restrictions[39] is at odds with the fact that they present alternative options, a point that has not been questioned by either party to this dispute.

(iii) Application of 'ordinary course of trade' criterion

50. India has not succeeded in denying the perverse consequences of interpretation of Article 2.2.2(ii) so as to permit to inclusion of data relating to sales not in the ordinary course of trade.[40] In the first of the EC's examples[41], rather than, as India proposes, accepting a zero margin, the authorities would have abandoned Article 2.2.2(ii), and used another methodology.[42]

51. The second example India does not try to answer, but reinvokes its principle of reasonableness.

52. It might seem at first glance that the EC's argument that Article 2.2.2(ii) contains an implicit 'ordinary course of trade' rule is no different to the one for which it is criticising India in regard to a criterion of reasonableness However, the EC's arguments differ crucially from those of India. The EC's view, founded on the rules of general international law, is that Article 2.2.2(ii) should not be interpreted in a way that would give rise to perverse results (they would be perverse if they contradicted the principle enshrined in Article 2.2 that normal values should not be based on data from unprofitable sales). On the other hand, India wishes to qualify the rule in Article 2.2.2(ii) with its vague criterion of reasonableness (see above). In the EC's view, Article 2.2.2(ii) crystallises the principle of reasonableness contained in the chapeau. In contrast, India cannot explain how the 'not in the ordinary course of trade' criterion is compatible with reasonableness in the chapeau, but not in Article 2.2.2(ii).[43]

3. Zeroing

53. Regarding zeroing, in its answer to the Panel India acknowledges that the correct methodology for the second phase of a dumping calculation is an 'open question' in the case of transaction-to-transaction comparisons.[44]

54. It denies this in the case of the weighted-average to weighted-average option, but its justification – that the Agreement requires a weighted average of 'all comparable export sales' – is patently flawed. This part of Article 2.4.2 is addressing the comparison of export sales and normal values. Here, as in the case of transaction-to-transaction comparisons, the Agreement has no explicit rule for the second phase of the process – bringing the individual dumping margins together into a single company-based margin.

55. India seeks support for its view from the word 'all' in the phrase 'all comparable export transactions'.[45] However, this argument does nothing to alter the fact that the phrase is concerned with *comparable* transactions. The distinctive characteristic of the second phase of calculating a dumping margin is that the individual margins that are taken into account are not comparable.

[39] India Oral Statement to the First Meeting of the Panel, paragraph 44.
[40] Ibid., para 47.
[41] EC first written Submission, paragraph 145.
[42] EC responses to Panel questions, Question 14.
[43] India's answers to Panel questions, Question 2.A.
[44] Question 6.
[45] Oral Statement to the First Meeting of the Panel, paragraph 52.

IV. INJURY

1. Sampling of producers

56. In its answer to the Panel's question[46], India finally acknowledges that Article 6.10 does not apply to sampling of domestic producers in injury investigations. It asserts that sampling should be statistically valid on the basis of a general principle that is somehow derived from the individual provisions on sampling. Even if there were such a principle, India fails to notice that, as an alternative to sampling, Article 6.10 authorizes the use of 'the largest percentage of the volume of the exports from the country in question which can reasonably be investigated'. It is by analogy with this criterion that Article 17(1) of the Basic Regulation allows the investigation to be limited to 'the largest representative volume of production … which can reasonably be investigated within the time available'. In the Initiation Notice the EC announced its intention to proceed on this basis when examining the Community industry.[47]

2. Article 3.4 impact factors

57. Article 3.4 regulates 'The examination of the impact of the dumped imports on the domestic industry'. It therefore does not envisage a general examination of the health of the domestic industry, but one directed to the consequences of dumping.

58. As the EC explained in its Oral Statement to the First Meeting of the Panel[48], Article 3.4 must be read in the context of the rest of Article 3. The structure of Article 3 makes clear that the role of the Article 3.4 is an examination of the impact on the domestic industry of the price and volume effects of dumping described in Article 3.1 (the true "injury factors"). It is not comparable to the injury and causality analysis conducted in a safeguard investigation, with which it has been wrongly compared.

59. As the EC has explained in its first written Submission[49], the examination of the EC bed linen industry that is contained in the Provisional and Definitive Regulations provides a coherent explanation of the condition of that industry which justified the conclusion that it was suffering injury from dumped imports of bed linen.

60. The circumstances of particular cases vary enormously. That obvious fact must be reflected in the practice of national authorities, and should be respected by the Panel when reviewing their actions.

61. In some cases an affirmative finding of injury will be based on an accumulation of indications in a broad variety of factors. The circumstances of the bed linen case were not like that. Rather, the indications of injury were almost entirely concentrated in two areas: profits and prices.

62. The Regulations reveal an industry that is continuing to operate normally except for these two vital factors. This normality was most notably apparent in the volume of sales, and of production, factors that were investigated by the EC authorities and reported in the Regulations.

63. In its Oral Statement to the First Meeting of the Panel India has made several criticisms of the EC's arguments, which can be briefly answered.

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[46] Question 10.
[47] Initiation notice, paragraph 5(b).
[48] Oral Statement to the First Meeting of the Panel, paragraphs 101 to 104.
[49] At paragraph 256 in particular.

64. India suggests[50], that the EC is presenting contradictory arguments. Apart from the fact that a party to a WTO dispute is entitled to present alternative arguments[51], the EC would remind the Panel that it did examine all the factors mentioned in Article 3.4, even if only to dismiss some of them as irrelevant. It goes on to refute the contention that all the factors in Article 3.4 must mandatorily be evaluated because it believes that it is a fundamental mistake for investigating authorities and panels to adopt a simplistic 'checklist' approach to the application of the Agreement. The EC has further argued that if Article 3.4 did provide for a 'checklist', it would concern only the negative aspects of the factors mentioned.

65. Contrary to India's suggestions[52], the EC has not said that its authorities did not investigate factors, but rather that they explained why injury could be concluded on the basis of some factors despite positive indications on other factors and made clear that they were open to hearing of other such factors that interested parties might suggest.[53]

66. Although India would wish to assume that the *HFCS* panel had taken various arguments into account because they were argued before it[54], that panel, like other legal bodies, can only be judged by what it said, not what it heard.[55]

67. India draws attention to the conundrum, posed by the words of Article 3.4, of how the authorities can decide whether an issue is relevant, before it has been evaluated, is set.[56] The EC has attempted to answer it, most recently in its answer the Panel's question where it said 'Relevance is a matter of degree rather than of 'yes or no'. In some cases it will be immediately apparent, even before the initiation of an investigation, that certain factors are not relevant and in others this may not be apparent until much later, so that the process of determining the relevance of a factor may be little different from that of evaluating it'.[57]

68. Whatever India's doubts on the matter[58], it is undoubtedly true 'domestic producers, are the best and sometimes the only source of information on the factors relevant to injury'.[59] The point is very pertinent to the decision in the *Bed Linen* investigation, in which profit and price data, known only to the producers, were crucial.

3. Sources of data on injury

69. In its Oral Statement to the First Meeting of the Panel[60], India largely repeats the arguments in its first Submission on the subject of the various levels of domestic producers mentioned in the EC Regulations.

70. The position of Luxorette is explained in the EC's answer to the Panel's question.[61]

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[50] India Oral Statement to the First Meeting of the Panel, paragraph 65.
[51] EC first written Submission, paragraphs 246 et seq. The point was explicitly acknowledged in Report of the panel on United States — restrictions on imports of tuna, BISD 39S/155 (1993), (unadopted), paragraph 5.22.
[52] India Oral Statement to the First Meeting of the Panel, paragraphs 66 and 67.
[53] EC first written Submission, paragraphs 246 to 262.
[54] India Oral Statement to the First Meeting of the Panel, paragraph 69.
[55] EC first written Submission, paragraph 289.
[56] India Oral Statement to the First Meeting of the Panel, paragraph 70.
[57] Question number 20.
[58] India Oral Statement to the First Meeting of the Panel, paragraph 70.
[59] EC first written Submission, paragraph 274.
[60] Paragraphs 73 et seq.
[61] Number 22.

71. The EC used information from the various levels in order to describe the situation in the domestic market, not to favour a particular finding.[62] In those Regulations the EC explained the peculiar feature of the case, that is to say the fact that several indicators showed the domestic industry to be in an apparently healthy condition. Data for the domestic industry were presented where possible, otherwise data for the sample were used. In several cases both types were given. Data for the EU-15 supported the EC's explanation of the consequences of the disappearance of firms.

4. Meaning of 'dumped imports' and assumption of dumping before investigation period

72. India has taken objection to the inclusion of transactions that are non-dumped wherever the phrase 'dumped imports' is used in Article 3, and accuses the EC of infringing Article 3.4 and 3.5 in particular. However, it does not clearly explain the nature of this infringement, and in fact there has been none.

73. There is an unspoken assumption in the Indian claim that findings of injury are made on a country-by-country basis. Indeed it is reflected in India's own practice.[63] This is in line with WTO law, and reflects a broader perception that the Agreement addresses dumping between countries, albeit that individual companies are the actors. The principle is reflected i Article VI GATT itself and at several points in the Agreement, notably in Article 12.1.1 on the initiation notice, and in the rules on cumulation in Article 3.3. In any event, there seems no doubt, as far as this dispute is concerned, that what matters is whether non-dumped transactions should be included in a country's exports of a product under consideration.

74. The issue is relevant solely to the causation of injury. It has no relevance to defining whether the domestic industry is in an injured state. Although the sales volume of domestic producers is relevant, and an increase in imports may be at the cost of a decrease in sales of the domestic product, it is the latter and not the former that is relevant for assessing the state of the domestic industry. The expansion of imports may be responsible for this, but that of course is an issue of causation.

75. One can go further and say that, as a question of causation, the issue arises solely in relation to the price and the volume of the imports in question.

76. As regards price, the inclusion of non-dumped transactions in the total of 'dumped imports' only serves to reduce the chance of causation being established, and therefore of a duty being imposed on the exporters. The reason for this is that it can hardly be supposed that the prices of transactions that are not dumped are lower than the prices of those that were dumped. In fact, the opposite is almost certainly the case, so that, as the EC has pointed out[64] the effect of including non-dumped transactions is generally to reduce the margin of undercutting. At any rate, the notion that the inclusion of such transactions could exaggerate the undercutting margin can be dismissed as academic.

77. Consequently, it can be safely concluded that in the bed linen investigation the effect of including non-dumped transactions in the notion of 'dumped imports' was to reduce the margin of undercutting, and therefore the indications of injury causation. Consequently, there can have been no unjustified finding of injury causation on this basis.

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[62] Cf. India Oral Statement to the First Meeting of the Panel, paragraph 79; and reply to Panel Question 36.

[63] See, e.g., Anti-dumping investigation concerning imports of Sodium Cyanide from the USA, European Union, Czech Republic and Korea Republic. 8/1/99-DGAD.

[64] First written Submission, paragraph 237.

78. In the bed linen investigation, undercutting was considered solely during the dumping investigation period.[65] The EC's conclusions on the point were essentially a snapshot of the prevailing situation, rather than an examination of changes in undercutting over time. Consequently, in this context the issue of assumed dumping in earlier years is not relevant.

79. Turning to the question of volume, what is notable about Article 3 is that all the contexts where the volume of dumped imports is an issue concern *changes* in volume. This is not surprising. A snapshot of the volume of imports (whether or not individual dumped transactions are included) says nothing about injury to the domestic industry. There could be a successful domestic industry where imports from the country concerned have 95 per cent of the market, and an unsuccessful one where they have only 5 per cent. Thus, what matters is the change in volume: in particular, whether there has been an increase.

80. It is in order to identify such changes that the injury investigation period covers a number of years, typically three or four, concluding with the dumping investigation period. Of course, as the India has noted, the EC authorities have no dumping data for the years proceeding the dumping investigation period. Consequently, no comparison can be made of volumes of dumped transactions over this period. The only comparison that can be made is that of total volumes of the product in question from the country in question.

81. Thus Members appear to be in a dilemma. The Agreement requires information on changes in the volume of dumped imports, but no Member's authorities (not even those of India) collect data on dumping for the whole of the period in which import volumes are studied. No one (not even India) has suggested that there is an obligation to carry out such an investigation. (India has asserted that its law and practice – which the EC has illustrated in its questions to India – are in conformity with the Anti-Dumping Agreement.[66]

82. Thus the Agreement envisages that the only basis on which volume change can be determined is one that includes all imports of the product from the relevant country. Consequently, the EC cannot be at fault for having made its determinations on that basis.

83. This argument would be sufficient to dispose of India's complaint, but the legality of the EC's behaviour is also supported by a closer consideration of the issues.

84. The bed linen investigation revealed that imports of the product in question had risen significantly in both absolute and relative (market share) terms between 1992 and mid-1996.[67] The evidence from the dumping investigation period revealed dumping between mid-1995 and mid-1996.[68] Although it is conceivable that the dumping practice changed dramatically in mid-1995, that seems unlikely. At any rate, the investigating authorities would have been entitled to assume, in the absence of evidence to the contrary, that dumping existed for some time before this. In fact, such an assumption was relevant to the bed linen case.

85. The only assumption which it could be said that the investigating authorities did make was that the volume of dumped transactions increased at the same time as the total volume of imports. In other words, that the exporters were not dumping, or were dumping smaller volumes in earlier years. This hardly seems an exceptional step to take. In any event, it is open to Indian exporters to argue that they were actually dumping greater volumes in earlier years. Bearing in mind the arguments regarding the cost of investigations into dumping margins it would not be acceptable for the authorities to

[65] Provisional Regulation, recital 68.
[66] India's answers to the EC's question, Introduction and Questions 5 and 7.
[67] Provisional Regulation, recital 67.
[68] Definitive Regulation, recital 28.

compel exporters to undergo such an investigation. This judgement is endorsed by the practice of Members of not imposing such burdens.

86. In regard to the current proceedings are concerned, the conclusion of this analysis must be that India's claims fail. As far as India accuses the EC of taking non-dumped transactions into account for assessing price effects, the only consequence is to reduce the likelihood of dumping measures being imposed, so the question is moot. As far as import volume is concerned, the only assumption that the EC could be accused of making is not that imports were being dumped, but that they were not being dumped.

V. TREATMENT OF DEVELOPING COUNTRIES – ARTICLE 15

87. EC has explained that it did explore the possibility of constructive remedies as required by Article 15. It was prepared to contemplate an undertaking in this case, even from a trade associations such as Texprocil. However no proposal was forthcoming 9 days after the deadline.[69] Even if Article 15 reduces, in the case of antidumping actions against developing countries, the discretion that investigating authorities have under Article 8 to reject undertakings, it is still not possible for investigating authorities to impose price undertakings on exporters that do not want to offer them.

88. India is dismissive of the EC's attempts to put the letter and the spirit of Article 15 into practice. However, the EC is not alone in having difficulty in this area. When questioned by the Panel, India was unable to suggest any alternatives to price undertakings under Article 83[70], and during the first oral session of the Panel it revealed that its exporters were not interested in offering undertakings during the bed linen investigation. (It seems therefore rather cynical for India to tell the Panel that the EC 'should have proposed either a price undertaking, or any other alternate constructive remedy to the Indian exporters' .)[71]

89. Anti-dumping procedures have a judicial character, which makes indulgence to any particular party or parties a very delicate matter. There are at least two sides to every investigation. An advantage for one is almost inevitably a disadvantage for the other. It is particularly difficult to give procedural benefits to one party in the course of an investigation without interfering with the rights of the other to present its case.

90. Whereas there is a general principle of favouring developing countries in trade matters (as reflected in GATT Part IV, and in the Generalized System of Preferences) this has proved very difficult to implement in the textiles sector (witness the criticisms regarding the implementation of the Agreement on Textiles and Clothing).

91. Furthermore, the EC, which has considerable experience in operating undertakings, has found that they are almost impossible to achieve in the textile sector. The practical problems are evidenced in a document accompanying India's first written Submission (Exhibit India-16) where the number of traders involved in shipping runs to nearly 300.

92. Furthermore, that document also illustrates the problems that arise even when dealing with producers' associations. Although it is included in the exhibit, Statement C of that document was never submitted to the Commission. It contains trade data for exporters that contradict those in Statement A, which was submitted. India has sought to explain away the discrepancies[72], but many remain. (For example, the list in Statement A contains companies that were traders, both sides having agreed that a sharp distinction was not possible).

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[69] EC's answers to Panel questions, Question 31.
[70] India's answers to Panel questions, Question 38.
[71] India's answers to Panel questions, Question 13.
[72] See India's answer to EC questions, Question 9.

93. It is also significant that bed linen is a non-commodity product, made to the purchaser's order. Setting minimum price levels in such circumstances is very difficult, except on terms (such as minimum price by weight) which are unlikely to be acceptable to exporters. It is significant that during the first oral session of the Panel India admitted that its exporters had little interest in offering undertakings.

94. The last occasion on which it proved possible to accept an undertaking in this area was Pure silk typewriter ribbon fabric originating in China, in 1991[73], hardly a mainstream textile product. Nevertheless, the EC continues to try.

95. One is also entitled to ask how it was that the exporters, who were represented by counsel thoroughly experienced in EC anti-dumping proceedings, raised the possibility of undertakings at only the last minute, and made no further efforts in this direction.

96. However, the reality of the EC's actions is not as bleak as the picture painted by India. Thus, its account[74] of the removal of handloom products from the scope of the definitive measure does not present the whole story. It was the exporters who invoked Article 15 in order to request special treatment of such products.[75] The EC could not take action on the basis of Article 15 because of the implications for its relations with other countries, but was able to redefine the scope of the measure in order to accommodate the exporters' interests. The special treatment of handloom products is a feature of the EC's trade policy that is exclusive to its relations with developing countries.[76]

97. Finally, while it is committed to observing both the letter and the spirit of Article 15, in defence of its interests in this case, EC is obliged to point out that India's claim[77] is that 'Inconsistently with Article 15 ADA, the EC failed to consider India's special situation of developing country Member before imposing provisional anti-dumping duties'. This is the topic that should be addressed by the Panel. The EC's alleged failures following the Provisional stage are not within the terms of reference of the Panel.

98. In any case, in view of the difficulties of trying to explore constructive remedies before a final assessment of dumping and injury is made, the EC does not believe that there is any obligation under Article 15 to do so at the provisional measures stage.[78]

VI. PUBLIC NOTICE – ARTICLE 12.2.2

99. In its first Oral Statement to the First Meeting of the Panel to the Panel[79], India has brought together its various claims under Article 12.2.2. The EC believes this is a useful approach. In its first Submission the EC has raised specific points about the interpretation of Article 12 in regard to each of India's individual claims, but in the present document it wishes to address some issues of overall importance.

100. However, before taking these up, there are some recent arguments of India that must be answered.

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[73] Official Journal L174/27, 1990, p. 27.
[74] First written Submission, paragraph 6.42.
[75] Second post hearing brief, Exhibit India-55, point 8.
[76] Definitive Regulation, recital 7 and Article 2; Letter from Vermulst & Waer of 11 August 1997, Exhibit EC-7.
[77] Point 18 of the panel request, and paragraph 6.32 of the first written Submission.
[78] See EC responses to Panel questions, Question 37.
[79] At paragraph 92.

101. According to India, the only arguments or claims that need not be included in the notice under Article 12.2.2 as not 'relevant' are ones that are nonsensical, and even here it holds that an explanation should be given for exclusion.[80] The result is that not even nonsensical arguments may be excluded since it will be necessary to mention them, and explain that they are nonsensical, in order to dismiss them.

102. Thus India's argument deprives the word 'relevant' of its meaning, since all claims and arguments are in effect relevant.

103. Having emasculated that criterion, India introduces another, characterized by the word 'important'. Claims are important either because they could affect the outcome of the case, or because they are regarded as matters of principle to developing countries. The significance of this criterion is not explained. However, it is apparent that India believes that claims or arguments which are acknowledged to be unimportant, and which could not affect the outcome of the investigation, are nevertheless relevant and therefore required to be mentioned in the public notice of the final determination.

104. In its various statements, including the list presented by India in its Oral Statement to the First Meeting of the Panel[81] India confuses the 'claims' said by it to have been made by the exporters during the proceedings (which are mentioned in Article 12.2), with the 'claims' presented in this dispute. (A further confusion arises because India introduced 'claims' in its first written Submission which, since they were not included in its panel Request, are not within the terms of reference of this Panel. Similarly certain claims in its Request have not been pursued before the Panel.). The confusion is compounded by India's answer to the Panel's Question 11.

105. The EC believes the most straightforward approach is to examine the complaints regarding publication of claims under Article 12.2 in so far as they were included in the panel Request and have been pursued before this Panel. These are as follows:

	Action that is said to have been inadequately notified/explained, despite exporters' arguments, etc.	**Claim in Panel Request**	**Claim in first Submission**
A	Inadequate decision on standing	1	28
B	Not examining evidence other than complaint	2	25
C	Applying Article 2.2.2(ii) of the Agreement before Article 2.2.2(i)	4	3 (3.120)
D	Using an option – Article 2.2.2(ii) – for which the requirements were not fulfilled because it was based on only one company,	5	
E	Using an option – Article 2.2.2(ii) – for which the requirements were not fulfilled because the profit level used was unreasonable	6	3 (3.119) 6 (3.144)
F	Using an option – Article 2.2.2(ii) – for which the requirements were not fulfilled because actual data were not used	7	3 (3.118)
G	Use of zeroing – Article 2.4.2	11	
H	Assuming that all imports in investigation period were dumped	12,13	10 (4.41)
I	Inconsistent use of sample	14	18
J	Disregarded factors under Article 3.4	15	13

[80] India's answers Panel's questions, Question 11.
[81] Paragraph 94.

K	Failure to consider factors other than dumped imports: restructuring		22 (4.233)
L	Failure to consider factors other than dumped imports: assuming that imports in years before investigation period were dumped		22 (4.234)
M	Examination of market share	16	
N	Consideration of developing country status	18	31

106. It will be noted that two claims (K, and L) made in the first Submission were not included in the Panel Request. Since that forms the Panel's terms of reference they fall outside the jurisdiction of the Panel.

107. Many of the remaining claims are misconceived. The EC has explained the point at several places in its first written Submission. In these cases India is objecting to actions taken in the application of a Member's law and practice on the basis that it is contrary to WTO rules. Whether it is or not will be determined by the Panel in the context of the appropriate claims. However, as regards Article 12.2, the only explanation that is required is for the EC Regulations to make clear that the action taken is an application of that law or practice.

108. It cannot be expected that investigating authorities, which will almost certainly have very limited if any judicial authority, will be empowered to disregard national law and practice on the basis that it is contrary to WTO rules. Nor will they be authorized to justify that law and practice against those rules. Therefore, arguments to the effect that the law and practice are contrary to WTO rules are irrelevant in so far as they are addressed to the investigating authorities.

109. This is not to say that the exporters are without a remedy. They could challenge the authorities' interpretations of EC law before the European courts (which have sought to interpret EC law in line with WTO obligations), or the exporting Member could, as in this case, take the matter to the WTO.

110. (It is possible that, if any elements of the EC's law and practice were to be held by the Panel not to be consistent with the requirements of the Anti-Dumping Agreement, infringements of Article 12.2 would follow, because the EC would not have provided an explanation appropriate to the proper application of WTO law.)

111. Nearly all the complaints in the Table fall into this category, either completely (those in lines B, C, D, E, F, G, H, I, J and M), or in part (those in lines A, K, and L). In other words, in each of these cases, the EC was following its usual law and practice, and it was to this that India took exception. In each case, by merely stating that law or practice, the EC authorities were complying with the obligations of Article 12.2.

112. Line C of the Table will serve as an example of the point that is being made. India complains that the EC has applied the options in Article 2.2.2 contrary to the proper order.[82] The Article 12.2.2 claim is essentially that the EC did not justify this or respond to the exporters complaints on the WTO-compatibility of its action. In fact, as they made clear in the Regulations, the EC authorities were simply applying EC law and practice . That is all the explanation that was required by Article 12.2 in such a case. For the exporters to continue to demand explanations of the point in the course of investigations was a waste of their money and of the authorities' time. Their arguments were irrelevant in the context of the investigation.

[82] Claim 1 in the first written Submission.

113. The table in India's Oral Statement to the First Meeting of the Panel seems to assume that an obligation under Article 12 arises only where the issue of which notice has to be given is one that concerns behaviour by the authorities that infringes the Agreement. This is not the case. The authorities could be complying with the requirements of the Agreement in the aspect of the rules that they are applying (e.g. making appropriate allowances when comparing sales), and yet fail to give adequate notice of that action and thereby infringe Article 12.

114. Because of India's assumption, it is very difficult to identify those instances where its claims contain elements of the second kind. It is possible that they exist in claim A. However, for A (and B) the governing provision is Article 12.1 of the Agreement, which India has not invoked. The EC has made additional arguments in its first Submission[83] and its Oral Statement to the First Meeting of the Panel.[84]

115. The one claim under Article 12.2 which seems to be independent of a disagreement about the substantive law (Article 15) is that in Line N. The matter is addressed in the EC's first written Submission.[85]

VII. CONCLUSION

116. The EC asks the Panel to look at the facts of this case, in particular the explanations given in the Regulations adopted by the EC, and conclude that they fall within the boundaries that the Agreement sets for the actions of Members. In this respect the EC recalls that the in the light of the provisions of Article 17.6(i) and the discretion that the terms of the Agreement leave to Members, the Panel is not called upon to approve every step that the EC has taken in the investigation but only to determine whether there is any inconsistency with the mandatory requirements of the Agreement which has affected the outcome of the investigation.

[83] At paragraphs 77 and 103.
[84] At paragraph 36.
[85] At paragraph 372.

EXHIBITS

EC-5	Expressions of support for initiation of investigation.
EC-6	Correspondence between Commission and Indian Embassy, 1997
EC-7	Letter from Vermulst & Waer regarding handloom products, 11 August 1997

Annex

Chronology of receipt of declarations of support for initiation of the investigation

French Association. Companies:	29-Jul-96
-Fremaux	29-Jul-96
-Hacot Colomb	29-Jul-96
-Hacot	29-Jul-96
-Vanderschooten	29-Jul-96
-Claude	29-Jul-96
-Mulliez	29-Jul-96
-Jalla	29-Jul-96
-Bera	29-Jul-96
Spanish Association: Companies:	29-Jul-96
-Estebanell	29-Jul-96
-Puignero	29-Jul-96
-Cano	29-Jul-96
Austrian Association. Companies:	29-Jul-96
-Fussenegger	29-Jul-96
-Getzner	29-Jul-96
-Hämmerle	29-Jul-96
Bierbaum	30-Jul-96
Meckelholt	30-Jul-96
Kettelhack	30-Jul-96
Erbelle	30-Jul-96
Luxorette	30-Jul-96
Wülfing	30-Jul-96
Bauer	30-Jul-96
Estella	30-Jul-96
Irisette	30-Jul-96
Damino	30-Jul-96
Dyckhoff	30-Jul-96
Bossi	30-Jul-96
Bassetti	30-Jul-96
1Zucchi	30-Jul-96
Gabel	30-Jul-96

Valman	30-Jul-96
Lameirinho	30-Jul-96
Incotex	30-Jul-96
Coelima	30-Jul-96
Almeida	30-Jul-96
Reikalevy	27-Aug-96
Finlayson	28-Aug-96
Marimekko	2-Sep-96
Fremaux	4-Sep-96
Hacot Colomb	4-Sep-96
Hacot	4-Sep-96
Vanderschooten	4-Sep-96
Claude	4-Sep-96
Mulliez	4-Sep-96
Jalla	4-Sep-96
Bera	4-Sep-96
Foncar	5-Sep-96

Date of publication of the notice of initiation: 13 September 96

ANNEX 2-7

ORAL STATEMENT AND CONCLUDING REMARKS OF THE EUROPEAN COMMUNITIES

SECOND MEETING OF THE PANEL

(6-7 June 2000)

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I. INTRODUCTION

1. The EC would like to thank the Panel for its dedication to resolving this case. There is a considerable volume of material to be dealt with, some of it relevant to the issues that the Panel is called on to decide.

2 In this Statement, the EC would like to take up various points in India's Rebuttal Submission[1]

3. As at last meeting,

- I will deal with the initiation phase of the EC anti-dumping investigation;
- Mr Vidal Puig will address the determination of dumping effectuated by the EC;
- and Mr White will deal with the finding by the EC of injury caused, and the issue of special regard for developing countries.

II. INITIATION

1. Article 5.3 – Evidence

4. India complains that the EC authorities failed to 'examine the accuracy and adequacy of the evidence provided in the application' as required by Article 5.3. However, its repeated statements to this effect have never amounted to more than assertions.

5. This style of argument is continued in the Rebuttal Submission. The following statement is typical. 'It is clear from the very text of the EC's notice of initiation, that there was no examination whatsoever.'[2] The contents of the initiation notice follow the requirements of Article 12.1 of the Agreement. Consequently, according to India, by respecting the Agreement a Member provides evidence that it is breaking it.

6. Having said that there was no examination whatsoever, India then asserts that there was an examination, but only of factors pointing towards injury.[3] The only support for this assertion appears to be the fact that the EC authorities did not enquire of one Association whether any of its members might be opposed to the complaint. India does not explain how the authorities were to achieve this without infringing the non-publication obligation in Article 5.5, nor how the mere fact of opposition, were it detected, would be indicative of insufficient evidence of injury.

7. India then misquotes the EC's first Submission in order to make it appear that the EC had argued that 'possible evidence that injury may not have occurred is not relevant'.[4] What the EC said was that evidence of no injury in the year 1993 (had it existed) would not have been relevant to the

[1] The EC would like to take this opportunity to make some corrigenda to its Rebuttal Submission.
(a) Paragraph 47, last phrase: should read 'extends to sub-paragraphs (i) and (ii)'.
(b) Paragraph 84, last sentence: should read: 'In fact, such an assumption was not relevant to the bed linen case'.
(c) Paragraph 107, second sentence: should read 'action', not 'actions'.
[2] India Rebuttal Submission, paragraph 8.
[3] India Rebuttal Submission, paragraph 10.
[4] India Rebuttal Submission, paragraph 11.

existence of injury in 1995/96.[5] (One can imagine India's reaction had the EC authorities used evidence of the existence of injury in 1993 to support a similar finding in regard to 1995/96).

8. India's argument in this regard seems to be that (a) the previous investigation concluded that there was no injury to the industry (in 1993), therefore (b) had the EC authorities considered that fact they could not have concluded that there was injury to the industry in 1995/96, regardless of the evidence in the complaint. The proposition only has to be stated for its illogicality to become apparent. On top of this, the premise is false. The previous investigation reached no such conclusion.

9. India suggests that the question in the dispute regarding Article 5.3 is 'whether investigating authorities can ignore information patently at their disposal'.[6] However, the real question is whether India has discharged its burden of proving that the EC authorities did not 'examine the accuracy and adequacy of the evidence provided in the application'. The EC submits that, since the strongest 'proof' provided by India is mere speculation, its failure in this regard is obvious.

10. The EC has noted from the outset[7] the particular problems of examining the accuracy of the evidence provided in this (or any other) complaint. Considered in the abstract one can speak of possible standards of proof that move in a smooth progression from 'mere allegation or conjecture' at base to something such as 'beyond any conceivable doubt' at the top, passing 'more likely than not' and 'beyond reasonable doubt' on the way.[8] In this world of abstraction one merely has to choose an appropriate point to select the standard that is appropriate for the initiation of the investigation (and, later on, for the definitive finding).

11. The problems arise when one moves to the real world and attempts to apply the chosen standard to the facts of the case. In particular, a dumping enquiry does not provide a similarly smooth progression in the available evidence. As regards both dumping and injury, access to company records constitutes a quantum leap in both the quality and the quantity of evidence.

12. At the initiation stage the authorities do not have access to such records. They can look at the internal coherence of the complaint, they can consider it in the light of their own experience (such as in this case the information, albeit several years old, of the previous investigation), and they can compare it with publicly available information. All these things the EC authorities did before they initiated the investigation in the bed linen case. In the light of this action, it is apparent that there is no merit in India's attempt to show that the EC authorities failed in their obligations under Article 5.3.

2. Article 5.4 - Standing

13. In the light of the repeated attacks made by India regarding the adequacy of support for the EC's decision to initiate an investigation on bed linen it is appropriate to recall that it is India that bears the burden of proving that the EC has failed to meet the requirements of Article 5.4 of the Agreement. In fact, India has sought to discharge this burden by means of little more than assertion, innuendo and misrepresentation.

14. In its Rebuttal Submission India repeats some of its previous accusations, and misinterprets statements by the EC in order to present one entirely new argument. The EC will deal with these points in the following paragraphs.

[5] EC first written Submission, paragraph 68.
[6] India Rebuttal Submission, paragraph 11.
[7] EC first written Submission, paragraph 55.
[8] The point is discussed in EC first written Submission, paragraph 51.

15. Firstly, India cites the *Swedish Steel* and *Mexican Cement* panel reports[9], to argue that Article 5.4 requires Members' to 'actively check' whether an application has been filed on behalf of the domestic industry. In fact, although they concern the rather different wording of the 1979 Codes, these reports merely confirm the ordinary doctrine that the investigators must ensure that sufficient support (as defined in Article 5.4) for the investigation has been expressed before it is commenced. Not only has India failed to provide evidence to establish a *prima facie* case in this respect. The EC has supplied documents that demonstrate that it has complied with the requirements of the Agreement.

16. India says that 'the whole point of Article 5.4 is that the claim of the complainant that it represents the industry must be checked. If the number of producers is not overly large, this can be done by contacting them or by some statement from them to this effect. ' India bases this proposition on the provision for sampling contained in the footnote to Article 5.4. It implies that the EC thinks that merely listing an association in the complaint is sufficient expression of support.[10]

17. In view of the degree of support expressed individually by EC producers for the initiation of this investigation these comments are largely academic. Nevertheless, the EC would like to reaffirm its view that an association can express support on behalf of its members.[11]

18. In its Rebuttal Statement, much of India's discussion of standing consists of an elaborate argument that entirely depends on a misreading of the EC's answer to one of its questions.[12] The first point to make is that this was a question directed to the composition of the sample of the domestic industry. Thus it concerned the injury determination that justified the imposition of anti-dumping measures, and not the issue of standing as regards initiation. In fact, the question made no mention of the latter topic. In its answer the EC gave the number of companies *listed in the complaint* –46.[13] This was not the number for which *expressions of support* for the complaint were obtained (for the purposes of Article 5.4), which was 38.[14] The EC's answer also gave the number of companies that were included in the final definition of 'domestic industry' (referred to as the 'Community industry'), which was 35, and said that their production represented 'around 34 per cent of total Community production'. It also observed that this satisfies the conditions set forth in Article 5.4, and that the conditions were satisfied both before and after initiation.

19. India now seeks to use this information to mount an attack on the initiation decision. However, although India purports to read it so[15], the EC's answer did not assert that there were only 35 companies that expressed support for initiation in the sense of Article 5.4, or that their production represented around 34 per cent of total production. Regarding initiation, and the requirements of Article 5.4, what the EC has demonstrated is that 38 companies expressed support for the complaint[16], and that they represented 'at least 34 per cent of the highest figure of total EC production '.[17]

[9] India Rebuttal Submission, paragraph 14.

[10] India Rebuttal Submission, paragraph 14, footnote.

[11] EC first written Submission, paragraphs 92 et seq. It is significant that the Statutes of Eurocoton provide that it is entitled "d'assurer la représentation de l'industrie cotonnière de la CEE auprès des autorités et des institutions publique en particulier des Communautés Européennes". Article 4, lett. b) (Exhibit India-59).

[12] EC answers to India questions , Question 40.

[13] Annex 3 of the non-confidential version of the Complaint, Exhibit India-6. Note that the entry for Austria on page 10 refers to three companies. What the EC's answer actually said was that 'there were 46 companies which supported the complaint before initiation'.

[14] See, e.g., the names listed in the Annex to EC second written Submission. Note that, because of a clerical error, the French companies appear twice on that list.

[15] That India understood the real significance of the reference to 46 companies is evident from the fact that it knew which were the eight extra companies, information which is only available in the Complaint.

[16] Annex to EC second written Submission; Exhibit EC-4; Exhibit EC-5.

[17] EC first written Submission, paragraph 99; EC first oral Statement, paragraph 41; Exhibit EC-4.

Furthermore, the figure of 45952 tonnes is, as India accepts, the total production of the 38 companies.[18]

20. As a separate point, India asks how the EC could have made estimates of total EC production at the time of initiation if it was still asking for information on production figures two months later.[19] The answer is that at the time of initiation the EC already had data on total EC production from a number of sources.[20] Taking even the highest production figure, it calculated that degree of support was well in excess of the threshold requirement set by Article 5.4. The enquiries referred to by India[21] concern companies with fractions of a per cent of total production. They represent a commendable attempt by the EC authorities to pursue the investigation it had initiated some months before.

21. Despite India's attempt to complicate the issue, the reality is straightforward. Before initiating the investigation the EC authorities determined that the levels of support required by Article 5.4 were satisfied. The list of producers who expressed that support has been provided to the Panel, along with the evidence as to when that support was expressed.[22]

22. Also in its Rebuttal Submission, India returns to the question of access to the non-confidential file, although it refuses to explain the relevance of this question to the issue before the Panel, other than to say it is a fact that 'stands out'.[23]

23. India maintains[24] that the EC was 'factually incorrect' to say that 'access to the non-confidential file was never requested'[25], but it does not state when a request was made, still less provide any evidence for it. As far as the EC is aware, the Indian exporters' representatives, having in October 1996 indicated their interest in seeing the file[26], did not pursue the matter. The EC maintains separate non-confidential files on initiation, dumping and injury. The records show that the representatives saw the non-confidential file on injury on 13 December 1996.[27] We have no record of what prompted the invitation of 7 January 1997[28] to inspect the initiation file.

24. As for the removal of the fax headers, the EC has already explained its practice of complying with producers' wishes in regard to the information held in the non-confidential file. Copies of the complete originals have now been supplied as Exhibit EC-5.

25. The EC has provided considerable information on this issue, and has more than satisfied the obligations of the DSU in this respect. It remains ready (in the words of Article 13.1 quoted by India)[29] to 'respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate'. India's observation[30] that the Appellate Body has encouraged panels to draw inferences from the refusal of a party to provide information that is within its possession is of no relevance to this case since the Panel has made no such request, despite India's plea.[31] India's invitation[32] to the Panel to draw such inferences in the present case is therefore misplaced.

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[18] It represents the total of the production figures listed in Exhibit EC-4.
[19] India Rebuttal Submission, paragraph 25.
[20] EC first written Submission, paragraph 99.
[21] Exhibit India-82.
[22] Exhibits EC-4, and EC-5; Annexe to EC second written Submission.
[23] India Rebuttal Submission, paragraph 27.
[24] Paragraph 27.
[25] EC answers to India questions, Question 14.
[26] Brief of 25 October 1996, point 1.2 (Exhibit India-50).
[27] Register: Inspection non-C files (Exhibit India-83).
[28] Exhibit India-58.
[29] India Rebuttal Submission, paragraph 32.
[30] Ibid.
[31] India first oral Statement, paragraph 27.

III. DUMPING

26. In this section of our statement I will address in turn each of the three substantive claims raised by India with respect to the dumping determination, i.e.

(1) the claim under Article 2.2 that the profit amount used in the constructed normal values is "unreasonable";

(2) the claim that the method set out in Article 2.2.2 (ii) was incorrectly applied; and

(3) the claim under Article 2.4.2 relating to inter-type "zeroing ".

1. Article 2.2: Reasonableness of the profit margin

27. By now the EC's position with respect to India's claim under Article 2.2 is well-known to the Panel. Article 2.2. does not establish a supplementary «reasonableness» test, different from that embodied in Article 2.2.2. Article 2.2 enunciates the general requirement that the amount of profit included in the constructed normal value must be «reasonable». That requirement, however, has been elaborated in Article 2.2.2, which sets out a series of specific formulae for arriving at that reasonable amount. The amount of profit established pursuant to those formulae is presumed to be "reasonable" and, therefore, consistent with the requirement in Article 2.2. This is not a refutable presumption.

28. India's position may appear attractive at first sight. Upon a closer examination, however, it becomes evident that the uncertainty introduced by India's interpretation could lead to results that are more "unreasonable" than the strict application of a set of well-defined set of rules agreed by all Members.

29. The rules contained in Article 2.2.2 purport to limit the discretion of the investigative authorities, and at the same time to create a « safe haven » for those authorities. India's interpretation would defeat both objectives. Investigative authorities would have to check the results obtained by applying the formulae in Article 2.2.2 against a broad « reasonableness » requirement, which is nowhere defined. India's interpretation could be detrimental also to the exporters, by devolving to the investigative authorities a large amount of discretion. It would allow those authorities, for example, to disregard the preferred method in the chapeau if they consider that the result is « unreasonably » low and move directly to «any other reasonable method ».

30. Even assuming for the sake of argument that the presumption that the method set out in subparagraph (ii) is reasonable per se could be overturned, India has presented no relevant evidence to that effect.

31. India appears to consider that it is enough to assert that Bombay Dyeing is "in a different league"[33], or that it possesses "an established position in the market for over one-hundred years"[34] in order to prove its sweeping claim that Bombay Dyeing's profit margin is unreasonable "for any other company in or outside India".[35] The EC obviously disagrees.

32. The Panel has invited India to provide evidence in support of its claim. India has produced none. Instead, India has made a wholesale reference to the unsupported arguments raised by the

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[32] India Rebuttal Submission, paragraph 34.
[33] India's answer to Question 2.A from the Panel.
[34] India's Second Submission, para. 38 and India's First Oral Statement, para. 33.
[35] India's answer to Question 3.A from the Panel

exporters during the administrative procedure.[36] Those arguments, which concerned essentially alleged differences between branded and non-branded sales, were addressed and rejected in the Definitive Regulation. In fact, the EC authorities found that, had those claims been accepted, it would have been to the disadvantage of the Indian exporters concerned, since Bombay Dyeing's profits on unbranded sales were higher than on branded sales.[37] India has not challenged that factual finding in this dispute.

33. India also reiterates the argument that the amount for profit was « unreasonable » because it was higher than those used for the Pakistani and the Egyptian exporters.[38] The EC recalls once again, however, that profit margins may vary considerably from one country market to another, depending on the prevailing competitive conditions in each market. Indeed, it is significant that none of the methods set out in Article 2.2.2 envisages the use of data pertaining to a different country of export. Moreover, the EC recalls that the amount of profit is related to the amount of SGA expenses. In this case, the combined amounts for profit and SGA expenses used for the Pakistani and the Egyptian exporters were similar to that used for the Indian exporters. India cannot pick and choose the most favourable figure for each amount from different data sets.

34. Finally, the comparisons made by India with the profit levels obtained by the exporters concerned in their domestic sales of products of the same category[39] (defined by India as « textiles ») are false because they do not compare like with like. Data from non-profitable sales are excluded from one side, but not from the other. (Incidentally, it is worth noting that the table at paragraph 3.134 of India's First Submission evidences that the « overall » profit margin for both domestic and export sales is lower than the profit margin for domestic sales of the same category, which suggests that the exporters concerned are dumping even by India's standard).

2. Article 2.2.2 (ii)

(i) Hierarchy of the options

35. The EC notes that India has nowhere addressed, either in its First Oral Statement or in its Second Submission, the EC's rebuttal of India's argument that the options set out in subparagraphs (i) and (ii) must be attempted in that order.

(ii) Use of data from a single company

36. As regards India's argument that Article 2.2.2(ii) does not allow the use of profit data from a single company, India now concedes the obvious point that « in general terms »[40], words in the plural can contain references to the singular as well. In its First Oral Statement, India attempts to shore up its argument by describing Article 2.2.2 (ii) as containing a 'triple plural'[41], which supposedly would justify to make an exception to the general rule. Rather sensibly, India omits altogether this argument in its Second Submission.

37. Instead, India presses its newly discovered claim that the EC authorities should have included Standard Industries in the calculation of the profit amount.[42] India's arguments misrepresent the EC's position. Standard Industries was not excluded from the profit margin calculation because it was

[36] India's answer to Question 1.B from the Panel.
[37] Recital 18.
[38] India's Second Submission, para. 40.
[39] India's First Submission, para. 3.134.
[40] India's First Oral Statement, para. 43.
[41] Ibid.
[42] India's Second Submission, para. 43.

not deemed « relevant ».[43] Standard Industries was excluded from the calculation because it had not been previously included in the sample. In turn, the reason why Standard Industries was not included in the sample was because its exports to the EC were minor.[44] India has not challenged the choice of the sample under the relevant provision of the Anti-dumping Agreement. In view of that, India is precluded from claiming now that the sample is not sufficiently representative for the purposes of Article 2.2.2 (ii).

38. India's complaint that Standard Industries should not have been excluded from the profit margin calculation without first examining Standard Industries' data makes no sense.[45] If India were correct, there would be no point in having a sample, because the investigative authorities would in any event have to examine all the data.

39. India contends that Standard Industries was more representative of domestic sellers than Bombay Dyeing, because it was «less anomalous and less peculiar ».[46] The EC, however, cannot see how a company with 80 per cent of the market can be more « anomalous and peculiar » than one with only 14 per cent. The only reason advanced by India is that it «genuinely believes »[47] that Standard Industries is more representative.

40. In its Second Submission, India has suggested that Bombay Dyeing's sales do not meet the 5 per cent rule in footnote 2 of the Agreement.[48] That rule, however, refers to all domestic sales of the like product. Moreover, it is applied on a company basis, rather than on a country basis. Domestic sales of the like product by Bombay Dyeing represented 70 per cent of its exports to the EC and 8.5 per cent of the total exports to the EC of the 5 sampled companies.

41. India's insistence that Standard Industries should have been included in the calculation of the profit amount is in any event misplaced. Standard Industries' response to the EC authorities' questionnaire shows that Standard Industries had no domestic sales in the ordinary course of trade during the investigation period. All 104 different bed linen types were sold at a loss. Thus, Standard Industries' data would have had no effect on the profit margin. To be clear, an d in response to India's remarks of this morning, the EC did not exclude Standard Industries because it had no profitable domestic sales, but because, as I have just mentioned, its export sales were small. Indeed, at the time were the sample was chosen, the EC authorities could not have been aware that Standard's sales were not profitable, since its questionnaire response had not been received yet. The EC's point is simply that India's claim, even if upheld, would be inconsequential, since it would not affect the level of the dumping margin.

(iii) Ordinary course of trade

42. The EC has shown that India's view that Article 2.2.2 (ii) does not allow the exclusion of the sales not in the ordinary course of trade would lead to results that are manifestly absurd.[49]

43. India has attempted to explain away[50] the illustrations of the perverse consequences of its theory. These attempts were in themselves unconvincing.[51] But more importantly they fail to deal

[43] Ibid.
[44] See India's Exhibit 22.
[45] Ibid.
[46] India's answer to Question 5.A from the Panel.
[47] Ibid.
[48] India's Second Submission, para. 44.
[49] EC's First Submission, paras. 145 et seq.
[50] India's First Oral Statement, paras. 47 et seq.
[51] The point of the illustration in paragraph 145 is that, under India's interpretation the data from companies with nil or negative profit levels would be taken into account to calculate each other's normal value.

with the fundamental argument from which they derive: under the Indian interpretation, normal values could be based on data from unprofitable or unrepresentative sales, but only as long as those data came from other producers or exporters.

44. Instead of addressing the EC's argument, India repeats once again the same unpersuasive textual arguments already made in its First Submission.[52] The truth, however, is that the ordinary meaning of Article 2.2.2 (ii) neither requires nor prohibits the inclusion of sales not in the ordinary course of trade.

45. India's responses to the Panel's questions evidence that India cannot explain why the exclusion of the sales in the ordinary course of trade is "reasonable" in the chapeau, but not in Article 2.2.2 (ii).[53]

46. India is led to argue that the "reasonableness" standard in the chapeau is different from that in the sub-paragraphs.[54] Specifically, according to India, "while the test of reasonableness under the chapeau of Article 2.2.2 still applies, it is perhaps somewhat easier to satisfy than in the case of Article 2.2.2 (ii)".[55]

47. The EC cannot understand why an exporter without domestic sales in the ordinary course of trade should be afforded more "reasonable" treatment than an exporter with domestic sales in the ordinary course of trade.[56] India has not provided, and indeed cannot provide, any rational justification for that difference in treatment.

3. Article 2.4.2: Zeroing

48. In response to a question from the Panel, India has acknowledged that Article 2.4.2 does not address the question of how the results of the transaction-to-transaction comparisons should be « summed up » in order to arrive at a single dumping margin.[57] Furthermore, India acknowledges that "it is an open question whether zeroing would be permitted in the T-to-T method".[58]

49. India's answers beg the question : why then should Article 2.4.2 address the « summing up » in the case of the average-to-average method? And why should « zeroing » be permitted in the transaction-to-transaction method but not in the average-to-average method? Indeed, even Japan concedes that the two methods should be interpreted consistently with respect to « zeroing ».[59]

50. India does not even attempt to provide a rational explanation for those differences. Instead, it relies on a purely textual analysis of the wording of Article 2.4.2. Specifically, according to India, "The WA-to-WA method clearly admonishes a weighted average of all comparable export transactions, whereas the T-to-T method does not contain similar strong language".[60]

51. Once again, however, India disregards that Article 2.4.2 does not refer to a weighted average of *all* transactions, but rather to a weighted average of *all comparable* transactions. India still has to

[52] India 's Second Submission, paras. 45-48.
[53] India's answers to Questions 1, 2, 3.C and 4 from the Panel.
[54] India's answer to Question 2.B from the Panel.
[55] India 's answer to Question 3.C from the Panel.
[56] India's answer to Question 2.A from the Panel.
[57] India's answer to Question 35.A from the Panel.
[58] India's answer to Question 6 from the Panel.
[59] Japan's answer to Question 1 from the Panel, at point III.
[60] India 's answer to Question 6 from the Panel.

account for the presence of the term « comparable » in Article 2.4.2. The truth is that even Japan admits that the language of Article 2.4.2 does not demonstrate that « zeroing » is prohibited.[61]

52. Given that its sole textual argument is flawed, India may be excused for resorting to invoke what it calls the "spirit"[62] of Article 2.4.2. According to India, Article 2.4.2 "was introduced in the ADA during the Uruguay Round to address specific concerns of victims (sic) of anti-dumping actions, so that exporters should not be put in an unfair situation due to skewed calculation techniques and to effectuate a genuinely fair comparison as per Article 2.4".[63] Yet India cites no evidence or authority to support that assertion.

53. Like India, Japan also makes much of the drafting history of Article 2.4.2.[64] Like India, however, Japan provides no evidence for its account of that drafting history. Instead, Japan relies upon an incidental remark contained in the *Audio-Cassettes* report noting that the issue of zeroing "would not arise" when average-to-average comparisons are used.[65] That remark, however, concerns the issue of zeroing within each average. It does not address the situation where there are multiple averages. In any event, that remark can have no bearing on the interpretation to be given to Article 2.4.2. Contrary to what is implied by Japan[66], the negotiators could not have taken it into account because the Uruguay Round was concluded one year before the report was issued.

54. India's and Japan's account of the drafting history of Article 2.4.2 is incomplete and one-sided. It is well known that Article 2.4.2 was introduced in response to the concerns expressed by some Members, such as Japan, which had objected to the average-to-transaction methodology. This does not mean, however, that the negotiators agreed to all the demands made by those Members. The wording of Article 2.4.2 reflects a finely balanced compromise. The term « comparable » was a crucial element of that compromise. Indeed, the EC recalls that, significantly, the only difference between the language of Article 2.4.2 contained in the Dunkel Draft, and the final version of Article 2.4.2 is the addition of the word « comparable ».

55. Aware that neither the letter nor the "spirit" of Article 2.4.2 support its interpretation, India also attempts a mathematical demonstration. At paragraph 55 of its Second Submission, India reproduces the same numerical example that was annexed to its First Oral Statement. The example purports to show that the EC's method is "illogical".[67] In fact, it shows only that different methods may lead to different results. A method is not "illogical" simply because it yields a result that is less favourable for the exporters than another method proposed by the exporters.

56. Furthermore, as already pointed out by the EC, India's example misrepresents the method applied by the EC in this case. Contrary to what is misleadingly stated in India's example, the EC did not compare the weighted average normal value to the "transaction by transaction export price". The EC compared the weighted average normal value to the weighted average export price of all sales of the same type. India's example seeks to obfuscate the difference between those two methods by presenting the Panel with an example in which there is just one transaction of each model.

57. The arguments derived by India from that example, like its arguments based on the "real life" example of Prakash[68], rest on purely circular reasoning. Thus, for example, India complains that the

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[61] Japan's answer to Question 1 from the Panel, at point I.
[62] India's Second Submission, para. 58.
[63] Ibid.
[64] Japan's answer to Question 1 from the Panel.
[65] Panel report on EC – Anti-dumping duties on Audio Tapes in Cassettes Originating in Japan, ADP/136, unadopted, at para. 349.
[66] Japan's answer to Question 1 from the Panel, at point II.
[67] India's First Submission, para. 55.
[68] India's Second Submission, para. 57.

EC's method has the consequence that "companies are found to be dumping while they are in fact not practising dumping behaviour if their export transactions would be properly weighted".[69] That argument assumes precisely what it purports to prove, i.e. that India's method is the proper method to calculate the amount of dumping. By the same logic, the EC could complain that India's method leads to the "illogical" and "unfair" result that no dumping can be found although Parakash is in fact dumping if the correct method is used.

58. The truth is that there is nothing inherently « illogical » or « unfair » about zeroing, as confirmed by the panel report in the *Audio-cassettes* case.[70] . Although India cited that report in its First Submission[71], it now seeks to deny its authority. To that end India « recalls » that Article 2.4.2 « was inserted in the ADA exactly to overrule the GATT Audio Tapes in Cassettes report on zeroing and therefore considers the EC's invocation of the ATC report on this point unconvincing ».[72] Yet the *Audio-cassettes* report was issued one year after the conclusion of the Uruguay Round. Therefore, it is hardly conceivable how it could have been "overruled" by the negotiators of the Anti-dumping Agreement.

59. In its Second Submission, India makes reference to the second sentence of Article 2.4.2 in order to cast light on the meaning of the first. Such an approach is valid in principle since the two sentences provide context for each other. However, there is no obvious lesson to be learnt from the exercise. In the second sentence, the patterns of export prices that differ significantly may occur among three categories: purchasers, regions and time periods. At first sight there might seem to be an overlap with the three categories of differences that prevent comparison: physical characteristics, time of sale, level of sale.[73] However, even as regards time, the concepts are not the same. Thus, the EC would regard time differences between sales as preventing comparison if the external circumstances affecting sales had changed significantly during the course of the investigation period. In the second sentence, on the other hand, the differences based on time are introduced by the seller rather than any external factor. Likewise, the differences in level of trade (such as sales direct to retailers and sales to wholesalers) that render sales non-comparable are capable of being objectively recognised. The topic of the second sentence, offering different prices to different purchasers, is dependent on the exporter only.

60. India accuses[74] the EC of confusing the rules in the first and second sentences of Article 2.4.2. However, as already explained, the distinctions drawn under the two provisions are not the same. Nor are the effects of applying the EC's methodology. Under the first sentence, zeroing never occurs among transactions that can be compared (taking account of physical, time or level of trade differences). On the other hand, when use of the second sentence is justified, all sales with negative margins may be treated as having a zero margin. The dumping margin that results will almost inevitably be greater.

61. To conclude, I would like to refer to an argument raised by Japan in response to a question from the Panel. Japan has alerted the Panel to the alleged risk that Article 2.4.2 may be abused in order to create artificial sub-divisions.[75] Japan overlooks, however, that the discretion of the investigative authorities to calculate multiple averages is limited by the term « comparable ». If two export transactions are « comparable », they must be included in the same average. India has at no

[69] Ibid.

[70] Panel report on EC – Anti-dumping duties on Audio Tapes in Cassettes Originating in Japan, ADP/136, unadopted, at paras. 347-359.

[71] India's First Submission, paras. 170-171.

[72] India's Second Submission, para. 59.

[73] EC answers to Panel's questions, Question 35.

[74] India's Second Submission, para. 52.

[75] Japan's answer to Question 1 from the Panel.

point argued that the different types of products for which the investigative authorities calculated separate averages were «comparable» and should have been included in the same average.

IV. INJURY

1. Companies included in sample

62. In its Rebuttal Submission[76] India addresses 'the concerns that it has regarding the manner in which the EC's sample and Community industry have been established' . No mention is made of any provision of the Agreement that the EC is alleged to have breached in this respect, nor of how these concerns relate to any claim that is being examined by this Panel. The EC therefore formally challenges their relevance to these proceedings.

63. It would seem that, at the Rebuttal stage of the Panel proceedings, India is still looking for evidence that might enable it to formulate a claim against the EC. Subject to the Panel's wishes regarding the provision of further evidence, the EC sees no point in devoting further attention to this issue. The EC is reinforced in this view by the fact that, during the investigation period, the production of the two companies mentioned by India as giving rise to its concerns amounted to 354 tonnes, which is to say less than two per cent of the total production of sampled companies.

2. Consideration of dumped imports

64. In its Rebuttal Submission[77] India takes up again its claim that, by including non-dumped transactions when applying the term 'dumped imports', the EC decision in the bed linen case infringed Article 3.1, 3.2, 3.4 and 3.5 of the ADA.

65. The EC would like first to note the cynicism of this claim in face of the evidence, which India has failed to deny, still less refute[78], that it adopts exactly the same practice in its own anti-dumping decisions.

66. Regarding the substance of the claim, the EC has shown that India's arguments do not withstand close examination. In the first place, they fail to recognise the country-based nature of dumping enquiries that is envisaged by the WTO rules.[79] Secondly, they fail to take account of the precise ways in which the term 'dumped imports' is employed in Article 3 of the Anti-Dumping Agreement.

67. The EC would like to underline that whether the issue in question is the price or the volume of the 'dumped imports', the inclusion of non-dumped transactions in the calculation does not prejudice the exporters. As regards price, the almost inevitable consequence will be to reduce the apparent undercutting, and thereby make a finding of injurious dumping less likely. As regards volume, the exporters' position could be adversely affected only if they had been dumping in *greater* volumes in previous years, and they remain free to present evidence to this effect, and thereby argue that injury was due to some other cause.

3. Examination of all factors

68. The EC has made a number of responses to the accusation that the authorities in the bed linen investigation failed to consider all the factors that are listed in Article 3.4. The following comments concentrate on some of the points that arise, in the light of India's Rebuttal Submission.

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[76] India Rebuttal Submission, paragraphs 61 et seq.
[77] India Rebuttal Submission, paragraphs 64 et seq.
[78] India's answers to the EC's questions, introduction.
[79] EC first written Submission, paragraphs 215 et seq.

69. One of the main features of the bed linen case was the peculiar nature of the injury that the EC investigators found was being experienced by the domestic industry. To state it briefly, injury was focussed on two factors, profits and prices, notably because of the concentration that had taken place among producers.

70. In its Rebuttal Submission India quotes[80] various of the EC's arguments in this context in an attempt to show that the EC authorities considered only those two factors, and disregarded all the others listed in Article 3.4. This is quite false.

71. In particular, India quotes[81] the EC's statement to the effect that no plausible negative factors, other than the two mentioned, were suggested to the investigating authorities or otherwise came to their attention. It then distorts this statement, even changing its wording[82], in order to conclude that the EC was at fault because Article 3.4 itself suggests other factors. The EC 's meaning was obvious, and reflects the conclusions in the Provisional and Definitive Regulations.[83] It was that the evidence of injury submitted to its authorities, or otherwise coming to their attention, was concentrated on the two factors.

72. The misrepresentations of the EC's case that are contained in India's Rebuttal Submission are such that it is easier to deal with them by simply reviewing what the EC argued.

73. Firstly, the EC authorities sought to carry out a comprehensive investigation of injury in this case. So much is obvious from the questionnaires that they sent to the domestic producers.[84] In addition to the specific questions on topics such as sales, prices, production, costs, turnover, and employment, the authorities included a general request to companies to 'describe the effects of the imports under consideration on your own business of producing the types of bed linen covered by the investigation, eg on market share, sales, prices, production, capacity utilisation, stocks, employment, profitability, ability to invest etc.'.

74. As another sign of this activity, the letter presented by India (as Exhibit India-82) shows the EC authorities engaged (in the first months of the investigation) in gathering information on a wide range of factors. The letter was sent to Eurocoton. The topics covered were production, sales (by volume and value), employment, production capacity, and stocks. Significantly, the response of Eurocoton to this letter (the non-confidential version of which the EC presents as Exhibit EC-8) already indicates the particular problems of identifying injury to this industry (Eurocoton describes the closure of firms, and restructuring).

75. Also as the EC pointed out in its first written Submission[85], information on several of the factors listed in Article 3.4 did not need to be explicitly requested since it was implicit in other data obtained by the EC authorities. For example profitability can be calculated from prices and costs.

76. India purports[86] to read the EC's Submission as putting the onus on exporters to suggest relevant injury factors. Of course, the EC had no such intention. On the other hand, its authorities

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[80] India Rebuttal Submission, paragraph 68.

[81] India Rebuttal Submission, paragraph 71.

[82] Thus it is wrongly implied that the EC made the following statement: *"no other factors [than profits and prices] came to their attention."* (ibid.). The word 'negative' has been omitted.

[83] In mentioning the Provisional and Definitive Regulations in this way, the EC intends to refer to only those parts of the Provisional Regulation that were adopted by reference in the Definitive Regulation. See EC first written Submission, note 9.

[84] Exhibit EC-2. The non-confidential replies are to be found in Exhibit India-53.

[85] EC first written Submission, paragraph 251.

[86] India Rebuttal Submission, paragraph 73.

were prepared receive evidence on all aspects of injury. The injury analysis contained in the Provisional Regulation gave exporters a concrete basis on which to submit such evidence, as did the two disclosure statements made by the EC in the course of the investigation.

77. For example, in the Provisional Regulation the EC completed its examination of the condition of the domestic industry by concluding, *inter alia*, that "The production, sales, employment and profits of companies which have since disappeared are not included in the aggregated data for the Community industry, thus improving the apparent trends for the survivors."[87] The picture of the domestic industry which formed the heart of the EC's conclusions in the Definitive Regulation was already clearly manifested in the Provisional measure.

78. The EC has argued that for a number of reasons the factors mentioned in Article 3.4 are not intended to be a compulsory checklist.

79. This consideration is reinforced by the opening words of the paragraph, which state its concern: the 'impact' of the dumped imports. India's comments focus on the listed factors as though they had an independent existence. In fact the significance of the whole paragraph, including the list, hangs on its opening clause.

80. The second clause of the paragraph speaks of 'an evaluation of all relevant economic factors and indices having a bearing on the state of the industry'. From this it follows that there may be factors 'that have a bearing on the state of the industry' which are nevertheless not 'relevant'. The principal criterion of relevance which is apparent in the paragraph is that indicated in the first clause – the impact of the dumped imports.

81. This interpretation of Article 3.4 is reinforced by a particular feature of the factors listed in the remainder of the paragraph. As the EC has already noted[88], this list consists not of 'factors and indices having a bearing on the state of the industry ', but of negative aspects of such factors.

82. In addition to these arguments, the EC notes that, on India's interpretation, WTO-compatibility of national anti-dumping investigations, perhaps involving investigation of tens of companies and thousands of man-hours work, would be thrown into question by failure to give explicit consideration to even the most minor of the factors listed in Article 3.4.

83. In this context, India has quoted[89] the EC's explanation to the Panel of the notion of relevance in a way that distorts the EC's actual views. As described above, the EC regards the word 'relevant' in the phrase 'all relevant factors and indices bearing in the state of the industry' as limiting the class of such factors and indices in line with the notion of 'impact' that is stated in the first clause.

84. However, the EC believes that a proper examination of the impact of the dumped imports will usually require some kind of overall assessment of the nature and condition of the domestic industry, which provides a framework for the particular study of the impact of the dumped imports. The form of the overall assessment will depend on the circumstances of the case. What is considered in this assessment could be called 'factors' that are 'relevant' to that industry, if it were not that those terms are used in Article 3.4 in a specific way. In the bed linen investigation the EC Regulations provide just such an overall assessment, that draws attention, in particular, to the special state of the domestic industry following the contraction that has occurred in the number of producers.

[87] Provisional Regulation, recital 92.
[88] EC first written Submission, paragraphs 256 et seq.; EC responses to Panel questions, Question 25.
[89] India Rebuttal Submission, paragraph 75.

85. India once again cites a passage from the panel report in *Brazil – CVD on Milk* in support of its case.[90] However, far from supporting India's interpretation, the panel described in that case the list of factors (now in Article 3.4) as 'illustrative in nature'.[91]

86. India also cites again[92] the panel report in *Korea Resins*. However, the passage in question refers to parties' obligations in Article 3:1 of the 1979 Anti-Dumping Code, and now in Article 3.1 of the Anti-Dumping Agreement, to carry out an 'objective examination' of volume, etc., which India has not invoked in the present case.[93] Whether, as India contends, Article 3.4 requires 'an unbiased and objective evaluation of the facts' alongside the examination imposed by Article 3.1 is, for the purposes of the present dispute, an academic question. India does not point to any way in which the EC's injury examination is biased or unobjective, other than its supposed failure to examine properly the factors listed in Article 3.4.[94]

87. India accuses[95] the EC of using the table presented in its first Submission[96] to provide *ex post facto* rationalisations of its authorities' conclusions in the bed linen investigation. This is to confuse the introduction of new evidence to justify decisions imposing anti-dumping measures, which the EC has not attempted, with explanations of the WTO-compatibility of those decisions, as they are found in the Provisional and Definitive Regulations. The EC has already[97] had occasion to draw this distinction.

88. Thus, in the arguments presented in its various statements to this Panel the EC has, it believes, shown how the analysis of the impact of the dumped imports that is contained in the Regulations satisfies the requirements of Article 3.4. This has involved the EC demonstrating, for example, how the term 'relevant' applies to the various factors listed in this provision. Thus, in categorising certain factors as 'Found not to be a significant independent factor' in its table the EC seeks merely to put in words the conclusion that is implicit in its Regulations.

4. Article 3.4 – evidence from different levels of producers

89. The EC would first like to dispose of the issue of whether Luxorette formed part of the 'domestic industry' (referred to as the 'Community industry' in the EC Regulations). India raises in

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[90] India Rebuttal Submission, paragraph 78; India first written Submission, paragraph 4.63.

33The Panel noted that the list of factors mentioned in Article 6:3 in this provision was illustrative in nature, and the last sentence made it clear that the provision did not prejudge the weight to be given to any particular factor mentioned in the provision. At the same time, Article 6:3 clearly required investigating authorities to conduct in each case a comprehensive analysis of "all relevant economic factors and indices having a bearing on the state of the industry". The Panel was of the view that to consider only the stagnation of domestic production in the analysis of the impact of imports on the domestic industry was inconsistent with this comprehensive character of the examination required under Article 6:3.

[91] India also quotes (paragraph 7) from the EC's arguments before this panel in order to detect inconsistency in its views. Whether such inconsistency exists is of course irrelevant to the outcome of a dispute, which the Panel will decide on the basis of the cogency of the arguments, rather than their pedigree. Parties are in any case free to present alternative, and therefore inconsistent, arguments even with the confines of a single dispute.

[92] India Rebuttal Submission, paragraph 79; India first written Submission, paragraph 4.64.

[93] Other than in regard to the meaning of 'dumped imports', discussed at paragraph above.

[94] The EC dealt with this issue in its first written Submission, paragraphs 319 et seq. India also (para. 80) cites, again, the *HFCS* panel report. The EC has observed that, whatever was said by parties, the report provided little basis for its conclusion, other than precedents concerning safeguard measures.

[95] India Rebuttal Submission, paragraph 82.

[96] EC first written Submission, paragraph 255.

[97] EC second written Submission, paragraphs 107 et seq.

its Rebuttal exactly the same point that it made in its oral Statement to the Panel.[98] For convenience, the EC quotes here part of the answer it gave to the Panel's question[99] on this point.

> Luxorette was not in the Community industry and was not in the final sample. The situation is that Luxorette was intended to be included in the sample and, as indicated in Recital 8 of the Provisional Regulation, an on-the-spot verification visit took place at the premises of the company. However, as indicated in 54 of the Provisional Regulation, it was excluded from the Community industry and thus from the sample.

90. India repeats in its Rebuttal Submission[100] its claim that the EC relied on the contraction that took place among EC producers prior to the investigation period as evidence of injury. The EC's refutation of this claim was made in its first written Submission.[101]

91. As regards use of data from different levels of producers, India attempts to advance its case by misrepresenting that of the EC. Contrary to India's assertions[102], the EC does not argue that information from outside the sample is relevant only if it points to injury. The EC has just explained its view of the notion of relevance.[103]

92. India seems to confuse[104] the identification of the domestic industry (for which Article 4.1 allows Members a discretion, and regarding which India has made no claim against the EC), with the use of evidence from different levels of producers in order to determine whether that industry is being injured.

93. In its oral Statement to the first meeting of the Panel[105] the EC elaborated on its alternative argument 'that actions taken by the EC authorities in the bedlinen investigation are also justifiable on the basis that a Member may use both definitions of the domestic industry in the course of a single investigation'. Rather than attempt to refute this argument India chooses to introduce further confusion by not recognising it as an alternative argument. Consequently the merits of the argument remain unanswered.

94. To boost its case, India misrepresents the EC's contentions in order to give a misleading account of the injury finding presented in the EC Regulations. Those Regulations (notably recitals 81 and following of the Provisional Regulation) gave a comprehensive account of the state of domestic industry (referred to as the 'Community industry'). In addition to data for the sampled producers in the 'domestic industry', that account also drew on information for the whole 'domestic industry', as well as from all EC producers. It was, however, directed (as the title of the relevant section indicated) to the 'Situation of the Community Industry'.[106]

95. India alleges[107] that the Regulations 'pick and choose' between levels in order to find evidence to support the conclusion of injury. However that conclusion rested on findings of injury in regard to two specific factors: prices and profits which were assessed at the level of the domestic industry as defined in the proceeding.

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[98] India first oral Statement, paragraph 75; India Rebuttal Statement, paragraph 86.
[99] EC responses to Panel questions, Question 22.
[100] India Rebuttal Submission, paragraph 89.
[101] EC first written Submission, paragraphs 348 et seq.
[102] India Rebuttal Submission, paragraphs 91 and 92.
[103] See above at paragraph 80.
[104] India Rebuttal Submission, paragraph 92.
[105] Paragraphs 134 et seq.
[106] The point has been made in EC first written Submission, paragraph 329; First oral Statement, paragraph 138; Rebuttal Statement, paragraph 71.
[107] India Rebuttal Submission, paragraph 93.

96. India implies that the Regulations ignored the price increase among the sampled producers of 3.2 per cent between 1992 and 1995/96. A reading of the relevant section of the Provisional Regulation[108] shows this to be quite unfounded. Thus, it is explained that, taking inflation into account, prices actually decreased.

97. Regarding the second factor, profits, India does not suggest that the EC quoted data selectively. The only other example it suggests is in regard to market share, where the industry was apparently healthy. However, the Regulations explain how the finding of injury could be reconciled with such data.

98. In conclusion it may be said that although India accuses the EC of not discuss ing positive factors, quite the opposite is true. It is the Indian account of the EC decisions that is misleading because it presents a set of bald figures without explanation of the context that is provided in the Regulations.

5. Article 6: Sampling

99. India has again invoked Article 6 of the Anti-Dumping Agreement[109], despite the Panel's ruling on the matter. The EC reaffirms its objections to the inclusion of claims under this Article.[110]

100. The EC has commented on the subject in its Rebuttal Submission.[111] Article 6.10 and 6.11 govern the determination of dumping margins for exporters and producers. They do not apply to the selection of the domestic producers in regard to the domestic industry.

101. Contrary to India's assumption[112], the selection of domestic producers in the bed linen investigation was never intended to be a statistical sample. It was 'the largest representative volume of production … which can reasonably be investigated within the time available'. Thus, even if the principles in Article 6 were applicable, the notion of statistical validity would be inapplicable.

6. Imports before investigation period

102. In its Rebuttal Submission India makes various accusations regarding the EC's attitude to alleged dumping before the dumping investigation period.

103. In this context, the issue to be decided by the Panel is whether India has established that the EC, in its Provisional and Definitive Regulations has failed to determine properly the issues of injury and causation. In particular, India claims that the EC infringed Article 3.4 because its determination was dependent on assumptions that the imports prior to the dumping investigation period were also dumped.

104. As the EC has already pointed out, the analysis contained in the Regulations reveals a domestic industry that had undergone considerable contraction in the years prior to the dumping investigation period. It also explains how the industry was currently suffering injury, despite the fact that, as a result of that contraction, it appeared to be healthy according to a number of indicators. There is therefore a clear distinction between the reasons for that contraction, and the reasons for the current injury to the industry. It is the latter that is relevant to the finding of injury and causation that are at issue in the present dispute. In this context the cause of the contraction is irrelevant. What matters is that it did take place, a fact that India does not challenge. Therefore, that the EC presumed

[108] Recitals 86 to 88.
[109] India Rebuttal Submission, paragraph 95.
[110] First written Submission, paragraph 11.
[111] Paragraph 56.
[112] India Rebuttal Submission, paragraph 96.

that the contraction was due to dumped imports was not relevant to the finding of injury during the dumping investigation period. Let me repeat that the EC did not base its measures on a finding of injury in the form of a contraction of the industry.

105. The EC has already addressed[113] the meaning of the phrase 'dumped imports' as it is found in Article 3 and shown that it is the accepted interpretation of this term, reflected in Members' practice (including that of India), in the context of volume, to make comparisons on the basis of all imports of the product in question.

7. Article 3.5 - Injury caused other than by dumping

106. India's claim[114] in regard to Article 3.5 is entirely dependent on its arguments concerning the meaning of 'dumped imports'. The EC has shown (above) that India is wrong in denying that the phrase covers all imports of the product in question from the country found to be dumping.

V. TREATMENT OF DEVELOPING COUNTRIES – ARTICLE 15

107. The EC has dealt with India's claims regarding Article 15 of the Agreement at several points in its statements.[115]

108. The EC regrets that it incorrectly informed the Panel that undertakings are not accepted at the stage of provisional measures.[116] As India points out[117], this has happened on a small number of occasions.[118]

109. The EC has suggested various ways in which it gave advantages as regards aspects of the anti-dumping proceedings. However, as the EC has acknowledged, three of these do not involve 'remedies' and consequently do not fit precisely with the obligation in the second sentence of Article 15.

110. India refers to these steps in its Rebuttal Submission[119], but it overlooks the fourth that the EC put forward, the exclusion of handloom products from the scope of the anti-dumping measure.

111. Although discussion of Article 15 usually concentrates on undertakings, it can hardly be denied that anti-dumping measures are 'remedies provided for by this Agreement'. Furthermore, in this context the word 'constructive' is best interpreted as meaning 'helpful'[120], and to narrow the scope of an anti-dumping duty is undoubtedly a 'constructive' action as regards the exporting country.[121]

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[113] Supra paragraph EC second written Submission, paragraphs 72 et seq.

[114] Repeated in India Rebuttal Statement, paragraphs 101, et seq.

[115] EC first written Submission, paragraphs 362 et seq.; first oral Statement, paragraph 153; Panel questions to EC, Questions 29 and 30; EC second written Submission, paragraphs 87 et seq.

[116] EC responses to Panel questions, Question 38.

[117] India Rebuttal Submission, paragraph 105.

[118] It is unfortunate that India's representatives did not take advantage of their detailed knowledge of EC law and practice to express interest in offering an undertaking at a point somewhat before the last possible minute.

[119] India Rebuttal Submission, paragraph 108.

[120] The New Shorter Oxford Dictionary (1996) contains the following definition of 'constructive': '3. Tending to construct or build up something non-material; contributing helpfully, not destructive.'

[121] That 'constructive remedies' should be broadly interpreted is also encouraged by the fact that the term was almost certainly taken (by the 1979 Codes) from Article XXXVII:3(c) of GATT, where it was not confined to contexts were undertakings could be used:

3. The developed contracting parties shall:

112. India has objected that the exclusion of handloom products was done under the notion of 'like product' rather than Article 15.[122] However, this is to misunderstand the obligation in the provision, which is to 'explore' the possibilities of constructive remedies[123], not to implement those remedies. Implementation is achieved using the provisions governing the 'remedies provided for by this Agreement'. In this case Article 9. Likewise, when an undertaking is accepted, even with exporters in a developing country, the governing provision is not Article 15 but Article8.[124]

113. The only question that remains is whether the EC 'explored' such the possibilities of such remedies within the meaning of Article 15.

114. That the EC authorities carried out such an exploration, and did so under Article 15 is evident from the fact that the exporters explicitly invoked Article 15 when requesting the exclusion of handloom products.[125] It hardly lies in India's mouth to deny that in responding to this request, by exploring the possibility of making such an exclusion, the EC authorities were acting under that provision.

115. India has made two responses on this issue. Firstly, it says[126] that Article 15 'puts the initiative for exploring constructive remedies with the importing country authority'.[127] The suggestion does not hold water.[128]

116. Most fundamentally, Article 15 only requires an investigating authority to explore the possibilities of constructive remedies "where they would affect the essential interests of developing countries." This demonstrates that an effect on the essential interests of a developing country first has to be invoked by that country before there is a requirement to explore constructive remedies.

117. In any event, if, as here, the exporters make a proposal and the authorities pursue it with them, then both are 'exploring' the issue, within the ordinary meaning of the word.[129]

118. Secondly, India's claim[130] refers to action prior to the imposition of provisional measures (13 June 1997), and the exploration of position of handloom products began no earlier, it would seem, than the receipt of the brief from the exporters (about a month later).

119. The EC has already shown that there is no obligation to explore constructive remedies before the imposition of provisional measures.[131] Furthermore, in so far as alleged failures to respect

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(c) have special regard to the trade interests of less-developed contracting parties when considering the application of other measures permitted under this Agreement to meet particular problems and explore all possibilities of constructive remedies before applying such measures where they would affect essential interests of those contracting parties.

[122] India first written Submission, paragraph 6.43.

[123] The distinction is apparent in paragraph 589 of the report of the *Brazil – Cotton-Yarn* panel, quoted by India in its Rebuttal Submission (paragraph 111).

[124] In this context the EC wishes to withdraw any implication in paragraph 96 of its Rebuttal Statement that the constructive remedies would have to be implemented under Article 15.

[125] EC second written Submission, paragraph 96. See Exporters' Second post hearing brief (Exhibit India-55), point 8.

[126] India Rebuttal Submission, paragraph 110.

[127] See also Egypt written Submission, paragraph 38.

[128] There is no indication in the *Brazil – Cotton Yarn* case to indicate that the initiative for an undertaking came from the EC.

[129] It is evident that there were a number of communications between the parties on the implementation of the proposal. See the communication from the exporters' representatives of 11 August 1997 (Exhibit EC-7).

[130] Request for the Establishment of a Panel by India, WT/DS141/3, (Exhibit EC-1) paragraph 18.

[131] EC second written Submission, paragraph 98; EC responses to Panel questions, Question 37.

Article 15 relate to those measures, they are not properly before the Panel.[132] In so far as such alleged failures relate to the imposition of definitive duties (in December 1997), the EC has complied with its obligations, for example, by the exploration that took place between July and December 1997 resulting in the exclusion of handloom products.

120. The EC's arguments in regard to Article 15 are not confined to its treatment of handloom products. It has explained its position in regard to the possibility of accepting exporters' undertakings.[133] India accuses the EC of rejecting the offer of an undertaking made by the exporters.[134] The exporters made no such offer. At the last minute their representatives indicated their 'desire … to offer price undertakings'.[135] The difference is important. Had the EC authorities had a text available to them they could have made a response to it.

121. During the consultations with India prior to the establishment of the Panel, in answer to a question from India on Article 15, the EC said that 'discussions on undertaking took place and this has to be considered as complying with obligations even if these did not result in measure in the form of undertakings'.[136] The response was quoted by India in its first Submission[137], and has not been contradicted. In its Rebuttal Submission India said that 'in answer to its repeated suggestions on undertakings in October 1997 the standard answer from the EC was always that Bed Linen was "*too complicated a product for undertakings*".[138] The explanation of this response – the difficulties of concluding undertakings in non-commodity textile products – has already been given by the EC.[139] What it incidentally confirms is that also in this context the EC did explore the possibilities of constructive remedies during the bed linen investigation.

122. Finally, the EC would recall that it also gave special and differential treatment to India by being prepared to consider an undertaking from a trade association (Texprocil) rather than insisting that undertakings be offered by exporters.

123. In this claim India has sought to convert the burden of proof on itself to show that the EC failed comply with its Article 15 obligations into one in which the EC has to justify its behaviour. In fact, not only has India failed to establish a *prima facie* case, but the EC has demonstrated that through its actions regarding both special treatment for handloom products, and undertakings it has fully satisfied its obligations.

VI. PUBLIC NOTICE – ARTICLE 12.2.2

124. The EC has stated at length why most of India's claims under Article 12.2.2 are unfounded because they in effect demand that the EC authorities should explain to parties involved in anti-dumping investigations why its law and practice are in accordance with WTO requirements.[140]

125. In its Rebuttal Submission India presents the EC as claiming that challenges to the investigating authorities' views are automatically irrelevant.[141] Of course, this is not the EC's view.

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[132] EC second written Submission, paragraph 97; EC first written Submission, paragraphs 22 et seq.
[133] EC second written Submission, paragraphs 87 et seq.
[134] India Rebuttal Submission, paragraph 104.
[135] Fax of 13 October 1997. Exhibit India-72.
[136] Follow-up to second round of consultations held between India and the EC (Exhibit India-14), question 115
[137] India first written Submission, paragraph 6.11.
[138] India Rebuttal Submission, paragraph 104.
[139] EC second written Submission, paragraph 93.
[140] EC second written Submission, paragraphs 104 et seq.
[141] India Rebuttal Submission, paragraph 115.

126. India also suggests that the EC's positions regarding Article 12.1 and 12.2 are incomprehensible.[142] Since the first of these has not been invoked in this dispute the EC will concentrate on the latter. On this matter the EC expressed its views in answer to a question from the Panel.[143] The fact that the Agreement leaves the exporters in a weak position regarding information about standing may be considered unfortunate but that is not a reason for changing the plain text of the ADA. The contracting parties made the choice that antidumping complaints should not receive any publicity before initiation of a procedure (Article 5.5 ADA).

127. Regarding the provision of information in the course of these dispute proceedings, the EC reaffirms its determination to comply with whatever requests the Panel may make. Any suggestion by India to the contrary is misconceived.[144] Furthermore, the EC does not suggest that investigating authorities have discretion to define what is 'relevant' in terms of Article 12.[145] Of course, it is they who will decide what appears in notices of initiation, and in instruments adopting provisional measures and definitive measures. But if they leave out matters that should have been included according to Article 12, then they are liable to have that error determined by a Panel in dispute proceedings.

128. India has chosen once more to emphasise the link that it sees between claims of alleged defects in the EC's anti-dumping measures (particularly as regards findings of dumping and injury), and the public notice requirements associated with those measures.[146] As the EC has already explained[147], such a linkage serves to confuse rather than enlighten. In most of the cases where India invokes Article 12.2 there is a dispute between India and the EC as to whether the EC law or practice breaks the linked substantive rule in the Agreement. The only explanation that might be given by the EC is why that law or practice does not infringe the Agreement. This is not an explanation that Article 12.2 requires Members to provide.

129. Once an investigation has been initiated, such authorities are charged with investigating questions of dumping or injury and making appropriate determinations thereon. They are not charged with reviewing the propriety of their own conduct. Consequently, arguments relating to that conduct are irrelevant.

EXHIBITS

EC-8	Reply by Eurocoton to EC Commission, 10 Jan. 1997.

[142] India Rebuttal Submission, paragraph 116.
[143] EC responses to Panel questions, Question 23.
[144] India Rebuttal Submission, paragraph 117.
[145] India Rebuttal Submission, paragraph 119.
[146] India Rebuttal Submission, paragraph 120.
[147] EC second written Submission, paragraphs 104 et seq.

CLOSING REMARKS OF THE EUROPEAN COMMUNITIES
TO THE SECOND MEETING OF THE PANEL

(6 June 2000)

Mr Chairman, Members of the Panel, I have just a few closing remarks to round of and complete some of the issues we have been discussing today.

VII. INITIATION

130. The obligation to examine the accuracy and adequacy of the evidence in the complaint arises at a stage of the procedure where exporters and importers are not involved since the investigating authority is required by Article 5.5 ADA to keep the complaint confidential. The only body that can be informed is the government of the exporting country. This government may have the opportunity to make representations about the complaint under Article 17.2 but the exporters and importers do not.

131. The ADA specifically regulates in Article 12.1 the information about the initiation that has to be made available in a public notice. India has not alleged a violation of this provision since it is fully aware that requirements of Article 12.1 have been satisfied. It attempts instead to argue that the EC somehow had an obligation under Article 5.3 or 12.2 to justify its determination that the evidence in the complaint was accurate and adequate.

132. There is no such obligation of explanation and if the determination is challenged in dispute settlement, the general rule applies that the complaining country must establish at least a *prima facie* case of violation. This, as we have seen, India has signally failed to do.

133. One of the reasons why the ADA does not provide for an obligation to justify initiation to the exporters is that the same evidence has to be examined in the investigation and the interested parties should concentrate their efforts on this rather than turning over issues that have already been decided on a preliminary basis and for the purpose of initiation.

VIII. ARTICLE 3.4 ADA

134. Earlier today we urged the Panel not to take a formalistic approach to Article 3.4. It serves no useful purpose to insist that an investigating authority investigate and evaluate factors that appear irrelevant to the issue of impact of dumped products in the circumstance of the case, in particular because they are not significant in the industry concerned or are implicit in other factors. Nor does it make any sense to require that the authority include a standard paragraph on each of the factors in its determination.

IX. EX POST FACTO EXPLANATIONS

135. India is regularly accusing the EC of making *ex post facto* explanations and justification of the measures. The EC has explained that it is not seeking to introduce new evidence which was not available during the proceeding as India seems to suggest but is simply explaining what it did and why. If this is not possible in dispute settlement concerning antidumping measures, then a Member would be able to do nothing more to defend a measure than produce the text of the determination! Clearly it must do more. There are a great many choices made in the course of an antidumping proceeding and every one of them cannot be set out in the public notice of the determination – otherwise this would be thousands of pages long. These choices can be challenged in dispute settlement but then it must be possible to elaborate on the reasons for the way in which the investigation was conducted.

X. QUANTITATIVE RESTRICTIONS

136. India has just mentioned for the first time in its closing remarks the fact that the products in question are subject to quantitative restrictions in support of its complaints.

137. Let me just say that this issue is not within the Panel's terms of reference and that this incident illustrates why the EC prefers to speak second when it is defendant before a Panel. It is only then that it can be sure to be in a position to respond to the allegations made against it.

XI. INACCURACIES IN INDIA'S PRESENTATION

138. India has again misrepresented the EC's case for example in stating just now that the EC had earlier declared that it determined standing on the basis of 46 companies. The EC refrains from repeating statements that it has already made and simply asks the Panel to check the EC's position as actually expressed by it rather than relying on India's statements.

139. Mr Chairman, Members of the Panel it only remains for me to thank you for the patience you have shown during this proceeding and to wish you well in your further deliberations.

ANNEX 2-8

RESPONSES OF THE EUROPEAN COMMUNITIES TO QUESTIONS
FROM THE PANEL FOLLOWING THE SECOND MEETING OF THE PANEL

(16 June 2000)

Questions for the European Communities

9. Even assuming that injury can be found based on the impact of dumped imports on only two of the factors set out in Article 3.4, could the EC explain why, in its view, it would be merely 'formalistic' and not useful to evaluate, and explain the evaluation of, other 'relevant economic factors and indices having a bearing on the state of the industry'.

In its necessarily brief closing remarks to the Panel the EC could not hope to summarise the complex arguments that it has presented regarding Article 3.4, nor did it attempt to do so. Rather, it picked out certain aspects of those arguments for the Panel's attention. In light of the Panel's question, the EC wishes to make clear that it does not base its defence on the argument that an examination of two factors alone justified a finding of injury (whether or not such a conclusion could be legally justified). Nor does it claim that a consideration of other factors would have been irrelevant.

What the EC denies is that Article 3.4 in every case requires the item-by-item **evaluation** of a specific checklist of factors – which could be described as a formalistic approach. Such an approach has been advocated on the basis of a cursory reading of Article 3.4 (notably the latter part of the provision, beginning with the words 'including actual and potential decline …'), coupled with references to the provisions of the Safeguards Agreement and ATC which have a superficial similarity.

The EC will not repeat here the arguments it has presented to demonstrate that this is not what the text of Article 3.4 says should be done (see First written Submission, paragraphs 249 et seq.).

Although this dispute has focussed on the factors listed in Article 3.4 it should not be forgotten that this provision does not purport to provide a complete framework for determining 'the impact of the dumped imports on the domestic industry' (it speaks of what the examination 'shall include'). The fundamental obligation of the Agreement is determine whether injury has been caused to the domestic industry. It is this obligation which the EC sought to discharge in its Regulations. The case presented there consists essentially of three elements:

(1) an assessment of the condition of the domestic industry, concentrating on those factors (volume and value of sales, profits, output, market share, prices and employment) which are most significant;

(2) the identification of two such factors (prices and profits) where the evidence indicated that the 'impact of the dumped imports' was injurious; and

(3) an explanation of how an overall finding of injury was justified in these circumstances despite the fact that in other respects the industry appeared to be healthy.

The first of these elements comes closest to the 'checklist' or 'formalistic' approach. However, the purpose of the assessment was to provide evidence for the second and third elements. Indeed, for the third element it was necessary to go further, and examine the recent history of the industry.

Viewed as a whole, the EC believes the methodology was sound, and provided a coherent and comprehensive explanation of how the industry was suffering injury that cannot be faulted (particularly in light of the standard of review enunciated in Article 17.6).

More than this, it satisfied the precise requirements of Article 3.4. It provided an examination of the 'impact of the dumped imports', and involved an 'evaluation of all relevant economic factors and indices having a bearing on the state of the industry'. Finally, it undoubtedly evaluated the 'actual … decline in sales, [and] profits', the only factors where such negative aspects were present.

10. The EC has asserted that it may be clear at the beginning of an investigation that some factors are not relevant to an evaluation of the impact of dumped imports on the domestic industry, that this lack of relevance might become apparent later. Assuming this is case, could the EC explain how a Panel, in reviewing a final determination, may assess whether the investigating authority found that a particular factor was not relevant in a particular case, whether at the outset or later, if there is no mention of that factor, or of the conclusion of lack of relevance, in the determination itself? Is a Panel to assume that the absence of discussion of a factor indicates that it was found not to be relevant? In response to the Panel's question number 27 after the first meeting, which posed a similar issue, the EC responded 'A panel must carry out this task by examining the situation of the industry as revealed in the determination and the arguments and explanations advanced by the parties to the dispute.' However, this sounds very much like an invitation to *de novo* review, which the parties recognised is not allowed under Article 17.6 of the AD Agreement. Could the EC please elaborate on how the panel can 'examine the situation' of the industry with respect to the relevance of any particular factor without making a judgement of its own as to the relevance of that factor?

In these questions the Panel seems to be assuming that factors are 'relevant' if they bear on the state of the industry. However, such a reading would render the word superfluous. It must refer to the finding of injury, which is made by examining the impact of the dumped imports. The evaluation of factors is required in so far as they are relevant to that finding. (EC Second Oral Statement, paragraph 80).

In its Regulations the EC has presented an explanation of how the dumped imports have injured the domestic industry, and it has done this, *inter alia*, by evaluating factors bearing on the state of that industry (see the answer to Question 9). Those factors are 'relevant' in that they support the case that the EC is presenting.

It is evident that what is relevant will depend on the particular justification that the Member gives for its injury determination. There will be some cases where the justification consists of a simple weighing of pluses against minuses among the various factors, with the decision depending on which way the balance points at the end. In such cases one would probably expect a wide range of factors to be considered.

As the EC Regulations make clear, the present case is not like that. On the basis of the analysis contained in those Regulations, the EC is implicitly saying that factors other than those it has evaluated are not relevant. This is not because they do not bear on the condition of the industry, but because they do not need to be evaluated in order to establish the EC's findings.

Such an approach does not leave the Panel unable to exercise its power of review. On the contrary it can examine the determination in the light of the review standard in Article 17.6. But it can only do so if the complaining party has challenged that determination.

In the present case India has not challenged the coherence of the EC's injury finding. All that it has done is complain that certain factors listed in the last part of Article 3.4 were not explicitly

evaluated. The EC has explained elsewhere how it has satisfied this part of Article 3.4. (EC First written Submission, paragraphs 246 et seq.)

In the light of these comments, the EC's answer to the Panel's second question is Yes. The Panel can assume from the absence of an explicit evaluation of a factor that the EC found it not to be relevant, in the sense described above, to its finding of injury.

Furthermore, the EC does not believe that a Member is obliged to say explicitly of each unevaluated factor that it is not relevant to the finding of injury. For one thing, the list in the latter part of Article 3.4 is clearly not comprehensive, so there is no knowing how many such statements should be included.

However, the EC Regulations, while not addressing such unevaluated factors individually, do provide an overall explanation of why they were not 'relevant ', albeit that the word itself was not used. This is contained in the discussion of the peculiar condition of the bed linen industry, resulting from the contraction in the number of producers. The Regulations explain how, because of the contraction in the number of producers, the industry appeared to be in many respects healthy. In fact, it was only as regards the factors of sales and profits that indications of injury were to be found. With the exception of these two, it was assumed that the economic indices would show an apparently healthy industry.

As to the last part of the Panel's question, the EC is far from suggesting that the Panel should engage in a *de novo* examination of the issue of injury. The EC rests its case on the determination contained in the two Regulations. By the 'arguments and explanations advanced by the parties to the dispute' it means no more than the kind of reasoning it is presenting here. It has not attempted to present additional evidence to retrospectively justify the finding of injury.

To answer the Panel's final question, the EC would first say that the task of the Panel is to examine the Regulations' assessment of the situation of the industry. (The Panel would itself attempt to examine the situation of the industry only to the extent that India was challenging the factual accuracy of the individual findings in the Regulations, which is not the case). As explained in the answer to Question 9, the Regulations provide a coherent and comprehensive explanation of how the EC bed linen industry was being injured, and one that satisfies the requirement in Article 3.4 to evaluate relevant factors and indices, etc. The question of which factors in a particular investigation are 'relevant' is a factual one, and therefore the task of the Panel is not to make its own determination on this issue, but to review the conclusions contained in the Regulations.

11. Could the EC explain the basis for its apparent view that events concerning companies that are not part of the Community industry at issue, that is the closure of some EC bed linen producers, can be relevant to the analysis and finding of injury to the Community industry.

It should be recalled that 'Community industry' has the same meaning as 'domestic industry' in the Anti-Dumping Agreement.

The investigations of the EC authorities revealed an industry where evidence of material injury was to be found in only two areas – prices and profits. In other respects the industry appeared to be healthy. The authorities concluded that this apparent contradiction was explained by the fact that the apparently healthy aspects of the condition of the producers making up the industry were the consequences of benefits flowing from the contraction that had taken place in the industry in the years preceding and during the 'investigation period'. In other words, the disappearance of a number of producers had made economic life easier in some respects for those that remained. This is illustrated by the fact that some of the companies that disappeared either merged or were bought by survivors.

Thus, 'events concerning companies that are not part of the Community industry at issue' helped explain the nature of the injury caused to the Community industry during the investigation period.

12. Could the EC elaborate on the statement that a Member may use 'both' definitions of the domestic industry in its analysis of injury to the domestic industry in a single anti-dumping investigation. This suggests that there are two domestic industries at issue in a single case, while the EC confirmed, in its answer to the Panel's question 22 after the first meeting, that the single domestic industry at issue in the disputed investigation was the 'Community industry', which comprised the 35 co-operating producers of bed-linen?

The EC's argument is that nothing in the Anti-Dumping Agreement requires that the decision on which industry definition to adopt should be made before the end of the investigation, that is, before the final determination. If, having carried out its investigation, an investigating authority finds that one part of the "domestic producers as a whole" has been injured, but another part has not, Article 4.1 allows the finding of injury for the part of the "domestic producers as a whole" to be used as a basis for imposing antidumping measures where this part constitutes "a major proportion" of the total domestic production of the products. Similarly, an investigating authority is entitled to rely on injury to "domestic producers as a whole" even where producers of "a major proportion" of the total domestic production of the products may not be injured.

In the present case, the EC relied only on injury to producers of "a major proportion" of the total domestic production of the products – that is the 35 co-operating complainants, since this was the part of industry on which it had the most information.

The EC made the argument referred to by the Panel in order to explain that even if India were right and the EC found injury to the "domestic producers as a whole", this would not justify a finding that the Regulation was inconsistent with the Anti-Dumping Agreement.

13. Could the EC please confirm that the company alleged to be importing bed-linen referred to in recital 54 of the provisional regulation as the 'one case' that was excluded from the domestic industry was Luxorette? In its answer to the Panel's question 22 after the first meeting, the EC stated 'The reasons for excluding them was that some were importing high volumes of Bed Linen, some were not producing the product concerned any longer, some were not focussed on the production of Bed Linen in the EC (this was the case of Luxorette) and some for lack of cooperation.'

The answer to the question is Yes.

The Panel's quotation from the EC's reply to question 22 of the Panel should be read in context. Rather than excluding Luxorette from the domestic industry, following the logic of the text of the Provisional Regulation, it would be more appropriate to say that Luxorette was not included in the domestic industry.

The relationship between the various numbers can be explained as follows.

- 46 companies gave their backing to the complaint – this is 'the list of companies included in the complaint' mentioned in PR recital 52 (Complaint annex 3, Exhibit India-6).

- exclusion of 7 companies (PR recital 52)

- exclusion of one company (which had also originally been included in the sample – Luxorette) (PR recital 54)

- exclusion of 3 companies (PR recital 56).

This process left 35 companies that constituted the domestic industry (PR recital 57).

Companies were excluded for any of four reasons:

- importing high volumes of bed linen;
- not producing the product concerned any longer;
- not being focussed on the production of bed linen in the EC; and
- lack of cooperation.

Luxorette fell into the third category, namely importing bed linen from Pakistan and not being focussed on producing bed linen

14. Referring to recital 29 of the final regulation, the Panel notes that four Pakistani exporters of bed-linen were found to have *de minimis* margins of dumping. Referring to Article 1 of the Regulation adopted by the EC Council, the Panel notes that exports from these four companies were assigned a rate of duty of "0.0 per cent". The EC conducted its injury analysis on the basis of cumulated volumes of imports, and appears to have included in that analysis all imports from Pakistan, including those attributable to these four companies. Is it the EC's contention that these exports from Pakistan were dumped, despite the findings of *de minimis* margins of dumping? If so, could the EC elaborate on the legal basis for that position?

The EC is not clear in what context the Panel is raising this question. It assumes that, since the issue is not before the Panel, the EC is not being asked to comment on the justification for cumulating imports from the three exporting countries for the purposes of determining injury.

That being so, the Panel's question appears to address the interpretation of the notion of 'dumped imports' as it has been raised by India in these proceedings. The EC has shown that this term is properly interpreted to include all imports of the product in question from the country whose exporters have been found to have been dumping (the four companies' exports comprised 20 per cent of Pakistani exports of bed linen to the EC). That conclusion applies both where the non-dumped transactions are scattered among the sales of various companies, and where they are concentrated on the sales of particular producers, thereby reducing the overall margins of such producers to zero or to *de minimis* levels.

Questions for both parties

15. In several instances, the AD Agreement gives members a free choice of methodology on a particular issue. One such issue is the choice of whether to determine normal value on the basis of a constructed value, or the export price to a third country, under Article 2.2, another is the choice of comparing a weighted average normal value to the weighted average of all comparable export transactions, or comparing normal value and export price on a transaction-to-transaction basis. It appears evident that in some cases, depending on the particular facts, the choice of one methodology would result in a determination of dumping, while the choice of the other methodology would result in a determination of no dumping. Could the parties please explain whether, in their view, this is a reasonable understanding of the AD Agreement in this regard? Further, could the parties please comment on how the choice of methodology is or may be determined in these instances, given that the results of application of either possible

methodology will not be known until after it is applied. Are there any considerations that must be brought to bear on the choice of methodology? May the choice of methodology be resolved by policy? Is a Member free to choose the methodology to be used in a particular case without any reasons at all?

The EC agrees with the Panel that the AD Agreement permits different methodologies for the calculation of the dumping margins of individual exporters, and that in some circumstances one methodology would result in a finding of dumping whereas another would not. In particular, apart from the explicit choice between the 'comparable weighted averages' and 'transaction-to-transaction' methodologies, there is an implicit choice regarding the methodology to be used in the second phase of the 'comparable weighted averages' option. (The first phase is the calculation of dumping margins of the exporter's comparable sales; the second phase is the bringing together of these margins into a single margin for the exporter).

The EC is reluctant to suggest solutions to problems that do not arise in the present case. The EC has, as a matter of policy, adopted a particular methodology, which (subject to the use of the option in the second sentence of Article 2.4.2) is applied as a matter of course in each investigation. (This practice is reflected in the fact that the exporters in the present case, although they raised many questions in the course of the investigation, did not dispute the use of this methodology). Consequently, in answer to the Panel's second question, the fact that alternative methodologies might produce different results is not a relevant consideration for the EC authorities in applying their standard methodology.

As regards the Panel's third question, the only consideration that the EC authorities take into account is whether the circumstances merit the application of the formula contained in the second sentence of Article 2.4.2.

As already stated, the EC's choice of basic methodology is one of policy, the essence of which is that it is applied without having to be justified in particular situations. The EC does not argue that no circumstances could ever exist in which the policy would not be applied, but it does not have a list of such circumstances. Furthermore, it is evident that no such circumstances were apparent to the investigators in the bed linen case, nor were any proposed by interested parties.

16. India indicated, in its rebuttal submission at paragraph 104, that it made 'repeated suggestions on undertakings in October 1997' but that the answer from the EC was 'always that Bed Linen was "*too complicated a product for undertaking*"'. Could the parties please provide specific details concerning any communications pertaining to undertakings between India and the EC in October 1997, or prior to that date. Copies of any relevant correspondence should be provided in this regard as exhibits. If in fact such discussions took place, could India indicate what additional facts would be required, in order for the Panel to conclude that 'constructive remedies' were 'explored'?

In contrast to the position regarding handloom products, the EC has no written record of its contacts with the exporters regarding a possible undertaking, other than those already made available to the Panel (Exhibit India-72).

The recollection of the responsible officials is that there were a number of telephone discussions on the subject, beginning in early October 1997. During these the EC emphasised the difficulty of drafting satisfactory undertakings because the product was supplied in consignments according to individual specifications of purchasers, involving hundreds of suppliers. They were advised to discuss the possibilities with Texprocil, the exporters' association. This willingness to contemplate undertakings by a trade association is not an automatic feature of the EC's practice in this respect.

17. Assume that a Member has a policy that it will not accept undertakings in an anti-dumping investigation involving a particular product. Could the parties comment on whether the application of that policy in the case of an investigation of imports of that product from a developing country would be sufficient to satisfy the requirements of Article 15, or whether there must be consideration of the specific circumstances of the investigation in question? Could the EC indicate whether its view regarding the difficulties of concluding undertakings in non-commodity textile products is a matter of general policy. if so, was this general policy applied in this case? Whether or not a general policy was ultimately applied in this case, was consideration given to the possibilities of undertakings in the particular circumstances of this case regardless of general policy?

The EC is reluctant to offer more than tentative interpretations of the Agreement in respect of hypothetical situations. If a Member were to adopt the policy described in the question, the application of that policy in the context of Article 15 would no doubt depend on the reasons for the adoption of the policy.

The EC's attitude to the difficulties of concluding undertakings in non-commodity textile products is not a matter of policy, whether general or otherwise. The sole policy maintained by the EC in this context is that of accepting undertakings only when their implementation can be adequately supervised. The EC's experience, which accords with common sense, is that undertakings are most easily supervised where the product in question is of a fungible character, such as natural or semi-processed materials, and appears in only a small number of forms. Another factor that plays a role is the number and nature of the traders who deal in the product.

The more variety there is in the product, the greater will be the difficulty of devising an appropriate scheme of minimum prices. Schemes could be devised on the basis of weight which would be enforceable but which, by not adequately reflecting differences in quality, would not be acceptable to exporters. The larger the number of traders, and the greater the informality of their methods of trading, the more difficult will it be to check that the undertakings are being respected.

The issue for the EC authorities was not that of deciding whether in the circumstances a policy should not be applied. The only policy in question was that of ensuring that undertakings could be supervised, and the EC could not abandon that policy.

As indicated in answer to Question 16, during October 1997 the EC authorities pointed out to the Indian exporters the difficulties of agreeing on acceptable undertakings in respect of bed linen. Nothing in the particular circumstances of this case appeared to the authorities to enable these difficulties to be overcome, nor did the exporters or their legal representatives suggest anything. The authorities remained open to offers of undertakings, but none was forthcoming within the relevant time limit, merely an expression of interest in giving an undertaking. In particular, the exporters did not mention possible undertakings in the individual submissions that they made to the EC at this time (Exhibits India-34 to 38). The EC authorities were of the opinion that the exporters had no serious interest in offering undertakings. For example, they made no request for an extension of the deadline for submitting offers, although extensions of other deadlines had previously been granted to them. That this was the case was confirmed by the comments of India in the first oral session.

18. Dumping investigations generally cover a period of investigation of six to 12 months. One effect of this is to smooth out, to some degree, minor or erratic price changes over that time-period in the determination of dumping. Zeroing detracts from this 'smoothing out' effect. Could the parties comment on this proposition and its relevance, if any to the understanding of Article 2.4.2 of the Agreement?

This answer is based on the two-phase process of calculating dumping margins that is used by the EC.

In the first phase (weighted average comparison of comparable sales), the longer the period over which sales are treated as comparable, the less chance there is that atypical prices will affect the resulting margins. A longer period is also more likely to reduce adventitious results when prices are erratic. ('Minor' price changes are likely to produce the same margin, whatever period is used).

Consequently, where there are atypical or erratic prices, if margins are calculated for each month of a twelve-month investigation period, those margins are likely to cover a greater range than had they been calculated for the whole year. (Of course, there will be twelve times as many margins.)

There is therefore more likelihood of instances arising where the export price exceeds the normal value.

Consequently when (in the second phase of calculating an exporter's margin) these margins are brought together to produce a single margin, more of them are likely to be zeroed. (Whether this actually happens will depend on the data in the particular investigation).

Thus, in the EC system, looked at in isolation the effect of sub-dividing the investigation period is, if anything, to increase the margin. It is not clear how it could be said that this effect involves either more or less 'smoothing out' of minor or erratic price changes.

However, this discussion takes no account of the reality of EC practice. Although the EC has emphasised that comparability of sales can take account of three types of difference – in model/type, channel of sale, and time of sale – in most investigations (including the bed linen case) only the first of these plays a role. The EC subdivides the investigation period only if prices at different points in the period are not comparable. For example, if there is serious inflation, or if raw material costs change markedly over the period, so that an export price at the end of the period is not comparable with a normal value calculated at the beginning. In such cases the consequences of limiting comparisons to sales that are truly comparable will outweigh any possible increase in the margin of the kind described above. The effect is to reduce rather than increase dumping margins.

This is why monthly or quarterly comparisons are almost always requested by the exporters themselves.

ANNEX 2-9

RESPONSES OF THE EUROPEAN COMMUNITIES TO QUESTIONS FROM INDIA FOLLOWING THE SECOND MEETING OF THE PANEL

(16 June 2000)

Questions Annexed to Closing Statement

1. Could the EC explain what it means with its statement in its answer to India's question 15: *" . . . it is not worse that [sic] not giving credit to a complaint which later turns out as having been supported by a major proportion of the industry."*

It is the EC's view that Article 5.4 permits trade associations to 'express support' for anti-dumping investigations on behalf of their members. That being the case, India's question appears irrelevant.

2. Could the EC explain, with detailed production figures, its statement in paragraph 21 of its second written submission that India's calculation of the 25 per cent threshold figure is erroneous because it involves *"double-counting"*?

The EC has provided adequate evidence to establish that the thresholds set by Article 5.4 were easily surpassed (even though the burden of proof lay on India to show that this had not happened). The double counting arose because in paragraph 21 of its First oral Statement India made use of a base figure of 34 per cent, from which it deducted the production of three companies, when that production had already been removed by the EC in arriving at the 34 per cent figure.

3. It is the practice of the EC, and especially Directorates I.C and I.E, to register incoming and outgoing written communications by date and with a number. This was also the case with documents in the *Bed Linen* proceeding, with the sole exception of the declarations of support. Why were the declarations of support never registered?

The declarations of support were registered on receipt, with the exception of one producer which had an output of only 5 mt.

4. Why were the fax headers and fax footers from *Eurocoton* removed while its fax number is even printed on the front page of the complaint?

As the EC has explained, the removals were made in response to the requests of producers.

5. The EC has stated in its reply to question 40 of India, that at the time of initiation, 46 producers supported the complaint, that seven were excluded after initiation, that three more were excluded after the questionnaires were sent (10-11/96) and that one more was excluded after verification. However, Exhibit EC-4 which, according to the EC, 'froze' the situation at the moment of initiation, as well as the declarations of support of individual producers, *c.q.* trade associations, refer only to 38 producers. Could the EC provide the declarations of support of the eight--later supposedly excluded--companies which, at the moment of initiation, must have filed such declarations in order for a legal standing determination to have been effected?

The EC has explained the relevant figures in its Second oral Statement to the Panel (paragraphs 18 et seq.).

6. How could the EC, at the time of initiation, already know that it was later going to exclude the eight companies?

See the answer to the previous question.

7. Could the EC explain the situation of the German company Luxorette and the French company Claude? More specifically, once the EC went from 19 producers to 17, in recital (61) of the provisional Regulation, Luxorette was still in the sample of 17. To come from 19 to 17 the EC used as one reason the stated reason as per recital (54). The situation of Luxorette remains therefore unclarified. Similarly, why was Claude excluded from the sample of 19, but not from the Community industry?

See the EC's answer to the Panel's question 13.

8. In paragraph 22 of its second written submission, the EC states that it *"…has in any case established that producers responsible for over 34 per cent of EC production expressly supported the complaint"*. But this 34 per cent can be reached only if one accepts the declarations of support of the French, Spanish, and Austrian textiles Federations because the EC, thus far, has not submitted individual declarations of support from French, Spanish, and Austrian textiles producers. Is this correct?

Individual declarations of support of the French producers have not been supplied, having been classified as confidential by the producers. They were received by the EC authorities prior to initiation. Spanish and Austrian producers expressed their support through their associations.

9. Does the EC agree that its logic in paragraph 76 and 77 of its Second Written Submission conveniently fails to mention, first, that – through the inclusion of non-dumped exports - the overall volume of 'dumped' imports will in all cases be higher than it otherwise would have been. Does the EC agree, second, that the mitigating effect on the price undercutting will occur only if the prices of the non-dumped exports are in fact higher than the prices of the dumped exports? In other words, that where dumping or non-dumping are caused by different patterns on the normal value side, the mitigating effect will not occur?

Since any particular level of imports, rather than changes in the level, is not relevant to injury causation, the first point is of no significance. As regards price, the only concern would arise if the inclusion of non-dumped transactions increased the undercutting margin. That it does not reduce the margin is irrelevant.

10. In paragraph 84 the EC posits that *"[a]t any rate, the investigating authorities would have been entitled to assume, in the absence of evidence to the contrary, that dumping existed for some time before this. In fact, such an assumption was relevant to the bed linen case."* Could the EC provide any legal basis in the ADA for such an assumption? Could the EC also confirm for the record that it follows from the last sentence that the EC did in fact assume that pre-investigation imports were dumped, as is in fact also clear from the published Regulations (but as has been denied by the EC in the course of the Panel proceedings).

As the EC noted in its Second Oral Submission, the sentence in question contained a typing error. It should have read '*In fact, such an assumption was <u>not</u> relevant to the bed linen case.'* The EC emphasizes that the observation was made in relation to the causation of injury.

11. Why would Indian exporters wish to argue that *"…they were actually dumping greater volumes in earlier years"*, especially where they would not have an inkling that they were dumping in the first place because they could not conceivably know that the EC would apply an 18+per cent profit to their non-existent domestic sales?

Only if the exporters were dumping in greater volumes in previous years might the effect of including non-dumped transactions in 'dumped imports' be to wrongly attribute responsibility to those exporters.

12. In paragraphs 104-115 the EC attempts to rebut the explanation claims made by India by differentiating between a member's obligations under the ADA and that same member's obligations under its domestic law and practice and arguing that an interested party's claims under the ADA would not be relevant claims (and therefore need not be addressed by an investigating authority) under such authority's law and practice where the latter were different. Would the EC not agree that this logic, *ceteris paribus*, would mostly benefit members which strayed furthest from the ADA, because such members then would have the least explaining to do, a bizarre and unwarranted result?

The EC would not agree because, by definition, by straying from the ADA the Member would be incurring international responsibility for infringing substantive provisions of the Agreement.

Questions Submitted on 7 June 2000

1. The EC in its closing statement on 6 June mentioned that it had "never" stated that it relied on 46 companies to determine support for the complaint. However, in its written answer to India's question No.40, EC had stated that " there were 46 companies, which supported the complaint before initiation". Could the EC explain this contradiction?

See the explanation provided at paragraph 18 of the EC Second oral Statement.

2. The EC in its closing statement on 6 June, also stated that their domestic regulation provided wide 'discretionary powers' to the investigating authority:

(a) Could the EC explain how the use of such 'discretionary powers' is consistent with the ADA, which in fact attempts to limit this very discretion.

In certain respects the ADA grants Members a wide discretion, in others it sets precise limits to what they may do.

(b) In this context, could the EC also explain how it uses these 'discretionary powers' in choosing the methodology for calculating the dumping margin, specially in case where two methodologies lead to different findings.

In accordance with the first sentence of Article 2.4.2, the EC has a methodology, fully explained in its submissions to the Panel, for determining the dumping margins of exporters. It departs from that methodology only when justified under the second sentence of Article 2.4.2.

3. The EC, again in its closing statement, stated that they could during a panel proceeding, provide 'ex-post facto justification' for actions taken during the investigation. Could the EC clarify as to how this 'ex-post facto justification' of actions taken earlier is compatible with Articles 2, 3 and 5 of the ADA, which specifically prescribe the conditions to be satisfied and the procedure to be followed before initiation of an investigation and for the determination of injury and the dumping margin.

The EC believe it has been misquoted in this question. The phrase it used in its closing remarks was 'ex post facto explanation' that The basic statements justifying the action taken by the EC in regard to bed linen are those contained in the Notice of Initiation, and in the Provisional and

Definitive Regulations. In the course of these dispute settlement proceedings information the EC has responded to arguments from India by providing further explanations of its Regulations. This has concerned points of detail. The EC has not attempted *ex post facto* justification of its actions. It has simply sought to explain for the benefit of the Panel, and of India, the justifications for the measures that are provided in the Regulations.

4. Can the EC indicate how many EC companies were contained in the sample drawn from its Community industry and could the EC provide details of their individual production of the like product.

Because the specific company production levels are confidential, the EC is prepared to provide them only if requested to do so by the Panel. The following table gives data at a country level.

Companies Included in the Sample

PORTUGAL AND GERMANY – 5 companies	
BIERBAUM TEXTILWERKE	
IRISETTE (belonging to Bierbaum)	
GÜNTER MECKELHOLT WEBEREI	
WILH WÜLFING	
LAMEIRINHO Industria textil	
Portugal and Germany production = 13.260 tonnes	
FRANCE – 8 companies	
Ets. FREMAUX	
Ets. HACOT	
HACOT Joseph et Cie	
JALLA S.A. NIEPPE	
MULLIEZ FRERES au LONGERON	
VANDERSCHOOTEN	
Ets. CLAUDE	
Ets. BERA	
France production = 8.533 tonnes	
ITALY – 4 companies	
BASSETTI	
BOSSI	
GABEL INDUSTRIA TESSILE	
ZUCCHI	
Italy production = 4.210 tonnes	
SAMPLE total production = 26.003 tonnes	

ANNEX 2-10

COMMUNICATION FROM THE EUROPEAN COMMUNITIES
TO THE CHAIRMAN OF THE PANEL

(22 June 2000)

The European Communities notes that, in its responses to the questions from the Panel following the second meeting, India reiterates its allegation that the European Communities could have in some way falsified the faxes containing the declarations of support of the domestic producers.

The European Communities considers these allegations serious and outrageous. Contrary to India's allegations, the European Communities has no need to forge documents and nothing to hide.

On the contrary, the European Communities has repeatedly stated its readiness to respond promptly and fully to any request by the Panel for such information as the Panel considered necessary and appropriate, and, the only time the Panel has made such request, it has responded promptly.

In view of the difficulty of accurately copying and transmitting by fax these documents, the European Communities, if the Panel considers it useful, would be happy to show to the Panel, in the presence of India, the original of these documents in order to resolve this issue once and for all.

A copy of this letter has also been sent to the Mission of India.

ANNEX – 2-11

COMMENTS OF THE EUROPEAN COMMUNITIES ON THE
DESCRIPTIVE PART OF THE PANEL REPORT

(3 July 2000)

The European Communities has the following comments to the descriptive part of the Panel's report.

Paragraphs 2.2 – 2.11 in general

The description of the EC measure concentrates on the provisional regulation (and therefore refers to "the Commission") which is not the subject of the dispute rather than on the definitive measure which is the subject of the proceeding but is not a measure adopted by the Commission. In order to avoid a complex and unnecessary explanation, the EC suggests that references to the Commission be replaced throughout by references to the EC. All the measures are measures of the EC.

The description of the measures seems rather unbalanced in that great detail is provided on some point and little on others. The EC will be suggesting certain simplifications below.

Paragraph 2.5

The summary of the sampling criteria is inaccurate. In particular, the document in Exhibit India-22, speaks of "the need to cover ... companies of different types (i.e. integrated, semi-integrated, merchant exporters)". The EC considers this to be disproportionate detail and suggests that the first sentence end after "sample of Indian exporters" and the second sentence be deleted entirely. The last sentence can also be deleted for the same reason.

In any case, the EC believes that the language described in paragraph 2.5 and referred in note 7 as coming from Exhibit India-22 appears in fact as taken from Exhibit India-19.

Paragraph 2.6

The second sentence of paragraph 2.6 might create some confusion regarding the method followed by the Commission when calculating the normal value for Bombay Dyeing (described in recitals 23, 24, 25 and 26 of the Provisional Regulation).

The EC would suggest that the second and third sentences be deleted completely as unnecessary detail. If the Panel does not follow this suggestion, it is suggested to redraft the second sentence as follows:

> "One company, Bombay Dyeing, was found to have global representative domestic sales of cotton-type bed-linen. However, only five types comparable to those exported to the EC were sold in representative quantities on the domestic market. Nevertheless, those five types were found not to be sold in the ordinary course of trade. Therefore, constructed values had to be calculated for all the types sold by Bombay Dyeing."

Paragraph 2.7

This paragraph refers twice to the concept of a "major proportion of Community industry" and does not distinguish between the two phases of standing and determination of Community industry. The EC does not think that it is necessary to discuss this matter in detail in the descriptive part. However, the text would be clearer for the reader if the words " represented a major proportion of the Community production of bed linen" in the first sentence of paragraph 2.7 were replaced by "satisfied the standing requirements of Article 5.4" (which phrase is also found in Recital 52 of the Provisional Regulation).

Paragraph 2.8

The third sentence does not mention prices. Both profits and prices were mentioned in the 'Conclusion on injury' in the Provisional Regulation, recital 93, last sentence. This is important as regards the overall conclusions on injury (see paragraph 40 of the Definitive Regulation). The EC asks that the words "and price depression" be added after "inadequate profitability" in the fourth line.

Paragraph 3.1, Claim 4

The EC recalls that India has confirmed that this claim does not extend to the amount for SGA expenses included in the constructed values. In particular, in response to Question 32 from the Panel following the First Meeting with the Parties, India stated that

> "India has posed no claim with regard to the calculation of SGA expenses since according to the understanding of India the SGA expenses expressed as a percentage [10.39 per cent] were in this case for the sales in the ordinary course of trade the same as for all sales […]."

It is suggested, therefore, to redraft this claim as follows:

> "Claim 4: Inconsistency with Article 2.2, by applying the profit amount determined for Bombay Dyeing in calculating the constructed value for other producers, even though that amount was clearly not "reasonable".

Before Paragraph 3.7

Only the EC's requests for preliminary rulings have been described. For the sake of accuracy, the EC asks that

(1) the following paragraph be inserted before paragraph 3.7:

> "The EC requests the Panel to reject the requests for recommendations made by India".

(2) the following paragraph be inserted after paragraph 3.7 (new 3.8):

> "In addition to its request for a preliminary ruling regarding the Panel's terms of reference, the EC also argued that claim 29 is largely outside the Panel's terms of reference because the Panel request referred to EC behaviour before the provisional measures Regulation."

(See EC Rebuttal Submission, paragraph 97.)

ANNEX 2-12

COMMENTS OF THE EUROPEAN COMMUNITIES ON THE
INTERIM REVIEW OF THE PANEL REPORT

(3 July 2000)

The European Communities thanks the Panel for its well-written Report and thanks both the Panel and the Secretariat for the work they have put into it. The EC is of course disappointed that the Panel has found that certain elements of the Regulation are not entirely consistent with the Anti-Dumping Agreement and reserves its rights in this respect.

The European Communities does not consider that an interim review meeting will be necessary unless India makes requests for substantive modifications to the Panel's findings which the Panel would be minded to accept.

The only request that the European Communities would make on the drafting of the final Report is that it be described by its correct WTO designation, "the European Communities", rather than the abbreviation, "the EC".

A copy of the present letter is being sent directly to the delegation of India.

ANNEX 3-1

THIRD-PARTY SUBMISSION OF EGYPT

(3 April 2000)

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I. INTRODUCTION

1. This third party submission by the Government of Egypt to the Panel on "European Communities – Anti-Dumping Duties on Imports of Cotton-type Bedlinen from India (WT/DS 141) is made pursuant to Article 10.2 of the WTO Dispute Settlement Understanding (DSU). Egypt trusts that the Panel will fully take into account Egypt's submission, as provided for in Article 10.1 of the DSU.

2. As an important producer and exporter of cotton and cotton products including bedlinen, Egypt has a substantial interest in the outcome of this proceeding especially considering that the European Communities (EC) is the destination for a significant proportion of Egypt's exports of cotton-type bedlinen.

3. Egypt is of the considered view that the initiation of anti-dumping proceedings, the imposition of provisional duties, and the imposition of definitive duties on Egyptian cotton-type bedlinen by the EC is unjustified and contrary to relevant rules of the World Trade Organization (WTO). As such, Egypt requests the panel to find that its benefits have been nullified and impaired under the WTO Agreement.

4. As Egypt is a third party in this present case, it has decided not to make a detailed submission on all the relevant issues before the panel. It has only addressed those factual and legal aspects of this case which, it believes, are germane to the outcome of this proceeding. In that context, it wishes to endorse all the arguments put forward by India to prove that the imposition of anti-dumping duties by the EC is illegal and cannot be justified under the WTO Agreement on Anti-Dumping (ADA).

II. FACTUAL ASPECTS

5. The present dispute arose out of a complaint lodged with the European Commission by Eurocoton in July 1996. It alleged, *inter alia*, that Egypt and other developing countries, namely India and Pakistan were dumping cotton-type bedlinen in the EC. Acting on the basis of this complaint, the EC initiated anti-dumping proceedings against imports of cotton-type bedlinen originating in or exported from Egypt, India and Pakistan by publishing a notice of initiation in September 1996 (in the Official Journal of the European Communities C266/2 of 13 September 1996). Following preliminary investigations, the EC imposed provisional anti-dumping duties on exports from the three-named countries in EC Commission Regulation No.1069/97 dated 12 June 1997. This was followed by the imposition of definitive anti-dumping duties by EC Council Regulation No. 2398/97 of 28 November 1997.

6. Pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXIII of General Agreement on Tariffs and Trade, 1994 and Article 17 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, the Government of India requested consultations with the EC. Following the failure of the consultations to resolve the issue, India requested the establishment of a panel in a communication to the Chairman of the Dispute Settlement Body dated 7 September 1999. Egypt notified the DSB at its meeting of 27 of October 1999 about its intention to participate in the case as a third party in accordance with Article 10 of the Dispute Settlement Understanding.

III. LEGAL ASPECTS

7. In the case of Egypt, three state-owned companies and one private company were selected as representatives of Egyptian bed-linen exporters/producers by the European Commission for purposes of the investigation. The EC received the assurance of cooperation in the investigations by the non-sampled companies, but did not send questionnaires to them nor requested any information from them during the proceedings. Egypt's complaint in this matter relates to the manner in which the investigations were conducted and the application of the substantive rules of the WTO Antidumping Agreement which it believes were contrary to the established multilateral disciplines.

1. Violations of procedural requirements of the Agreement on Anti-Dumping

8. Prior to lodging its complaint with the European Commission in July 1996, Eurocoton had been involved in a number of anti-dumping cases that were terminated principally because of the lack of co-operation or opposition by a significant proportion of domestic producers of like products in the EC.[1] A previous investigation into alleged dumping of bedlinen by India, Pakistan, Thailand and

[1] See (Cotton terry-towelling articles form Turkey, OJ-1996-L17/22 - non-cooperation on the part of the Community industry / Cotton fabric from China, India, Pakistan, Indonesia and Turkey, OJ-1996-L42/16 -

Turkey was terminated after Eurocoton withdrew its complaint. Although no reasons were given for the withdrawal, it is common knowledge that it did not receive the support of other significant producers of bedlinen in the EC. With only a minority of producers supporting it, Eurocoton had no choice but to request the withdrawal of its complaint.

9. While the EC was at all material times aware of the withdrawal of the initial complaint (*OJ-1996-L17/27)*, by Eurocoton on the ground that it was not supported by a significant proportion of Community producers, it chose to launch an investigation upon receiving another complaint against dumped exports of bedlinen from Eurocoton. Prudence would have required the EC to satisfy itself if the new complaint had been lodged by or on behalf of the domestic industry producing a like product as required by Article 5.4 of the ADA before taking any further steps. Had it scrupulously followed the provisions of the ADA, it would have realised that the Eurocoton did not have the standing required under Article 5.4 of the ADA to lodge a complaint.

10. The EC's assertion that the complaint was filed on behalf of the Community industry is not supported by the facts in this case. The investigation revealed that those Community producers who supported the complaint were in the minority. Even among them, several complainants had to be excluded for various reasons. As many as 7 complainants had to be excluded because they were "found not to be complainants" by the Commission. Furthermore, out of the remaining producers, three failed to co-operate with the Commission in the course of the investigation and one was found to be no longer producing bed linen. Finally it was found that one company in the sample had to be excluded because it imported a significant proportion of the product under investigation from Pakistan. These exclusions brought down the number of complainants initially listed in the complaint from 46 to 34. The level of co-operation from the remaining Community producers was, on the whole, extremely low. Many producers failed to provide - at least in non-confidential form - information, which is usually required during investigations of this kind.

11. In the instant case, the proportion of the complaining industry is extremely low (34%) but the Commission and Council claim that the thresholds set out in the EC basic regulation had been met throughout the proceeding (Recitals 32 to 34 of the Regulation imposing definitive measures). The figure of 34 per cent is sufficient under the ADA provided the remaining 66 per cent did not object to the initiation of the investigation. This argument by the EC does not appear to be supported by the evidence so far adduced in this case. Neither the non-confidential files made available to the interested parties, nor the disclosure documents or the Regulation imposing definitive duties offers conclusive proof that the complainants indeed represented 34 per cent of total EU production. Furthermore, in order to ascertain whether the above-mentioned thresholds were met, the Commission was supposed to have made a preliminary determination as to which producers were to be excluded from the Community industry on the basis that they themselves were importers of the allegedly dumped products. There is no mention of this determination in any of the available files open for inspection.

12. It is not sufficient for the complaining industry to represent 25 per cent of total Community production to pass the "representative" test provided for in ADA. Given the above-mentioned facts, the Commission was supposed to have closely scrutinized whether the remaining Community producers who co-operated with the investigation accounted for more than 50 per cent of the total production of bed linen in the EC. Since the co-operating producers were found by the Commission to represent only 34 per cent and the other Community producers claimed by Eurocoton to be

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withdrawal of complaint on unspecified grounds / Synthetic staple fibre fabric from India, Pakistan, Indonesia and Thailand, OJ 1996-L42/18 - withdrawal of complaint on unspecified grounds / Denim fabric from Turkey, Indonesia, Hong Kong and Macao, OJ-1990-l222/50 - no injury and/ Polyester/cotton sheets and pillowcases from the United States, OJ-1982-48/30 - no dumping).

supporting the complaint represented only 15 per cent of total EU production, it can be concluded that all the producers in favour of the complaint accounted for 49 per cent of total Community production.

13. Given the difficulties that had been experienced by Eurocoton in getting the support of other Community producers, it could be inferred that the producers accounting for 51 per cent of Community production were opposed to the complaint. The true position could have been established, if the Commission had launched a thorough enquiry to ascertain the position of the various producers of bed linen in the EC and verified the claims of Eurocoton that it represented a "major proportion of the Community industry" within the meaning of the ADA. By failing to launch this enquiry, the Commission was obliged to terminate the proceeding immediately.

14. The interpretation given to what the EC claims to be the relevant phrase in Article 5.4 i.e., "the authorities have determined" is not supported by the context, object and purpose of the Article. The purpose of Article 5.4 of the ADA is to safeguard the interests of exporters by requiring investigative authorities not to initiate frivolous actions which could disrupt trade. It is because of that the Article requires them to be sure about the support a complaint enjoys before initiating investigations. The word "determine" does not mean that investigative authorities can arrive at any decision that they like. Any decision taken to launch an investigation must be supported by the relevant facts and evidence. If the interpretation of the EC were to be accepted, it would make the Article redundant, as there would be no cases where you can question the determination of investigative authorities. Had the Agreement wanted to give this huge discretionary power to investigators, it would have stated so explicitly.

15. Contrary to the express wording of Article 5.3 of the ADA, the EC failed to examine thoroughly the allegations in the complaint. It failed to take into account information available to it at time of initiation pointing to lack of material injury caused by dumped imports. Even if the EC carried out the examination, it failed to disclose this fact to the interested parties. As such, it acted in breach of Articles 12.1 and 12.2 of the ADA. The EC's argument that in paragraph 81 of its First Written Submissions seems to stretch the relevant language of the Article. A breach of any provision of the WTO Anti-dumping Agreement could invalidate the decision made by a Member country. Thus, it is not open to the EC to minimize or disregard its breaches of explicit provisions in the WTO Agreement.

2. Substantive breaches of the Anti-Dumping Agreement

16. Before proceeding to outline the substantive breaches of provisions of the Anti-Dumping Agreement, it is in order to comment on the argument of the EC that claims by India in respect of "alleged defects in the Provisional Regulation…[were] beyond the Panel's jurisdiction". The EC gives two reasons in support of this claim. That a provisional measure can only be referred to the DSB when it "has [had] a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7." It is clear that had India and the other countries affected by the measure not think that the measure was imposed in breach of the provisions of Article 7.1 of the ADA, they would not have found it necessary to participate in this panel proceeding. Regarding the first condition, it also follows that if the measure had not had any significant impact, India and the other affected countries would not have complained. The very fact that they cooperated in the investigation and provided evidence to refute the allegations means that they were concerned about the significant impact the imposition of anti-dumping duties would have on their bed-linen industries. In summary, the EC's argument that the Panel cannot entertain claims relating to the provisional Regulation is unfounded and should be rejected by the Panel.

(i) Dumping

17. In determining the normal value of the alleged dumped product, the EC disregarded the provisions of Articles 2.2.1.1 and 2.2.2 of the ADA, which provide in relevant parts, as follows:

> "…costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation" (Article 2.2.1.1); and
>
> "…amounts from administrative, selling and general costs and for profits shall be based on actual data." (Article 2.2.2).

Costs calculated by the Commission were not based on the records kept by the exporters or producers under investigation in the case of Egypt, nor were amounts for SGA costs based on actual data submitted by the relevant parties. Instead, higher amounts for administrative, selling and general costs than were ever incurred and properly reported in the records kept by the producer, were used in the calculation of the constructed normal value. The Commission, in adding more SGA costs than were ever incurred, violated the above provisions. Accordingly, the normal values have been overstated resulting in artificially inflated dumping margins. This over-addition of SGA expenses stems from calculation techniques that are mathematically flawed and contrary to an elementary understanding of accounting.

18. The argument of the EC in paragraph 137 of its first written submission that they "were correct to put certain limits on what data they would consider for the purposes of constructing the normal value" is overstated. While in certain cases, adjustments could be made, the overriding goal is that the use of any method should not result in excess profit margins. By inflating the figures, the EC grossly exaggerated the profits of the 4 sampled Egyptian exporters permitting it to arrive at a higher normal value and consequently an unrealistic dumping margin.

19. In establishing the margin of dumping in this case, the EC violated the provisions of Article 2.4.2:

> "the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. However (as an exception to this rule), a normal value established on a weighted average basis may compared to prices of individual export transactions if the authorities find a pattern of exports prices which differ significantly among different purchases, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average of transaction comparison."

Paragraph 46 of the EC Regulation imposing provisional duties notes that weighted average constructed normal value "by type" was compared with weighted average export price "by type" with regard to Egyptian exporters. In effect, the EC chose to apply the first option stipulated in Article 2.4.2 of the ADA. However, its manipulation of the calculation by zeroing negative dumping amounts on a per-type basis goes beyond what could legitimately be done within the bounds of Article 2.4.2 of the ADA. Had the Commission followed strictly its own established practice, the outcome would have been different. In failing to do that, it is clear that the EC was determined to have bigger dumping margins.

20. In imposing provisional anti-dumping duties, the EC violated the provisions of Article 9.4 of the ADA. As pointed out in paragraph 7 of this submission, the EC Regulations imposing provisional

and definitive duties distinguished between state-owned and private enterprises and that the investigation covered three state-owned enterprises and one private enterprise. However, paragraph 48 of the Regulation imposing provisional duties affirmed that one weighted average dumping margin was calculated for the three state-owned companies which was then applied to all state companies, regardless of whether or not they offered to co-operate with the EC authorities during the investigation. The resulting margin was 13.5 per cent. An individual dumping margin of 9.1 per cent was calculated for the private investigated company. However, the 9.1 per cent margin was not applied across the board to all private companies including the non-sampled private companies which offered to co-operate with the EC authorities during the investigation. Rather, the EC authorities attributed the weighted average dumping of the four companies in the sample, weighted on the basis of their export turnover to the EC, and came up with a dumping margin of 13 per cent applicable to the entire private sector. Clearly, the approach adopted by the EC is unjustified under the ADA. The EC should have been consistent, rather than manipulate the relevant figures to enable it to achieve its objective.

(ii) Injury

1. The volume of dumped imports

21. The relevant question which needs to be addressed is whether in determining injury, the EC was justified in treating all imports from the targeted countries as dumped during the period of investigation? It would appear that the standard practice of the EC in injury determinations is to consider all imports of the products under consideration as dumped, once the weighted average dumping margin has been established. In other words, all the relevant products originating in the investigated country would be deemed to have been dumped. Following this standard practice, the Commission noted in the Regulation imposing provisional duties that:

> "(67) Dumped imports from the three countries concerned increased from 33825 tones in 1992 to 46656 tones during the investigating period i.e. an increase of 12831 tones or 38 per cent during the same period their market share increased from 16.9 per cent to 25.1 per cent."

An examination of the evidence revealed that there was no segregation between dumped exports and those that were not dumped. There is no textual support for the approach adopted by the EC in the ADA. In fact, its approach is contrary to Articles 3.1, 3.2, 3.4, 3.5 and 3.6 of the ADA.

22. The EC's interpretation of Article 3.1 of the ADA is not supported by the cardinal rules of interpretation laid down in Article 31 of the Vienna Convention on the Law of Treaties as clarified and applied in a number of cases by the Appellate Body starting with United States - Standards for Reformulated and Conventional Gasoline (WT/DS2/AB/R, adopted by the DSB on 20 May 1996). The relevant words in Article 3.1 of the ADA are "dumped imports". Thus, if ceratin products are not dumped, then they cannot be taken into account for the purposes of determining injury. The EC has read too much into the provisions of Article 3.1 of the ADA and that should not be permitted by the Panel.

2. Data collection

23. The relevant issue to be addressed is whether it is a breach of the ADA to use data from producers other than those determined to be part of the Community industry in injury determinations? In paragraph 57 of the EC Regulation imposing provisional anti-dumping duties, it is explicitly stated that:

> "The remaining 35 companies, which cooperated with the inquiry and are located in France, Germany, Italy, Spain, Portugal, Austria and Finland represented a major proportion of total Community production in the investigation period. These companies were therefore deemed to make up the Community industry under the terms of Article 4.1 of the basic Regulation."

Notwithstanding this statement, the Commission relied heavily on the data of companies not supporting the complaint to establish injury. There is no textual support in the ADA for the approach adopted by the EC, which is incompatible with Article 3.1 (as well as Articles 3.3, 3.4, 3.5 and 3.6) which requires the Commission to determine whether the domestic industry has suffered injury, and which does not mandate an injury determination which is based on data relating to companies not belonging to the domestic industry.

24. An ancillary question which needs to be answered is the extent to which the EC is bound by data of sampled companies in an injury analysis. Put in another way, is the Commission entitled to ignore data collected on sampled companies and base its decision on companies which were not sampled? The Commission, by ignoring the results of its own sample of the domestic industry, failed to make an unbiased and objective assessment of the facts and thus acted inconsistently with Article 6.10 in conjunction with Article 3.4, 3.5 and 3.6. By failing to provide relevant data for the domestic industry on a factor-by-factor basis, the Commission acted inconsistently with Article 3.5 of the ADA.

3. The injury suffered by the EC industry

25. In assessing whether the Community industry had suffered material injury, the Commission appeared to have treated indifferently the EC industry and the total EC production. It also drew a number of conclusions relating to the situation of the EC industry on the basis of statistical information concerning the total EC production. These indices are completely different and should be treated as such, otherwise a distorted picture would be given. The evidence available in this case shows that the EC industry is in a healthy state and could not have been injured by the imports of bed-linen from the targeted countries. The following facts are indicative:

4. Production

26. The total production of bed linen by the EC industry increased by 8.7 per cent between 1992 and the period of the investigation. The fact that production by some producers in the EC fell is irrelevant, since pursuant to Article 3 of the basic EC Regulation, the Commission must only examine whether material injury had been caused to the relevant EC industry. It is quite disturbing that the Commission now wants to ascribe a different meaning to the phrase "relevant industry." According to it, the term encompasses those Community producers that were able to survive notwithstanding the dumping by the targeted countries. The allegation by the EC that the closure of certain companies was due to the alleged dumped imports, and not attributable to other independent causes, is unsubstantiated by any evidence. Carried to its logical conclusion, the EC argument would mean that the dumped products were able to selectively injure only those industries that did not support the complaint lodged by Eurocoton. Clearly, this reasoning of the EC is absurd. Again, there is no textual support for EC's interpretation of Article 3 of the ADA. The more logical explanation of the reduction in production on the part of the non-EC relevant industry is due to reasons other than dumping, as there is sufficient evidence to indicate that global production in the EC had increased during the period of investigation.

5. Sales volume

27. The Commission alleges that sales of total Community producers fell by 17 per cent and that sales for the sampled producers fell by 1.5 per cent. However, for reasons best known to it, the Commission fails to provide the figures that are really important, i.e. the sales trends in volume terms of the EC industry, even though it does provide this information in value terms. The Disclosure document indicates, however, that sales by the EC industry have actually increased during the relevant period. Indeed, if the relationship between sales trends in volume and in value terms of the sampled producers is contrasted to the trend in sales values of the EC industry, it becomes apparent that the sales volume of the EC industry increased by around 2.5 per cent between 1992 and the period of the investigation. Given this result, the figures given by the Commission are quite dubious.

6. Sales value

28. The evidence discloses that between 1992 and the period of the investigation, there was an increase of 4.2 per cent in sales value terms for the EC industry and an increase of 1.7 per cent for the sampled producers. Thus, the assertion by the EC that the alleged dumped products had an effect on domestic sales values is unsubstantiated.

7. Market share

29. In value terms, the market share of the EC industry increased by a respectable 11.8 per cent between 1992 and the investigation period. The market share of the sampled producers increased by 9 per cent between 1992 and the investigation period and by as much as 17.2 per cent between 1991 and the investigation period. In volume terms, the market share of the sampled producers increased by 5.6 per cent between 1992 and investigation period. No data was provided with respect to the EC industry. However, even if one considers that sales volume remained stable as indicated by the Commission in the Disclosure letter, the market share of the EC industry must have, at least, increased by a similar ratio.

8. Employment

30. The evidence discloses that there was an insignificant decrease in the level of employment as far as the EC industry is concerned. Out of the 7,000 persons engaged in this sector, only 375 persons lost their jobs. It should be borne in mind, however, that production increased during the same period, which points to the fact that increased efficiency rather than alleged dumped imports was responsible for the decrease in the level of employment.

9. Price development and profitability

31. Considering the decline in Community consumption, the Community producers have been able to maintain remarkably stable prices and actually managed to increase them by over 3 per cent during the relevant period and remain profitable.

32. It follows from the forgoing that virtually all the indicators that the Commission relied on to demonstrate injury to the domestic industry actually proves the contrary. In other words, they confirm that the EC industry is in a good state of health and has not been injured by any dumped exports. They suggest that other reasons are to blame for the difficulties being experienced by some individual EC producers. From the available evidence, the EC cannot controvert the fact that between 1992 and the period of investigation, the EC industry increased its production, increased its sales, increased its market share, increased its prices and remained profitable in spite of a significant decrease in consumption.

33. The Commission's observation that in analyzing data on the EC industry, account should be taken of the 29 companies, other than the EC industry, which ceased or reduced bed linen production in the Community between 1992 and the investigation period (page 18 of the disclosure) is irrelevant, since injury must be assessed in respect of the basic Regulation and not in respect of the Community production.

(iii) Causality

34. Among the requirements (dumping, injury, causality) necessary for anti-dumping duties to be lawfully imposed, causality is the only purely legal requirement. The causality requirement will be satisfied under the ADA when two conditions are proved: that dumping through its effects caused injury to the domestic industry producing a like product; and that the injury to the domestic industry is not to be attributed to any other factor.

35. The Commission's assertion that it satisfied both conditions is not supported by the evidence. In paragraphs 95-99 of the Regulation imposing provisional duties, the Commission noted that "it can be concluded that there was a direct causal link between these imports and the material injury found". What is intriguing is that it was only after making this finding that the EC examines whether other factors could have caused the injury. The approach adopted is inconsistent with Article 3.5 of the ADA.

36. There is no evidence that the EC took into account in its analysis the fact that consumption of the like product in the EC decreased over the relevant period. Had it taken this into account, it could not have arrived at the conclusion that the alleged dumped products were the source of injury to the EC industry. By ignoring this important fact, the EC failed to make a fair and objective determination under Article 3.4 of the ADA.

37. While the Commission acknowledges that the dumped imports have not had an effect on the market share of Community industry, it asserts that they have had an impact on the profitability of the sampled producers "whose profitability had fallen from 3.6 per cent to 1.6 per cent". It should be pointed out that the alleged reduction in profitability was based on one sampled producer. Since the market share in value of the Community industry increased proportionately at a higher rate in comparison to the variation of its market share in volume terms than that of the sampled producers, it may reasonably be assumed that the trend in profitability of the Community industry would have certainly shown a different pattern. Assuming that the variation in its production costs is the same as that of the sampled producers, its profitability would have actually increased during the relevant period.

(iv) Breach of Article 15 of the ADA

38. By virtue of the provisions of Article 15 of the ADA, the EC was obliged to explore "the possibilities of constructive remedies…before applying anti-dumping duties where they would affect the essential interests of developing country Members." It is clear that the EC acted in contravention of this provision, as it did not suggest to the Egyptian exporters the possibility of giving, for example, price undertakings. It appears that the EC is of the view that the offer has to come from the exporters. Its interpretation of the provisions of Article 15 is erroneous for the simple reason that since it is a legal obligation which has to be fulfilled by developed countries anytime they contemplate on imposing antidumping duties, it is up to them to suggest to the developing countries involved whether or not they would be interested in offering price undertakings. By failing to offer Egyptian exporters the possibility of giving price undertakings, the EC acted inconsistently with the provisions of Article 15 of the ADA.

ANNEX 3-2

THIRD-PARTY SUBMISSION OF JAPAN

(3 April 2000)

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I. INTRODUCTION

1. The WTO Agreement, in particular the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (hereinafter referred to as AD Agreement) permits the use of anti-dumping measures only under strict conditions stipulated therein because such measures are exceptions to the non-discriminatory principle and the rule prohibiting duties that exceed the bound rate of the WTO. By virtue of being such exceptions, the authorities must adhere strictly to the rules of the AD Agreement when initiating anti-dumping investigations. We have witnessed a substantial increase in the number of instances in which anti-dumping measures are invoked, and have increasingly become concerned about the abuse of anti-dumping measures in some cases.

II. ARTICLE 2.2.2 – "PROFITS"

2. Japan believes that Article 2.2.2(ii) does not allow the exclusion of below cost sales before determining the profit amount. Article 2.2.2(ii) refers to "the actual amounts incurred and realized," and does not include any qualifications. If they choose this option, the authorities must therefore determine the weighted average of the actual profit margins reported by the exporters or producers in their accounting records or reflected in the price and cost of the transactions at issue. Article 2.2.2(ii) does not allow the authorities to modify these actual profit margins.

3. This interpretation reflects both the plain text and the overall context of Article 2.2.2. One should not improperly graft the concept of "ordinary course of trade" onto Article 2.2.2(ii). Such an interpretation has several flaws as a matter of treaty interpretation.

4. First, the initial sentence of Article 2.2.2 sets forth one of four distinct options for determining profit. The language of this option explicitly includes the concept "ordinary course of trade". This first sentence, however, is grammatically distinct from the second sentence that serves as the chapeau for the remainder of this provision. The concept "ordinary course of trade" is therefore not properly considered to be part of the remaining text of this provision.

5. Second, the drafters of Article 2 were quite careful to insert the concept "ordinary course of trade" in precisely those places where they intended the concept to apply. The decision not to include

the concept in Article 2.2.2(ii) must therefore be given meaning when interpreting this language. If the drafters had intended the concept to apply, they would have so drafted the legal text.

6. Third, such an interpretation would give no significance to the important distinction between the language of the option set forth in Article 2.2.2 based on "actual data" and the language of the option set forth in Article 2.2.2(ii) based on "actual amounts incurred and realized." The former option contemplates manipulation of a database specific to the exporter in question, and thus excluding those sales not in the "ordinary course of trade". The latter option in Article 2.2.2(ii) does not focus on a narrowly defined database, but instead uses the broader concept of "actual amounts incurred and realized". No company in the world records the profits "realized" in its accounting records in accordance with the rather unique anti-dumping law concept of "ordinary course of trade".

7. In its First Submission, the EC tries to bolster its own flawed interpretation by attacking the Indian interpretation as leading to unreasonable results (See EC submission para 145,146). Japan finds this EC argument unpersuasive for several reasons.

8. First, the EC interpretation is equally capable of unreasonable results. Suppose a company had nine sales at a loss of 1 per cent each, but a tenth sale at a profit of 20 per cent. If the sales had equal weight, the overall profit would be 1.1 per cent. Yet under the EC interpretation, the company would have a profit margin of 20 per cent. The company with an average profit margin of about 1 per cent would undoubtedly be perplexed by the legal conclusion that its profits were actually 20 per cent.

9. Second, unreasonable results should not occur. Presumably if the outcome under Article 2.2.2(ii) were unreasonable, and thus inconsistent with Article 2.2, the EC could choose some other option such as Article 2.2.2(i) or Article 2.2.2(iii). Neither of these alternatives would permit the arbitrary exclusion of sales deemed "outside the ordinary course of trade". But switching from the narrow "like product" specified under Article 2.2.2 and Article 2.2.2(ii) to the broader "same general category" specified under Article 2.2.2(i) and Article 2.2.2(iii) might avoid the outcome the EC believed to be unreasonable.

10. Third, the requirement of Article 2.2 that any profit amount be added must be "reasonable" serves as a final safeguard against unreasonable results. If the EC truly believed that the profit calculated from all sales, not just those sales in the "ordinary course of trade", to be unreasonable, after calculating the amounts of profits in accordance with Article 2.2.2(ii), it could so find and decide not to take that option.

III. ARTICLE 2.4.2 – "WEIGHTED AVERAGE"

11. Japan believes that the EC practice of "zeroing" dumping margins is not consistent with the requirements of Article 2.4.2. This provision explicitly calls for dumping margins to be based on a comparison of a weighted average normal value with "a weighted average of prices of all comparable export transactions". A proper weighted average does not arbitrarily raise some of the numbers in the average in an effort to increase the final result of the weighted average.

12. The EC erroneously believes its practice can be justified by the term "comparable" in Article 2.4.2. This term speaks only to the need to make the "comparison" on an apples-to-apples basis. In other words, the authorities may properly define whatever reasonable categories are necessary to make sure the comparison is between "comparable" home market products and export market products. It would make no sense at all to calculate an overall average price of all home market products and another overall average price of all export market products - differences in prices between those products mix could render such an analysis unreasonable. The term "comparable"

seeks to avoid such unreasonable results, but in no way authorizes setting any non-dumped categories to zero before calculating an overall weighted average dumping margin.

13. The EC seems to believe that if they properly weight-averages once within the product category, they need not then properly weight-average in the next stage of its aggregation across the various product categories. This interpretation, however, ignores the plain meaning of Article 2.4.2 which requires the comparison of a weighted average in establishing the existence of dumping margins.

14. The text of Article 2.4.2 calls for a weighted average based on "all" comparable export transactions, not just those transactions found to be dumped. The EC apparently believes that including the volume of the non-dumped product categories in the overall average satisfies this requirement of including "all" export transactions. The EC approach, however, arbitrary considers only part of the export transactions - the volume element, not the price element. The first sentence of Article 2.4.2 explicitly calls for a weight average of the "prices" of export transactions. Yet setting the value of the non-dumped product category to zero essentially amounts to resetting the "prices" of the underlying export transactions. Nothing in Article 2.4.2 contemplates such rigging of the export prices before conducting a proper overall weighted average.

15. Finally, the EC cannot hide behind the argument that Article 2.4.2 does not prohibit "zeroing", and thus the practice must be permitted. The text of Article 2.4.2 explicitly calls for a weighted average of the "prices", not of some actual prices and some arbitrarily adjusted prices. Japan believes that the treaty text and plain meaning of Article 2.4.2 are quite clear.

16. Moreover, Article 2.4 creates an overall obligation of "fair comparison" for the calculation of dumping margins. Indeed, the first phrase of Article 2.4.2 explicitly refers back to the obligation of "fair comparison" in Article 2.4. Japan believes that it is not "fair" to skew a proper weight average by essentially adjusting some prices.

17. Indeed, the unfairness of such an approach can be seen in this case. A company that was not dumping under a proper weighted average comparison suddenly was deemed to have been dumping because of the EC methodology. The EC tries to shift the focus away from this company by pointing to the calculation of the "all other rate" under different scenarios (See EC submission, para 212, 213). The distinction between 12 per cent and 15 per cent dumping margins for companies not investigated at all does not matter to the company fully investigated and yet subjected to dumping duties when none should properly apply at all.

IV. ARTICLE 3 – "DUMPED IMPORTS"

18. In various places, Article 3 refers to the concept of "dumped imports". Japan believes that this language means that the injury determination set forth in Article 3 must reflect the authorities' assessment of only "dumped imports", and not imports that were not found to have been "dumped".

19. This language has a readily discernable plain meaning. If the authorities find that some imports are "dumped" and others are not "dumped", then the authorities must distinguish between the two types of imports in making injury determinations. The fact that some imports from a company may be "dumped" does not give the authorities a license to assume that all imports from that company should be deemed as having been "dumped".

20. The EC misinterprets various provisions of the Anti-dumping Agreement in an effort to defend its practice. The EC misreads Article 2.1. First the EC seems to assume that "product" means "like product", even though the two terms are quite different and used quite carefully in the Anti-dumping Agreement. Second, the EC ignores the fact that Article 2.1 refers to "the export price of the

product . . . ". Since there is no "price" associated with product categories, but only individual transactions, this definition must refer to transactions. If the EC believes that "product" means the same thing as "like product" in this context (See EC submission, para 223-226), Japan wonders how the EC would even attempt to define "the price" (as opposed to the aggregate value) associated with such a broad category of multiple products.

21. The EC also misreads Article 3.3. The discretion to cumulate applies to all "imports", since Article 3.3 does not refer to "dumped imports". Even if imports are cumulated, however, the authorities still have an obligation to make the injury determination only for the "dumped" portion of the cumulated imports.

22. Allowing some "dumped" imports to taint all imports from that company seriously skews the fundamental injury analysis of Article 3. The core analysis of Article 3.1 and 3.2 require the assessment of the volume and price impact of "dumped imports". Considering non-dumped imports to be "dumped" unavoidably skews the analysis of the "volume of the dumped imports". It is simply not possible for imports to be both "dumped" and not dumped at the same time.

V. ARTICLE 3.4 – "ALL RELEVANT ECONOMIC FACTORS AND INDICES"

23. Japan believes that the language of Article 3.4 requires all listed factors to be considered. The list of factors in Article 3.4 is the minimum that must be evaluated by the authorities. The degree of importance of each factor may vary from case to case, but all of the listed factors must be fully considered and evaluated in each case. Authorities may not exclude certain factors because they deem these to be irrelevant.

24. Japan believes that this interpretation of Article 3.4 finds additional support in the change in the language of this provision over time. The change from the phrase "such as" in the comparable provision of the Tokyo Round Antidumping Code to the word "including" in the Anti-dumping Agreement underscores the interpretative significance of the word "including". Because "including" means "part of a whole", the factors after the word "including" must be viewed as a subset of a potentially larger group of factors that must be evaluated by the authorities. Had the drafters intended this list of factors be a discretionary check list, from which authorities may pick and choose, they would not have changed "such as" to "including". The drafters also would have used language to more clearly provide that authorities could consider as many or as few of these factors as they wished.

ANNEX 3-3

THIRD-PARTY SUBMISSION OF THE UNITED STATES

(3 April 2000)

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I. INTRODUCTION

1. The United States makes this third party submission to comment on certain legal interpretations of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "Agreement"). Many of the issues in this dispute appear to involve questions of fact, and, in several instances, the facts are either unclear or are in dispute. In addition, in several instances, the precise claims of India are sufficiently vague to make comment difficult. For this reason, the United States has emphasized what it believes to be the proper legal interpretation of several provisions of the Agreement, without expressing a definitive view as to whether, over all, the facts of this case spell out a violation of the Agreement.

2. Section II below addresses one of the issues raised by the European Communities ("EC") in its request for preliminary rulings.

3. Section III below addresses a number of the dumping issues raised by the parties, including (1) the calculation of constructed value profit; (2) the interpretation of the "reasonableness" language in Articles 2.2. and 2.2.2; (3) the manner in which non-dumped sales are included in the calculation of dumping margins; (4) the relevance of a prior, incomplete investigation to the decision to initiate this investigation; (5) the nature of evidence that must be considered to determine industry support for initiation purposes; and (6) the appropriate timing and nature of accommodations to be made pursuant Article 15. With respect to issue (2), in particular, the United States urges the panel to reject India's interpretation of the Agreement's constructed value profit provisions – contained in Articles 2.2 and 2.2.2 – because it imposes a comparative "reasonableness" standard and creates a cap on constructed value profit amounts where no such provision exists in the Agreement. In addition, with respect to issue (3), the United States urges the panel to reject India's interpretation of Article 2.4.2, because it would require an investigating authority to distort the calculation of an overall dumping margin by offsetting dumped sales with non-comparable non-dumped sales.

4. Finally, Section IV addresses issues relating to the injury determination in this case. The United States notes that the EC appears to have defined the domestic industry in this case in a manner inconsistent with its obligations under Articles 3 and 4 of the Agreement. Also, the sample taken for purposes of determining injury was fundamentally flawed, and there is no basis to conclude that the sample was statistically valid. The United States also presents views concerning India's claims regarding the EC's evaluation of the criteria in Articles 3.2 and 3.4, and the EC's treatment of all subject imports as dumped imports.

A. THE STANDARD OF REVIEW

5. The United States respectfully notes that, pursuant to Article 17.6(i), the task of the reviewing panel when examining the assessment of the facts is to examine whether the evidence before the investigating authority is such that an unbiased and objective investigating authority evaluating that evidence could properly have made the same determination.[1] With regard to the examination of legal issues, Article 17.6(ii) requires a panel to uphold an interpretation of the Agreement by an investigating authority when the language in the Agreement is susceptible to more than one

[1] See: Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States, WT/DS132/R, Report of the Panel (28 January 2000) ("HFCS"), paras. 7.94 - 7.95.

permissible interpretation and the challenged interpretation is a permissible construction. On this basis, the United States submits that it would be inappropriate for a reviewing panel to re-weigh the evidence that was before the investigating authority, or to substitute its own judgment for that of the investigating authority. The United States further submits that it would be inappropriate for a reviewing panel to overturn a permissible interpretation of the Agreement simply because the panel viewed another interpretation as permissible or even preferable. We respectfully request that the panel bear in mind the dictates of Article 17.6 in the course of its deliberations.

II. PRELIMINARY ISSUES RAISED BY THE EUROPEAN COMMUNITIES

6. The EC argues that the panel should not consider Annex 49 of India's first submission, because the document in question appears to be confidential and related to a separate investigation, and because India may have wrongfully released such information. Annex 49 appears to be an excerpt from a disclosure document from the European Commission to Messrs. Vermulst and Wang regarding an anti-dumping proceeding concerning stainless steel fasteners from the People's Republic of China. The letter indicates that it constitutes disclosure to them on behalf of their clients of the essential facts and considerations in the investigation; attached thereto is a list of what appear to be product-specific export prices and normal values. The normal values appear to be based on information from Taiwanese companies, while the export prices appear to be from sales by the Chinese clients of Messrs. Vermulst and Wang. This information may have been the business proprietary information of the clients of Messrs. Vermulst and Wang and there is no indication in the First Submission of India that these clients granted permission for that information to be disclosed to the Government of India or this panel. If, in fact, Messrs. Vermulst and Wang have breached a duty of confidentiality to their clients in releasing this information to the Government of India, such action is deplorable and should not be encouraged by this pane[2]

III. INDIA'S CLAIMS UNDER ARTICLE 2.2.2[3]

A. INVESTIGATING AUTHORITIES ARE ENTITLED TO USE THE PROFITS AND THE SELLING, GENERAL, AND ADMINISTRATIVE COSTS (SG&A) OF A SINGLE EXPORTER OR PRODUCER IN CONSTRUCTING A NORMAL VALUE PURSUANT TO ARTICLE 2.2.2.(II) (INDIA'S CLAIM 1, ARGUMENT 1)

7. India argues that the EC's use of the SG&A and profit from a single company in the calculation of constructed value for other companies without domestic market sales was inconsistent with Article 2.2.2(ii) of the Agreement. Specifically, India charges that the EC was not entitled to use the calculation method specified by Article 2.2.2(ii) because the relevant language of Article 2.2.2(ii) is in the plural, and thus can only refer to a "weighted average" of SG&A and profit for more than one company. India argues that the words "weighted average," "amounts" and "other producers or exporters" clearly refer to a calculation based on the profit and SG&A of more than one other company.[4]

8. The EC contends that it was entitled to use the profits and SG&A of a single producer in its calculation of normal value. In its definitive Regulation, the EC stated:

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[2] We note that it is unclear whether the document stands for the proposition for which it is cited. India states that "it may be clear from the tables [...]" that the EC is inconsistent with respect to its practice of zeroing negative differences between normal value and export price. First Submission of India, para. 3.160 (emphasis added). Having reviewed the document in question, the United States is of the view that it is not clear that this document demonstrates any inconsistency on the part of the EC.

[3] The United States argument with respect to the constructed value profit issue should not be construed as expressing agreement or disagreement with the EC's actual calculation of a profit amount in this case, as the United States does not have access to t he specific factual information considered by the EC.

[4] First Submission of India, paras. 3.54 - 3.77.

> (18)... [T]he reference in Article 2(6)(a) of the basic Regulation [i.e., the provision of EC anti-dumping law corresponding to Article 2.2.2(ii) of the Agreement] to a weighted average amount for profits determined for other exporters or producers, does not exclude that such amount can be determined by reference to a weighted average of transactions and/or product types of a single exporter or producer.

In the EC's view, the use of the plural does not require the use of more than one company in the profit and SG&A calculations.

9. In the view of the United States, Article 2.2.2(ii) does not require a minimum number of companies to be used in calculating profit and SG&A amounts, and it neither forbids an investigating authority to use a single company for purposes of this calculation, nor requires it to use more than one company. The use of plural forms in this provision, without more, is not determinative of this issue.

10. Article 2.2.2(ii) of the Agreement provides that SG&A and profit may be calculated as follows:

> 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.

11. The use of the term "weighted average" is not determinative of this issue. Notwithstanding that an average normally is based on more than one figure, it is possible to calculate weighted average SG&A and profit amounts for one company. In such a case, the SG&A and profit amounts of that single company receive 100 per cent weighting and the result is the SG&A and profit amounts of that company. The use of the weighted average terminology simply makes clear the methodology to be employed when there are two or more other companies from which the SG&A and profit amounts will be utilized.

12. The use of the word "amounts" also is not determinative. As India correctly notes,[5] the word "amounts " as used in Article 2.2.2(ii), refers back to the language in the *chapeau* referring to the "amounts for administrative, selling and general costs and for profits." In this context, "amounts" refers to two things: the SG&A amount and the profit amount. The use of this term cannot fairly be read to specify anything further about whether the SG&A and profit amounts are to be drawn from a single company or multiple companies.

13. The use of the term "other exporters or producers" cannot be read as excluding a single exporter or producer without creating absurd results throughout the Agreement. For example, if the use of a plural term necessarily excludes the singular, then a domestic industry composed of a single producer may never obtain relief from dumping;[6] if there is only a single exporter or producer, they would not be entitled to some of the procedural safeguards contained in Article 6 of the Agreement;[7] and a single other exporter or producer could never be the basis for a profit cap pursuant to

[5] First Submission of India, paras. 3.61 - 3.62.

[6] Article 3.1 specifies that a determination of injury must consider, *inter alia*, the impact of dumped imports on **domestic producers** of like products and Article 4.1 of the Agreement defines the domestic industry as " the domestic producers as a whole of the like products..." (emphasis added).

[7] For example, Article 6.1.1 provides that "[e]xporters or foreign producers" must have at least 30 days to respond to a questionnaire and Article 6.1.3 requires the investigating authorities to provide the text of the application for anti-dumping duties "to the known exporters."

Article 2.2.2(iii).[8] Interpretations of the Agreement which lead to such absurd results should be avoided.[9]

B. ARTICLE 2.2.2(ii) DOES NOT PROHIBIT AN INTERPRETATION THAT BELOW-COST SALES MAY BE EXCLUDED FROM THE PROFIT AND SG&A CALCULATIONS (INDIA'S CLAIM 1, ARGUMENT 2)

14. India argues that the EC relied on an impermissible interpretation of Article 2.2.2(ii) when it excluded the profit and SG&A amounts obtained on below cost sales from the profit and SG&A amounts utilized pursuant to this provision. India contends that the term "actual amounts incurred and realized by other producers or exporters" in Article 2.2.2(ii) cannot be interpreted as permitting the exclusion of the profit amounts on such below cost sales, even when they are made within an extended period of time, in substantial quantities, and at prices which do not provide for the recovery of all costs within a reasonable period of time.[10]

15. The United States disagrees with this aspect of India's interpretation of Article 2.2.2(ii). The United States believes that it is a permissible interpretation of Article 2.2.2(ii) to restrict consideration of "actual amounts incurred and realized" to sales made in the ordinary course of trade. Such an application of Article 2.2.2(ii) is not prohibited by the Agreement and, in fact, would be a more reasonable interpretation of the Agreement.

16. First, as is obvious from a reading of Article 2.2.2(ii), there is no reference within that provision to sales which are not in the ordinary course of trade. In other words, there is no explicit requirement that such sales be included or excluded from the calculation of profit and SG&A to be used to calculate the constructed value for other producers or exporters.

17. Second, Article 2.1 provides the basic definition of when a product is dumped. Specifically, it defines a product as dumped when "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." (Emphasis added.) Thus, the basic concept of dumping in the Agreement incorporates the concept of ordinary course of trade.

18. Consistent with Article 2.1, Article 2.2 of the Agreement provides for the use of a constructed normal value when domestic market sales are in such low volumes that they do not permit a proper comparison or when there are "no sales of the like product in the ordinary course of trade in the domestic market of the exporting country...." The Agreement further specifies, in Article 2.2.1, that sales may be treated as not in the ordinary course of trade by reason of price "and may be disregarded in determining normal value" if such sales are made within an extended period of time in substantial quantities and at prices which do not provide for the recovery of all costs within a reasonable period of time. Thus, the type of situation in which the investigating authorities may have to resort to constructed normal value is when all of a producer's or exporter's domestic market sales have been made below the cost of production.

19. The constructed normal value provided for in Article 2.2 consists of the cost of production in the country of origin plus a reasonable amount for SG&A costs and for profits. Article 2.2.2 of the Agreement provides several methodologies for determining the amounts for SG&A and for profit. In this case, the methodology which was utilized was that provided for in Article 2.2.2(ii):

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[8] Article 2.2.2(iii) provides that when the profit amount is determined by other reasonable means, the amount may not exceed "the profit normally realized by **other exporters or producers**..." (emphasis added).

[9] *See Vienna Convention on the Law of Treaties* ("*the Vienna Convention*") Articles 31 and 32, done at Vienna, 23 May 1969, 1155 U.N.T.S. 221; 8 International Legal Materials 697 (1969)(a treaty should be interpreted in good faith and supplementary means of interpretation may be used when the interpretation leads to absurd or unreasonable results).

[10] First Submission of India, paras. 3.78-3.96.

> 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.

Although Article 2.2.2(ii) does not explicitly provide for the exclusion of below cost sales, as noted above, Article 2.2.1 makes it clear that when below costs sales have been made, the investigating authorities are under no obligation to consider them in the determination of normal value, provided that certain conditions have been met.

20. Moreover, excluding the profit and SG&A on sales not in the ordinary course of trade from the figures used pursuant to Article 2.2.2(ii) is consistent with the overall operation of Article 2 of the Agreement. This simply means that in an investigation involving two producers (A and B), if producer A has no domestic market sales that are in the ordinary course of trade, and producer B has 50 per cent of its domestic market sales in the ordinary course of trade, producer A will be assigned the same profit rate as producer B, rather than a more favorable rate.[11]

C. THE TEXT OF ARTICLE 2.2.2. IS NOT HIERARCHICAL WITH RESPECT TO THE ALTERNATIVE METHODS FOR COMPUTING PROFIT AND SG&A (INDIA'S CLAIM 1, ARGUMENT 3)

21. India argues that Article 2.2.2 of the Agreement establishes a hierarchy of alternative methods to be used in calculating profit and SG&A amounts, when constructing normal value pursuant to Article 2.2. India contends that the EC' s Basic Regulation reverses the order of 2.2.2(i) and 2.2.2(ii), causing it to prefer using the weighted average of domestic sales of the like product by other exporters and producers, rather than using the domestic sales of the same general category of products of the exporter or producer in question . India contends that the EC's use of profit and SG&A amounts pursuant to Article 2.2.2(ii), when the EC could have determined profit and SG&A pursuant to Article 2.2.2(i), was inconsistent with the Agreement.[12] To this end, India contends:

> Dumping being a highly producer-specific concept [note omitted] should by its intrinsic nature be calculated as much as possible on the basis of the data of the producer whose behaviour is under scrutiny. In this regard the order of the Agreement makes sense, since it establishes a preference for producer-specific data.[13]

22. The United States respectfully differs with India's Claim that Article 2.2.2 is clearly hierarchical in nature. While we agree that there is indeed an explicit hierarchy as between the *chapeau* of Article 2.2.2 and the three alternative methods described under Article 2.2.2(i) through (iii), we do not agree that the Agreement contains a hierarchy of preference among the three alternative methods, based on the order in which they appear. Dumping is both a producer-specific and product-specific determination; therefore, the *chapeau* of Article 2.2.2 expresses a clear preference for the use of actual data of the producer or exporter under investigation, for sales of the like product in the ordinary course of trade. When the method of the *chapeau* of Article 2.2.2 cannot be applied, any of the three alternatives that follow may be applied instead.

23. Notably, the Agreement provides an explicit hierarchy between Article 2.2.2 and the three alternatives that follow. To that end, Article 2.2.2 provides for the use of the alternative

[11] If producer B's profit rate on the ordinary course of trade sales was 15 per cent, but on all domestic market sales (including below cost sales) was only 4 per cent, it would be illogical to interpret the Agreement as requiring the investigating authorities to use the 15 per cent profit for producer B, but to use the more favorable profit rate of 4 per cent for producer A (the company that made all of its domestic sales outside the ordinary course of trade).

[12] First Submission of India, paras. 3.97-3.107.

[13] First Submission of India, para. 3.98.

methodologies "[w]hen such [profit and SG&A] amounts cannot be determined" on the basis of the methodology in the *chapeau*. The Agreement, however, does not contain a hierarchy among the three alternatives. It is permissible to infer both from the presence of an explicit hierarchy between the *chapeau* and the three alternatives that follow, and from the absence of such a hierarchy among the three alternatives, that the drafters of the Agreement intended no such hierarchy to exist among Article 2.2.2(i), (ii), and (iii).[144] Such an interpretation would be consistent with Article 31(1) of the *Vienna Convention*, which provides, *inter alia*, for good faith interpretations of treaties in light of their object and purpose.

24. Articles 2.2.2(i) and 2.2.2(ii) call for profit and SG&A to be based on information from either (i) the same exporter or producer in question, but for production and sales in the domestic market of the same general category of goods, or (ii) sales of the like product in the domestic market by other exporters or producers subject to investigation. To the extent that the Agreement contains clear preferences that dumping be measured on an exporter- or producer-specific basis AND with respect to the like product, there is no basis for saying that exporter-specific comparisons are preferred over like-product comparisons-- that is, that Article 2.2.2(i) is preferable to Article 2.2.2(ii). There is no hierarchy intended or implied among Articles 2.2.2(i)-(iii).

25. For all of the above reasons, the United States believes that India's legal claims should be rejected and that the EC's method for calculating the SG&A and profit amount used in constructed normal value was a permissible interpretation of Article 2.2.2.

D. OPTIONS FOR THE CALCULATION OF CONSTRUCTED VALUE PROFIT CONSISTENT WITH ARTICLES 2.2 AND 2.2.2 ARE LIMITED, BUT NOT IN THE MANNER ADVOCATED BY INDIA (INDIA'S CLAIM 4)

26. Articles 2.2 and 2.2.2 of the Agreement set forth the requirements for calculating profit when normal value is based on constructed value instead of prices. Article 2.2 provides for the addition to cost of production of a reasonable amount for profit, *inter alia*. Article 2.2.2 then sets forth several explicit options for how a reasonable profit may be determined.

27. India argues that the EC impermissibly used an "unreasonable" amount for constructed value profit. According to India, Article 2.2, read in conjunction with Article 2.2.2(iii), imposes a comparative "reasonableness" standard which limits the amount for profit that can be utilized in calculating constructed value. India contends that Article 2.2 imposes a "reasonableness" standard on both the method used to determine profits, as well as the substantive result.[15] In addition, India claims that Article 2.2.2(iii) contains an implicit definition of what is "reasonable" under Article 2.2: that whatever method is used, the resulting profit should not exceed that normally realized by other exporters or producers[16] India reads this definition of "reasonableness" into the other provisions of Article 2.2.2, *viz*., the *chapeau*, Article 2.2.2(i) and 2.2.2(ii).[17] Using this standard, India compares the profit amount calculated by the EC with profit figures for other Indian textile producers under investigation,[18] and concludes that the profit figure used by the EC is impermissible under the

[14] Article 6.10 contains a similar example of an explicit hierarchy in which the preferred method is followed by alternative methods of equal importance, where it is similarly clear that either alternative method is equally available if the preferred option is unavailable. Here again, the drafters of the Agreement made clear that the hierarchy was between the first method and the alternatives, and not between the alternative methods.

[15] First Submission of India, para. 3.128.

[16] *Id.*, paras. 3.129-3.131.

[17] *Id.*, para. 3.132.

[18] India also compares the profit determined by the EC to the profits obtained by other countries subject to investigation, Egypt and Pakistan, and to the reasonable profit imputed to the EC industry.

agreement because it "stands out as a complete anomaly," and "does not in any way reflect the profit actually realized by the Bed Linen producers inside and outside India."[19]

28. The United States disagrees with India's interpretation of Articles 2.2 and 2.2.2 which imposes a limitation on the amount for constructed value profit where no such limitation exists in the Agreement. The general requirement of Article 2.2, which provides for the addition to cost of production of a "reasonable" amount for profit, does not itself create an absolute limit on the profit amount because Article 2.2 provides no specific or express standard against which to judge a profit figure. The only explicit limitations on the determination of constructed value profit found in the Agreement are those in Article 2.2.2. With one exception, discussed below, these methodologies in Article 2.2.2 limit *how* the administering authorities may determine profit amount, *not the amount of the profit* itself. Therefore, if a profit amount is determined pursuant to one of the methodologies specified under Article 2.2.2, it is "reasonable" within the meaning of Article 2.2.

29. The *chapeau* of Article 2.2.2 provides that the preferred option for constructed value profit is to calculate an amount for profit based on "actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation." If, however, an amount for profit cannot be determined on this basis, it may be based on any of the following three alternatives:

1. the actual amounts incurred and realized by the exporter or producer in question in respect of product and sales in the domestic market of the country of origin of the same general category of products;

2. 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;

3. any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.

The *chapeau* of Article 2.2.2 and subparts (i) and (ii), therefore, provide limitations only as to the source of the data used to calculate a profit figure (*i.e.*, the location of the sales and the types of products), but not as to the amount. In contrast, subpart (iii) does contain a limitation on profit amount. Specifically, subpart (iii) provides a cap on the amount of constructed value profit when the profit amount is calculated by any reasonable method not articulated in Article 2.2.2 by requiring that the profit amount not exceed profits normally realized by other exporters or producers on sales of products in the same general category in the domestic market.

30. The "profit cap" in subpart (iii), therefore, is the only explicit limitation on the choice of a constructed value profit figure – and is applicable only to profit amounts determined under subpart (iii). The cap is necessary in this instance to impose some limitations on "other" "reasonable" methodologies for determining profit not specifically articulated in the Agreement. Significantly, subpart (iii) *does not* expressly or implicitly impose a similar limitation upon the preferred profit methodology in the *chapeau* or the alternatives in subparts (i) or (ii). Such a limitation is not necessary with respect to these provisions because each of these provisions defines a specific "reasonable " methodology. In fact, subpart (iii)'s initial language of "any other reasonable method" explicitly recognizes the methods previously detailed in Article 2.2.2 as "reasonable."

[19] First Submission of India, para. 3.138. *See also* paras. 3.134-3.139.

31. Article 31(1) of the *Vienna Convention*[20] states: "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 light of its object and purpose." Furthermore, "it is the duty of any treaty interpreter to 'read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously.'"[21] India's interpretation of the constructed normal value profit provisions bundles the various provisions together in order to imply the existence of a limitation where none exists. Such an interpretation is contrary to the plain language of Article 2.2.2, which provides the only explicit limitations on the methodology for calculating constructed normal value profit. Furthermore, India's construction of the constructed normal value profit provisions would render the preferred option found in the chapeau of Article 2.2.2, as well as those in subparts (i) and (ii) of Article 2.2.2, superfluous.

32. Finally, the negotiating history of the Agreement[22] reveals the delicate negotiated balance reflected in Article 2.2.2.[23] The 1979 Code provided that constructed value include a "reasonable" amount for profit. The term "reasonable", however, was not defined; nor were explicit profit calculation methodologies included in the 1979 Code. During the Uruguay Round negotiations, a number of delegations advocated that profit be determined on the basis of a company's actual data and proposed alternative methodologies for determining profit when actual data was unavailable.[24] The resulting provisions of Article 2.2.2 of the Agreement reflect a similar structure, *i.e.*, a preferred option and three alternatives. India's interpretation accords neither with the negotiators' intent nor with the meaning of Articles 2.2 and 2.2.2.

33. For these reasons, the United States believes that the EC's interpretation of the profit provisions found in Articles 2.2 and 2.2.2 is correct. At a minimum, it is plainly a permissible interpretation, under Article 17.6(ii) of the Agreement. Furthermore, in accordance with Article 17.6(i), should the panel determine that the EC's establishment of the facts was proper, that the facts on the record support the methodology employed, and that the evaluation was unbiased and objective, the panel should sustain the EC 's calculation of constructed normal value profit as consistent with Article 2.2.2.

E. ARTICLES 2.4 AND 2.4.2 DO NOT PROHIBIT THE ZEROING OF NEGATIVE DIFFERENCES BETWEEN NORMAL VALUE AND EXPORT PRICE (INDIA'S CLAIM 7)[25]

34. Articles 2.4 and 2.4.2 of the Agreement set forth the provisions for making a fair comparison between export price and normal value. Article 2.4 contains the general requirement, calling for comparisons to be made to the extent possible at the same level of trade, based on sales at the same time, and with due allowance for differences affecting price comparability. Article 2.4.2 provides that, in an investigation, the comparison of prices shall normally be made on a weighted-average to weighted-average basis or a transaction-to-transaction basis, unless certain conditions are met.

35. India argues that the EC acted inconsistently with Article 2.4.2 of the Agreement when it calculated the overall margins of dumping in this investigation. In the course of calculating dumping margins, the EC reset negative differences between normal value and export price determined on a

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[20] Vienna Convention on the Law of Treaties, *supra* fn. 9.

[21] *See Korea – Definitive Safeguard Measures on Imports of Certain Dairy Products*, Report of the Appellate Body, AB 1999-8 (adopted 14 December 1999), para. 81.

[22] Under Article 32 of the Vienna Convention, this material may be considered to confirm the meaning of a provision of a treaty.

[23] *See generally* Terence P. Stewart, *et al.*, The GATT Uruguay Round: A Negotiating History (1986-1992) 171-190 (1993) (discussing the negotiations concerning constructed value profit, *inter alia*).

[24] *See* Stewart, *supra* n. 23 at 175-77 n.1012-1024, and GATT documents cited therein.

[25] Nothing the United States has said with respect to this zeroing issue should be construed as expressing agreement or disagreement with the EC's actual calculation of the dumping margin in this case, because the United States does not have access to the specific factual information considered by the EC.

product-specific basis to zero, prior to calculating an overall margin of dumping for each Indian producer.[26] India claims that this practice is inconsistent with Article 2.4.2's requirement to determine dumping based on a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions.

36. The United States disagrees with India's interpretation of Article 2.4.2 which, if taken to its logical conclusion, would distort many of the requirements of Article 2.4 for a fair comparison and the making of due allowances for differences which affect price comparability.

37. The comparison of export prices and normal values is addressed in Articles 2.4, 2.41,[27] and 2.4.2. Article 2.4 requires that "A fair comparison shall be made between the export price and the normal value." The Article then proceeds to detail that such a comparison shall be made

> at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability [...].

These considerations of time, selling conditions, quantities, *inter alia*, illustrate that Article 2.4 clearly contemplates that comparisons normally must be made on a level-of-trade basis, a product-specific basis (to account for differences in physical characteristics) and a time-period basis. Thus, notwithstanding the use of the singular terms of "the export price and the normal value" in the first sentence of Article 2.4, the mandate of a fair comparison contemplates that there may be several to several thousand export prices and normal values which are compared within an investigation for a respondent company, depending on, *inter alia*, the variety of products, levels of trade, and selling conditions involved. This multitude of comparisons may result in the calculation of varying dumping amounts, both positive and negative.

38. The Agreement further provides, in Article 2.4.2, that:

> Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis[....]

39. All that Article 2.4.2 requires is that, in making comparisons between the export price and the normal value of the like product in an investigation, each comparison shall be made either on a weighted-average-to-weighted-average basis or a transaction-to-transaction basis. This requirement of comparing weighted-average-to-weighted-average figures or transaction-to-transaction figures is explicitly made subject to the requirements of Article 2.4. Thus, it is clear that the weight-averaging normally is not to involve transactions which are distinct in terms of physical characteristics of the products, conditions and terms of sale, and other differences affecting price comparability.

40. It is worth recognizing that Article 2.4.2 was newly introduced with the Uruguay Round of negotiations to address a specific concern of certain Members with respect to the conduct of investigations. Previously, the practice of some Members, including the EC and the United States,

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[26] First Submission of India, paras. 3.152-3.171.

[27] Article 2.4.1 contains provisions regarding the conversion of currency which are not relevant to this issue.

was to compare individual export price transactions to weighted-average normal values. Article 2.4.2 was included in the Agreement to provide that, except in the case of targeted dumping, margin calculations in an investigation would be made on a consistent basis, i.e., weight-average to weight-average or transaction to transaction.[28] Thus, the intent was to eliminate transaction-to-average comparisons in investigations, not to alter the manner in which authorities calculated overall margins after all appropriate comparisons were made.

41. As discussed above, Articles 2.4 and 2.4.2 provide for a fair comparison between export price and normal value and further provide that such comparisons in investigations should normally be on a weight-average-to-weight-average basis or on a transaction-to-transaction basis. The "zeroing" practice about which India objects is not covered by Articles 2.4 and 2.4.2 because it arises at a step subsequent to the comparison of export price and normal value. The "zeroing" took place at the stage when the individual, product-specific margins were combined into an overall average rate of dumping.[29] This point is confirmed by the fact that Article 2.4.2 explicitly permits transaction-to-transaction comparisons without providing a methodology for combining margins calculated pursuant to that methodology either.

42. When this stage is reached, the individual, product-specific differences between normal value and export price may be positive or negative. If positive, they represent the aggregate amount of dumping duties that the importing country is permitted to collect for that product or group of transactions. If negative, they represent the amount by which the export price exceeded the normal value; however, the Agreement imposes no liability on the importing country to make payments to the importer or anyone else involved in the transaction for not dumping the merchandise in question. The negative difference between normal value and export price simply means there is no dumping; i.e., the dumping margin for that product or group of transactions is zero. Thus, for such products with no dumping margins, the amount of dumping duties which the importing country is permitted to collect is zero.

43. Equally important, when the investigating authority calculates an overall, average rate of dumping, neither Article 2.4.2 nor any other Article of the Agreement requires that more credit be given for negative dumping amounts than if the dumping duties were to be collected on a product-specific basis. Nevertheless, that would be the result if India's interpretation of Article 2.4.2 were accepted. This problem may be illustrated with the following example:

[28] *See generally* Stewart, *et al.*, *supra* n. 23 at 155-61 (discussing the negotiations concerning weighted-average comparisons, *inter alia*); see also, *EC - Anti-dumping Duties on Audio Tapes in Cassettes Originating in Japan*, ADP/136, Report of the Panel (28 April 1995), para. 348 (unadopted) (discussing the EC's prior practice of comparing individual export prices to weight-average normal values).

[29] *See e.g., EC - Imposition of Anti-dumping Duties on Imports of Cotton Yarn from Brazil*, ADP/137, (4 July 1995) paras. 500-501 (finding the practice of "zeroing" not to be inconsistent with the Anti-dumping Code).

	Aggregate Domestic Market Value in Currency Units (CU)	Aggregate Importing Country Value in CU	Aggregate Dumping Amount Calculated in CU	Product-specific Aggregate Dumping Duties Which May be Collected in CU
Product 1	5,500	5,000	500	500
Product 2	1,800	2,000	-200	0
Product 3	3,300	3,000	300	300
Product 4	4,500	5,000	-500	0
Product 5	2,200	2,000	200	200
TOTAL	17,300	17,000	300	1,000

44. Based on the above figures, the overall, average rate of dumping is 5.88 per cent (1,000/17,000). Moreover, the application of that dumping margin to the total import value (5.88 per cent * 17,000) would result in the collection of 1,000 CU in dumping duties – no more and no less than the importing country is permitted to collect on a product-specific basis.

45. By contrast, if this calculation were to be performed based on the India's interpretation, the overall, average rate of dumping would be 1.76 per cent (300/17,000). Even if we were to ignore the fact that this is a *de minimis* margin, the application of that margin of dumping to the total import value (1.76 per cent * 17,000) would result in the collection of only 300 CU in dumping duties. Stated another way, there would be an additional 700 CU in dumping which the importing country would not be permitted to remedy. Moreover, because, as noted above, this methodology would result in the calculation of a *de minimis* dumping margin, the importing country would actually be unable to place any dumping duties on these products, despite the fact that the majority of the products (on a value and volume basis) were dumped at an average rate of 10 per cent (1,000/10,000)[30]

46. The United States also disagrees with India's reading of Article 2.4.2 as requiring positive margins to be offset by negative margins because it would fail to give meaning to the requirements of Article 2.4, which, as noted above, contemplate that comparisons be made at least on a product-specific basis in order to account for physical and other differences which affect price comparability. This failure may be observed utilizing the above example by noting that the difference between the total aggregate home market prices and the total aggregate importing country prices (17,300-17,000) is 300 CU. In other words, India's methodology necessarily distorts the effect of making the product-specific comparisons and is equivalent to simply aggregating normal values and export prices regardless of comparability.

47. For these reasons, the United States believes that resetting negative dumping amounts calculated on a product-specific basis to zeros is a permissible interpretation of Articles 2.4 and 2.4.2.

F. ARTICLE 5.3 DID NOT OBLIGATE THE EC TO CONSIDER A PREVIOUSLY TERMINATED, INCOMPLETE INVESTIGATION AGAINST A DIFFERENT GROUP OF COUNTRIES BEFORE INITIATING THE UNDERLYING INVESTIGATION (INDIA'S CLAIM 23)

48. India argues that the EC's initiation of the underlying investigation was inconsistent with Article 5.3 of the Agreement. India's argument is based, in part, on its Claim that neither the application for the anti-dumping investigation nor the EC's initiation of the investigation took account

[30] The 10,000 CU denominator is the aggregate value of the imports for which there were positive dumping duties.

of the fact that the EC had recently terminated an investigation of the same products from a different mix of countries.[31]

49. The United States disagrees with India's Claim that the EC's initiation of the underlying investigation was faulty based on its failure to consider the termination of the prior investigation. Specifically, the United States disagrees that the termination of the prior investigation constituted a tacit admission by the EC domestic industry that it was not injured during that period of investigation and that such a tacit admission must be given evidentiary weight in the investigation of the subsequent investigation pursuant to the provisions of Article 5.3 of the Agreement.[32]

50. First, it should be noted that the basic requirements for an application for an investigation are contained in Article 5.2 of the Agreement. Therein, the Agreement provides:

> An application under paragraph 1 shall include evidence of (a) dumping, (b) injury [...] and (c) a causal link between the dumped imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant [....]

Thus, what is required in an application is, *inter alia*, evidence of injury which is reasonably available to the applicant. An applicant is not required to furnish evidence, if any exists, which weighs against its application.

51. Article 5.3 of the Agreement provides for the investigating authorities' evaluation of the application, and states:

> The authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation.

Once again, it is important to note the specific requirements of Article 5.3. The evidence which the authorities are required to examine is "the evidence provided in the application." Moreover, there is no obligation that the authorities weigh this evidence against contrary evidence; rather, they are required merely to determine whether "there is sufficient evidence to justify the initiation of an investigation."

52. The premise of each aspect of Articles 5.2 and 5.3 is that the information covered is "evidence." The *chapeau* of Article 5.2 specifies that "Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph."

53. In this case, the United States does not believe that the earlier investigation must be considered evidence within the meaning of Articles 5.2 and 5.3. First, the earlier investigation was terminated based upon the withdrawal of the application for relief without any final determination by the investigating authorities.

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[31] First Submission of India, paras 5.28 - 5.31. The first aspect of India's argument concerns whether the EC conducted a sufficient examination of the adequacy and accuracy of the application for relief and, if so, whether it provided adequate notice of that examination. *Id*. at paras. 5.23 - 5.27. The United States does not have the detailed records of the initiation to evaluate the facts of this Claim and takes no position with respect to this issue.

[32] See First Submission of India, paras 5.29 - 5.30.

54. Second, that earlier investigation, although it may have involved the same products, involved a different mix of countries. Specifically, the earlier investigation concerned India, Pakistan, Thailand and Turkey, whereas the underlying investigation concerned India, Egypt and Pakistan.[33] Thus, two countries were dropped from the earlier investigation and another country was added. Consequently, the United States believes that India's Claim that the termination of the earlier investigation constitutes evidence of a lack of injury is mere speculation or, in the words of Article 5.2, "simple assertion." Speculation regarding the import of prior actions cannot, by itself, rise to the level of evidence recognized by Article 5.3 of the Agreement; moreover, as the Appellate Body has stated in the *Wool Shirts* decision, "we find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a Claim might amount to proof."[34]

55. Finally, each bedlinen investigation constituted a separate proceeding for which a separate record was established by the European Commission. Even if the two investigations involved the same countries and the same period of time, it is quite possible that there would have been substantial differences in the two records. The EC was obligated, consistent with the Agreement, to base its determination on its assessment of the facts of the matter which were before it. To the extent that it did so, and its decision was based on an unbiased and objective evaluation of the facts before it, consistent with the standard contained in Article 17.6(i), that decision should not be overturned.

G. CONSIDERATION OF INDUSTRY SUPPORT INFORMATION SUBMITTED BY ASSOCIATIONS OF DOMESTIC PRODUCERS IS NOT INCONSISTENT WITH ARTICLE 5.4 (INDIA'S CLAIM 26)

56. Article 5.4 of the Agreement provides that an investigation shall not be initiated unless the authorities have determined that the application for relief has been made by or on behalf of the domestic industry. Article 5.4 further provides for certain numeric tests to determine whether the application has been filed by or on behalf of the domestic industry.

57. India asserts that the EU has violated Article 5.4 in its initiation of the investigation of bedlinen from India by accepting statements of support by and from certain associations of domestic bedlinen manufacturers. India claims that Article 5.4's reference to "the degree of support for, or opposition to, the application expressed by domestic producers of the like product" (footnote omitted) requires that the expressions of support (or, presumably, opposition) must come directly from the domestic producer.[35]

58. The United States disagrees with India's interpretation of Article 5.4 of the Agreement. In particular, the United States believes that India' s focus on Article 5.4, to the exclusion of Article 6 of the Agreement, has resulted in an incorrect assessment of the requirements of Article 5.4.

59. Article 5.4 of the Agreement provides:

> An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed13 by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry.14 The application shall be considered to have been made "by or on behalf of the domestic industry" if it is supported by those domestic producers whose collective output

[33] First Submission of India, paras. 5.3 (regarding the earlier investigation) and 2.2 (regarding the underlying investigation).

[34] United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India, DS33/AB/R, p. 14.

[35] First Submission of India, paras. 5.94 - 5.101.

> constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.
>
> [13] In the case of fragmented industries involving an exceptionally large number of producers, authorities may determine support and opposition by using statistically valid sampling techniques.
>
> [14] Members are aware that in the territory of certain Members employees of domestic producers of the like product or representatives of those employees may make or support an application for an investigation under paragraph 1.

60. While the United States does not disagree with India that Article 5.4 places certain affirmative obligations upon the authorities to evaluate the evidence before it prior to initiating an anti-dumping investigation and establishes numeric standards which the authorities must find to have been met prior to initiation, Article 5.4 does not address from whom the authorities may receive this evidence.

61. The evidence which may be considered by the authorities in making any determinations and the parties entitled to provide such evidence is discussed in Article 6 of the Agreement. This Article includes, in relevant part, the following provisions:

> 6.2 Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. [...]
>
> 6.6 Except in circumstances provided for in paragraph 8, the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based.
>
> 6.11 For the purposes of this Agreement, "interested parties" shall include:
>
> (i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product;
>
> (ii) the government of the exporting Member; and
>
> (iii) a producer of the like product in the importing Member **or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.**
>
> This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties.
>
> (Emphasis added.)

As Article 6.11(iii) of the Agreement makes clear, trade and business associations qualify as interested parties provided that a majority of their members produce the like product in the territory of the importing Member.

62. As interested parties, Article 6.2 provides that such trade and business associations shall have the full opportunity to defend their interests. These interests may include an interest in having the anti-dumping investigation be conducted by the authorities. The Agreement does not prohibit trade and business associations from defending these interests.

63. Thus, to the extent that an association qualifies as an interested party because a majority of its members produce the like product in the territory of the importing Member, the Agreement does not prohibit that association from expressing the views of its member companies. In fact, if anything, it could be argued that the Agreement expressly protects the rights of such associations to express the views of its members.

64. The Agreement, however, does provide a limited counter-balance to trade and business associations representing their members. Article 6.6 of the Agreement requires the authorities to satisfy themselves as to the accuracy of the information provided by interested parties upon which their findings are based. Thus, to the extent that an investigating authority relies upon representations by or through an association of support for an application for anti-dumping relief, that authority must first satisfy itself as to the accuracy of those representations. Nevertheless, if the authority has, in fact, confirmed the accuracy of the representations, contrary to the position of India, the Agreement does not prohibit reliance on the representations of the associations.

65. For the above stated reasons, the United States contends that the EC's interpretations of the Agreement was permissible, under Article 17.6(ii) of the Agreement and would suggest that the panel reject the interpretation advocated by India. The United States, however, takes no position as to whether the EC's determination of industry support, as a factual matter, was consistent with the standards required by Articles 5.4 and 6 of the Agreement.

H. ARTICLE 15 OF THE ANTI-DUMPING AGREEMENT DOES NOT REQUIRE ANY PARTICULAR SUBSTANTIVE OUTCOME, NOR DOES IT REQUIRE ANY SPECIFIC ACCOMMODATIONS TO BE MADE ON THE BASIS OF DEVELOPING COUNTRY STATUS (INDIA'S CLAIM 29)

66. India argues that the EC acted inconsistently with Article 15 of the Agreement by not exploring possibilities of a constructive remedy and by failing to address arguments from Indian exporters that the textile industry, including the bed linen industry, is of essential interest to the Indian economy. India further contends that special consideration, in terms of changes in the questionnaire, flexibility in the enforcement of deadlines, and the like, is not sufficient to meet the requirements of Article 15. In addition, India asserts that under Article 15, and particularly under the second sentence thereof, an investigating authority must give special consideration to developing country status before any provisional measures are taken.[36]

67. The EC contends that, during the anti-dumping investigation, it made a number of specific concessions to Indian firms in view of their location in a developing country, such as the preparation of simplified questionnaires for exporters, the acceptance of responses submitted after stated deadlines, and the individual treatment of newcomers despite the case having been based on sampling. In addition, the EC notes that discussions on undertakings did take place, and argues that although the discussions did not result in undertakings between India and the EC, the fact that the discussions took place is sufficient to comply with the requirements of Article 15.

68. The United States is of the view that Article 15 of the Agreement provides important procedural safeguards to developing countries when their essential interests are at stake, but it does not require any particular substantive outcome, nor does it specify any particular accommodations which must be made on the basis of developing country status.

[36] First Submission of India, paras. 6.28-6.53.

69. Article 15 provides that:

> 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.

70. The United States agrees with the interpretation of India that the first sentence is couched in precatory language which creates a "statement of preferred policy,"[37] rather than a substantive obligation. The words "[i]t is recognized that" are hortatory, not mandatory, and the Article does not define the "special regard" that it is to be given.

71. The United States respectfully differs with India about the nature of the second sentence of Article 15. Although the second sentence is not prefaced by any language such as " it is recognized," which would clarify the extent of the obligations that follow, the language and structure do not impose anything other than a procedural obligation to "explore" the "[p]ossibilities of constructive remedies provided for by this Agreement..." The word "explore" cannot fairly be read to imply an obligation to reach a particular substantive outcome; it merely requires the consideration of these possibilities.

72. In the Tokyo Round Anti-dumping Code panel report on *Cotton Yarn From Brazil*,[38] the panel construed the second sentence of Article 13 of the GATT – a provision essentially identical to Article 15 of the Agreement[39] – finding that:

> [I]f the application of anti-dumping measures "would affect the essential interests of developing countries," the obligation that then arose was to explore the "possibilities" of "constructive remedies." It was clear from the words "[p]ossibilities" and "explored" that the investigating authorities were not required to adopt the constructive remedies merely because they were proposed.[40]

The panel underscored this position, noting that "...there was no obligation to enter into the constructive remedies, merely to consider the possibility of entering into constructive remedies."[41] The question, then, is whether the EC explored the possibility of entering into such constructive remedies. This is a factual determination; because the United States is not privy to the factual record in this case, we take no position on whether the EC's actions were sufficient under Article 15.

73. With regard to the timing of the "exploration of possibilities of constructive remedies" required by the second sentence of Article 15, India further argues that because these possibilities "shall" be explored "before applying anti-dumping duties," the EC was required to conduct this exploration prior to its imposition of provisional anti-dumping duties.

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[37] First Submission of India, para. 6.22.

[38] EC-Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil, ADP/137, 4 July 1995.

[39] Article 13 provided:

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

Id., para. 582.

[40] Cotton Yarn from Brazil, para. 584.

[41] Cotton Yarn from Brazil, para. 589.

74. The United States respectfully disagrees. The reference in Article 15 to "applying anti-dumping duties" relates to the actual imposition and collection of anti-dumping duties pursuant to Article 9 of the Agreement. That did not occur until the EC made its final determination of dumping and injury. Article 7 of the Agreement recognizes the imposition of provisional measures, which may be provisional anti-dumping duties, as a separate and earlier step which is distinct from the application of anti-dumping duties themselves.

75. Furthermore, if, as India proposes, the "possibilities" to be explored include price undertakings,[42] it is clear that this exploration must occur after any provisional determination by the investigating authority. Article 8.2 provides that "[p]rice undertakings shall not be sought or accepted from exporters unless the authorities of the importing Member have made a preliminary affirmative determination of dumping and injury caused by such dumping." (Emphasis added.) This more specific language of Article 8.2, along with the Agreement's recognition of the distinction between provisional duties and the imposition of anti-dumping duties, makes it clear that there is no obligation that the exploration of constructive remedies occur before the imposition of provisional measures.

76. In sum, the United States is of the view that Article 15 of the Agreement does not require any particular substantive outcome, nor does it require any specific accommodations to be made on the basis of developing country status. With respect to timing, an investigating authority is not compelled to give special regard, or to explore possible constructive remedies, prior to the issuance of its provisional findings. Thus, the United States believes that the EC's interpretation of Article 15 was permissible, and should be sustained in accordance with Article 17.6(ii).

IV. CLAIMS RELATED TO THE INJURY DETERMINATION AND THE EXPLANATION THEREOF

A. DEFINITION OF DOMESTIC INDUSTRY UNDER ARTICLE 4.1 OF THE ANTI-DUMPING AGREEMENT

77. In determining the scope of the domestic industry ("Community industry") in this case, the EC authorities explained –

> In conclusion, that the 35 complainant companies represent a major proportion [34 per cent] of total Community production within the meaning of Article 5(4) of the basic Regulation and that they therefore constitute the Community industry within Article 4(1) of the basic Regulation is confirmed.

The Anti-dumping Regulation defines "Community industry" as "the Community producers as a whole of the like product or those whose collective output of the products constitutes a major proportion, *as defined in Article 5(4)* of the total production of those products."[43] Article 5(4) of the Regulation in turn defines "major proportion" as "those Community producers whose collective output constitutes more than 50 per cent of the total production produced by that proportion of the domestic industry expressing either support or opposition to the application."

78. India has not objected to the EC's definition of domestic industry, but argues that the EC should not have included other Community producers in its injury evaluation.[44] India has missed an important point. In the view of the United States, the EC's application of its regulation led to an industry definition, injury investigation, and injury analysis that contravened Articles 3 and 4 of the Agreement, because the EC limited the domestic industry to those producers that came forward to affirmatively pursue the investigation.

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[42] First Submission of India, para. 6.26.
[43] *See* First Submission of India at para. 4.94.
[44] First Submission of India at para. 4.95.

79. Article 4.1 of the Anti-dumping Agreement provides that

> the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products

80. In the Bed Linens investigation, the EC defined the domestic like product as "bed linens of cotton fibres."[45] Article 4.1 would therefore have called for the EC to define the "domestic industry" as the Community producers of bed linens of cotton fibres. The EC did not do so, but instead defined the domestic industry as limited to those Community producers who had filed the application for an investigation. This definition is inconsistent with Article 4.1. The EC 's action in this case appears to have been mandated by its Anti-dumping Regulation,[46] which defines the domestic industry as those producers who filed the "complaint."[47] If the definition of industry employed in this case is inconsistent with Article 4.1, and this definition was indeed mandated by the EC Regulation, then it follows that the EC is systematically and repeatedly violating the Anti-dumping Agreement.

81. The EC's basic regulation equates the "domestic industry" as defined in Article 4.1 of the Agreement with the portion of the domestic industry that has demonstrated sufficient support to permit initiation of the investigation under Article 5.4 of the Agreement. Such a reading of the two articles misconstrues the relationship between the two articles.

82. If the EC were correct, Article 4.1 of the Agreement could have simply defined the domestic industry as those producers who expressly supported the petition. But Article 4.1 does not, for reasons that should be obvious. With such a definition, an injury investigation would be mostly a pro-forma exercise in which the authorities would simply check whether the petitioning firms really were materially injured. Article 5.4 does not provide a basis for the creation of such a self-selecting industry. It does not reference or purport to define the term "a major proportion" as used in Article 4.1.

83. The sole purpose of Article 5.4 is to provide a standard for determining whether a investigation should be initiated. Neither on its face nor by implication does that Article purport to affect the substantive requirements that an authority must meet in conducting an investigation, or allow an authority to limit its investigation to those domestic producers who have supported an application. Determining whether an application meets the requirements of Article 5.4 merely involves determining the degree of <u>support</u> for the petition. Article 5.4 recognizes that the petitioning producers may constitute only a portion of the "domestic industry" and distinguishes between "that portion of the domestic industry" that expresses support for the petition and the "total production of the like product produced by the domestic industry." Further, by using the phrase "on behalf of," Article 5.1 contemplates that those supporting an application as ascertained under Article 5.4 will be representative of an industry that will often include other members, not as the EC regulation implies that they will ordinarily constitute the entirety of the industry.

84. The gap in the EC's reading of Articles 4.1 and 5.4 is illustrated by the shifts in its reasoning supporting the instant determination. In both the provisional and definitive determinations in this case, the EC defined the domestic industry by starting only with the complaining companies, and then

[45] Definitive Regulation at para.9.

[46] Council Regulation (EC) No 384/96 (22 Dec. 1995).

[47] Definitive Regulation at para. 34. The term "complaint" used by the EC corresponds to the "application" in Article 5.4 of the Anti-dumping Agreement and the "petition" in U.S. law.

eliminating certain companies within that group from consideration.[48] The EC never appears to have even discussed the option of defining the domestic industry as the Community producers as a whole of the like product. Rather, the EC explained that "the finding that the 35 complainant companies represent a major proportion of total Community production within the meaning of Article 5(4) of the basic Regulation and that they therefore constitute the Community industry within the meaning of Article 4(1) of the basic Regulation is confirmed."[49] In short, it appears from its contemporaneous statement that the EC during its investigation never considered whether to include within the domestic industry any non–petitioning producers. Effectively, then, the EC's application of its Regulation reads out of the Agreement any necessity to consider the industry consisting of the domestic producers as a whole of the like product. Apparently in retrospect recognizing the shortcomings of such a practice as a reading of the Agreement, in its first submission, the EC for the first time states that, throughout the investigation, it applied "the option" in Article 4.1 of the Agreement "of defining the domestic producers as a group or producers whose collective output constituted a 'major proportion of the total domestic production' of the products in question."[50] The EC then goes on to argue that "a Member may use both definitions of the domestic industry in the course of a single investigation."[51]

85. The EC suggests that Article 4.1 gives the importing Member the option of choosing in each case to define the domestic industry as all producers or only as the complaining producers. The Agreement does not support this view. As the EC's statement during its investigation reflect, such a view effectively reads out of the Agreement any necessity to consider the industry as a whole. If this reading of the Agreement were correct, there would have been no need to refer in Article 4.1 to the domestic producers as a whole of the like products.

86. Such an interpretation contradicts the requirement of Article 3.1 that the injury evaluation involve an "objective" examination of, *inter alia*, the impact of the dumped imports on "domestic producers" of the like products. Article 3.1 on its face does not limit that inquiry to only those domestic producers who support an investigation. Likewise, Article 3.6 refers to assessing the effect of the imports "in relation to the domestic production of the like product." The EC's interpretation allows an authority to decide in advance that it will examine only some domestic production of the like product. Indeed, an injury investigation that systematically excludes all producers except those which submitted the complaint cannot be described as "objective." The EC's interpretation of Article 4.1 encourages the exact opposite of an "objective" examination, as it would let an importing Member bias an injury investigation by initiating on the basis of a complaint filed solely by those producers who are most adversely affected by certain imports, and totally ignoring the firms in the same industry that are prospering.

87. Thus, Article 3.1 reflects that Article 4.1 establishes a preference for basing an injury determination on examination of the domestic producers as a whole. Such an interpretation is also borne out by the very specific requirements in Article 4.1 for excluding producers related to exporters or importers and for defining an industry as consisting of producers only with certain areas. It would be anomalous for the negotiators of the Agreement to articulate such precise conditions for excluding some domestic producers from the industry and not to include a cross-reference to Article 5.4 if they

[48] Provisional Regulation at paras. 52-57, Definitive Regulation at paras. 32-34. The EC eliminated seven companies that were found not to be complainants, one company whose core interests were found not to be in the production of bed linen within the Community, one company that no longer produced bed linen, and two companies that did not respond to the requests for information. The EC's elimination of the non-responsive complaining producers is further indicative of the way in which the EC's approach deviates from the requirements of the Agreement. Under Article 6.8, the EC should have relied on the facts available rather than redefining the domestic industry to exclude the non-responsive producers.

[49] Definitive Regulation at para. 34.

[50] EC's First Submission at para. 308

[51] EC's First Submission at para. 309.

had intended an injury inquiry could be conducted solely by an inquiry concerning the universe of producers supporting an application.

88. The Agreement provides no better support for the revised version of the EC's theory reflected in its initial submission to this panel. Articles 3.4 and 3.5 specifically direct that an injury analysis shall concern "the domestic industry." These provisions accordingly do not contemplate that an authority will at its discretion use one industry definition in a determination examining injury and another definition in that determination for other purposes.

89. Notwithstanding its obvious bias in favor of complainant producers, the EC's definition of domestic industry may, as here, occasionally have the anomalous result of working to the detriment of the producers which filed the complaint. In this particular case, some Community producers had ceased production in the period prior to initiation, and therefore could not be included in the "domestic industry" as defined by the EC's basic regulation. Apparently in an effort to remedy this result, the EC defined a separate pool of producers–"total Community producers" or "EC-15" for the purposes of evaluating trends concerning production, consumption, and market share.[52] Notably, the trends for these factors for the broader producer group were more indicative of injury than were the trends for the restrictive "Community industry" defined by the EC. India has claimed that the EC acted impermissibly in looking to total EC-15 producers for any purpose in the injury evaluation. In contrast, the United States believes that the EC acted inconsistently with the Agreement by not including all Community producers in the domestic industry for the purposes of evaluating other factors such as price and impact under Articles 3.1, 3.2, 3.4 and 3.5.[53]

90. Moreover, by using the standard for ascertaining the adequacy of support for an investigation to define the industry to be investigated, the EC's regulation fits poorly with Article 6 concerning the conduct of investigations. Article 6.11 includes within the definition of "interested party " all producers of the like product in the importing Member. Article 6.11 is part of the context against which Article 3.4 must be interpreted. Investigating authorities are obligated under Article 6.1 to provide all interested parties with notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.[54] Furthermore, Article 6.21 entitles all interested parties, and hence all domestic producers, to a full opportunity for defense of their interests. Paragraph I of Annex II to the Agreement reinforces this concept, by stating that "[a]s soon as possible after the initiation of an investigation, the investigating authorities should specify in detail the information required from any interested party, and the manner in which that information should be structured by the interested party in its response." By excluding some domestic producers from the domestic industry *a priori*, the EC not only contravenes its obligation to gather information from all domestic producers, but also appears impermissibly to prevent non-complainant interested party producers from having the same degree of participation and consideration that it affords to complainant interested party producers.

91. In sum, the EC erred not, as India alleges, in including information from non-petitioning producers as part of its injury evaluation, but rather in including only some information from those producers and in excluding them in general from the coverage of the investigation.

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[52] Provisional Regulation at para. 62.

[53] The United States notes that, had the EC adopted the proper definition of the domestic industry, the numerous Community producers which went out of business during the period of injury assessment (1992-July 1995) would have been included in the industry. Consequently, India's Claim that the EC looked beyond the domestic industry in making the injury evaluation would be rejected.

[54] It is not clear from the facts available about the Bed Linens investigation whether the EC sought information from the non-complaining Community producers.

B. CLAIMS CONCERNING SAMPLING

92. For the purposes of evaluating prices and profitability, the EC sent questionnaires to a sample of 17 producers selected from the group of 35 that the EC defined as the Community industry.[55] In the provisional Regulation, the EC explained that it selected companies to be included in the sample in consultation with the complainant Eurocoton, and selected companies located in the four Member States in which most of the production of the complainant companies occurs. The sample group represented 20.7 per cent of total Community production.[56]

93. The United States agrees with the EC and India[57] that the Agreement permits an importing Member to use a sample of the domestic industry in evaluating the effects and impact of the dumped imports. Although the Agreement does not explicitly refer to the use of sampling in this context, it does specify that sampling is appropriate in other contexts, *e.g.*, "using samples which are statistically valid" to determine dumping margins,[58] and use of "statistically valid sampling techniques" to determine support and opposition for an application in the case of fragmented industries.[59] The United States notes that the critical criterion for sampling is that it be "statistically valid."

94. As the United States has discussed with respect to the EC's domestic industry definition, the EC defined the industry too narrowly, and as consequence, did not draw its sample from the appropriate base of all domestic producers. While nothing in the Agreement required the EC to describe the precise methodology by which it selected companies for inclusion in its sample, the Panel must be able to discern that the sample is statistically valid. Further, the selection of the sample must be, as the EC acknowledges, consistent with the EC's obligations to conduct an "objective" injury examination.[60] The only information the EC has provided is that it selected the companies from a subset (companies within four Member States) of a subset (complaining producers) of the domestic industry, and that the sample included the largest members of the first subset and "also smaller producers."[61] A statistically valid sample must fairly represent the entire underlying population from which the sample was taken. The correct population to be represented in this case was the entire domestic industry; however, the EC drew its sample in a manner that systematically excluded a significant part of that population in a manner that is manifestly likely to bias the results. For that reason there is no basis to conclude that the sample was "statistically valid."[62]

C. CLAIMS REGARDING EC'S EXAMINATION OF INJURY FACTORS UNDER ARTICLE 3.4

95. Article 3.4 of the Anti-dumping Agreement specifically requires that the investigating authorities' examination of the impact of the dumped imports on the domestic industry

> 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.

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[55] Provisional Regulation at 58-59.
[56] Provisional Regulation at 61.
[57] *See* First Submission of India at paras. 4.145- 4.146.
[58] Article 6.10.
[59] Article 5.4, note 13.
[60] *See* First Submission of EC at para. 226.
[61] Provisional Regulation at para. 61.
[62] The United States does not take a position concerning the statistical validity of the EC's actual method for selecting the companies from the given pool.

96. As India points out, the EC did not include explicit findings concerning each and every factor in Article 3.4.[63] This allegation in itself does not, in the view of the United States, set out a violation. The Agreement, in requiring that each factor be evaluated, does not require that the investigating authorities make a finding as to each factor. Rather, Article 12.2 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." While all enumerated factors must be evaluated, not all are necessarily material in any particular case.

97. While the United States does not believe that, in light of Article 12.2, investigating authorities are required in each case to make a specific finding on each enumerated factor in Articles 3.2 and 3.4, it should be discernible from the authorities' determination that they evaluated each of the enumerated factors. This objective may be achieved when a determination, through its demonstration of why the authorities relied on the specific factors they found to be material in the case, thereby discloses why other factors on which they do not make specific findings were accorded little weight. In the current case, the United States shares some of India's concerns about the adequacy of the EC's findings because the EC's specific findings on the factors it addressed do not elucidate why it did not give weight to factors it did not discuss.[64]

98. The United States notes that the Panel in the dispute on *Mexico - Anti-dumping Investigation of High Fructose Corn Syrup from the United States* discussed the issue of consideration of the factors listed in Article 3.4. The panel stated that "consideration" of the factors is required in every case, although such consideration may lead the investigating authority to conclude that a particular factor is not probative in the circumstances of a particular industry and therefore is not relevant to the particular determination.[65] The United States does not support the EC's efforts to dismiss the HFCS panel's discussion of this argument.[66] That panel did not, as the EC argues, make its decision based on "simplistic reliance on the inappropriate precedent of safeguard cases." Rather, the parties to the dispute fully argued the issue to the panel, citing GATT anti-dumping determinations such as *Korea Resins.*[67]

99. Nor does the United States agree that this Panel should reach a different conclusion than those reached by the HFCS and Resins Panels on the basis of the EC's argument that some of the Article 3.4 factors are negative in character. In this regard, the EC argues that, because the phrase "*decline in*" or "*negative effects on*" precedes some of the factors, these factors need not be considered if they are positive. To support its related argument that the word "impact" denotes a negative meaning, the EC contrasts the word "impact" as used in Article 3.4 of the Anti-dumping Agreement with the reference in Article 6 of the Agreement on Textiles and Clothing to "the effect of the imports." However, the EC's argument ignores that Article 3.5 of the Anti-dumping Agreement refers to "the *effects* of dumping , as set forth in paragraphs 2 and 4 of Article 3. Article 3.2 also refers to the "effect" of the dumped imports on prices, and Article 3.4 discusses cumulative assessment of "the effects" of subject imports from more than one country. The "relevance" of the Article 3.4 factors

[63] First Submission of India at para. 4.47.

[64] In its First Submission to the Panel, the EC provides a table setting out the required factors, noting where some of the factors are discussed, and indicating that certain factors - such as productivity, return on investments, capacity utilization, effects on cash flow, inventories, wages, growth, ability to raise capital or investments - were "found not to be a significant independent factor." First Submission of EC at para. 250-255 and Table 4. The EC's conclusion that these factors were found not to be significant, however, does not appear to have been included in the EC's provisional or definitive regulation, nor is it possible to discern from the EC's discussion of the factors it did find to be material why the other factors were not significant.

[65] HFCS at para. 7.128.

[66] *See* First Submission of EC at para. 288-289.

[67] See HFCS at paras. 5.4666, 7.135-7.142 & n.610 (citing Korea – Anti-Dumping Duties on Imports of Polyacetal Resins from the United States (Korea-Resins), BISD 40S/205 (Korea-Resins Panel Report), adopted 27 April 1993).

extends beyond supporting an injury determination. Article 3.4 states that "all relevant economic factors and indices having a bearing on the state of the industry" must be evaluated. Thus, even if a factor does not lend support to an affirmative injury determination, the authority must evaluate it so long as it sheds light on the condition of the domestic industry. For example, the Panel in *Korea Resins* concluded that the investigating authority could not focus solely on factors supporting a conclusion that the domestic industry would likely encounter difficulties while disregarding other factors.[68]

D. CLAIMS REGARDING TREATMENT OF ALL SUBJECT IMPORTS AS DUMPED IMPORTS

100. India argues that the EC acted inconsistently with Articles 3.1, 3.2, 3.4, 3.5 and 3.6 of the Anti-dumping Agreement in that the EC failed to limit its examination to "dumped transactions only" for the purposes of the injury determination.[69] India makes two main points in respect to this argument. First, India challenges the EC's failure to separate out transactions found to be dumped from those found not to be dumped for the purposes of evaluating the volume of dumped imports during the investigation period.[70] With respect to these claims, the United States generally supports the views expressed in paragraphs 219-241 of the EC's First Submission. The United States finds the EC's views to be reasonable in light of the Agreement's requirement that investigating authorities consider weighted average margins and the Agreement's focus on "products" that are dumped[71] and the effects of imports of those products on domestic producers of like products.[72]

101. India also challenges the EC's apparent assumption that all imports from India were dumped during the injury evaluation period (1992-1996).[73] The EC denies that it makes such assumptions as a matter of practice or that it specifically made such an assumption in this case.[74] If the Panel agrees that the EC did not make such an assumption, there will be no need for the Panel to address India's claims on these counts.

102. Even assuming the EC did treat all subject imports during the injury assessment period as dumped, that treatment would have been consistent with the Anti-dumping Agreement. The reasons supporting the EC's view that it acted consistently with the Agreement in treating all subject imports as dumped during the period of investigation likewise apply with respect to the treatment of subject imports during the portion of the injury assessment period that was prior to the dumping investigation period.[75]

103. In order to determine whether dumping is occurring, the importing Member may look at a "snapshot" of time. As footnote 4 to Article 2.2.1 of the Agreement provides, the time period covered by such a "snapshot" should be one year, but in no case less than six months. The determination of dumping normally need not consider trends over time. In contrast, the requirements of Article 3.1 concerning a determination of injury necessarily contemplate that the importing Member will gather information covering several years in order to evaluate volume and price changes. An importing Member's consideration of whether there have been significant absolute or relative increases in the volume of dumped imports and of whether the dumped imports have to a significant degree depressed or suppressed prices for the like product in the domestic market must be made in the context of an appropriate time frame, which will almost always extend longer than the period of investigation for making a dumping calculation. Indeed, the effects of import volume increases or price undercutting

[68] Korea-Resins Panel Report, paras. 274-76, 287.
[69] First Submission of India at para. 4.35.
[70] First Submission of India at paras. 4.12-4.35.
[71] Anti-dumping Agreement Article 2.
[72] Anti-dumping Agreement Article 3.
[73] First Submission of India at paras. 4.198-4.216.
[74] First Submission of EC at paras. 340-345 and 351-353.
[75] *See* First Submission of EC at paras. 219-241.

often take longer than a year to reach the level where they would be significant, and the impact of those effects on the domestic industry's condition may take even longer to become apparent. Furthermore, the fact that execution of sales in some industries can take as long as a year, and that in some industries sales are made pursuant to annual contracts, further demonstrates the need for examining a multi-year period in injury investigations. The disparity between the typical period of investigation of 12 months for calculating dumping and the several times lengthier period of investigation for making an injury determination existed well before the Uruguay Round. Thus, the negotiators were well aware that the period for calculating dumping would be shorter than that for assessing injury. With this awareness, they reaffirmed the requirement that investigating authorities evaluate injury based upon an examination of volume and price effects and impact that inherently would cover more than one year.

104. Since an injury assessment period of only one year would hardly be meaningful for making the evaluation required under Articles 3.1, 3.2 and 3.4, the only way to assure that volume, price effects and impact are assessed for the same period as that covered by the dumping determination would be to extend by several years the investigative period for determining dumping, and require the production and examination of several years' worth of data on prices (and costs when appropriate). This "solution" to India's concerns would be unduly burdensome both to the authorities and to exporters and foreign producers, particularly those in developing countries, and in this respect, would be contrary to the spirit of Articles 6.10, 6.13 and 15.

105. The United States recalls the GATT Panel decisions in the *Salmon* cases.[76] In considering the significance of the volume and volume increases of dumped imports, the United States had viewed all imports of salmon from Norway during the three year injury period of investigation as "dumped" or "subject" imports. In examining whether the United States had properly considered whether there had been a significant increase in the volume of dumped imports, the Panels found that the United States had met the requirements of, and had not acted inconsistently with its obligations under, Articles 3:1 and 3:2 of the Anti-dumping and Subsidies Codes.[77] The EC's evaluation of the volume of subject imports in the Bed Linen investigation was consistent with the Panel's conclusions in the *Salmon* cases. As the EC notes, the drafters of the Anti-dumping Agreement chose to use the same text in the Agreement as that used in the Tokyo Round Codes and interpreted by the *Salmon* Panels.

[76] *Imposition of Anti-dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway* ("*Salmon Anti-dumping Duties*"), ADP/87, adopted on 27 April 1994, BISD 41S/228; *Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway* ("*Salmon Countervailing Duties*") SCM/153, adopted on 28 April 1994, BISD 41S/576.

[77] *Salmon Anti-dumping Duties* at paras. 498-501; *Salmon Countervailing Duties* at paras. 264-267.

ANNEX 3-4

ORAL STATEMENT OF EGYPT

FIRST MEETING OF THE PANEL

(11 May 2000)

1. The Government of the Arab Republic of Egypt decided to reserve its third party rights in this case because of the systemic implications for this area of WTO law. Egypt is a substantial producer and exporter of cotton and cotton products including bedlinen, and as such has a substantial interest in the outcome of this proceeding, especially considering that the European Communities (EC) is the destination for a significant proportion of Egypt's exports of cotton-type bedlinen. It must be said that this is the first time that Egypt has participated in a WTO case as a third party.

2. Egypt is of the considered view that the initiation of anti-dumping proceedings, the imposition of provisional duties, and the imposition of definitive duties on Egyptian cotton-type bedlinen by the EC are unjustified and contrary to relevant rules of the World Trade Organization (WTO). In this context, Egypt endorses all the arguments advanced by India in this case.

3. Egypt believes that the EC acted in breach of the procedural requirements of the WTO Anti-dumping Agreement ("ADA") by launching an investigation on the petition of Eurocoton, an association which did not have the backing of a significant proportion of Community producers of the relevant products at issue. The European Commission ("Commission") had earlier terminated an investigation it launched at the request of Eurocoton, after it became apparent that the petition did not enjoy the support of other significant producers of bedlinen in the European Communities.

4. Prudence would have required the Commission to satisfy itself if the new complaint by Eurocoton had been lodged by or on behalf the domestic industry producing a like product as required by Article 5.4 of the ADA before taking any further steps. Had it scrupulously followed the provisions of the ADA, it would have realised that the Eurocoton did not have the standing required under Article 5.4 of the ADA to lodge a complaint. The EC's assertion that the complaint was filed on behalf of the Community industry is not supported by the facts in this case. The investigation revealed that those Community producers who supported the complaint were in the minority. Even among them, several complainants had to be excluded for various reasons. As many as 7 complainants had to be excluded because they were "found not to be complainants" by the Commission. Furthermore, out of the remaining producers, three failed to co-operate with the Commission in the course of the investigation and one was found to be no longer producing bed linen. Finally it was found that one company in the sample had to be excluded because it imported a significant proportion of the product under investigation from Pakistan. The level of co-operation from the remaining Community producers was, on the whole, extremely low. Many producers failed to provide - at least in non-confidential form - information, which is usually required during investigations of this kind.

5. In the instant case, the proportion of the complaining industry is extremely low (34 per cent) but the Commission and Council claim that the thresholds set out in the EC basic regulation had been met throughout the proceeding (Recitals 32 to 34 of the Regulation imposing definitive measures). That the figure of 34 per cent is sufficient under the ADA, provided the remaining 66 per cent did not object to the initiation of the investigation. This argument by the EC does not appear to be supported by the evidence so far adduced in this case. Neither the non-confidential files made available to the interested parties, nor the disclosure documents or the Regulation imposing definitive duties offers conclusive proof that the complainants indeed represented 34 per cent of total EU production.

Furthermore, in order to ascertain whether the above-mentioned thresholds were met, the Commission was supposed to have made a preliminary determination as to which producers were to be excluded from the Community industry on the basis that they themselves were importers of the allegedly dumped products. There is no mention of this determination in any of the available files open for inspection.

6. It is the submission of Egypt that it is not sufficient for the complaining industry to represent 25 per cent of total Community production to pass the "representative" test provided for in ADA. Given the above-mentioned facts, the Commission was supposed to have closely scrutinized whether the remaining Community producers who co-operated with the investigation accounted for more than 50 per cent of the total production of bed linen in the EC. Since the co-operating producers were found by the Commission to represent only 34 per cent and the other Community producers claimed by Eurocoton to be supporting the complaint represented only 15 per cent of total EU production, it can be concluded that all the producers in favour of the complaint accounted for 49 per cent of total Community production.

7. Given the difficulties that had been experienced by Eurocoton in getting the support of other Community producers, it could be inferred that the producers accounting for 51 per cent of Community production were opposed to the complaint. The true position could have been established, if the Commission had launched a thorough enquiry to ascertain the position of the various producers of bed linen in the EC and verified the claims of Eurocoton that it represented a "major proportion of the Community industry" within the meaning of the ADA. By failing to launch this enquiry, the Commission was obliged to terminate the proceeding immediately. The interpretation given to what the EC claims to be the relevant phrase in Article 5.4 i.e., "the authorities have determined" is not supported by the context, object and purpose of the Article. The purpose of Article 5.4 of the ADA is to safeguard the interests of exporters by requiring investigative authorities not to initiate frivolous actions which could disrupt trade. Had the ADA wanted to give wide discretion to investigative authorities, it would have stated so explicitly.

8. Contrary to the express wording of Article 5.3 of the ADA, the EC failed to examine thoroughly the allegations in the complaint. It failed to take into account information available to it at time of initiation pointing to lack of material injury caused by dumped imports. Even if the EC carried out the examination, it failed to disclose this fact to the interested parties. As such, it acted in breach of Articles 12.1 and 12.2 of the ADA. The EC's argument that in paragraph 81 of its First Written Submissions seems to stretch the relevant language of the Article. A breach of any provision of the WTO Anti-dumping Agreement could invalidate the decision made by a Member country. Thus, it is not open to the EC to minimise or disregard its breaches of explicit provisions in the WTO Agreement.

9. It is the contention of Egypt that in determining the normal value of the alleged dumped product, the European Communities disregarded the provisions of Articles 2.2.1.1 and 2.2.2 of the ADA. Costs calculated by the Commission were not based on the records kept by the exporters or producers under investigation in the case of Egypt, nor were amounts for SGA costs based on actual data submitted by the relevant parties. Instead, higher amounts for administrative, selling and general costs than were ever incurred and properly reported in the records kept by the producer, were used in the calculation of the constructed normal value. The Commission, in adding more SGA costs than were ever incurred, violated the above provisions. Accordingly, the normal values have been overstated resulting in artificially inflated dumping margins.

10. The argument of the EC in paragraph 137 of its first written submissions that they "were correct to put certain limits on what data they would consider for the purposes of constructing the normal value" is overstated. While in certain cases, adjustments could be made, the overriding goal is that the use of any method should not result in excess profit margins. By inflating the figures, the EC

grossly exaggerated the profits of the 4 sampled Egyptian exporters permitting it to arrive at a higher normal value and consequently an unrealistic dumping margin.

11. In establishing the margin of dumping in this case, the EC violated the provisions of Article 2.4.2. Paragraph 46 of the EC Regulation imposing provisional duties notes that weighted average constructed normal value "by type" was compared with weighted average export price "by type" with regard to Egyptian exporters. In effect, the EC chose to apply the first option stipulated in Article 2.4.2 of the ADA. However, its manipulation of the calculation by zeroing negative dumping amounts on a per-type basis goes beyond what could legitimately be done within the bounds of Article 2.4.2 of the ADA. Had the Commission followed strictly its own established practice, the outcome would have been different. In failing to do that, it is clear that the EC was determined to have bigger dumping margins.

12. In imposing provisional anti-dumping duties, the EC violated the provisions of Article 9.4 of the ADA. The EC Regulations imposing provisional and definitive duties distinguished between state-owned and private enterprises, while the investigation covered three state-owned enterprises and one private enterprise. However, one weighted average dumping margin was calculated for the three state-owned companies which was then applied to all state companies, regardless of whether or not they offered to co-operate with the EC authorities during the investigation. The resulting margin was 13.5 per cent. An individual dumping margin of 9.1 per cent was calculated for the private investigated company. However, the 9.1 per cent margin was not applied across the board to all private companies including the non-sampled private companies which offered to co-operate with the EC authorities during the investigation. Rather, the EC authorities attributed the weighted average dumping of the four companies in the sample, weighted on the basis of their export turnover to the EC, and came up with a dumping margin of 13 per cent applicable to the entire private sector. Clearly, the approach adopted by the EC is unjustified under the ADA. The EC should have been consistent, rather than manipulate the relevant figures to enable it to achieve its objective.

13. It would appear that the standard practice of the EC in injury determinations is to consider all imports of the products under consideration as dumped, once the weighted average dumping margin has been established. In other words, all the relevant products originating in the investigated country would be deemed to have been dumped. Following this standard practice, the Commission noted in the Regulation imposing provisional duties that:

> "(67) Dumped imports from the three countries concerned increased from 33,825 tonnes in 1992 to 46656 tones during the investigating period i.e. an increase of 12,831 tonnes or 38 per cent during the same period their market share increased from 16.9 per cent to 25.1 per cent."

An examination of the evidence revealed that there was no segregation between dumped exports and those that were not dumped. There is no textual support for the approach adopted by the EC in the ADA. In fact, its approach is contrary to Articles 3.1, 3.2, 3.4, 3.5 and 3.6 of the ADA.

14. The EC's interpretation of Article 3.1 of the ADA is not supported by the cardinal rules of interpretation laid down in Article 31 of the Vienna Convention on the Law of Treaties as clarified and applied in a number of cases by the Appellate Body starting with United States - Standards for Reformulated and Conventional Gasoline (WT/DS2/AB/R, adopted by the DSB on 20 May 1996). The relevant words in Article 3.1 of the ADA are "dumped imports". Thus, if certain products are not dumped, then they cannot be taken into account for the purposes of determining injury. The EC has read too much into the provisions of Article 3.1 of the ADA and that should not be permitted by the Panel.

15. It is Egypt's submission that by taking into account data of companies not supporting the complaint to establish injury, the European Communities acted in breach of Article 3.1 (as well as Articles 3.3, 3.4, 3.5 and 3.6). By ignoring data collected on sampled companies in its injury analysis, the Commission failed to make an unbiased and objective assessment of the facts and thus acted inconsistently with Article 6.10 in conjunction with Article 3.4, 3.5 and 3.6. Similarly by failing to consider relevant data for the domestic industry on a factor-by-factor basis, the Commission also acted inconsistently with Article 3.5 of the ADA.

16. In assessing whether the Community industry had suffered material injury, the Commission appeared to have treated indifferently the EC industry and the total EC production. It also drew a number of conclusions relating to the situation of the EC industry on the basis of statistical information concerning the total EC production. These indices are completely different and should be treated as such, otherwise a distorted picture would be given. The evidence available in this case shows that the EC industry is in a healthy state and could not have been injured by the imports of bed-linen from the targeted countries. The following facts are indicative:

(a) The total production of bed linen by the EC industry increased by 8.7 per cent between 1992 and the period of the investigation. The fact that production by some producers in the EC fell is irrelevant, since pursuant to Article 3 of the basic EC Regulation, the Commission must only examine whether material injury had been caused to the relevant EC industry. The allegation by the EC that the closure of certain companies was due to the alleged dumped imports, and not attributable to other independent causes, is unsubstantiated by any evidence. Carried to its logical conclusion, the EC argument would mean that the dumped products were able to selectively injure only those industries that did not support the complaint lodged by Eurocoton. There is no textual support for EC's interpretation of Article 3 of the ADA. The more logical explanation of the reduction in production on the part of the non-EC relevant industry is due to reasons other than dumping, as there is sufficient evidence to indicate that global production in the EC had increased during the period of investigation.

(b) The Commission alleges that sales of total Community producers fell by 17 per cent and that sales for the sampled producers fell by 1.5 per cent. However, for reasons best known to it, the Commission fails to provide the figures that are really important, i.e. the sales trends in volume terms of the EC industry, even though it does provide this information in value terms. The Disclosure document indicates, however, that sales by the EC industry have actually increased during the relevant period. Indeed, if the relationship between sales trends in volume and in value terms of the sampled producers is contrasted to the trend in sales values of the EC industry, it becomes apparent that the sales volume of the EC industry increased by around 2.5 per cent between 1992 and the period of the investigation. Given this result, the figures given by the Commission are quite dubious.

(c) The evidence discloses that between 1992 and the period of the investigation, there was an increase of 4.2 per cent in sales value terms for the EC industry and an increase of 1.7 per cent for the sampled producers. Thus, the assertion by the EC that the alleged dumped products had an effect on domestic sales values is unsubstantiated.

(d) In value terms, the market share of the EC industry increased by a respectable 11.8 per cent between 1992 and the investigation period. The market share of the sampled producers increased by 9 per cent between 1992 and the investigation period and by as much as 17.2 per cent between 1991 and the investigation period. In volume terms, the market share of the sampled producers increased by 5.6 per cent between 1992 and investigation period. No data was provided with respect to the EC industry. However, even if one considers that sales volume remained stable as indicated by the Commission, the market share of the EC industry must have, at least, increased by a similar ratio.

(e) The evidence discloses that there was an insignificant decrease in the level of employment as far as the EC industry is concerned. Out of the 7,000 persons engaged in this sector, only 375 persons lost their jobs. It should be borne in mind, however, that production increased during the same period, which points to the fact that increased efficiency rather than alleged dumped imports was responsible for the decrease in the level of employment.

(f) Considering the decline in Community consumption, the Community producers have been able to maintain remarkably stable prices and actually managed to increase them by over 3 per cent during the relevant period and remain profitable.

17. It follows from the forgoing that virtually all the indicators that Commission relied on to demonstrate injury to the domestic industry actually proves the contrary. In other words, they confirm that the EC industry in a good state of health and has not been injured by any dumped exports. From the available evidence, the EC cannot controvert the fact that between 1992 and the period of investigation, the EC industry increased its production, increased its sales, increased its market share, increased its prices and remained profitable in spite of a significant decrease in consumption.

18. The Commission's observation that in analyzing data on the EC industry, account should be taken of the 29 companies, other than the EC industry, which ceased or reduced bed linen production in the Community between 1992 and the investigation period (page 18 of the disclosure) is irrelevant, since injury must be assessed in respect of the basic Regulation and not in respect of the Community production.

19. Among the requirements (dumping, injury, causality) necessary for anti-dumping duties to be lawfully imposed, causality is the only purely legal requirement. The causality requirement will be satisfied under the ADA when two conditions are proved: that dumping through its effects caused injury to the domestic industry producing a like product; and that the injury to the domestic industry is not to be attributed to any other factor.

20. The Commission's assertion that it satisfied both conditions is not supported by the evidence. In paragraphs 95-99 of the Regulation imposing provisional duties, the Commission noted that "it can be concluded that there was a direct causal link between these imports and the material injury found". What is intriguing is that it was only after making this finding that the EC examines whether other factors could have caused the injury. The approach adopted by is inconsistent with Article 3.5 of the ADA.

21. There is no evidence that the EC took into account in its analysis the fact that consumption of the like product in the EC decreased over the relevant period. Had it taken into account, it could not have arrived at the conclusion that the alleged dumped products were the source of injury to the EC industry. By ignoring this important fact, the EC failed to make a fair and objective determination under Article 3.4 of the ADA.

22. Last but not least, the EC acted in breach of Article 15 of the ADA, as it failed to explore the possibilities of constructive remedies before imposing antidumping duties on Egypt and the other developing countries. At no point in time did the EC suggest to the Egyptian exporters the possibility of giving, for example, price undertakings. It appears that the EC is of the view that the offer has to come from the exporters. Its interpretation of the provisions of Article 15 is erroneous for the simple reason that since it is a legal obligation which has to be fulfilled by developed countries anytime they contemplate on imposing antidumping duties, they should have suggested to the developing countries involved whether or not they would be interested in offering price undertakings. By failing to offer Egyptian exporters the possibility of giving price undertakings, the EC acted inconsistently with the provisions of Article 15 of the ADA.

ANNEX 3-5

ORAL STATEMENT OF JAPAN

FIRST MEETING OF THE PANEL

(11 May 2000)

The Government of Japan would like to express its appreciation to the Panel for providing this opportunity to present its views on the important issues raised in this proceeding. In our presentation today, we wish to focus on the four issues set out in our written submission and, furthermore, would like to respond to several of the arguments raised by the United States in its own submission.

I. ARTICLE 2.4.2 – ZEROING

From a systemic perspective, the issue of "zeroing" is one of the most important issues before the Panel in this particular case. We urge the Panel to think very carefully about how it should handle this issue.

For the reasons put forth in our written submission, Japan believes that the EC practice of using "zeroing" dumping margins is not consistent with the requirements of Article 2.4.2. This provision explicitly calls for the "existence of margins of dumping" to be based on a weighted average comparison. A proper weighted average does not arbitrarily raise some of the figures in the average in order to simply increase the final result of the weighted average.

The EC seems to believe that if it properly weight-averages just once within the product category, it need not then carry out proper weight-averages in the next stage of its aggregation across the various product categories. The United States has also embraced this argument. This argument, however, ignores the plain meaning of the provision at issue.

The text of Article 2.4.2 calls for a weighted average based on "all" comparable export transactions, not just those transactions found to be dumped. The first sentence of Article 2.4.2 explicitly calls for a weight average of the "prices" of export transactions. Yet, setting the value of the non-dumped product category to zero essentially amounts to resetting the "prices" of the underlying export transactions. Nothing in Article 2.4.2 contemplates such rigging of the export prices before conducting a proper overall weighted average.

Nor does Article 2.4.2 in any way mention subdividing the analysis and then using the weight-average methodology only for part of the analysis. Such an approach ignores some words in the provision and instead tries to introduce other concepts into the provision.

The US submission largely repeats the logic that the United States offered during the Uruguay Round to justify its then practice of looking at individual transaction prices. During the Uruguay Round negotiations, the US argued that there was no rationale to reduce dumping liability by deducting the amount by which certain prices of products into the importing country exceed those in the home market. However, that logic being opposed by the other countries, the Anti-dumping

Agreement adopted Article 2.4.2 that embraced the concept of averaging. Thus Article 2.4.2 should be interpreted to represent a new set of obligations for WTO Members..[1]

The US submission itself reveals the important underlying logic behind Article 2.4.2. In the example given, the United States argues that through averaging, the company in question would not have been found to be dumping. That is the exact point. Article 2.4.2 reflects the basic concept that a company should not be subject to antidumping measures if it has so many sales at non-dumped prices and, as a result, a complete and fair weight-average margin shows only *de minimis* dumping.

Indeed, the unfairness of such an approach can be seen in this case. A company that had not been dumping under a proper weight-average comparison was suddenly deemed to have been dumping because of the EC methodology. The plain meaning of Article 2.4.2 does not permit such an unfair methodology.

II. ARTICLE 2.2.2 – "PROFITS"

Japan believes that Article 2.2.2(ii) does not allow the exclusion of below cost sales before determining the profit amount. If they choose this option, the authorities must determine the weight average of the actual profit margins reported by the exporters or producers in their accounting records, or reflected in the price and cost of the transactions at issue. The authorities cannot modify these actual profit margins.

This interpretation reflects both the plain text and the overall context of Article 2.2.2 (ii). This provision does not contain the concept of an "ordinary course of trade". Thus, the EC and US interpretation, which grafts this concept onto Article 2.2.2 (ii), contains several flaws in the matter of treaty interpretation that we discussed in our written submission, and simply cannot be considered a permissible interpretation of this provision.

The US Submission confuses two distinct concepts. Article 2.2.1 permits the exclusion of the prices of a particular exporter that are below cost from the normal value calculation of that exporter. That concept of disregarding the particular home market sales in determining the normal value stipulated in Article 2.2.1, however, is quite different from the methodology evoked in Article 2.2.2 (ii) to determine the profit and selling, general, and administrative (SG & A) amount for use in a constructed value. Article 2.2.2 (i-iii) provides guidance as to how the authorities may identify, at a more general level, a surrogate profit and the SG & A amount as the constructed value. In the real economy, even those companies that are quite profitable rarely earn a profit on all of their sales.

The Panel must adhere strictly to the wording of the provision. Japan believes that the language of the provision, understood in context, simply does not permit the authorities to exclude below cost sales.

III. ARTICLE 3 – "DUMPED IMPORTS"

In various places, Article 3 refers to the concept of "dumped imports". Japan believe that this language means that the injury determination, set forth in Article 3, must reflect the authorities' assessment of only "dumped imports", and not the imports that have not been found to be "dumped".

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[1] *See generally* Terence P. Stewart, *et al*., The GATT Uruguay Round: A Negotiating History (1986-1992) (1993): page 1537-1543, discussing the negotiations concerning use of Weighted Averages in the Calculation of Export Prices and Normal Values.

This language has a readily discernible plain meaning. If the authorities find that some imports are "dumped" and that others are not "dumped", then the authorities must distinguish between the two types of imports when making injury determinations. The fact that some imports from a company may be "dumped" does not give the authorities a license to assume that all imports from that company should be deemed as having been "dumped".

Our written submission discusses the problems with the various EC arguments on this point. The US submission stresses the argument that the authorities must look at longer periods of time for the purposes of injury determination, and that they cannot be expected to conduct an analysis for that entire period. That may be true, but the United States never explains why those sales are presumed to have been dumped when the relevant sales have yet to be investigated.

More importantly, the United States never explains why some portion of the sales affirmatively found not to have been dumped should be deemed to have been dumped. Allowing some "dumped" imports to taint all imports from that company seriously skews the fundamental injury analysis of Article 3. The core analysis of Article 3.1 and 3.2 requires the assessment of the volume and price impact of "dumped imports". According to the EC and US interpretations, the volume of actually "dumped" imports could be lower than the volume presumed to have been dumped, although the authorities would never realise this discrepancy because they would neither have to nor try to distinguish the dumped from non-dumped imports.

IV. ARTICLE 3.4 – "ALL RELEVANT ECONOMIC FACTORS AND INDICES"

Japan believes that the language of Article 3.4 requires all listed factors to be considered. Such list of factors in Article 3.4 is the minimum requirement that must be evaluated by the authorities. The degree of importance of each factor may vary from case to case, but all of the factors must be fully considered and evaluated in each case. In other words, the authorities may not exclude certain factors because they deem these to be irrelevant.

Note that we do not suggest a mechanical rule, but it must be possible to discern from the decision of the authorities themselves, how each factor has been considered and why the factor was deemed not important in a particular case.

This concludes our statement.

ANNEX 3-6

ORAL STATEMENT OF THE UNITED STATES

FIRST MEETING OF THE PANEL

(11 May 2000)

I. INTRODUCTION

1. For the record, my name is Bruce Hirsh and I am with USTR Geneva. With me today are Mark Barnett and Peter Kirchgraber of the Department of Commerce in Washington. It is a pleasure for us 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 our written statement, in light of issues raised by other third parties, and to comment on new issues raised in those third party submissions. My colleague Mr. Barnett will begin our presentation with a discussion of dumping issues. I will then conclude with a discussion of injury and one other issue.

II. CONSTRUCTED VALUE PROFIT

2. With respect to constructed value profit, as stated in our third party written submission, the United States disagrees with India's interpretation of Article 2.2.2(ii), because it would artificially limit the permissible range of data from which constructed value profit may be calculated, where no such limit exists in the Agreement. The United States would like to stress the following points.

3. India argues that Article 2.2.2(ii) – specifically the terms "weighted average," and the plural forms "amounts," and "exporters and producers" – expressly excludes the use of selling, general and administrative expenses (SG&A) and profit data from a single company. This argument is without merit.

4. With regard to the use of plural forms, such as "amounts" and "exporters and producers," it is common both in general usage, and in the particular context of the Anti-Dumping Agreement, that plural forms are understood to include both the singular and the plural. If plural terms were automatically read to exclude the singular, then, for example, a domestic industry composed of a single producer could never obtain relief from dumping. Such a result could not have been intended.

5. The United States concurs with the EC's view that Article 2.2.2(ii) does not require a minimum number of companies to be used in calculating profit and SG&A amounts. It does not forbid an investigating authority to use a single company as the basis of this calculation, nor does it require it to use more than one company.

6. The United States likewise concurs with the EC that Article 2.2.2(ii) – specifically, the phrase "actual amounts incurred and realized by other exporters or producers" – does not prohibit an investigating authority from excluding below-cost sales from constructed value calculations of profit.

7. Article 2.2.2(ii) contains no explicit requirement that sales not in the ordinary course of trade should be included in, or excluded from, these calculations. However, the concept of ordinary course of trade is integral to the very definition of dumping. Article 2.1 of the Agreement provides the basic definition, that a product is dumped when "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."

8. Consistent with this basic definition of dumping, when sales in the domestic market are in such low volumes that they do not permit a proper comparison, or, when there are no sales of the like product in the ordinary course of trade in the exporting country, Article 2.2 of the Agreement provides for the use of a constructed normal value. When below-cost sales have been made, Article 2.2.1 makes clear that investigating authorities are under no obligation to consider them in the determination of normal value, provided that certain conditions have been met. Thus, the type of situation in which an investigating authority may have to resort to constructed normal value is when all of a producer's or exporter's domestic market sales have been made below the cost of production.

9. Moreover, it is consistent with the overall operation of Article 2 of the Agreement to exclude the profit on sales not in the ordinary course of trade from the figures used pursuant to Article 2.2.2(ii). Indeed, excluding sales below cost avoids the creation of perverse incentives that otherwise would reward most those exporters and producers with the greatest amount of sales not in the ordinary course of trade. Such an unfair result could not have been intended.

10. The United States also respectfully disagrees with India's claim that Article 2.2.2 is clearly hierarchical in nature. While there is an explicit hierarchy as between the *chapeau* of Article 2.2.2 and the three alternative methods described under Article 2.2.2(i) through (iii), we do not agree that the Agreement contains a hierarchy or preference among the three alternative methods, based on the order in which they appear. It is permissible to infer from the presence of an explicit hierarchy between the *chapeau* and the three alternatives that follow, and from the absence of such a hierarchy among the three alternatives, that the drafters of the Agreement intended no such hierarchy to exist among Article 2.2.2(i), (ii), and (iii). Such an interpretation is consistent with Article 31(1) of the *Vienna Convention*, which provides, *inter alia*, for a good faith interpretation of treaties in light of their object and purpose.

11. It also must be noted, in response to India's argument, that dumping is both a producer-specific and a product-specific determination; therefore, the *chapeau* of Article 2.2.2 expresses a clear preference for the use of actual data of the producer or exporter under investigation for sales of the like product in the ordinary course of trade. When the *chapeau* methodology cannot be applied, it is clear that any of the three alternatives that follow may be applied instead, whether it be producer-specific, as in Article 2.2.2(i), product-specific, as in Article 2.2.2(ii), or any other reasonable means, as in Article 2.2.2(iii). No hierarchy is intended or implied among Articles 2.2.2(i) through (iii).

12. For these reasons, the United States believes that India's interpretation of the constructed normal value profit provisions of Article 2.2.2(ii) should be rejected.

III. THE ZEROING OF NEGATIVE DIFFERENCES BETWEEN NORMAL VALUE AND EXPORT PRICE

13. Turning now to the issue of zeroing negative differences between normal value and export price, as stated in the United States' submission, the Anti-Dumping Agreement does not prohibit the EC from zeroing such negative differences. In our written submission, we discussed this issue in some depth. Rather than repeat that detailed explanation, we would like to emphasize the single most important point in that discussion: the zeroing of negative differences between normal value and export price, about which India complains, takes place after the step in the calculation of dumping margins to which Articles 2.4 and 2.4.2 apply.

14. Article 2.4 provides for a fair comparison between export price and normal value. In particular, it contemplates that comparisons normally must be made on a level-of-trade basis, a product-specific basis and a time-period basis. Consequently, even though Article 2.4 uses singular terms such as "export price" and "normal value," the fair comparison requirement necessitates that, depending upon the product subject to investigation, there may be as many as several thousand comparisons taking place – with each comparison, for example, representing a particular product configuration sold at a particular level of trade.

15. Article 2.4.2 requires that, in making comparisons between export price and normal value, each comparison shall be made either on a weighted-average-to-weighted-average basis or a transaction-to-transaction basis. In other words, in a given investigation, if there were multiple export price and normal value transactions of a particular product configuration at a particular level of trade, the comparison between them must be made either on a weight-average-to-weight-average basis or on a transaction-to-transaction basis; rather than comparing individual export price transactions to weighted-average normal values, as some administering authorities used to do.

16. That, however, is as far as Articles 2.4 and 2.4.2 go. They establish that an importing country is permitted to collect anti-dumping duties equivalent to the positive differences between export price and normal value on that product-specific, level-of-trade-specific basis. Those Articles, and the Anti-Dumping Agreement itself, do not address how an administering authority is to go about combining all of those product-specific, level-of-trade specific dumping levels into an overall anti-dumping duty rate. As we demonstrated in our written submission, the mathematical process of zeroing negative margins is simply a means by which an importing country may be certain to collect dumping duties equivalent to all of the positive differences between export price and normal value. The Anti-Dumping Agreement does not require that the importing country credit an importer for not dumping. To read such a requirement into the Agreement would effectively counter-act the explicit requirements regarding fair comparisons contained in Article 2.4.

IV. THE PRIOR, TERMINATED INVESTIGATION

17. With respect to India's argument regarding the prior, terminated investigation, the United States disagrees with India's claim that the EC was required to consider the termination of the earlier investigation into bedlinen prior to initiating the investigation at issue before this panel. Articles 5.2 and 5.3 of the Anti-Dumping Agreement discuss the basic requirements for an application for an investigation and the investigating authorities' evaluation of that application. The Agreement does not require the application to contain contrary evidence, nor are the investigating authorities obligated to weigh the evidence in the application against contrary evidence. To that end, the fact that a prior investigation involving a different mix of countries was terminated following the withdrawal of the complaint by the European producers does not appear to go to the accuracy or the adequacy of the evidence provided in the application for the current investigation.

V. SUPPORT BY ASSOCIATIONS

18. Next, as explained in our written submission, the United States disagrees with India's interpretation that Article 5.4 prevents an investigating authority from considering support for an application for relief from an association of domestic producers. Article 6.11 of the Anti-Dumping Agreement specifically provides that "a trade and business association a majority of the members of which produce the like product in the territory of the importing Member" qualifies as an interested party within the meaning of the Agreement. This recognition is important, particularly with respect to maintaining the ability of very fragmented industries, such as those producing various agricultural products, to exercise their right to seek relief under the Anti-Dumping Agreement. Moreover, Article 6.2 of the Agreement provides that interested parties are entitled to a full opportunity to defend their interests in an anti-dumping investigation. Thus, without positing whether the EC's

determination of industry support, as a factual matter, was consistent with the Agreement, the United States contends that the EC's consideration of the position of associations of EC producers in determining industry support was permissible under the Agreement.

VI. CLAIMS RELATING TO ARTICLE 15 TREATMENT

19. On another issue, the United States is of the view that Article 15 of the Agreement provides important procedural safeguards to developing countries when their essential interests are at stake, but does not require any particular substantive outcome, nor does it specify any particular accommodations which must be made on the basis of developing country status.

20. In particular, the United States respectfully differs with India about the nature of the second sentence of Article 15. In the view of the United States, the second sentence imposes a procedural obligation to "explore" the "[p]ossibilities of constructive remedies provided for by this Agreement..." The word "explore" cannot fairly be read to imply an obligation to reach a particular substantive outcome; it merely requires consideration of these possibilities. Construing a nearly identical provision of the Tokyo Round Anti-dumping Code, the Panel in *Cotton Yarn From Brazil* reached the same conclusion.

21. The United States likewise disagrees that the second sentence of Article 15 required the EC to explore the possibilities of constructive remedies prior to its imposition of provisional anti-dumping duties. We also reject India's argument regarding the timing for the exploration of price undertakings. Article 8.2 explicitly provides that price undertakings shall not be sought or accepted unless the investigating authority has made a preliminary determination of dumping and injury caused by such dumping. This more specific language of Article 8.2, along with the Agreement's recognition of the distinction between provisional duties and the application of anti-dumping duties, makes clear that there is no obligation that the exploration of constructive remedies occur before the imposition of provisional measures.

22. In sum, the United States believes that the EC's interpretation of Article 15 was permissible, and should be sustained.

VII. INJURY ISSUES

23. We turn now to highlighting certain points made by the United States on material injury. Article 6.10 of the Anti-Dumping Agreement permits investigating authorities, in certain circumstances, to make dumping determinations and to calculate dumping margins on the basis of a limited examination of foreign producers/exporters and products either by sampling or by examining the largest percentage of the volume of exports which can reasonably be investigated. India, Egypt and Japan suggest that when investigating authorities use either of these methods to assess dumping, it must also assess the effects of dumped imports on the domestic industry, by considering only imports that have specifically been found to have been dumped. The United States disagrees.

24. Such a requirement would defeat the purpose of the limited examination for which Article 6.10 provides. The purpose of this Article is to permit authorities to apply the results of such a limited examination to non-examined foreign producers/exporters or products. Further, Article 2.4 of the Agreement permits investigating authorities to calculate dumping margins by comparing weighted-average-to-weighted-average figures. India's approach would render this provision a nullity; the importing Member would still have to perform a transaction-to-transaction comparison to know whether each import was dumped.

25. The EC's use of *all* imports from the subject countries to conduct its injury analysis in this investigation was consistent with Article 3 of the Anti-Dumping Agreement. If the reading asserted

by India were correct, then an importing Member would not be permitted to consider for injury purposes the volume and price effects of any imports that fall outside the typical twelve-month period used by most investigating authorities as the period of investigation for determining dumping. Just last week, on 5 May 2000, the WTO Committee on Anti-Dumping Practices adopted the Draft Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations, which states that the period of data collection for investigations normally should be twelve months for dumping and at least three years for injury. All parties here today, including India and Japan, were active participants in the consensus-building process which led to the adoption of the Draft Recommendation. In our written submission, the United States explained why it is usually necessary to examine a period of at least three years for injury purposes. In particular, we noted that Article 3 contemplates a comparative evaluation of the import volumes and prices of the dumped imports over time and of the relevant Article 3.4 industry factors. Thus, Article 3.2 explicitly requires the investigating authority to consider whether there has been a significant increase in the absolute volume or market share of dumped imports, and whether there has been significant price undercutting by the dumped imports or whether the effect of the dumped imports is to depress or suppress prices to a significant degree. In order to determine whether there have been significant volume increases or significant price effects, the investigating authority must look at the volumes and prices for both the imports and the domestic like product over a period of several years.

26. Thus, the injury investigation, unlike the dumping investigation, cannot focus on a relatively short period of time. In order to consider whether there have been significant volume or price effects, it usually will be necessary to compare the volumes and prices of the imported products and any changes in those volumes or prices to the volumes, prices, and any changes for the domestic product. Further, under Articles 3.4 and 3.5, an assessment of the impact of dumped imports on the domestic industry inevitably requires that the investigating authority conduct a year-to-year comparative analysis of the factors bearing on the state of the industry. The language of Article 3.4 is explicit on this point in at least one respect, that is, that the factors to be considered include "actual and potential declines in sales, profits, output, market share, productivity, return on investments, or utilization of capacity."

27. India, Egypt and Japan fail to explain how their interpretation would be applied in making a threat determination under Article 3.7. That Article allows the investigating authority to make an affirmative threat determination where a totality of the factors lead to the conclusion that "further dumped exports are imminent." Among the factors are the exporter's available capacity and imminent capacity increases, which indicate "the likelihood of substantially increased dumped imports." If the investigating authority must segregate dumped and non-dumped imports from the same exporter, how is the investigating authority to guess whether the exporter is likely to devote available or increased capacity to dumped exports or to non-dumped exports?

28. The approach suggested by India, Egypt and Japan would require the importing Member to make a segregated injury analysis for each import from each company found to be dumping. First, the importing Member would be required to trace each import back to production and exportation and then follow it through entry into and sale within the importing Member in order to evaluate the volume and price effects and impact on the domestic industry. This would create any number of impracticalities. For example, the purchaser of imported product would be unlikely to know whether the particular import was dumped or not. Without this information, the investigating authority would be unable to compare the purchase prices for the dumped imports, versus those for non-dumped imports, with those for the domestic product. In turn, the investigating authority would be hindered in its ability to determine the price effects of the dumped imports.

29. Moreover, the interpretation suggested by India, Egypt and Japan is inconsistent with Article 3.3. That Article provides that as long as certain conditions are met, "where imports from more than one country are simultaneously subject to anti-dumping investigations, the investigating

authorities may cumulatively assess the effects of such imports." This provision clarifies that all imports from the subject countries may be considered in the injury determination. Japan argues that, while the discretion to cumulate applies to all imports from the subject countries, investigating authorities must make their injury determinations based on segregated cumulative data covering solely dumped transactions. That, however, is not what Article 3.3 states. Rather, Article 3.3 explicitly states that the investigating authority may cumulatively assess the effects of "such" (i.e., all) imports from the subject countries.

30. If the interpretation urged by India, Egypt and Japan were correct, that would mean the drafters of Article 3 intentionally created an anomaly: in multi-country investigations, investigating authorities could assess the effects of all imports from the subject country, whereas, in single-country investigations, investigating authorities would be required to make an import-by-import dumping determination and then could consider the effects only of imports specifically found to have been dumped.

31. Contrary to Egypt's suggestion in paragraph 22 of its submission, application of the rules of interpretation set forth in Article 31 of the Vienna Convention supports the EC 's interpretation of Article 3 of the Anti-Dumping Agreement. The EC's interpretation gives meaning to all the terms of the Article in their context and in the light of the object and purpose of the Anti-Dumping Agreement.

32. Further with respect to Article 3, the United States wishes to address one additional argument summarily made by Egypt. At paragraph 34 of its written submission, Egypt states that the causality requirement can be satisfied under the Anti-Dumping Agreement when two conditions are proved: (1) "that the dumping through its effects caused injury to the domestic industry producing a like product;" and (2) " that the injury to the domestic industry is not attributed to any other factor." The United States agrees with the first condition stated by the Egyptians, but does not agree with the second condition. Article 3.5 of the Anti-Dumping Agreement requires investigating authorities to "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 factors must not be attributed to the dumped imports." Thus, the Agreement prohibits investigating authorities from attributing to the dumped imports the injuries caused by factors other than the imports. However, it plainly contains no requirement for a finding that the injury to the domestic industry is not attributed to any other factor. Such a requirement would mean that the dumped imports must be the sole cause of injury to the domestic industry – a requirement that is patently absent from the Agreement. Indeed, it is a basic premise of the Anti-Dumping Agreement that dumping need not be the exclusive cause of injury.

33. Egypt, at paragraph 35 of its submission, objects to the fact that the EC considered other factors after first determining that there was a causal link between the dumped imports and the material injury found. In the United States' view, investigating authorities may consider the matters required by the Agreement in any order they choose, so long as they set forth in sufficient detail and with sufficient clarity to ascertain their reasoning, the findings and conclusions required by Article 12.2.1.

34. Turning to Article 3.5 of the Anti-Dumping Agreement, the United States has addressed at length in its written submission its views concerning the EC's definition of the domestic industry. To summarize, the United States believes that the EC acted inconsistently with Articles 3, 4, 5 and 6 of the Agreement by limiting the domestic industry to those producers who supported the application for an investigation. The Agreement in no way indicates that the group of producers sufficiently representative under Article 5.4 constitutes the "domestic industry" defined in Article 4.1 as the producers as a whole of the like product. The EC's practice reflected in this case will obviously skew the data in favor of the domestic industry in most cases. Yet the fact that the EC violated the Agreement did not necessarily mean that the EC could not have found material injury in a lawful manner. If the EC had properly defined the industry in this case, it would have included in the

industry those producers who went out of business just prior to the initiation of the investigation, and whose data the EC in fact relied on to support the affirmative injury finding.

VIII. ANTI-DUMPING MEASURES NOT EXCEPTION (JAPAN'S SUBMISSION)

35. Finally, the United States disagrees with Japan's characterization, in their third party submission, of anti-dumping measures as an exception to free-trade principles of the WTO. Quite to the contrary, the right conferred by Article VI and the Anti-Dumping Agreement to impose anti-dumping measures forms part of the carefully crafted balance of rights and obligations under the WTO.

36. The Anti-Dumping Agreement embodies positive rules that are part of the WTO balance of rights and obligations. They are not an exception that must be proved or which is subject to any special scrutiny. Similar arguments have been recognized by WTO panels and the Appellate Body. For example, in Wool Shirts and Blouses from India (WT/DS33/AB/R), the Appellate Body recognized (at page 16) that it must respect the balance of rights and obligations embodied in the transitional safeguard mechanism of Article 6 of the Agreement on Textiles and Clothing. It rejected the argument that the positive obligations in the transitional safeguard mechanism were "exceptions" imposing the burden of proof on the party asserting their use. In doing so, the Appellate Body distinguished between affirmative defences, that is, limited exceptions from obligations under certain other provisions of the GATT 1994, and positive rules that establish obligations in and of themselves.

37. In summary, anti-dumping measures are subject to the same rules of interpretation as any other provision of the WTO Agreements. Therefore, the Panel should decline to endorse Japan's assertion that anti-dumping measures constitute an exception to free trade principles or, by implication, require the application of a heightened level of scrutiny.

IX. CONCLUSION

38. Thank you very much for the opportunity to present our views. We will be happy to receive any questions from the Panel or the parties.

ANNEX 3-7

RESPONSES OF EGYPT TO QUESTIONS FROM
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I. REPLIES TO THE PANEL'S QUESTIONS (22 May 2000)

Q.1. India's argument against zeroing relies on the language of Article 2.4.2 concerning weighted average prices. Assume, for the sake of argument, that a transaction-to-transaction comparison were used. There is no weighted average of prices in that case. Would zeroing still be prohibited? If so, why? If not, how would the overall dumping margin be calculated from the individual transaction margins? How is this different from the calculation of an overall margin from individual model margins?

Reply

Concerning "zeroing" in case of establishing dumping margin on the basis of the transaction-to-transaction method, we would like to clarify that the weighted average method could leads to artificial inflated dumping margin, also it could leads to remedies being applied where no dumping in reality exists, the volume of dumped imports may not be determined by using this approach. The extent of the dumping may will be incorrect or alternatively give a result showing no dumping when dumping is occurring. Calculating dumping margin on the basis of "transaction-to-transaction" comparison, the calculation of the overall dumping margin without "zeroing" will be determined by summing up dumping amount for each transaction whether the transactions are dumped or non-dumped. Transaction-to-transaction methodology provides the information, which identifies the dumping, and the volume of dumped goods, it also reflects any variations in export price and normal value over the investigation period.

Q.2. Would the third parties indicate whether, in their view, in a case in which there is information from more than one exporter or producer available for use in the calculation of profit amounts under Article 2.2.2(ii) (including the case in which a proper sample includes more than one exporter or producer), the investigating authorities may nonetheless choose to rely on the information concerning only one of those exporters or producers?

Reply

Article 2.2.2(ii) of the WTO AD Agreement provides that the amounts of the SG&A and the profits may be determined on the basis of the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation, while Article 2.2.2(iii) of the WTO AD Agreement provides that the amounts of the SG&A and profits may be determined on the basis of any reasonable method.

According to the first methodology the investigating authorities could not rely on the information related to only one exporter or producer to calculate the profit amounts, instead, it should rely on "the weighted average of the actual amounts incurred or realized by other exporters or

producers". The question here is whether such information are available or not, and could the investigating authority use as a reasonable method, the information that relating to only one exporter in the case of the other information are not available. To answer this question, in relation to the case under dispute, we would like to note that the information related to all cooperating exporters in the sample were available to the investigating authority, which means that the use of the first methodology must be applied in order to determine the profit amounts and there was no reason to apply the last methodology in the presence of all information required to determine the profit amounts under Article 2.2.2(ii) of the WTO AD Agreement. In our opinion, that the only reason to use the information related to one exporter is that there were no information related to the other exporters, which was not the case in the case under dispute.

Q.3. Where an investigation involves multiple product types, investigating authorities will have different SGA for each of them, not all of which product types may be sold for profit. As a result, if the investigating authority excludes from consideration sales of one or more product types as being not sold in the ordinary course of trade, they will have different data sets for calculation of SGA expenses as compared to those for calculation of profit. In the view of the third parties, would such a methodology fulfil the "fair comparison" requirement of Article 2.4?

Reply

It should be noted that the Agreement does not include any rule concerning the situation where the investigating authority will have different data sets for calculating SGA expenses as compared to those available for profit calculations. The sole rule concerning calculating SG&A expenses and profits is that they should be "reasonable" according to Article 2.2. Consequently, if SG&A expenses and profits are calculated as stated in Article 2.2, this methodology will fulfil the "fair comparison" required in Article 2.4.

Q.4. As the Panel understands it, India takes the position that in the case of multiple comparisons of weighted average normal value to weighted average export price, Article 2.4.2 specifically precludes "zeroing", but that Article 2.4.2 does not address the question of "zeroing" in the process of "summing up" the results of multiple transaction-to-transaction comparisons of normal value and export price. The Panel notes that if a member makes separate comparisons of weighted average normal value and weighted average export price for each quarter during the dumping investigation period, the same question of "summing up" arise. Could the third parties explain, with specific reference to the text of the provision, whether, and if so how, Article 2.4.2 governs this process of "summing up" in these situations?

Reply

Article 2.4.2 provides that "the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of all prices of all comparable export transactions or by the comparison of normal value and export price on a transaction-to-transaction basis.

Article 2.4.2 of WTO AD Agreement makes no reference what is known as "zeroing" in the calculation of dumping through either weighted average method or transaction-to-transaction approach, nor does it refer to how the "summing up" exercise should be calculated.

If a weighted average to weighted average comparison is applied, the use of "zeroing" is redundant as a direct comparison is made between the weighted average normal value calculated over the period and the weighted average export price determined - individual transactions are not compared with one another.

As the use of "zeroing" increases the exporter's overall dumping margin by deducting from the dumping calculation exercise, those shipments made at non dumped prices, it would appear to be an approach contrary to the "fairness" requirements set out in the WTO AD Agreement.

Q.5. Could the third parties 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.

Reply

As a general rule, an anti-dumping duty shall be collected on imports of a certain product found to be dumped and causing injury to the domestic industry in the importing Member.

Articles 3.1 of the WTO AD Agreement provides that 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.

By reading the above-mentioned article, it shows that it imposes an obligation based on two conditions. The first one is that the investigating authority must determine the existence of injury on the basis of the volume of the dumped imports and its effect on the domestic prices. The second one is the examination of the impacts of the dumped imports on the domestic producers of the like products. The Article was very clear and more precise in determining the word of "dumped imports" and not all the imports from the exporting Members. This means that the investigating authority should base its determination of injury on the dumped imports only, therefore, investigating authority should exclude non-dumped imports from its determination.

In addition, Article 3.2 of the WTO AD Agreement provides that 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 . . . etc. This Article, also, is a self explanatory and clear in its requirements to the investigating authorities, that they shall limit their examination to the dumped imports only, and not all imports from the exporting Member.

In all cases, Article 3 of WTO AD Agreement creates an obligation on the investigating authorities to examine the effects of the dumped imports only.

Q.6. In view of the third parties, does the fulfilment of obligations imposed by Article 15 go beyond the fulfilment of obligations under Article 8.3? If so, what would that involve? In particular, is it necessary for the investigating Member, for instance, to take the initiative to seek an understanding, and if so, how, and when, is that to be done?

Reply

Yes, the fulfilment of obligations imposed by Article 15 go beyond the fulfilment of obligations under Article 8.3.

In our opinion that Article 15 of the WTO AD Agreement imposes two obligations. The first obligation is to have a special regard to the situation of developing Members when considering the application of the anti-dumping measures under the Agreement. The second obligation is to explore constructive remedies.

The term "special regard" required the investigating authorities to examine information submitted by the exporters of the developing Members, to acknowledge the receipt of and to reply to submissions, to consider those submissions, to note those submissions in the public statement of reasons.

The word "special" in Article 15 made clear that the result of the treatment of developing country Members should be "special" in all meanings.

The second obligation created by Article 15 of the WTO AD Agreement is to explore possibilities of constructive remedies before applying anti-dumping duties. The word "possibilities of constructive remedies provided for by this Agreement shall be explored" creates an obligation to explore options other than the imposition the anti-dumping duties. The terms of "provided for by this agreement" are not intended to be limited to a reference to undertakings alone. Undertakings are only one of the forms of constructive remedies provided for by the Agreement. It the meaning was limited only to the undertakings, a cross-reference to Article 8 of the WTO AD Agreement would have been inserted.

Suitable constructive remedies would have been the adjustments or allowances in relation to the normal value and export price requested by the exporters during the course of the investigation, excluding the non-dumped imports, applying the duty which was calculated for the private investigated company to all cooperating, non-sampled, private companies, instead of applying the weighted average dumping margin that was applied to the all cooperating, non-sampled, state-owned companies (as in the case of Egypt), and any other constructive remedies depending on the case.

The words "when considering the application of anti-dumping measures" does not mean that the obligation under Article 15 of the WTO AD Agreement only arise immediately prior to the imposition of a final anti-dumping duty. In the case of imposition a provisional anti-dumping duty, such words should be interpreted to mean at any stage during the investigation process.

It should be noted that Article 15 of the WTO AD Agreement was introduced under the umbrella of the provisions on special and differential treatment of developing countries. The WTO Agreements (including the WTO AD Agreement) contain provisions for the extension of special and differential treatment to developing country Members. Under these provisions, developing country Members are given "more favourable" treatment than developed country Members. The provisions of Article 15 of the WTO AD Agreement is one of the provisions of WTO Agreements that requires countries to take measures to facilitate the trade of developing country Members. Therefore investigating Member, obliged to take the initiative to seek an understanding at any stage during the investigation process, by inviting, for example, the exporters to submit an undertakings or any other forms of remedies based on the situation and the circumstances of the case taking into consideration that such invitation is not a contradiction to Article 8 of WTO AD Agreement, as we explained above that the Article 15 of the WTO AD Agreement provides a special treatment to the developing country Members and the developed country Member must show good intention to apply this Article as a part of their obligation under the WTO Agreements.

Article 8.3 of the WTO AD Agreement deals only with the possibility that the investigating authorities of the importing Members may consider the acceptance of undertakings impracticable in the case when the "number of actual or potential exporters is to great". In addition, this Article covers the normal situation of an investigation and does not cover the special circumstances that might be faced by the developing country Members.

II. REPLY TO THE EC'S QUESTION (19 May 2000)

Q.1. The EC notices that, both in the written submission and in the oral statement, Egypt refers to a figure of 15% as the share of total EU production passively supporting the Eurocoton complaint. Could Egypt identify the source of this data?

Reply

First, Egypt would like to thank the EC for its question.

In replying to this question, we would like to note that during the investigation process, the Egyptian exporters through their legal representative submitted a letter to the Commission on 27 June 1997.

This letter contained the Egyptian exporters' comments on the disclosure of the provisional dumping calculation, which was received on 2 June 1997.

We refer to paragraph 5 of the letter dated 27 June 1997, which contained the 15% figure.

In this letter we asked the Commission to verify several issues, *inter alia*, the information concerning the standing of the EU industry.

But, since no reply to this letter has been received from the Commission confirming whether or not this information was correct, therefore we mentioned in our oral and written submissions to the panel this argument hoping that the EC or other parties would be able to verify and comment on this particular issue.

ANNEX 3-8

RESPONSES OF JAPAN TO QUESTIONS FROM THE PANEL

(24 May 2000)

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Reply

Japan believes that zeroing is not permitted under Article 2.4.2 when the comparison is based on either the transaction-to-transaction or average-to-average methodology identified in the first sentence of that article. In interpreting Article 2.4.2, the panel should consider, at first, the ordinary meaning of Article 2.4.2.[1] As the language of Article 2.4.2 is not clear about this question, the panel should consider the negotiations during the Uruguay Round that led to this provision.[2] This historical context shown below is important because it demonstrates that zeroing has always occurred at the "summing up" stage under any comparison methodology.[3] In response to this zeroing at the summing up stage, Article 2.4.2 created two preferred comparison methodologies (i.e., average-to-average, and transaction-to-transaction), and one exceptional comparison methodology. The first sentence of Article 2.4.2 eliminated zeroing in the two "preferred" comparison methodologies. The structure of Article 2.4.2 and the circumstances that led to its adoption show that Article 2.4.2 permits zeroing in only one situation: when the authorities find it necessary to calculate a margin based on a comparison

[1] Article 31(1) of the Vienna Convention on the Law of Treaties.

[2] Article 32 of the Vienna Convention on the Law of Treaties permits the use of supplementary means of interpretation when interpretation according to Article 31 leaves the meaning ambiguous or obscure. The Appellate Body has noted that both Article 31 and Article 32 of the Vienna Convention have attained the status of a rule of customary or general international law. See *Japan – Taxes on Alcoholic Beverage*s, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Report of the Appellate Body adopted 1 November 1996, at 10.

[3] The summing up can occur at least in the following circumstances:

- when the margins of individual export sales are summed up after transaction-to-transaction comparisons or after transaction to weighted average comparisons;
- when the margins of various sub-products are summed-up after average-to-average comparisons, or
- when the margins of various sub-periods are summed up after dividing a period of investigation into months or other periods.

of individual export prices to a weighted average normal value under certain circumstances stipulated in the article.

I. THE LANGUAGE OF ARTICLE 2.4.2 ON ITS FACE

Japan admits that the language of Article 2.4.2 does not appear to demonstrate on its face that zeroing is prohibited under average-to-average and transaction-to-transaction comparisons. It simply provides that the weighted-average to weighted-average comparison or transaction-to-transaction comparison is preferred to weighted-average to transaction comparison. It does not specifically provide how to sum up the results of transaction-to-transaction comparison. In this case, in order to answer the question posed by the panel for the sake of argument, we should turn to the historical backgrounds which led to the provision of Article 2.4.2.

II. BACKGROUND TO THE CONCEPT OF "ZEROING"

Prior to the Uruguay Round, the prevailing methodology among major users of the dumping law involved a comparison of individual export prices to weighted-average normal value. After making these comparisons, investigating authorities set to zero the margins for any export sale that was found to have negative margins (i.e., where the export price exceeded the normal value). After setting to zero the negative margins, the investigating Members would then sum up the positive margins to calculate an overall margin for the product.

The permissibility of this comparison methodology was addressed by a GATT panel in EC – Antidumping Duties On Audio Tapes In Cassettes Originating In Japan (full cite) (unadopted). In that dispute, the panel noted that zeroing occurred after dumping comparisons were made (i.e., at the summing up stage after the comparison of individual export prices to a weighted average normal value). ¶ 349. Importantly, the panel noted that the issue of zeroing would not arise if margins were based on a comparison of weighted average export prices to weighted average normal values. Id. In that dispute, the panel determined that under the terms of the former Antidumping Code, zeroing was allowed.

The problem of zeroing was best understood in the hypothesis discussed by that Panel in which an exporter sold the same product, at the beginning of each month, in its home market at the same price as a sale to the export market.

	Export		**Home Market**		**Margin**		
	Date	Price	Quant.	Price	Weighted Average Price	Quant.	Transaction-to-Transaction	Export Price to Weighted Average Normal Value
Sale #1	Jan. 1	120	1	120	100	1	0	-20
Sale #2	Feb. 1	100	1	100	100	1	0	0
Sale #3	Mar. 1	80	1	80	100	1	0	20
							0	**20** (total after "zeroing")

In this example, a transaction-to-transaction comparison demonstrates that the exporter was never dumping because the prices would always track one another over time. However, a comparison of the individual export prices to a weighted average would always lead to a determination of

dumping, if at the summing up stage, the negative margins were zeroed.[4] In the example above, the negative margin related to the January 1 sale is reset to zero when the margins for all of the sales are summed up. Importantly, a comparison of weighted averages to weighted averages would lead to the same result as the transaction-to-transaction comparison (i.e., no dumping).[5] For this reason, the *Audio - Cassette* panel observed that zeroing "does not arise" when an average-to-average comparison is used.

In response to this practice, various Members urged the adoption of a provision in the Antidumping Agreement that would eliminate this zeroing, and ensure that the dumping calculation accounted correctly for negative margins.[6] Members such as the US opposed this suggestion by arguing that any methodology that would allow exporters to get "credit" for negative margins would be unacceptable.[7]

Ultimately, the Members adopted Article 2.4.2 which elevates average-to-average and transaction-to-transaction as the preferred comparison methodologies. Consistent with the GATT panel's observation in *Audio - Cassettes* that zeroing would not arise when comparisons were based on weighted averages, Article 2.4.2 eliminated zeroing when the preferred comparison methodologies are used.

To win support for the use of such comparison methodologies, however, the last sentence of Article 2.4.2 preserved Members' right to base margin calculations on comparisons between individual export transactions and a weighted average normal value under certain defined circumstances. Under this methodology commonly used by Members prior to the Uruguay Round, zeroing would be permitted.

III. THE LANGUAGE OF ARTICLE 2.4.2 IN LIGHT OF THIS HISTORICAL CONTEXT

In light of this historical context, the language of Article 2.4.2 demonstrates that zeroing is not allowed for either of the comparison methodologies identified in the first sentence of that article.

Consistency Between The Preferred Methodologies - As a threshold matter, Article 2.4.2 classifies average-to-average and transaction-to-transaction in the same category of preferred comparisons. By virtue of the classification of these two methodologies in the same preferred category in Article 2.4.2, and to ensure consistency within this preferred category, zeroing is prohibited under both methodologies.

Adoption of the average-to-average comparison methodology eliminated zeroing at the transaction-specific level. As a *Audio - Cassettes* Panel observed, zeroing "does not arise" when average-to-average comparisons are used. Even the US and the EC do not contest that a feature of average-to-average comparisons is that it eliminates the zeroing of negative margins at the transaction-specific level (See US submission paras. 34-47, EC submission para. 201-214). Zeroing does not arise under a proper average-to-average comparisons because there is no need to sum up transaction-specific margins.

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[4] In the example, the overall dumping percentage would be 6.67% (i.e., 20/300)

[5] In the example above, an average to average comparison would compare an average export price of 100 to an average normal value of 100.

[6] See generally, Terence P. Stewart, *et al.*, The GATT Uruguay Round: A Negotiating History (1986-1992)(1993): page 1537-1543 (discussing the negotiations concerning the use of weighted averages in the calculation of export prices and normal values).

[7] Id. at 1540.

Since average-to-average comparisons mathematically eliminate the step of zeroing margins of individual export transactions (when the individual margins would otherwise be summed up), it would be illogical then to read Article 2.4.2, first sentence, as allowing zeroing when the transaction-specific margins are summed up under the transaction-to-transaction methodology, the other preferred comparison methodology. A more natural reading of the requirements of Article 2.4.2 is that the first sentence of the Article eliminates zeroing of individual transaction margins with the use of average-to-average comparisons, and at the same time, disallows zeroing of individual transaction margins under the transaction-to-transaction methodology.

Consistency Between Stages in the Dumping Calculation - Independent of any inconsistency between the two preferred methodologies in Article 2.4.2, the panel should also avoid an interpretation that creates an inconsistency at different levels of the dumping calculation. Once it is acknowledged that average-to-average comparisons eliminate zeroing at the transaction level, it would then be inconsistent to interpret Article 2.4.2 to allow zeroing at a subsequent stage in the margin calculation (i.e., at a summing up stage). Article 2.4.2 provides no basis to conclude that the Article was designed to eliminate zeroing at one level, but then permit it at another level. This applies to zeroing at the summing up stage of sub-product margins (under average-to-average comparisons), and the summing up of transaction margins (under the transaction-to-transaction approach). Again, to suggest a different interpretation reads into the first sentence of Article 2.4.2 an unnatural and unreasonable inconsistency with respect to zeroing.

The panel should ensure that its interpretation of Article 2.4.2 avoids this internal inconsistency. As a result, using as an interpretive tool, the circumstances that led to the inclusion of Article 2.4.2 in the Anti-dumping Agreement, the panel should avoid an interpretation of the first sentence of Article 2.4.2 that results in a conceptual inconsistency with respect to zeroing.

Unreasonable Results - The panel should also avoid an interpretation of Article 2.4.2 that leads to unreasonable results. If the panel were to find that zeroing were allowed at the summing up stage under either of the preferred methodologies, this would provide a clear incentive for investigating Members to sub-divide the dumping calculation into the most narrow average-to-average comparisons possible. This division could take place, for example, at the sub-product level, in which the overall product subject to investigation would be sub-divided into hundreds of sub-products. The mathematical effect of this would be to isolate all products with negative margins from products with positive margins. The authorities could then zero away any negative margins at the summing up stage, effectively circumventing the mathematical averaging that would normally occur if a broader average-to-average comparison were used.

The artificial division could also occur by dividing the overall period of investigation into multiple sub-periods. In this scenario, the Member could sub-divide the period into two or numerous periods so that the sales with positive margins are isolated from sales with negative margins. Then, at the summing up stage, the negative margins would be zeroed, leaving only the positive margins to contribute to the calculation of the overall margin.

The mathematics of zeroing when sub-periods are summed up is identical to the pre-Uruguay Round zeroing problem when transaction-specific margins were summed up after a comparison of individual export price to a weighted average normal value.

Export			Home Market		Margin	
Date	Average Price for the Month	Quant.	Average Price for the Month	Quant.	Monthly	Period Average to Period Average
Jan	120	10	80	10		
Feb	100	10	100	10	0	
Mar	80	10	120	10	40	
	100 (period average)		100 (period average)		**40** (after zeroing)	0

As the example demonstrates, if zeroing is allowed at the summing up stage of the sub-periods, there is an incentive to create multiple sub-periods. That is, there is a disincentive to calculate margins on an average to average basis over the period. Since Article 2.4.2 requires an average-to-average comparison using "all" comparable export transactions, it would be unnatural to interpret Article 2.4.2 to provide an incentive to subdivide the dumping comparisons into the narrowest possible average-to-average comparisons. Such an interpretation would create a built-in incentive to minimize the volume of comparisons made within each average-to-average comparison, and to maximize the process of summing up. Given the negotiating history of Article 2.4.2, the language of Article 2.4.2 should not be read to create this perverse incentive. To the contrary, the negotiating history demonstrates that Article 2.4.2 was intended to create the opposite scenario, where zeroing was eliminated in all circumstances except when a Member could justify comparisons under the second sentence of Article 2.4.2.

Q.2. Would the third parties indicate whether, in their view, in a case in which there is information from more than one exporter or producer available for use in the calculation of profit amounts under Article 2.2.2(ii) (including the case in which a proper sample includes more than one exporter or producer), the investigating authorities may nonetheless choose to rely on the information concerning only one of those exporters or producers?

Reply

Japan believes that Article 2.2.2(ii) does not permit the authorities to pick and choose among the companies that have provided profit data in a particular investigation.

First, the language of Article 2.2.2(ii) is plain on its face. The language contemplates a "weighted average" of data of "the other exporters or producers" subject to investigation, and in no way contemplate picking and choosing the particular data of one exporter or producer. The EU and US have argued that the use of plural here ("exporters or producers") does not have any substantive meaning. In Japan's view, the use of the phrase "weighted average" combined with the use of the plural in this particular provision together means that all the available data must be used. It would have been easy for the drafters to provide authorities with the discretion to pick profit data from "any of the other exporters or producers," but the provision does not use such language. Nor does the language of Article 2.2.2(ii) provide any qualifying language such as "ordinary course of trade" as seen in other context (e.g., Article 2.2 and the chapeau of Article 2.2.2). The plain meaning of the provision is unambiguous, and the language should be respected.

Second, the interpretation offered by the EC and US (See EC submission paras. 115-134, US submission paras. 7-13) poses enormous risks of abuses. If authorities can pick and choose at their discretion, then Article 2.2.2(ii) provides no discipline at all. Authorities can distort the result of the investigation in how they pick and choose the particular profit levels to use. The requirement of Article 2.2.2(ii) to use a weighted average of all the available data provides a clear, transparent, and predictable rule.

Third, the rule of Article 2.2.2(ii) minimizes the risk of a company under investigation being unfairly punished or benefited by the anomalous profit experience of a single company, rather than an average of profit results for all companies. The weighted average is far more likely to be a more typical and representative surrogate than the result of any single company.

Q.3. Where an investigation involves multiple product types, investigating authorities will have different SGA expenses for each of them, not all of which product types may be sold for profit. As a result, if the investigating authority excludes from consideration sales of one or more product types as being not sold in the ordinary course of trade, they will have different data sets for calculation of SGA expenses as compared to those for calculation of profit. In the view of the third parties, would such a methodology fulfill the "fair comparison" requirement of Article 2.4?

Reply

Japan believes the situation raised in this question would violate the requirement of "fair comparison."

The EC and US interpretation of Article 2.2.2 (See EC submission para. 135-152, US submission paras. 14-20) reads the phrase "ordinary course of trade" too narrowly. This phrase means more than just sales below cost. Article 2.2.1 makes clear that below cost sales may be treated as being outside "the ordinary course of trade" under some specific situations, but does not regard all the below cost sales as sales "out of the ordinary course of trade". Thus it is not appropriate to exclude from consideration sales of one or more product types merely as being not sold for profit.

This interpretation also avoids the dilemma identified by the panel question. If sales are below cost but not outside the ordinary course of trade, they should be used for both profit rates and for SGA rates. If the sales are below cost and treated as outside the ordinary course of trade, then they should be excluded for both purposes. Thus it is not necessary to use different data set to calculate profit rates and SGA rates.

Q.4. As the Panel understands it, India takes the position that in the case of multiple comparisons of weighted average normal value to weighted average export price, Article 2.4.2 specifically precludes "zeroing", but that Article 2.4.2 does not address the question of "zeroing" in the process of "summing up" the results of multiple transaction to transaction comparisons of normal value and export price. The Panel notes that if a Member makes separate comparisons of weighted average normal value and weighted average export price for each quarter during the dumping investigation period, the same question of "summing up" arises. Could the third parties explain, with specific reference to the text of the provision, whether, and if so how, Article 2.4.2 governs this process of "summing up" in these situations?

Reply

As discussed in response to Question 1, it is Japan's position that the text of Article 2.4.2 governs zeroing due to the hierarchy of comparison methodologies created by the text and structure of that article. By designating, in the first sentence, the weighted-average-to-weighted average

comparison as the preferred comparison methodology, the structure of the Article expressly directs Members to a methodology whose main attribute is to eliminate zeroing.[8] The transaction-to-transaction methodology is also a preferred methodology. As discussed in response to Question 1, however, it is reasonable to assume that zeroing is prohibited for this methodology as well to ensure a consistency with respect to zeroing between the two preferred methodologies.

On the other hand, by relegating the "export price-to-weighted average normal value" methodology to a secondary methodology, only to be used in exceptional circumstances, the text of Article 2.4.2 expressly demotes the only methodology that historically allowed zeroing at the summing up stage. Thus, the textual hierarchy between the first and second sentences of Article 2.4.2, and the inclusion of the average-to-average methodology in the first sentence demonstrates that Article 2.4.2 is intended to avoid comparison methodologies that permit zeroing. In this sense, Article 2.4.2 governs and prohibits the use of zeroing at the summing up stage for the preferred comparison methodologies.

Q.5. Could the third parties 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.

Reply

As discussed in our submission, Japan believes that Article 3 unambiguously requires authorities to consider only the impact of "dumped imports," and not the impact of all imports whether dumped or not. If a company has been found not to be dumping, the imports from that company must be excluded in the examination of price and volume effects.

Q.6. In the view of the third parties, does the fulfilment of obligations imposed by Article 15 go beyond the fulfilment of obligations under Article 8.3? If so, what would that involve? In particular, is it necessary for the investigating Member, for instance, to take the initiative to seek an understanding, and if so, how, and when, is that to be done?

Reply

No. The reference to "constructive remedies" under Article 15 would include a possible price undertaking pursuant to Article 8. Article 15 does not impose any specific requirements on developed country Members.

[8] As discussed in response to Question #1, the fundamental virtue of average-to-average comparisons is that it eliminates the mathematical step of "summing up" sale-specific margins, thereby obviating the possibility of zeroing.

ANNEX 3-9

RESPONSES OF THE UNITED STATES
TO QUESTIONS FROM THE PANEL,
INDIA AND THE EUROPEAN COMMUNITIES

(24 May 2000)

Panel Questions to Third Parties

Q1. India's argument against zeroing relies on the language of Article 2.4.2 concerning weighted average prices. Assume, for the sake of argument, that a transaction-to-transaction comparison were used. There is no weighted average of prices in that case. Would zeroing still be prohibited? If so, why? If not, how would the overall dumping margin be calculated from the individual transaction margins? How is this different from the calculation of an overall margin from individual model margins?

1. The United States is of the view that "zeroing" is not prohibited in the calculation of the overall dumping margin, regardless of whether the comparisons between normal value and export price were made on a weight-average-to-weight-average basis or a transaction-to-transaction basis. In either case, the Anti-Dumping Agreement does not prohibit, in the calculation of the overall dumping margin, the zeroing of negative differences between normal value and export price calculated on the weight-average-comparison basis or on the transaction-specific-comparison basis. In both cases, the mathematical process of zeroing these negative amounts would simply permit the importing country to collect dumping duties equivalent to all of the positive differences between export price and normal value.

Q2. Would the third parties indicate whether, in their view, in a case in which there is information from more than one exporter or producer available for use in the calculation of profit amounts under Article 2.2.2(ii) (including the case in which a proper sample includes more than one exporter or producer), the investigating authorities may nonetheless choose to rely on the information concerning only one of those exporters or producers?

2. The United States declines to venture beyond the present case to address this question at this time, because the circumstances described in this question are not now before the Panel.

Q3. Where an investigation involves multiple product types, investigating authorities will have different SGA expenses for each of them, not all of which product types may be sold for profit. As a result, if the investigating authority excludes from consideration sales of one or more product types as being not sold in the ordinary course of trade, they will have different data sets for calculation of SGA expenses as compared to those for calculation of profit. In the view of the third parties, would such a methodology fulfill the "fair comparison" requirement of Article 2.4?

3. The "fair comparison" language of Article 2.4 relates to the manner in which export price and normal value are to be compared with each other. Based upon the United States' understanding of this question, it does not involve this fundamental dumping comparison, and, thus, does not clearly implicate the "fair comparison" language of Article 2.4.

Q4. As the Panel understands it, India take the position that in the case of multiple comparisons of weighted average normal value to weighted average export price, Article 2.4.2

specifically precludes "zeroing", but that Article 2.4.2 does not address the question of "zeroing" in the process of "summing up" the results of multiple transaction to transaction comparisons of normal value and export price. The Panel notes that if a Member makes separate comparisons of weighted average normal value and weighted average export price for each quarter during the dumping investigation period, the same question of "summing up" arises. Could the third parties explain, with specific reference to the text of the provision, whether, and if so how, Article 2.4.2 governs this process of "summing up" in these situations?

4. As the United States discussed in its Third Party Submission (at paras. 39-41), Article 2.4.2 requires that, in making comparisons between the export price and the normal value in an investigation, each comparison shall be made either on a weighted-average-to-weighted-average basis or a transaction-to-transaction basis. Neither Article 2.4.2 nor 2.4 addresses the subsequent step of "summing up" the results of these comparisons into a single overall dumping margin.

Q5. Could the third parties 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.

5. It is the United States' practice to exclude from the injury evaluation companies for which a negative determination of dumping margins has been made based in the determination of a zero or *de minimis* margin. The United States regards such a practice as permitted by the Anti-Dumping Agreement but does not contend that it is required.

Q6. In the view of the third parties, does the fulfilment of obligations imposed by Article 15 go beyond the fulfilment of obligations under Article 8.3? If so, what would that involve? In particular, is it necessary for the investigating Member, for instance, to take the initiative to seek an understanding, and if so, how, and when, is that to be done?

6a. The United States is of the view that Article 8.3 and Article 15 are complementary provisions, and that Article 15 does not impose any obligations that would conflict with, or go beyond what is called for in Article 8.3. Article 8.3 speaks to the conditions under which an investigating authority may choose to reject an undertaking, once offered, and, in the event of such a rejection, it calls on investigating authorities, where practicable, to provide the exporter with reasons for the rejection and an opportunity to comment thereon. The precatory language of the provision[1] makes clear that a hard and fast obligation is not intended.

6b. Likewise couched in precatory language, Article 15 asks developed country Members to extend "special consideration" to developing country Members when considering the application of anti-dumping measures, and calls for the exploration of constructive remedies before the application of anti-dumping duties, where such application would affect the essential interests of developing country Members.

6c. The internal logic of Article 15 does suggest, however, that a developing country should take the initiative to identify to the developed country when the developing country's essential interests may be affected if the developed country were to apply anti-dumping duties, because the developing country would be in the best position to know what these essential interests are, and when they may be affected. The obligation to explore constructive remedies can only be triggered when the

[1] *viz.*, "need not be accepted," "reasons of general policy," "where practicable," and "to the extent possible."

developed country is aware that its impending action would affect the essential interests of the developing country.

6d. Also with regard to timing, Article 15 addresses the desirability of exploring constructive remedies prior to application of anti-dumping duties, where such constructive remedies have not yet been explored, whereas Article 8.3 addresses the situation in which such remedies have been explored, and an undertaking has already been offered. To the extent that the two provisions suggest an intended sequence of events, Article 15 does not appear to suggest any timing that would conflict with Article 8.3. As we have noted previously, Article 15 seeks to protect developing countries when their essential interests would be affected by the application of anti-dumping duties, but it does not require any particular substantive result, nor does it create a substantive obligation.

EC Questions to the United States

1. Initiation Questions

(1) According to the United States, what type of evidence has to be evaluated in order to determine whether or not to initiate an anti-dumping investigation under Article 5.3 of the Anti-dumping Agreement?

1. The "evidence [that] has to be evaluated in order to determine whether or not to initiate an anti-dumping investigation under Article 5.3" is, as stated in Article 5.3, the "evidence provided in the application." However, as the Panel noted in *Guatemala Cement*, "there is nothing in the Agreement to prevent an investigating authority from seeking evidence and information on its own, that would allow any gaps in the evidence set forth in the application to be filled."[2] Regardless of whether the information was contained in the application or obtained by the investigating authority on its own, Article 5.3 requires an examination of the accuracy and adequacy of that evidence.

(2) What is the standard of proof that the United States considers necessary for purposes of initiation of an anti-dumping investigation under Article 5.3 of the Anti-dumping Agreement?

2. Article 5.2 provides that an application for an anti-dumping investigation must contain evidence of dumping, injury, and a causal link between the dumped imports and the alleged injury. The application must contain relevant evidence, rather than simple assertion, and the investigating authority, as discussed in response to EC Question 1, must examine the accuracy and adequacy of that evidence. That said, the Anti-Dumping Agreement does not contain a "standard of proof" for purposes of initiation; rather, the proof of dumping, injury and the causal link between dumping and injury will be established in the course of any investigation.[3]

(3) The US has maintained that Article 5.4 of the Anti-dumping Agreement allows associations of producers to bring a complaint on behalf of the domestic industry. Could the United States illustrate what type of enquiry they consider necessary on the part of the investigative authorities to satisfy themselves that the complaint is in fact brought "on behalf of" the domestic industry?

3. The type of inquiry necessary to determine whether an application for an anti-dumping investigation has been brought on behalf of a domestic industry does not differ based upon whether the application is brought by individual domestic producers or an association which qualifies as an

[2] Panel report on *Guatemala - Anti-dumping Investigation Regarding Portland Cement from Mexico ("Guatemala Cement")*, WT/DS60/R (19 June 1998), para. 7.53.

[3] See the discussion of this issue in *Guatemala Cement*, paras. 7.54-7.57.

interested party consistent with Article 6.11(iii) of the Anti-Dumping Agreement. To that end, the inquiry involves satisfaction of the 25 per cent and 50 per cent standards provided in Article 5.4 of the Agreement.

(4) Does the US consider that an investigating authority should close an anti-dumping proceeding that it has initiated if it should determine, during the course of an investigation and on the basis of information that was not available to the authority before the investigation was initiated, that the domestic producers expressly supporting the application do not account for at least 25% of total domestic production?

4. Article 5.8 provides that an investigation shall be terminated as soon as the authorities are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. Article 5.8 does not provide for termination of an investigation based upon new, post-initiation information indicating that there is not sufficient industry support for the investigation.

2. Injury Questions

(5) Article 4.1 Anti-dumping Agreement provides that the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products.

Why does the US consider that

"The EC acted inconsistently with the Agreement by not including all Community producers in the domestic industry for the purposes of evaluating other factors such as price and impact under Articles 3.1, 3.2, 3.4 and 3.5."[4]

5. In context, the quoted statement responds to India's claim that the EC acted impermissibly in looking to total EC-15 producers for any purpose in the injury evaluation. India appears to argue that the EC should have confined its analysis of injury factors to those producers who were complainants, and should not have sought or relied on any data covering any other producers. In the United States' view, the Anti-Dumping Agreement required the EC to seek information from all Community producers ("EC-15 producers") of the like product (or, in the special circumstances discussed in response to question 10, producers representative of all Community producers). For example, the EC should have sent questionnaires to all Community producers, rather than just to complainant-producers. To the extent the EC chose at the outset to seek complainant-only data for any factors, it acted inconsistently with the Agreement. We do not disagree with the EC that it properly sought information from or concerning producers other than complainants, but rather that it should have done so with respect to all factors.

(6) The US states that India has not made a claim that the EC should have defined the Community Industry as all the producers. Need the Panel therefore consider these comments of the US?

6a. The United States brought its views on the domestic industry definition to the Panel's attention as a predicate to its response concerning arguments made by the complaining Party, India. In challenging the breadth of the data and other information relied on by the EC, India assumes that the EC properly confined the domestic industry to the complaining producers; but, in India's view, the EC acted impermissibly in looking at Community-wide production, consumption and market share data, and by relying on the closures of numerous domestic bedlinen firms during the two-year period

[4] US Third Party Submission, para. 89.

preceding initiation as evidence of the industry's financial condition. The United States believes the EC acted correctly in considering both Community-wide data and evidence about recent closures of domestic firms. However, the United States believes the EC's inclusion of this information was correct for reasons other than those argued by the EC, *i.e.*, the United States believes the inclusion of this information was required by the Agreement because the information concerns producers who are properly members of the domestic industry.

6b. The Panel can take into account the third party comments of the United States concerning the definition of the domestic industry in order to avoid resolving this case on the basis of an incorrect view of the Anti-Dumping Agreement. The United States supports the implicit point of the EC's question that the Panel cannot go beyond its terms of reference, nor may arguments made only by a third party satisfy a party's burden of proof with respect to a claim. If the Panel does not address the issue concerning the correct domestic industry definition, the United States strongly urges that the Panel expressly state that it is not addressing that issue. Such a statement will insure that neither the parties to this investigation nor other Members infer that the Panel reached a conclusion that it did not in fact reach or that this Panel endorsed an EC practice that may be directly challenged in other cases.

(7) How does the US interpret the term "a major proportion" of the industry?

7a. Article 4.1 of the Anti-dumping Agreement provides that

> the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that
>
> (i) when producers are related to the exporters or importers or are themselves importers of the allegedly dumped product, the term "domestic industry" may be interpreted as referring to the rest of the producers;
>
> (ii) in exceptional circumstances the territory of a Member may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if {certain conditions are met}

7b. The chapeau of the Article provides only one definition of the domestic industry: "the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products." The use of the word "or" does not, as the EC seems to imply,[5] mean that in a given investigation there are two alternative definitions of "domestic industry," either of which the investigating authority may choose. Rather, the definition recognizes the reality of many anti-dumping investigations: that it will not always be possible to obtain the requested information from all domestic producers of the like product. Article 4.1 makes clear that a determination is adequate even if an investigating authority is not successful in obtaining information from all producers.

7c. Thus, the investigating authority is charged broadly under Article 3.1 with conducting an objective examination of volume, price effects, and the impact of the imports on "domestic producers" of like products, not "a major proportion" of domestic producers. The more specific provisions of Article 3.4 address the relevant factors about which information must be obtained to evaluate the impact of the imports on the "domestic industry," a term defined for the purposes of the Agreement in Article 4.1. Read together, these provisions spell out an investigating authority's obligations with

[5] See EC Oral Statement, para. 132.

respect to evaluation of injury to domestic producers–the investigating authority should seek in an objective (*i.e.*, unbiased) manner to obtain data from all producers of the like product ("producers as a whole).[6] But in circumstances where some producers fail to respond, the investigating authority's analysis under Article 3 may concern those producers whose collective output of the products constitutes a major proportion of the total domestic production of the like product. Thus, the term "major proportion" as used in Article 4.1 refers to all the producers who responded to the information requests sent to all producers.

7d. "Major proportion" does not have a numerical benchmark, and will vary from one investigation to another. Indeed, both approaches to the domestic industry may inform the injury analysis in a single investigation. For example, an authority may obtain public or official data on some factors covering all producers, but on other factors for which questionnaires must be sent may receive responses from only some producers. In such circumstances, Article 4.1 allows an authority to use both sets of information through an "objective examination" under Article 3.1 Nor does "major proportion" automatically equate, as the EC Anti-Dumping Regulation and practice presume, to the same group of producers who filed the application. If the EC's presumption were correct, the producers who filed the application would always constitute the "domestic industry," and the "*or on behalf of* the domestic industry" language in Article 5.4 would be superfluous.

7e. Further, to be consistent with Article 3.1's requirement for an "objective examination," the phrase "major proportion" cannot be read to define the domestic industry as a particular self-selected group of less than all producers of the like product. Nor can it mean any other pre-selected sub-group of the producers as a whole that is likely to tilt the database in most investigations towards an affirmative injury finding, as the EC's Regulation and practice generally do.

(8) Does the US consider that the only cases where less than all producers may be considered to be the domestic industry are those set out in sub-paragraphs (i) and (ii) of Article 4.1? If so, why does not Article 4.1 say this? If not, what are the criteria which, according to the US, allow less than all producers to be considered to constitute the domestic industry?

8. As discussed in response to the previous question, the definition of "domestic industry" provided in the chapeau of Article 4.1. includes all domestic producers from whom the investigating authority is able to obtain information. Subparagraphs (i) and (ii) of that Article set out the only instances in which the investigating authority may deliberately exclude certain domestic producers from the domestic industry. These exclusions apply to except certain producers from the domestic industry regardless of whether the industry ultimately includes all producers or the major proportion that complies with the investigating authority's efforts to obtain information. The Agreement's reference to these specific exclusions reinforces that an investigating authority's reliance on a "major proportion" is not a matter of excluding some producers from the domestic industry. Rather, the reference to a "major proportion" reflects the practical consideration that complete information may not be forthcoming in response to requests to all producers.

(9) Does the US consider that an investigating authority must irrevocably choose at the beginning of an investigation its definition of "domestic industry"?

[6] As discussed below, in response to EC question 10, the investigating authority may at the onset determine that the nature of the industry makes it necessary to send questionnaires to a representative sample of the industry rather than to every producer in the industry. Even in that case, the definition of the industry would be the same as that defined in the text above, although the neutral group to whom questionnaires were sent would be narrower.

9. No. The investigating authority cannot irrevocably choose its definition of the "domestic industry" at the beginning of an investigation. The investigating authority may make a threshold definition of domestic industry to decide whether to initiate an investigation under Article 5.4. However, the final definitions of the domestic like product and domestic industry for the injury determination under Article 3 must be based upon the information obtained during the investigation.

(10) The US argues in paragraph 93 that the sample of domestic producers must be "statistically valid". In this context, does "statistically valid" mean the same as "representative"? The US criticisms of the EC sample of domestic producers seem to derive exclusively from its view that it was wrong to define the complaining and co-operating producers as the "Community industry". Is this correct?

10a. Nothing in Articles 3 and 4 prohibits sampling, and the United States agrees with the EC and India that investigating authorities may use a sample of the domestic industry in evaluating the effects and impact of the subject imports. In its third party written submission, the United States noted the express references in other Articles of the Agreement to "statistically valid" sampling.[7] At this time, we wish to clarify the views expressed earlier concerning the use of sampling for the purposes of an injury determination. The United States concurs with the EC that in the context of reaching an injury determination, the criterion for judging whether the sampling was consistent with the Agreement is whether the sample was representative of the domestic industry, not whether it is statistically valid. However, it is only by properly defining the domestic industry in the first instance as all producers that a representative sample of producers will assure that the investigating authority conducts the "objective examination" of the industry that is required under Article 3.1.

10b. The United States' principal criticism of the EC's sample of domestic producers rests on the EC's improper definition of the domestic industry, from which the EC drew its sample.[8] Since the population from which the EC took the sample was likely to have been biased toward those producers who consider themselves as injured, any sample taken from that base was similarly likely to be biased. The United States has not reviewed the entire record in this investigation and takes no position as to whether the particular sampling methodology used by the EC in this investigation would have been objective had it been taken from the entire group of EC bedlinen producers.

(11) The US invokes Article 6 in support of its view that the EC should have looked at all the Community Industry. The EC does not deny that an excluded domestic producer is an 'interested party' within the meaning of Article 6 and is entitled to depend its interests i.e. present information to the investigating authority. But is the US really arguing that this means that all interested parties must be investigated ?

11. Yes, investigating authorities must make active efforts to investigate all interested parties or an unbiased sample of those interested parties. Here, the EC failed to investigate fully even all the domestic producers known to it.

(12) In paragraph 96 of its submission, the United States states that it considers that "all enumerated factors [in Article 3.4] must be evaluated". On what basis does the US construe an

[7] Article 6.10 refers to "using samples which are statistically valid" to determine dumping margins, and Article 5.4, note 13 refers to the use of "statistically valid sampling techniques" to determine support and opposition for an application in the case of fragmented industries.

[8] The United States does not agree with the EC's characterization of the group it defined as the "Community industry" as including the "cooperating" producers. This characterization inaccurately suggests that some producers were cooperating while others were not. While it is undoubtedly true that the complaining producers cooperated by responding to the questionnaires they received, this fact does not that mean the non-complaining Community producers who were not sent questionnaires were not cooperative.

obligation to evaluate all relevant factors (the terms of Article 3.4) as an obligation to evaluate all factors, even if it is apparent at the outset that some factors are not relevant? The US seeks to defend the HFCS panel discussion of this issue. Where in its report did the panel in that case consider the EC's arguments presented in its First Written Submission and its Oral Statement (which the US now has)? The US also refers to the Korea – resins report.[9] Where in that report is there any statement that all factors must be evaluated, whether relevant or not, or any consideration of the arguments that the EC has made in this case?

12a. The EC quotes the US comment out of context. The entire sentence from which the quote is taken reads, " [w]hile all enumerated factors must be evaluated, not all are necessarily material in any particular case."[10] In its third party submission, the United States went on to further explain that it does not believe that investigating authorities are required in each case to make a specific finding on each enumerated factor in Articles 3.2 and 3.4. Thus, the United States draws a distinction between what must be evaluated and what must be contained in the public notice or report under Article 12.2. Article 3.4 delineates certain relevant factors that must be evaluated. Article 12.2 requires an authority's notice or report to include findings only on what it considers "material." If, upon evaluation, the authority determines that a particular factor is not material to the investigation, the authority is not required to discuss that factor in its notice or report. In order to demonstrate that the investigating authority has conducted the evaluation required by Article 3, however, it should be discernible from the authority's determination that it evaluated each of the enumerated factors. This objective may be achieved when a determination, through its demonstration of why the authorities relied on the specific factors they found to be material in the case, thereby discloses why other factors on which they do not make specific findings were accorded little weight or were deemed not relevant at all.

12b. The United States believes the HFCS decision provides a reasoned analysis of the Agreement's requirements concerning a panel's ability to discern from an investigating authority's report that the authority fulfilled its obligations to consider the factors enumerated in Article 3.4. In that case, the panel stated that "consideration" of the factors is required in every case, although such consideration may lead the investigating authority to conclude that a particular factor is not probative in the circumstances of a particular industry and therefore is not relevant to the particular determination.[11] The United States has not contended that the HFCS panel considered all of the counter arguments that the EC now makes to the panel's conclusions regarding this issue. The United States disagrees, however, with the EC's assertions that the HFCS panel based its decision on "simplistic reliance on the inappropriate precedent of safeguard cases." As illustrated by Attachment 1,[12] the parties to that dispute presented the HFCS Panel with thorough analysis, discussion, and case precedent for the panel's consideration of this issue.

12c. Relative to the issue of which factors an investigating authority must consider, the EC has argued that Article 3.4 only requires consideration of factors that have declined. As discussed in the US original submission, the United States disagrees with this view. An "objective examination" as required by Article 3.1 encompasses those factors tending to support an injury finding as well as those tending against it. In explaining the fallacy of the EC's position, the United States cited the *Korea Resins* decision, wherein the panel concluded that the investigating authority could not focus solely on

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[9] *Panel report on* Korea – Anti-Dumping Duties on Imports of Polyacetal Resins from the United States (Korea-Resins), *BISD 40S/205, adopted 27 April 1993.*

[10] US Third Party Submission, para. 90.

[11] Panel report on *Mexico - Anti-dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, para. 7.128.

[12] US Exhibit 1, attached hereto, contains portions of the United States' second submission (paras. 118-125) to the HFCS panel.

factors supporting a conclusion that the domestic industry would likely encounter difficulties while disregarding other factors.[13]

Indian Questions to the United States

1. In paragraph 19 of its Oral Statement made on 11th May, the US has stated that Article 15 of the Anti-Dumping Agreement "provides important procedural safeguards to developing countries". Could the US please explain and elaborate, on the basis of its own experience of implementing Article 15, what these important procedural safeguards are?

1. The United States is of the view that Article 15 creates two safeguards that are procedural, rather than substantive. The first sentence of Article 15 calls on developed country members to give "special regard" to a developing country when considering the application of anti-dumping measures under the ADA, while the second sentence requires that possibilities of constructive remedies "shall be explored" before applying anti-dumping duties where they would affect the essential interests of developing country members. Article 15 does not define what "special regard" is, nor does it say what "exploration" is required. It does not require any particular substantive result. Absent a more specific requirement, the exact substance of that "special regard" and "exploration" depends upon a good-faith interpretation of the provision, in accordance with Article 31 of the Vienna Convention on the Law of Treaties. Insofar as Article 15 calls for a good-faith exploration of constructive remedies prior to applying anti-dumping duties, it creates a procedural safeguard, as opposed to a substantive one, that is designed to protect developing countries when their essential interests would be affected by the application of anti-dumping duties.

2. In paragraph 25 of its Oral Statement, the US has referred to the draft recommendations of the WTO committee on Anti-Dumping Practices on the period of data collection for anti-dumping investigations. Would the US agree that these guidelines are only in the form of recommendations?

2a. The United States agrees that these guidelines take the forms of a recommendation. The United States did not mean to imply that these guidelines were requirements. The United States referred to this recommendation to show that WTO Members have, by consensus, endorsed the practice of collecting data for a one year period for dumping determinations and for at least a three year period for evaluating injury. Under this practice, there will not, by definition, be data on dumped imports for at least two of the three years of the injury investigation period. If there had been a question consistency of this widely-used practice with the Anti-Dumping Agreement, WTO Members would not have given it their endorsement.

2b. By referring to the recommendation, the United States also points out that India itself has participated in the consensus to adopt these guidelines, while at the same time taking issue with the EC's practice which appears to be consistent with those guidelines. India presumably would not have acquiesced to this type of practice, by consenting to the Committee's adoption of the guidelines, if it questioned the consistency of this practice with the Anti-Dumping Agreement. Having agreed to the recommendation, it is inconsistent for India to suggest that the EC violated the Anti-Dumping Agreement by following a practice that the recommendation endorses.

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[13] US Third Party Submission, para. 99, *citing Korea Resins* Panel Report, paras. 274-76, 287.