DS141

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European Communities – Anti-Dumping Duties on Imports

of Cotton-Type Bedlinens from India

(WT/DS141)

Third-Party Submission of
the United States

April 3, 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.

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 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 panel.[2]

III. India's Claims under Article 2.2.2[3]

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[1] *See: Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, Report of the Panel (January 28, 2000) ("HFCS"), paras. 7.94 - 7.95.

[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 the specific factual information considered by the EC.

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:

> (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 percent 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.

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[4] First Submission of India, paras. 3.54 - 3.77.

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 Article 2.2.2(iii).[8] Interpretations of the Agreement which lead to such absurd results should be avoided.[9]

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

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[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."

[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.

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):

> 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 percent 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]

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 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

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[11] If producer B's profit rate on the ordinary course of trade sales was 15 percent, but on all domestic market sales (including below cost sales) was only 4 percent, it would be illogical to interpret the Agreement as requiring the investigating authorities to use the 15 percent profit for producer B, but to use the more favorable profit rate of 4 percent 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.

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).[14] 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.

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

[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.

profit figures for other Indian textile producers under investigation,[18] and concludes that the profit figure used by the EC is impermissible under the 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.

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[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.

[19] First Submission of India, para. 3.138. *See also* paras. 3.134-3.139.

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."

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

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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.

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.

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 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, 2.4.1,[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[....]

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[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.

[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.

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, 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

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[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).

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:

	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	5500	5000	500	500
Product 2	1800	2000	-200	0
Product 3	3300	3000	300	300
Product 4	4500	5000	-500	0
Product 5	2200	2000	200	200
TOTAL	17300	17000	300	1000

44. Based on the above figures, the overall, average rate of dumping is 5.88 percent (1000/17000). Moreover, the application of that dumping margin to the total import value (5.88

[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).

percent * 17000) would result in the collection of 1000 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 percent (300/17000). 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 percent * 17000) 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 percent (1000/10000).[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 (17300-17000) 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.

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 of the fact that the EC had recently terminated an investigation of the same products from a different mix of countries.[31]

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[30] The 10000 CU denominator is the aggregate value of the imports for which there were positive dumping duties.

[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.

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.

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,

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[32] See First Submission of India, paras 5.29 - 5.30.

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 bedlinens 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.

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.

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[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.

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 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.

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.

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.

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.

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[36] First Submission of India, paras. 6.28-6.53.
[37] First Submission of India, para. 6.22.

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.

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

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[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.

[42] First Submission of India, para. 6.26.

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

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 percent] 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% 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.

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

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[43] *See* First Submission of India at para. 4.94.
[44] First Submission of India at para. 4.95.

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 support 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.

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[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.

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 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

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[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 nonresponsive 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.

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 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]

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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.

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.

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 percent 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

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[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.

[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.

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]

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.

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.

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[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.

[63] First Submission of India at para. 4.47.

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 extends beyond supporting an injury

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[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).

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]

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

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[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.

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 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

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[76] *Imposition of Anti-dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway* ("Salmon Anti-dumping Duty"), ADP/124, adopted on 26 April 1994, BISD 41S/228; *Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway* ("Salmon Countervailing Duty") SCM/153, adopted on 28 April 1994, BISD 41S/576.

[77] *Salmon Anti-dumping* at paras. 498-501; *Salmon Countervailing Duty* at paras. 264-267.