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CHECK AGAINST DELIVERY

European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bedlinen from India

Oral Statement of the United States at the Third Party Session with the Panel

May 11, 2000

Introduction

1. Thank you, Mr. Chairman, and members of the Panel. My name is Bruce Hirsh. I am with USTR Geneva. With me today are Mark Barnett and Peter Kirchgraber of the Department of Commerce in Washington. It is a pleasure for us to appear before you today to present the views of the United States in this proceeding. The purpose of this oral statement is to highlight certain aspects of our written statement, in light of issues raised by other third parties, and to comment on new issues raised in those third party submissions. My colleague Mr. Barnett will begin our presentation with a discussion of dumping issues. I will then conclude with a discussion of injury and one other issue.

Constructed Value Profit

2. With respect to constructed value profit, as stated in our third party written submission, the United States disagrees with India's interpretation of Article 2.2.2(ii), because it would artificially limit the permissible range of data from which constructed value profit may be calculated, where no such limit exists in the Agreement. The United States would like to stress the following points.

3. India argues that Article 2.2.2(ii) – specifically the terms "weighted average," and the plural forms "amounts," and "exporters and producers" – expressly excludes the use of selling, general and administrative expenses (SG&A) and profit data from a single company. This argument is without merit.

4. With regard to the use of plural forms, such as "amounts" and "exporters and producers," it is common both in general usage, and in the particular context of the Anti-Dumping Agreement, that plural forms are understood to include both the singular and the plural. If plural terms were automatically read to exclude the singular, then, for example, a domestic industry composed of a single producer could never obtain relief from dumping. Such a result could not have been intended.

5. The United States concurs with the EC's view that Article 2.2.2(ii) does not require a minimum number of companies to be used in calculating profit and SG&A amounts. It does not forbid an investigating authority to use a single company as the basis of this calculation, nor does it require it to use more than one company.

6. The United States likewise concurs with the EC that Article 2.2.2(ii) – specifically, the phrase "actual amounts incurred and realized by other exporters or producers" – does not prohibit an investigating authority from excluding below-cost sales from constructed value calculations of profit.

7. Article 2.2.2(ii) contains no explicit requirement that sales not in the ordinary course of trade should be included in, or excluded from, these calculations. However, the concept of ordinary course of trade is integral to the very definition of dumping. Article 2.1 of the Agreement provides the basic definition, that a product is dumped when "the export price of the product exported from one country to another is less than the comparable price, **in the ordinary**

course of trade, for the like product when destined for consumption in the exporting country."

8. Consistent with this basic definition of dumping, when sales in the domestic market are in such low volumes that they do not permit a proper comparison, or, when there are no sales of the like product in the ordinary course of trade in the exporting country, Article 2.2 of the Agreement provides for the use of a constructed normal value. When below-cost sales have been made, Article 2.2.1 makes clear that investigating authorities are under no obligation to consider them in the determination of normal value, provided that certain conditions have been met. Thus, the type of situation in which an investigating authority may have to resort to constructed normal value is when all of a producer's or exporter's domestic market sales have been made below the cost of production.

9. Moreover, it is consistent with the overall operation of Article 2 of the Agreement to exclude the profit on sales not in the ordinary course of trade from the figures used pursuant to Article 2.2.2(ii). Indeed, excluding sales below cost avoids the creation of perverse incentives that otherwise would reward most those exporters and producers with the greatest amount of sales not in the ordinary course of trade. Such an unfair result could not have been intended.

10. The United States also respectfully disagrees with India's claim that Article 2.2.2 is clearly hierarchical in nature. While there is an explicit hierarchy as between the *chapeau* of Article 2.2.2 and the three alternative methods described under Article 2.2.2(i) through (iii), we do not agree that the Agreement contains a hierarchy or preference among the three alternative methods, based on the order in which they appear. It is permissible to infer from the presence of an explicit hierarchy between the *chapeau* and the three alternatives that follow, and from the absence of such a hierarchy among the three alternatives, that the drafters of the Agreement intended no such hierarchy to exist among Article 2.2.2(i), (ii), and (iii). Such an interpretation is

consistent with Article 31(1) of the *Vienna Convention*, which provides, *inter alia*, for a good faith interpretation of treaties in light of their object and purpose.

11. It also must be noted, in response to India's argument, that dumping is both a producer-specific and a product-specific determination; therefore, the *chapeau* of Article 2.2.2 expresses a clear preference for the use of actual data of the producer or exporter under investigation for sales of the like product in the ordinary course of trade. When the *chapeau* methodology cannot be applied, it is clear that any of the three alternatives that follow may be applied instead, whether it be producer-specific, as in 2.2.2(i), product-specific, as in 2.2.2(ii), or any other reasonable means, as in 2.2.2(iii). No hierarchy is intended or implied among Articles 2.2.2(i) through (iii).

12. For these reasons, the United States believes that India's interpretation of the constructed normal value profit provisions of Article 2.2.2(ii) should be rejected.

The Zeroing of Negative Differences Between Normal Value and Export Price

13. Turning now to the issue of zeroing negative differences between normal value and export price, as stated in the United States' submission, the Anti-Dumping Agreement does not prohibit the EC from zeroing such negative differences. In our written submission, we discussed this issue in some depth. Rather than repeat that detailed explanation, we would like to emphasize the single most important point in that discussion: the zeroing of negative differences between normal value and export price, about which India complains, takes place after the step in the calculation of dumping margins to which Articles 2.4 and 2.4.2 apply.

14. Article 2.4 provides for a fair comparison between export price and normal value. In particular, it contemplates that comparisons normally must be made on a level-of-trade basis, a product-specific basis and a time-period basis. Consequently, even though Article 2.4 uses singular terms such as "export price" and "normal value," the fair comparison requirement

necessitates that, depending upon the product subject to investigation, there may be as many as several thousand comparisons taking place – with each comparison, for example, representing a particular product configuration sold at a particular level of trade.

15. Article 2.4.2 requires that, in making comparisons between export price and normal value, each comparison shall be made either on a weighted-average-to-weighted-average basis or a transaction-to-transaction basis. In other words, in a given investigation, if there were multiple export price and normal value transactions of a particular product configuration at a particular level of trade, the comparison between them must be made either on a weight-average-to-weight-average basis or on a transaction-to-transaction basis; rather than comparing individual export price transactions to weighted-average normal values, as some administering authorities used to do.

16. That, however, is as far as Articles 2.4 and 2.4.2 go. They establish that an importing country is permitted to collect anti-dumping duties equivalent to the positive differences between export price and normal value on that product-specific, level-of-trade-specific basis. Those Articles, and the Anti-Dumping Agreement itself, do not address how an administering authority is to go about combining all of those product-specific, level-of-trade specific dumping levels into an overall anti-dumping duty rate. As we demonstrated in our written submission, the mathematical process of zeroing negative margins is simply a means by which an importing country may be certain to collect dumping duties equivalent to all of the positive differences between export price and normal value. The Anti-Dumping Agreement does not require that the importing country credit an importer for not dumping. To read such a requirement into the Agreement would effectively counter-act the explicit requirements regarding fair comparisons contained in Article 2.4.

The Prior, Terminated Investigation

17. With respect to India's argument regarding the prior, terminated investigation, the United States disagrees with India's claim that the EC was required to consider the termination of the earlier investigation into bedlinens prior to initiating the investigation at issue before this panel. Articles 5.2 and 5.3 of the Anti-Dumping Agreement discuss the basic requirements for an application for an investigation and the investigating authorities' evaluation of that application. The Agreement does not require the application to contain contrary evidence, nor are the investigating authorities obligated to weigh the evidence in the application against contrary evidence. To that end, the fact that a prior investigation involving a different mix of countries was terminated following the withdrawal of the complaint by the European producers does not appear to go to the accuracy or the adequacy of the evidence provided in the application for the current investigation.

Support by Associations

18. Next, as explained in our written submission, the United States disagrees with India's interpretation that Article 5.4 prevents an investigating authority from considering support for an application for relief from an association of domestic producers. Article 6.11 of the Anti-Dumping Agreement specifically provides that "a trade and business association a majority of the members of which produce the like product in the territory of the importing Member" qualifies as an interested party within the meaning of the Agreement. This recognition is important, particularly with respect to maintaining the ability of very fragmented industries, such as those producing various agricultural products, to exercise their right to seek relief under the Anti-

Dumping Agreement. Moreover, Article 6.2 of the Agreement provides that interested parties are entitled to a full opportunity to defend their interests in an anti-dumping investigation. Thus, without positing whether the EC's determination of industry support, as a factual matter, was consistent with the Agreement, the United States contends that the EC's consideration of the position of associations of EC producers in determining industry support was permissible under the Agreement.

Claims Relating to Article 15 Treatment

19. On another issue, the United States is of the view that Article 15 of the Agreement provides important procedural safeguards to developing countries when their essential interests are at stake, but 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.

20. In particular, the United States respectfully differs with India about the nature of the second sentence of Article 15. In the view of the United States, the second sentence imposes a procedural obligation to "explore" the "[p]ossibilities of constructive remedies provided for by this Agreement..." The word "explore" cannot fairly be read to imply an obligation to reach a particular substantive outcome; it merely requires consideration of these possibilities. Construing a nearly identical provision of the Tokyo Round Anti-dumping Code, the Panel in *Cotton Yarn From Brazil* reached the same conclusion.

21. The United States likewise disagrees that the second sentence of Article 15 required the EC to explore the possibilities of constructive remedies prior to its imposition of provisional anti-dumping duties. We also reject India's argument regarding the timing for the exploration of price undertakings. Article 8.2 explicitly provides that price undertakings shall not be sought or

accepted unless the investigating authority has made a preliminary determination of dumping and injury caused by such dumping. This more specific language of Article 8.2, along with the Agreement's recognition of the distinction between provisional duties and the application of anti-dumping duties, makes clear that there is no obligation that the exploration of constructive remedies occur before the imposition of provisional measures.

22. In sum, the United States believes that the EC's interpretation of Article 15 was permissible, and should be sustained.

Injury Issues

23. We turn now to highlighting certain points made by the United States on material injury. Article 6.10 of the Anti-Dumping Agreement permits investigating authorities, in certain circumstances, to make dumping determinations and to calculate dumping margins on the basis of a limited examination of foreign producers/exporters and products either by sampling or by examining the largest percentage of the volume of exports which can reasonably be investigated. India, Egypt and Japan suggest that when investigating authorities use either of these methods to assess dumping, it must also assess the effects of dumped imports on the domestic industry, by considering only imports that have specifically been found to have been dumped. The United States disagrees.

24. Such a requirement would defeat the purpose of the limited examination for which Article 6.10 provides. The purpose of this Article is to permit authorities to apply the results of such a limited examination to non-examined foreign producers/exporters or products. Further, Article 2.4 of the Agreement permits investigating authorities to calculate dumping margins by comparing weighted-average-to-weighted-average figures. India's approach would render this

provision a nullity; the importing Member would still have to perform a transaction-to-transaction comparison to know whether each import was dumped.

25. The EC's use of *all* imports from the subject countries to conduct its injury analysis in this investigation was consistent with Article 3 of the Anti-Dumping Agreement. If the reading asserted by India were correct, then an importing Member would not be permitted to consider for injury purposes the volume and price effects of any imports that fall outside the typical twelve-month period used by most investigating authorities as the period of investigation for determining dumping. Just last week, on May 5, 2000, the WTO Committee on Anti-Dumping Practices adopted the Draft Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations, which states that the period of data collection for investigations normally should be twelve months for dumping and at least three years for injury. All parties here today, including India, were active participants in the consensus-building process which led to the adoption of the Draft Recommendation. In our written submission, the United States explained why it is usually necessary to examine a period of at least three years for injury purposes. In particular, we noted that Article 3 contemplates a comparative evaluation of the import volumes and prices of the dumped imports over time and of the relevant Article 3.4 industry factors. Thus, Article 3.2 explicitly requires the investigating authority to consider whether there has been a significant increase in the absolute volume or market share of dumped imports, and whether there has been significant price undercutting by the dumped imports or whether the effect of the dumped imports is to depress or suppress prices to a significant degree. In order to determine whether there have been significant volume increases or significant price effects, the investigating authority must look at the volumes and prices for both the imports and the domestic like product over a period of several years.

26. Thus, the injury investigation, unlike the dumping investigation, cannot focus on a relatively short period of time. In order to consider whether there have been significant volume or price effects, it usually will be necessary to compare the volumes and prices of the imported products and any changes in those volumes or prices to the volumes, prices, and any changes for the domestic product. Further, under Articles 3.4 and 3.5, an assessment of the impact of dumped imports on the domestic industry inevitably requires that the investigating authority conduct a year-to-year comparative analysis of the factors bearing on the state of the industry. The language of Article 3.4 is explicit on this point in at least one respect, that is, that the factors to be considered include "actual and potential declines in sales, profits, output, market share, productivity, return on investments, or utilization of capacity."

27. India, Egypt and Japan fail to explain how their interpretation would be applied in making a threat determination under Article 3.7. That article allows the investigating authority to make an affirmative threat determination where a totality of the factors lead to the conclusion that "further dumped exports are imminent." Among the factors are the exporter's available capacity and imminent capacity increases, which indicate "the likelihood of substantially increased dumped imports." If the investigating authority must segregate dumped and non-dumped imports from the same exporter, how is the investigating authority to guess whether the exporter is likely to devote available or increased capacity to dumped exports or to non-dumped exports?

28. The approach suggested by India, Egypt and Japan would require the importing Member to make a segregated injury analysis for each import from each company found to be dumping. First, the importing Member would be required to trace each import back to production and exportation and then follow it through entry into and sale within the importing Member in order to evaluate the volume and price effects and impact on the domestic industry. This would create

any number of impracticalities. For example, the purchaser of imported product would be unlikely to know whether the particular import was dumped or not. Without this information, the investigating authority would be unable to compare the purchase prices for the dumped imports, versus those for non-dumped imports, with those for the domestic product. In turn, the investigating authority would be hindered in its ability to determine the price effects of the dumped imports.

29. Moreover, the interpretation suggested by India, Egypt and Japan is inconsistent with Article 3.3. That article provides that as long as certain conditions are met, "where imports from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports." This provision clarifies that all imports from the subject countries may be considered in the injury determination. Japan argues that, while the discretion to cumulate applies to all imports from the subject countries, investigating authorities must make their injury determinations based on segregated cumulative data covering solely dumped transactions. That, however, is not what Article 3.3 states. Rather, Article 3.3 explicitly states that the investigating authority may cumulatively assess the effects of "such" (i.e., all) imports from the subject countries.

30. If the interpretation urged by India, Egypt and Japan were correct, that would mean the drafters of Article 3 intentionally created an anomaly: in multi-country investigations, investigating authorities could assess the effects of all imports from the subject country, whereas, in single-country investigations, investigating authorities would be required to make an import-by-import dumping determination and then could consider the effects only of imports specifically found to have been dumped.

31. Contrary to Egypt's suggestion in paragraph 22 of its submission, application of the rules

of interpretation set forth in Article 31 of the Vienna Convention supports the EC's interpretation of Article 3 of the Anti-Dumping Agreement. The EC's interpretation gives meaning to all the terms of the Article in their context and in the light of the object and purpose of the Anti-Dumping Agreement.

32. Further with respect to Article 3, the United States wishes to address one additional argument summarily made by Egypt. At paragraph 34 of its written submission, Egypt states that the causality requirement can be satisfied under the Anti-Dumping Agreement when two conditions are proved: (1) "that the dumping through its effects caused injury to the domestic industry producing a like product;" and (2) "that the injury to the domestic industry is not attributed to any other factor." The United States agrees with the first condition stated by the Egyptians, but does not agree with the second condition. Article 3.5 of the Anti-Dumping Agreement requires investigating authorities to "examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these factors must not be attributed to the dumped imports." Thus, the Agreement prohibits investigating authorities from attributing to the dumped imports the injuries caused by factors other than the imports. However, it plainly contains no requirement for a finding that the injury to the domestic industry is not attributed to any other factor. Such a requirement would mean that the dumped imports must be the sole cause of injury to the domestic industry – a requirement that is patently absent from the Agreement. Indeed, it is a basic premise of the Anti-Dumping Agreement that dumping need not be the exclusive cause of injury.

33. Egypt, at paragraph 35 of its submission, objects to the fact that the EC considered other factors after first determining that there was a causal link between the dumped imports and the material injury found. In the United States' view, investigating authorities may consider the

matters required by the Agreement in any order they choose, so long as they set forth in sufficient detail and with sufficient clarity to ascertain their reasoning, the findings and conclusions required by Article 12.2.1.

34. Turning to Article 3.5 of the Anti-Dumping Agreement, the United States has addressed at length in its written submission its views concerning the EC's definition of the domestic industry. To summarize, the United States believes that the EC acted inconsistently with Articles 3, 4, 5 and 6 of the Agreement by limiting the domestic industry to those producers who supported the application for an investigation. The Agreement in no way indicates that the group of producers sufficiently representative under Article 5.4 constitutes the "domestic industry" defined in Article 4.1 as the producers as a whole of the like product. The EC's practice reflected in this case will obviously skew the data in favor of the domestic industry in most cases. Yet the fact that the EC violated the Agreement did not necessarily mean that the EC could not have found material injury in a lawful manner. If the EC had properly defined the industry in this case, it would have included in the industry those producers who went out of business just prior to the initiation of the investigation, and whose data the EC in fact relied on to support the affirmative injury finding.

Anti-dumping Measures Not Exception (Japan's Submission)

35. Finally, the United States disagrees with Japan's characterization, in their third party submission, of anti-dumping measures as an exception to free-trade principles of the WTO. Quite to the contrary, the right conferred by Article VI and the Anti-Dumping Agreement to impose anti-dumping measures forms part of the carefully crafted balance of rights and obligations under the WTO.

36. The Anti-Dumping Agreement embodies positive rules that are part of the WTO balance of rights and obligations. They are not an exception that must be proved or which is subject to any special scrutiny. Similar arguments have been recognized by WTO panels and the Appellate Body. For example, in Wool Shirts and Blouses from India (WT/DS33/AB/R), the Appellate Body recognized (at page 16) that it must respect the balance of rights and obligations embodied in the transitional safeguard mechanism of Article 6 of the Agreement on Textiles and Clothing. It rejected the argument that the positive obligations in the transitional safeguard mechanism were "exceptions" imposing the burden of proof on the party asserting their use. In doing so, the Appellate Body distinguished between affirmative defenses, that is, limited exceptions from obligations under certain other provisions of the GATT 1994, and positive rules that establish obligations in and of themselves.

37. In summary, anti-dumping measures are subject to the same rules of interpretation as any other provision of the WTO Agreements. Therefore, the Panel should decline to endorse Japan's assertion that anti-dumping measures constitute an exception to free trade principles or, by implication, require the application of a heightened level of scrutiny.

Conclusion

38. Thank you for the opportunity to present our views. We will be happy to receive any questions from the Panel or the parties.