

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

Recourse to Article 21.5 of the DSU by India

*Report of the Panel*

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

## I. INTRODUCTION

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

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

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

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

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

Chairman: Mr. Dariusz ROSATI  
Members : Mr. Paul O' CONNOR  
              Mr. Virachai PLASAI

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

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

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<sup>1</sup> WT/DS141/12.

<sup>2</sup> WT/DS141/13/Rev.1.

<sup>3</sup> WT/DS141/14.

## II. FACTUAL ASPECTS

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

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

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

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

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

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

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

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

<sup>6</sup> WT/DS141/9.

<sup>7</sup> WT/DS141/10.

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

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

<sup>10</sup> Regulation 1644/2001.

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

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

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

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

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

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<sup>11</sup> Exhibit-India-RW-21.

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

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

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

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

<sup>16</sup> WT/DS141/12 .

<sup>17</sup> WT/DS141/13.

<sup>18</sup> WT/DS141/13/Rev.1.

### III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

#### A. INDIA

3.1 India requests that the Panel make the following findings:

- (a) By failing to withdraw the measures found to be inconsistent with the AD Agreement and to bring its measures into conformity with its obligations under the AD Agreement within the mutually agreed reasonable period of time, the EC failed to comply with the DSB recommendations and rulings in this dispute; and
- (b) The redetermination, as amended, and the subsequent actions, as identified above, are inconsistent with the following provisions of the AD Agreement and the DSU:
  - Article 2.2.2(ii) of the AD Agreement by not properly calculating a "weighted average" of amounts for SG&A and profits;
  - Articles 3.1 and 3.3 of the AD Agreement by cumulating Indian imports with those from a country for which no dumping was found;
  - Article 5.7 of the AD Agreement by not simultaneously considering the evidence of dumping and injury;
  - Articles 3.1 and 3.2 of the AD Agreement by not properly excluding the portion of non-dumped imports from the total volume of Indian imports;
  - Articles 3.1 and 3.4 of the AD Agreement by reciting factors without even collecting them and by failing to enter into an overall reconsideration and analysis of the information in light of the requirements of the AD Agreement;
  - Article 3.5 of the AD Agreement by incorrectly establishing a causal relationship between dumped imports and injury and by disregarding the non-attribution language;
  - Article 15 of the AD Agreement by not exploring any remedy, constructive or otherwise; and
  - Article 21.2 of the DSU by failing to pay particular attention to this matter affecting India; and which already had formed the subject of dispute settlement.

#### B. THE EUROPEAN COMMUNITIES

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

- (a) Regulations 160/2002 and 696/2002 are not measures "taken to comply" with the DSB's rulings and recommendations within the meaning of Article 21.5 of the DSU and therefore, are not within the Panel's jurisdiction;
- (b) the relevant date for assessing the consistency of the measures "taken to comply" with the covered agreements is the date of establishment of the Panel;
- (c) certain claims raised by India in its first submission with respect to findings set out in the original measure which were not challenged by India before the original Panel, and which have not been modified by the measures at issue in this dispute, are not properly before this Panel; and
- (d) the following claims raised by India in its first submission were not stated in its request for establishment of the Panel, contrary to the requirement imposed by Article 6.2 of the DSU, and are, therefore, not within the Panel's terms of reference:

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

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

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

#### **IV. ARGUMENTS OF THE PARTIES**

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

#### **V. ARGUMENTS OF THE THIRD PARTIES**

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

#### **VI. FINDINGS**

##### **A. GENERAL ISSUES**

##### **1. Standard of Review**

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

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

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

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

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

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

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

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

## 2. Burden of Proof

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

### B. REQUEST FOR PRELIMINARY RULINGS

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

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

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

<sup>21</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, at p. 14.

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

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

(a) Arguments of the parties

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

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

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

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

<sup>24</sup> Regulation 160/2002, at para.13.

<sup>25</sup> *Id.*, at Article 2.

<sup>26</sup> *Id.*, at Article 1.1.

<sup>27</sup> *Id.*, at Article 1.2.

<sup>28</sup> Notice of Expiry, published at OJ C65/12, 14 March 2002. Exhibit-India-RW-24.

<sup>29</sup> Regulation 696/2002, at Article 1.

<sup>30</sup> *Id.*

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

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

(b) Evaluation by the Panel

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

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

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

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

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

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

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

<sup>32</sup> *Id.*, para. 7.10, subparagraph 22

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

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

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

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

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

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

<sup>35</sup> *Australia - Salmon (Article 21.5 – Canada)*, at para. 7.10, subparagraph 22.

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

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

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

comply" and its consistency with the AD Agreement, or lack thereof, will not be considered in this proceeding.<sup>39</sup>

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

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

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

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

### (a) Arguments of the parties

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

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

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

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

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

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

(b) Arguments of third parties

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

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

(c) Evaluation by the Panel

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

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

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

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

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

(a) Arguments of the parties

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

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

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

<sup>44</sup> India's First Written Submission to the original Panel, paras. 4.217 - 4.220, reproduced in original Panel report, p. 221.

<sup>45</sup> Original Panel report, *EC - Bed Linen*, at para. 6.142.

<sup>46</sup> India's FWS, at para. 250.

<sup>47</sup> *Id.*, at para. 256.

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

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

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

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

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

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

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<sup>48</sup> India's First Written Submission to the original Panel, paras. 4.56 - 4.76, reproduced in original Panel report, pp. 170 - 177.

<sup>49</sup> India's FWS, at paras. 166 - 171.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*, at paras. 180 - 182.

<sup>53</sup> *Id.*, at paras. 172 - 179.

<sup>54</sup> *Id.*, at paras. 201 - 204.

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

<sup>56</sup> India's SWS, at para. 39.

(b) Evaluation by the Panel

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

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

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

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

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

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

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

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

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

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

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

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<sup>58</sup> See Articles 3.2 - 3.3 of the DSU.

<sup>59</sup> Original Panel Report, *EC-Bed Linen*, at para. 6.144.

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

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

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

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

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

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<sup>61</sup> India's answer to the Panel's question 2 at para. 5, Annex E-1.

<sup>62</sup> India's answer to the Panel's question 2 at para. 6, Annex E-1.

<sup>63</sup> See *Australia - Salmon (Article 21.5 – Canada)* at para. 7.10, subparagraph 9.

<sup>64</sup> Articles 21.3 and 3.7 of the DSU.

<sup>65</sup> Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by Ecuador ("EC – Bananas III (Article 21.5 – Ecuador)"), WT/DS27/RW/EQU, 12 April 1999, DSR 1999:II, 803, at paras. 6.8 - 6.10*

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

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

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

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

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

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

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

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

<sup>67</sup> Panel Report, *Australia – Salmon (Article 21.5 – Canada)* at para. 7.10, subparagraph 9 (emphasis in original).

<sup>68</sup> Panel Report, *Australia – Salmon (Article 21.5 – Canada)* at para. 7.10 subparagraph 14 .

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

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

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

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

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

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

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<sup>69</sup> Appellate Body Report, *United States – Shrimp (Article 21.5 - Malaysia)*".

<sup>70</sup> *Id.*, at para. 79.

<sup>71</sup> *Id.*, at para. 89.

<sup>72</sup> *Id.*, at para. 97.

<sup>73</sup> We find support for our view in the finding of the Appellate Body in *Japan – Alcoholic Beverages II*: "Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, **except with respect to resolving the particular dispute between the parties to that dispute**".

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

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

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

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

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

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

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

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

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

##### **(a) Arguments of the parties**

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

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<sup>74</sup> Appellate Body Report, *Japan – Alcoholic Beverages II*, at p. 14.

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

<sup>76</sup> Original Panel Report, *EC - Bed Linen*, at para. 6.169.

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

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

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

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

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

(b) Evaluation by the Panel

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

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

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<sup>77</sup> First Written Submission of the European Communities (hereinafter "EC FWS"), at para. 54, Annex A-2.

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

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

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

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

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

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

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

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

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

<sup>80</sup> India's SWS at paras. 42, 46, and India's Closing Statement at para. 27.

<sup>81</sup> India's SWS at paras. 47 - 50, and India's Closing Statement at para. 27.

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

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

### C. CLAIMS AND ARGUMENTS

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

##### (a) Factual background

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

##### (b) Arguments of the parties

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

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<sup>82</sup> Regulation 1644/2001, at paras. 5 – 14.

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

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

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

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

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

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

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

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

(c) Arguments of third parties

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

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

(d) Evaluation by the Panel

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

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

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

Article 31 of the Vienna Convention goes on to provide:

"2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties".<sup>86</sup>

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

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<sup>84</sup> Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* ("*United States – Gasoline*"), WT/DS2/AB/R, adopted 20 May 1996, at p. 17 (footnote omitted).

<sup>85</sup> (1969) 8 International Legal Materials 679.

<sup>86</sup> (1969) 8 International Legal Materials 679.

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

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

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

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

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

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

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

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

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

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

<sup>88</sup> India's answer to the Panel's question 12, Annex –E-1.

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

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

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

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

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

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

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

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

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

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

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

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

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

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<sup>92</sup> India's answer to the Panel's question 4, Annex E-1.

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

<sup>94</sup> Article 3.2 of the DSU.

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

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

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

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

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

### (a) Factual background

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

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<sup>95</sup> India's FWS at paragraph 65.

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

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

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

<sup>99</sup> Appellate Body Report, *EC-Bed Linen*..

<sup>100</sup> Original Panel Report, *EC-Bed Linen*..

requested the European Communities to bring its measure into conformity with its obligations under the AD Agreement.<sup>101</sup>

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

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

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

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

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

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<sup>101</sup> WT/DS141/9.

<sup>102</sup> Regulation 1515/2001.

<sup>103</sup> Regulation 1644/2001, at para.72 and Article 2.

<sup>104</sup> *Id.* at paras. 75 and 78 and Article 2.

<sup>105</sup> Exhibit-India-RW-21.

<sup>106</sup> Notice of initiation of a partial interim review of the anti-dumping measures applicable to imports of cotton-type bed linen originating in India, published in Official Journal of the European Communities of 13 February 2002, C-series, No 39. Exhibit-India-RW-23.

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

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

(b) Arguments of the parties

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

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

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

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

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<sup>107</sup> Regulation 160/2002.

<sup>108</sup> *Id.* at paras. 14, 22, 25, and Article 1.

<sup>109</sup> Notice of the expiry of certain anti-dumping measures, published in Official Journal of the European Communities of 14 March 2002, C-series, No 65. Exhibit-India-RW-24.

<sup>110</sup> Regulation 696/2002.

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

(c) Arguments of third parties

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

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

(d) Evaluation by the Panel

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

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

<sup>112</sup> India's FWS, at paras. 73 - 84.

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

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

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

6.111 Article 5.7 provides:

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

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

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

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

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

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

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

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

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

#### **(a) Factual background**

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

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

<sup>115</sup> India's SWS at para. 117.

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

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

(b) Arguments of the Parties

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

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

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

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

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

<sup>118</sup> Original Panel Report, *EC – Bed Linen*, at para. 6.138.

<sup>119</sup> New Shorter Oxford Dictionary, Clarendon Press, 1993.

<sup>120</sup> *Id.*

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

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

(c) Arguments of third parties

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

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

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<sup>121</sup> Original Panel Report, *EC – Bed Linen*, at paras. 6.121–141.

<sup>122</sup> *Id.*, at para. 6.136.

<sup>123</sup> *Id.*, at paras. 6.136 and 6.139.

<sup>124</sup> The United States clarified its view on the question of whether dumping is determined for countries. *See id.*, at para. 6.131 and note 50. The United States agrees with the EC that dumping is determined for countries. In the original panel proceedings in this dispute, the Panel asked the third parties to comment on – *whether, in their view, investigating authorities are obligated to exclude, from their examination of volume and price effects, imports attributable to companies for which a negative determination of dumping has been made based on the determination of a zero or de minimis margin of dumping.*

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

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

(d) Evaluation by the Panel

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

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

3.2 With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member...".

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:

(i) the weighted average margin of dumping established with respect to the selected exporters or producers or,

(ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined,

provided that the authorities shall disregard for the purpose of this paragraph any zero and *de minimis* margins and margins established under the circumstances referred to in paragraph 8 of Article 6. The authorities shall apply individual duties or normal values to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation, as provided for in subparagraph 10.2 of Article 6".

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

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

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

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

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

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

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

"Attempting to segregate individual transactions as to whether they were "dumped" or not, even assuming it could be done, would leave investigating authorities in a quandary in cases in which the dumping investigation is undertaken for a sample of companies or products. Such sampling is specifically provided for in the AD Agreement, yet it would not be possible, in such cases, accurately to determine the volume of imports attributable to "dumped" transactions.<sup>53</sup>

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<sup>53</sup> India's argument suggests that the proportion of imports attributable to dumped transactions for one producer or country could be applied to determine the volume of dumped imports for a different producer or country. We do not consider that such a practice would satisfy the general requirements of the AD Agreement for consideration of positive evidence and objective decision-making".<sup>128</sup>

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

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

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

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<sup>128</sup> Original Panel Report, *EC - Bed Linen*, at para. 6.140.

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

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

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

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

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

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

##### **(a) Factual background**

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

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<sup>129</sup> India's answers to the Panel's question 6(D), Annex E-1.

(b) Arguments of the parties

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

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

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

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

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

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

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<sup>130</sup> Original Panel Report, *EC - Bed Linen*, at para. 6.167.

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

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

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

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

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

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

(c) Arguments of third parties

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

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

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<sup>132</sup> Original Panel Report, *EC - Bed Linen*, at para. 6.167.

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

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

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

(d) Evaluation by the Panel

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

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

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

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<sup>133</sup> *Id.*, at para. 6.155 (emphasis added).

<sup>134</sup> *Id.*, at para. 6.168.

<sup>135</sup> *Id.*

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

6.160 Article 3.4 of the AD Agreement provides that,

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

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

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

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

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<sup>136</sup> Appellate Body Report, *US - Hot-Rolled Steel*, at para. 192.

<sup>137</sup> *Id.*, at para. 193.

<sup>138</sup> New Shorter Oxford English Dictionary, Clarendon Press, 1993..

<sup>139</sup> Merriam-Webster's Collegiate Dictionary online: <http://www.m-w.com>.

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

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

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

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

(ii) *Alleged failure to collect data*

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

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<sup>142</sup> Original Panel Report, *EC–Bed Linen* para. 6.162.

<sup>143</sup> *Id.*, at para. 6.168.

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

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

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

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

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

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

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

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

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

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

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

<sup>147</sup> India's answer to the Panel's question 8, Annex E-1.

<sup>148</sup> Regulation 1644/2001, at para. 28.

<sup>149</sup> *Id.*, at para. 29.

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

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

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

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

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

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<sup>150</sup> India's FWS at para. 164.

<sup>151</sup> Original Panel Report, *EC - Bed Linen*, at para. 6.47.

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

*Sales, market share, prices*

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

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

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

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

<sup>154</sup> E.g., Regulation 1069/97 at paras. 69, 72, 75.

### *Profits*

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

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

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

### *Output*

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

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<sup>155</sup> India's FWS at para. 173.

<sup>156</sup> *Id.* at para. 174.

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

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

<sup>159</sup> Regulation 1069/97, at para.89.

<sup>160</sup> *Id.*, at para. 81.

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

#### *Productivity*

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

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

#### *Return on investments*

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

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

#### *Capacity utilisation*

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

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

<sup>162</sup> Regulation 1069/97 at para.81.

<sup>163</sup> Regulation 1644/2001, at para. 32.

<sup>164</sup> *Id.*, at para. 31.

<sup>165</sup> *Id.*, at para. 31.

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

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

<sup>168</sup> Regulation 1644/2001, at para. 39.

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

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

#### *Factors affecting domestic prices*

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

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

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

#### *The magnitude of the margin of dumping*

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

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

<sup>170</sup> Regulation 1644/2001, at para. 28.

<sup>171</sup> *Id.*, at para. 44.

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

<sup>173</sup> Regulation 1644/2001, at para. 45. See also Regulation 1069/97, at para. 88.

<sup>174</sup> *Id.*, at para. 43.

<sup>175</sup> *Id.*

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

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

#### *Cash flow*

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

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

#### *Inventories*

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

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

#### *Employment*

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

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<sup>176</sup> *Id.*, at para. 29.

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

<sup>178</sup> India's FWS at para. 201.

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

#### *Wages*

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

#### *Growth*

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

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

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

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

#### *Ability to raise capital*

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

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<sup>179</sup> Exhibit-India-RW-5, at table 1.

<sup>180</sup> Exhibit-India-RW-18, at para. 31.

<sup>181</sup> Regulation 1644/2001, at para. 33.

<sup>182</sup> Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear ("Argentina – Footwear (EC)")*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515, at para. 129.

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

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

(iv) *Facts allegedly ignored*

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

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

(v) *Facts allegedly changed without explanation*

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

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

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<sup>183</sup> Regulation 1069/97, at para. 54.

<sup>184</sup> India's SWS at 187. See Regulation 1069/97, at para. 85, and Regulation 1644/2001, at para. 35.

(vi) *Facts allegedly misrepresented*

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

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

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

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

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

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

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

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<sup>185</sup> Regulation 1644/2001, at para. 19

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

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

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

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

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

### (a) Arguments of the parties

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

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

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<sup>186</sup> *Id.*, at para. 51.

<sup>187</sup> Regulation 1069/97, at para. 103.

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

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

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

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

(b) Arguments of third parties

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

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

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

(c) Evaluation by the Panel

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

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

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

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

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

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

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

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

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

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<sup>189</sup> Regulation 1644/2001, at para. 22.

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

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

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

(d) Additional finding in the alternative

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

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

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

"222. This provision requires investigating authorities, as part of their causation analysis, first, to examine *all* "known factors", "other than dumped imports", which are causing injury to the domestic industry "at the same time" as dumped imports. Second, investigating authorities must ensure that injuries which are caused to the domestic industry by known factors, other than dumped imports, are not "*attributed* to the dumped imports." (emphasis in original)

223. The non-attribution language in Article 3.5 of the *Anti-Dumping Agreement* applies solely in situations where dumped imports and other known factors are causing injury to the domestic industry *at the same time*. In order that investigating authorities, applying Article 3.5, are able to ensure that the injurious effects of the other known factors are not "attributed" to dumped imports, they must appropriately assess the injurious effects of those other factors. Logically, such an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports. If the injurious effects of the dumped imports are not appropriately separated and distinguished from the injurious effects of the other factors, the authorities will be unable to conclude that the injury they ascribe to dumped imports is actually caused by those imports, rather than by the other factors. Thus, in the absence of such separation and distinction of the different injurious effects, the investigating authorities would have no rational basis to conclude that the dumped imports are indeed causing the injury which, under the *Anti-Dumping Agreement*, justifies the imposition of anti-dumping duties.

224. We emphasize that the particular methods and approaches by which WTO Members choose to carry out the process of separating and distinguishing the

injurious effects of dumped imports from the injurious effects of the other known causal factors are not prescribed by the *Anti-Dumping Agreement*. What the Agreement requires is simply that the obligations in Article 3.5 be respected when a determination of injury is made.

228. ... If the injurious effects of the dumped imports and the other known factors remain lumped together and indistinguishable, there is simply no means of knowing whether injury ascribed to dumped imports was, in reality, caused by other factors. Article 3.5, therefore, requires investigating authorities to undertake the process of assessing appropriately, and separating and distinguishing, the injurious effects of dumped imports from those of other known causal factors".<sup>192</sup>

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

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

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

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

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<sup>192</sup> Appellate Body Report, *US – Hot-Rolled Steel*, at paras. 222

<sup>193</sup> Regulation 1644/2001, at para. 69.

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

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

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

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

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

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

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<sup>194</sup> Regulation 1069/97 at para. 103. The EC confirmed this finding in Regulation 1644/2001, at para. 60.

<sup>195</sup> Regulation 1644/2001, at para. 44, Regulation 1069/97 at para. 86.

<sup>196</sup> Original Panel Report, *EC – Bed Linen*, at para. 6.182.

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

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

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

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

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

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

### **(a) Factual background**

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

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<sup>197</sup> Regulation 1644/2001, at para. 50.

<sup>198</sup> Regulation 1069/97, at para. 86.

<sup>199</sup> EC's answer to the Panel's question 22 at paras. 30 - 31, Annex E-2. As we have noted, the EC attributed this increase to the change in the product mix sold to higher value niche products.

<sup>200</sup> Cf. Regulation 1644/2001, at paras. 50 and 51.

<sup>201</sup> Regulation 1515/2001 .

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

(b) Arguments of the parties

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

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

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

(c) Evaluation by the Panel

6.252 Article 15 provides:

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

6.253 We turn our attention to the text of the second sentence of Article 15, which is the basis of India's claim. This provision was specifically addressed by the Panel in the original dispute, which

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<sup>202</sup> Regulation 1644/2001, at para. 72 and Article 2.

<sup>203</sup> *Id.*, at paras. 75 and 78 and Article 2.

<sup>204</sup> Exhibit-India-RW-21.

<sup>205</sup> Notice of initiation of a partial interim review of the anti-dumping measures applicable to imports of cotton-type bed linen originating in India, published in Official Journal of the European Communities of 13 February 2002, C-series, No 39. Exhibit-India-RW-23.

concluded that Article 15 required a Member to actively consider, with an open mind, the possibility of applying a constructive remedy provided for under the AD Agreement, before it applied a final anti-dumping measure that would affect the essential interests of a developing country.<sup>206</sup>

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

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

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

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

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

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

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<sup>206</sup> See Original Panel Report, *EC - Bed Linen*, at para. 6.233.

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

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

<sup>209</sup> New Shorter Oxford English Dictionary, Clarendon Press, 1993.

<sup>210</sup> India's SWS at para. 228.

imports more expensive, in discouraging imports because they become more expensive, or in preventing imports altogether".<sup>211</sup>

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

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

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

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

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

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

<sup>212</sup> EC Oral Statement at para. 118, Annex D-3.

<sup>213</sup> We note that questions of municipal law are treated as matters of fact.

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

(a) Arguments of the parties

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

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

(b) Arguments of third parties

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

(c) Evaluation by the Panel

6.265 Article 21.2 of the DSU provides that:

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

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

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

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<sup>214</sup> India's SWS at para. 248.

<sup>215</sup> India's SWS at para. 250.

<sup>216</sup> India's answer to the Panel's question 31, Annex E-1.

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

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

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

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

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

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

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

<sup>220</sup> *Id.* at para. 24.

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

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

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

## **VII. CONCLUSIONS AND RECOMMENDATION**

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

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

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