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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY INDIA

AB-2003-1

Report of the Appellate Body

I. Introduction 1

II. Arguments of the Participants and the Third Participants 6

A. *Claims of Error by India – Appellant* 6

1. Article 21.5 of the DSU 6
2. Paragraphs 1 and 2 of Article 3 of the *Anti-Dumping Agreement* 7
3. Article 17.6 of the *Anti-Dumping Agreement* and Article 11 of the DSU 10
4. Article 3.5 of the *Anti-Dumping Agreement* 11

B. *Arguments of the European Communities – Appellee* 12

1. Article 21.5 of the DSU 12
2. Paragraphs 1 and 2 of Article 3 of the *Anti-Dumping Agreement* 14
3. Article 17.6 of the *Anti-Dumping Agreement* and Article 11 of the DSU 17
4. Article 3.5 of the *Anti-Dumping Agreement* 18

C. *Arguments of the Third Participants* 19

1. Japan 19
2. United States 20

III. Issues Raised in this Appeal 22

IV. Article 21.5 of the DSU 22

A. *Introduction* 22

B. *Analysis* 26

V. Paragraphs 1 and 2 of Article 3 of the *Anti-Dumping Agreement* 37

A. *Introduction* 37

B. *Analysis* 40

VI. Article 17.6 of the *Anti-Dumping Agreement* and Article 11 of the DSU 59

A. *Introduction* 59

B. *Analysis* 63

VII. Findings and Conclusions 73

ANNEX 1: Notification of an Appeal by India under paragraph 4 of Article 16 of the Understanding on Rules and Procedures Governing the Settlement of Disputes

TABLE OF CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
Australia – Automotive Leather II (Article 21.5 – US)	Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by the United States*, WT/DS126/RW and Corr.1, adopted 11 February 2000, DSR 2000:III, 1189
Australia – Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327
Australia – Salmon (Article 21.5 – Canada)	Panel Report, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada*, WT/DS18/RW, adopted 20 March 2000, DSR 2000:IV, 2035
Canada – Aircraft (Article 21.5 – Brazil)	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/AB/RW, adopted 4 August 2000, DSR 2000:IX, 4299
Chile – Price Band System	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002
EC – Bananas III (Article 21.5 – Ecuador)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/RW/ECU, 12 April 1999, DSR 1999:II, 803
EC – Bed Linen	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001 Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted 12 March 2001, as modified by the Appellate Body Report, WT/DS141/AB/R
EC – Bed Linen (Article 21.5 – India)	Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/RW, 29 November 2002
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
EC – Sardines	Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002
Guatemala – Cement I	Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, 3767
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97
Korea – Alcoholic Beverages	Appellate Body Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I, 3
Mexico – Corn Syrup (Article 21.5 – US)	Appellate Body 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*, WT/DS132/AB/RW, adopted 21 November 2001
Thailand – H-Beams	Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001

Short Title	Full Case Title and Citation
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002
US – Cotton Yarn	Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, adopted 5 November 2001
US – FSC	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, 1619
US – FSC (Article 21.5 – EC)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001
US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001
US – Lead and Bismuth II	Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, adopted 7 June 2000, DSR 2000:V, 2601
US – Offset Act (Byrd Amendment)	Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003
US – Shrimp (Article 21.5 – Malaysia)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted 21 November 2001
US – Wheat Gluten	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323

WORLD TRADE ORGANIZATION
APPELLATE BODY

European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India
Recourse to Article 21.5 of the DSU by India

India, *Appellant*
European Communities, *Appellee*

Japan, *Third Participant*
Korea, *Third Participant*
United States, *Third Participant*

AB-2003-1

Present:

Abi-Saab, Presiding Member
Bacchus, Member
Taniguchi, Member

I. Introduction

1. India appeals certain issues of law and legal interpretations in the Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India* (the "Panel Report").[1] The Panel was established to consider a complaint by India with respect to the consistency with the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*") and the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") of the measures taken by the European Communities to comply with the recommendations and rulings of the Dispute Settlement Body (the "DSB") in *EC – Bed Linen*.[2]

2. The original panel found that Council Regulation (EC) No 2398/97 of 28 November 1997[3], imposing definitive anti-dumping duties on imports of cotton-type bed linen from India, is inconsistent with Articles 2.4.2, 3.4, and 15 of the *Anti-Dumping Agreement*.[4] India and the European Communities appealed certain issues of law and legal interpretations developed by the original panel. The Appellate Body upheld the original panel's finding that "the practice of 'zeroing' when establishing 'the existence of margins of dumping', as applied by the European Communities in the anti-dumping investigation at issue" is inconsistent with Article 2.4.2 of the *Anti-Dumping*

[1]WT/DS141/RW, 29 November 2002.

[2]The recommendations and rulings of the DSB resulted from the adoption, by the DSB, of the Appellate Body Report and the panel report, as modified by the Appellate Body Report, in *EC – Bed Linen*.

[3]Council Regulation (EC) No 2398/97, 28 November 1997, imposing a definitive anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan, published in the Official Journal of the European Communities, 4 December 1997, L-series, No. 332 ("EC Regulation 2398/97").

[4]Original Panel Report, WT/DS141/R, adopted 12 March 2001, as modified by the Appellate Body Report, WT/DS141/AB/R.

Agreement.[5] In addition, the Appellate Body found that "the European Communities, in calculating amounts for administrative, selling and general costs and profits in the anti-dumping investigation at issue", had acted inconsistently with its obligations under Article 2.2.2(ii) of the *Anti-Dumping Agreement* and, therefore, reversed the findings of the original panel to the contrary in paragraphs 6.75 and 6.87 of the original panel report.[6]

3. On 12 March 2001, the DSB adopted the Appellate Body Report and the original panel report, as modified by the Appellate Body Report.[7] The parties to the dispute mutually agreed that the European Communities should have until 14 August 2001 to implement the recommendations and rulings of the DSB.[8] On 7 August 2001, the Council of the European Union adopted Council Regulation (EC) No 1644/2001, amending the original definitive anti-dumping measure on cotton-type bed linen from India.[9] Subsequently, on 28 January 2002 and 22 April 2002, the Council of the European Union adopted Council Regulations (EC) No 160/2002 and No 696/2002, respectively.[10] EC Regulation 160/2002 terminated the anti-dumping proceedings against cotton-type bed linen imports from Pakistan and established that the anti-dumping measures against Egypt would expire on 28 February 2002, if a review were not requested by that date. This review was not requested, and the anti-dumping measures against Egypt expired. EC Regulation 696/2002 established that a reassessment of the injury and causal link based on imports from India alone had revealed that there was a causal link between the dumped imports from India and material injury to the European Communities industry. Additional factual aspects of this dispute are set out in greater detail in the Panel Report.[11]

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[5]Appellate Body Report, *EC – Bed Linen*, adopted 12 March 2001, para. 86(1).

[6]*Ibid*., para. 86(2).

[7]WT/DS141/9, 22 March 2001.

[8]WT/DS141/10, 1 May 2001.

[9]Council Regulation (EC) No 1644/2001, 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 the Official Journal of the European Communities, 14 August 2001, L-series, No. 219 ("EC Regulation 1644/2001").

[10]Council Regulation (EC) No 160/2002, 28 January 2002, amending Council 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 the Official Journal of the European Communities, 30 January 2002, L-series, No. 26 ("EC Regulation 160/2002").

Council Regulation (EC) No 696/2002, 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 the Official Journal of the European Communities, 25 April 2002, L-series, No. 109 ("EC Regulation 696/2002").

[11]Panel Report, paras. 2.1-2.11.

4. India was of the view that the European Communities had failed to comply with the recommendations and rulings of the DSB, and that EC Regulations 1644/2001, 160/2002, and 696/2002 were inconsistent with several provisions of the *Anti-Dumping Agreement* and Article 21.2 of the DSU. India, therefore, requested that the matter be referred to a panel pursuant to Article 21.5 of the DSU.[12] On 22 May 2002, in accordance with Article 21.5 of the DSU, the DSB referred the matter to the original panel. A member of the original panel was unable to participate in the proceedings and the parties therefore agreed on a new panelist on 25 June 2002.[13] The Panel Report was circulated to the Members of the World Trade Organization (the "WTO") on 29 November 2002.

5. Before making findings on India's claims, the Panel made the following rulings on four preliminary matters raised by the European Communities. The Panel:

(i) ruled that EC Regulations 160/2002 and 696/2002 are not "measures taken to comply" with the recommendation of the DSB, within the meaning of Article 21.5 of the DSU.[14] Thus, the Panel limited its examination to EC Regulation 1644/2001;

(ii) declined to assess whether the measures "taken to comply" were adopted within the "reasonable period of time" agreed by the parties under Article 21.3 of the DSU[15];

(iii) found that India's "claim 6" was not properly before the Panel, to the extent that it concerned the consistency of the European Communities' measure with the obligation under Article 3.5 of the *Anti-Dumping Agreement* to ensure that injuries caused by "other factors" not be attributed to the dumped imports, because it was disposed of by the original panel and not appealed.[16] The Panel, however, rejected the European Communities' request to exclude India's "claim 5" because the Panel found that India could not have presented that claim in the original dispute[17]; and

(iv) rejected the European Communities' request that the Panel exclude India's claims relating to Article 4.1(i) of the *Anti-Dumping Agreement* and Article 21.3 of the DSU, given that India itself denied making such claims.[18]

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[12]WT/DS141/13/Rev.1, 8 May 2002.

[13]WT/DS141/14, 2 July 2002; WT/DS141/14/Corr.1, 10 July 2002.

[14]Panel Report, para. 6.22.

[15]*Ibid.*, para. 6.27.

[16]*Ibid.*, para. 6.53.

[17]*Ibid.*, para. 6.57. India's "claim 5" related to the assessment of whether the European Communities' reconsideration of injury was consistent with Article 3.4.

[18]Panel Report., para. 6.68.

6. The Panel then examined India's claims and found that:

(i) India had failed to demonstrate that the European Communities' calculation of a weighted average for administrative, selling, and general costs on the basis of sales value violates Article 2.2.2(ii) of the *Anti-Dumping Agreement*[19];

(ii) even assuming EC Regulations 160/2002 and 696/2002 properly formed part of the Panel's evaluation, the European Communities had not violated paragraphs 1 and 3 of Article 3 or Article 5.7 of the *Anti-Dumping Agreement* in conducting a cumulative assessment of the effects of dumped imports from India and Pakistan (and Egypt), in subsequently re-examining whether imports from Pakistan were being dumped, and subsequently in reassessing the effects of the dumped imports from India alone[20];

(iii) the European Communities had not acted inconsistently with paragraphs 1 and 2 of Article 3 of the *Anti-Dumping Agreement* in considering "dumped imports"[21];

(iv) the analysis and conclusions of the European Communities with respect to injury are not inconsistent with paragraphs 1 and 4 of Article 3 of the *Anti-Dumping Agreement*[22];

(v) the European Communities' finding of a causal link between the dumped imports and the injury is not inconsistent with Article 3.5 of the *Anti-Dumping Agreement*[23];

(vi) the European Communities had not acted inconsistently with Article 15 of the *Anti-Dumping Agreement* by failing to explore possibilities of constructive remedies before applying anti-dumping duties[24]; and

(vii) the European Communities had not violated Article 21.2 of the DSU.[25]

7. Having excluded, as a preliminary matter, India's claim that the European Communities had failed to ensure that injuries caused by "other factors" was not attributed to the dumped imports pursuant to Article 3.5 of the *Anti-Dumping Agreement,* the Panel nevertheless made an alternative

[19]Panel Report, para. 6.94.

[20]*Ibid*., para. 6.116.

[21]*Ibid*., para. 6.144.

[22]*Ibid*., para. 6.217.

[23]*Ibid*., para. 6.233.

[24]*Ibid*., para. 6.260.

[25]*Ibid*., para. 6.271.

finding on this issue and determined that the European Communities had not acted inconsistently with Article 3.5 in this regard.[26]

8. For these reasons, the Panel concluded that EC Regulation 1644/2001 is not inconsistent with the *Anti-Dumping Agreement* or the DSU.[27] Therefore, the Panel found that the European Communities had implemented the recommendation of the DSB to bring its measure into conformity with its obligations under the *Anti-Dumping Agreement*.[28] In the light of these conclusions, the Panel did not make any recommendations under Article 19.1 of the DSU.[29]

9. On 8 January 2003, India notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the DSU, and filed a Notice of Appeal pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*").[30] On 20 January 2003, India filed an appellant's submission.[31] On 3 February 2003, the European Communities filed an appellee's submission.[32] On the same day, Japan and the United States each filed a third participant's submission.[33] Korea notified its intention to appear at the oral hearing as a third participant.[34]

10. The oral hearing in this appeal was held on 20 February 2003. The participants and third participants presented oral arguments and responded to questions put to them by the Members of the Division hearing the appeal.

11. We recall that the Panel found, as a preliminary matter, that only EC Regulation 1644/2001 was a measure "taken to comply" within the meaning of Article 21.5 of the DSU, and thus the Panel excluded EC Regulations 160/2002 and 696/2002 from the scope of its examination.[35] India has not appealed this finding. During the oral hearing, India and the European Communities agreed, moreover, that the measure at issue in this appeal is EC Regulation 1644/2001.[36] Therefore, we will confine our analysis in this appeal to EC Regulation 1644/2001.

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[26]Panel Report, para. 6.246.

[27]*Ibid*., para. 7.1.

[28]*Ibid*., para. 7.2.

[29]*Ibid*., para. 7.3.

[30]WT/DS141/16, 9 January 2003.

[31]Pursuant to Rule 21(1) of the *Working Procedures*.

[32]Pursuant to Rule 22(1) of the *Working Procedures*.

[33]Pursuant to Rule 24(1) of the *Working Procedures*.

[34]Pursuant to Rule 24(2) of the *Working Procedures*.

[35]Panel Report, para. 6.22.

[36]India's and the European Communities' responses to questioning at the oral hearing.

II. Arguments of the Participants and the Third Participants

A. *Claims of Error by India – Appellant*

1. Article 21.5 of the DSU

12. India asserts that the Panel erred in finding, as a preliminary matter, that India's claim, concerning the consistency of EC Regulation 1644/2001 with the obligation under Article 3.5 of the *Anti-Dumping Agreement* to ensure that injuries caused by "other factors" are not attributed to the dumped imports, was not properly before the Panel. India notes that the European Communities based its request for a preliminary ruling on two arguments: (i) that India should not be allowed to raise claims before the Article 21.5 Panel that it could have raised before the original panel; and (ii) that India was acting in bad faith. India submits that, although the Panel found that India's claim *was* raised during the original proceedings, and also that India *was* pursuing the matter in *good faith*, the Panel nevertheless granted the European Communities' request for a preliminary ruling.

13. According to India, instead of focusing on the facts of the case, the Panel based some of its conclusions on overarching considerations of the appropriate functioning of Article 21.5 panels and the dispute settlement system as a whole. For example, the Panel determined that defending Members in Article 21.5 proceedings would *always* be prejudiced by a finding in Article 21.5 proceedings of a violation made on the basis of a claim that could have been pursued in the original proceedings, but was not, because the defending member would not have a reasonable period of time for implementation. India submits that it had argued before the Panel that the European Communities would not, in this particular case, suffer any prejudice from lack of a reasonable period for implementation, since India's claim under Article 3.5 is not the only claim in these proceedings. However, according to India, the Panel "declined to address [India's] argument". [37]

14. India contends that the Panel failed to take into account the Appellate Body Report in *US – FSC (Article 21.5 – EC)*, where the European Communities raised a claim in the Article 21.5 proceedings that it had not raised in the original proceedings. The Article 21.5 panel and the Appellate Body, nevertheless, made findings with respect to that claim. In India's view, EC Regulation 1644/2001, like the measure before the Appellate Body in *US – FSC (Article 21.5 – EC)*, is a new and different measure from the measure subject to the original dispute. [38]

[37] India's appellant's submission, para. 145.

[38] India's response to questioning at the oral hearing.

15. India argues that the Panel erred in considering the situation in *US – Shrimp (Article 21.5 – Malaysia)* to be analogous to the situation in the present case. India asserts that in *US – Shrimp (Article 21.5 – Malaysia)*, the complainant sought to challenge exactly the same measure that had been found to be WTO-consistent in the original proceedings, whereas in the present case, the measure challenged by India is a *new* measure that is separate and distinct from the original measure. According to India, in *US – Shrimp (Article 21.5 – Malaysia)*, the "measure" consisted of several sub-measures, and the Appellate Body had found, in the original dispute, that one of these sub-measures, Section 609, was consistent with the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994").[39] Therefore, in those Article 21.5 proceedings, the Appellate Body declined to re-examine Section 609 because it had already found that it was consistent with the GATT 1994. In India's view, the issue in this appeal is different from that in *US – Shrimp (Article 21.5 – Malaysia)* because the "measure" cannot be divided into sub-measures. According to India, all the aspects of the original measure have been changed—there has been a redetermination of dumping and injury, as well as a re-examination of causation. India notes that the fact that the European Communities analyzed causation anew, makes that analysis part of the new implementation measure. In India's view, the European Communities should have similarly re-ensured that the injury caused by other factors was not attributed to the dumped imports.[40]

16. India also submits that the Panel should have followed the Appellate Body's conclusion in *Canada – Aircraft (Article 21.5 – Brazil)*, that Article 21.5 panels are not confined to examining the "measures taken to comply" from the perspective of the claims, arguments, and factual circumstances related to the measure that was the subject of the original proceedings.[41]

2. Paragraphs 1 and 2 of Article 3 of the *Anti-Dumping Agreement*

17. India appeals the Panel's finding that the European Communities did not act inconsistently with paragraphs 1 and 2 of Article 3 of the *Anti-Dumping Agreement* when determining the volume of "dumped imports" for purposes of making a determination of injury. According to India, the European Communities mistakenly concluded that 86 percent of the total volume of imports of bed linen from India were dumped. India argues that the proportion of imports attributable to *sampled* producers found to be dumping (47 percent) constitutes the only *positive evidence* that could have been used to *objectively examine* and determine the volume of *total* imports from India that are dumped. India contends that if the basis for determining dumped imports is the calculation of dumping margins for sampled producers, and that calculation reveals no dumping for producers

[39]India's response to questioning at the oral hearing.

[40]*Ibid.*

[41]Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 41.

representing 53 percent of the imports attributable to sampled producers, one cannot objectively reach the conclusion that 86 percent of the total volume of imports are positively dumped.

18. Second, India argues that the Panel erred in finding that Article 3 does not provide any guidance on how to determine the volume of *dumped imports* for purposes of making a determination of injury. In India's view, Article 3.1 provides that an injury determination, including a determination of the volume of dumped imports, *shall* be based on *positive evidence* and involve an *objective examination*. Thus, according to India, Article 3.1 casts an *overarching obligation* on domestic authorities to make an objective examination of the volume of dumped imports based on positive evidence. India refers to the Appellate Body Report in *Thailand – H-Beams* as supporting this interpretation. [42]

19. India asserts that the Panel mistakenly found that the European Communities had resorted to the *second* option provided for in the second sentence of Article 6.10 of the *Anti-Dumping Agreement*, namely that the European Communities individually examined producers accounting for the largest percentage of the volume of exports which could reasonably be investigated. This finding, according to India, is at odds with the conclusion reached by the original panel in this dispute, which correctly established that the European Communities had conducted its analysis of dumping based on *a statistically valid sample* of Indian producers and exporters within the meaning of the *first* option found in the second sentence of Article 6.10. Thus, India asserts that the Panel ignored its own factual determinations in the original proceedings. India notes that the evidence it presented to the Panel demonstrated that the European Communities sought to select a statistically valid sample. For example, India points to the Notice of initiation of the investigation which provides for the use of *sampling* techniques in this investigation. India refers also to an exchange of letters between the association of Indian exporters and the European Commission which, in India's view, demonstrates that the investigating authorities sought to select a sample representing Indian producers and exporters. [43] India concludes that the failure of the European Communities to objectively examine the positive evidence resulting from the sample of investigated Indian producers or exporters runs directly counter to the overarching obligation under Article 3.1 to base the determination of the volume of dumped imports on positive evidence and an objective examination.

[42] Appellate Body Report, *Thailand – H-Beams*, para. 106.

[43] India's appellant submission, paras. 56 and 59.

20. Third, India argues that the Panel confused two distinct stages of the investigation—the stage of determining dumping and the stage of duty collection. India notes that, instead of seeking guidance in the text of Article 3, the Panel looked to Article 9.4 of the *Anti-Dumping Agreement*, which concerns duty collection. India contends that it cannot be inferred that the *Anti-Dumping Agreement* provides that all imports from producers or exporters that have not been individually examined may be considered dumped for purposes of analyzing injury, from the fact that Article 9.4 permits the collection of anti-dumping duties from non-examined producers *after* having completed a determination of *dumping*, *injury*, and *causality*. In other words, India asserts that the Panel was wrong in concluding, on the basis of the premise that a duty may be collected from non-examined producers, that all non-examined producers have dumped and caused injury. According to India, the Panel's reasoning disregards the fact that the dumping and injury findings logically *precede* the collection of duties. In addition, India contends that Article 9.4 expressly restricts the scope of its application to the imposition of anti-dumping duties. Therefore, according to India, it would be contrary to previous Appellate Body rulings regarding effective treaty interpretation to read into Articles 2, 3, and 6 of the *Anti-Dumping Agreement* the method set forth in Article 9.4 for the calculation of anti-dumping duties. Moreover, India argues that extending the application of the method set forth in Article 9.4 to other provisions of the *Anti-Dumping Agreement* would upset the delicate balance of rights and obligations agreed to by the Uruguay Round negotiators. Accordingly, India asserts that this finding of the Panel is contrary not only to the *Anti-Dumping Agreement*, but also to Articles 3.2 and 19.2 of the DSU, which provide that findings and recommendations cannot add to or diminish the rights and obligations provided in the covered agreements.

21. Fourth, India argues that the Panel erred in concluding that India's proposed interpretation would lead to bizarre and unacceptable results for which there are no remedial mechanisms. The Panel determined that these results would be a consequence of the fact that only 47 percent of the total imports from India would be considered dumped for purposes of making a determination of injury, whereas pursuant to Article 9.4, anti-dumping duties would be applied to *all* imports from exporters or producers not individually examined. India notes that the Panel recognized the possibility of refunds and reviews as mechanisms for remedying the situation where a duty would be collected on imports from an unexamined producer that might not have been dumped. In India's view, the reference to Article 11.2 (review possibilities) and to Article 9.3 (refund possibilities) supports India's interpretation rather than that of the Panel.

22. Finally, India asserts that, if the sample of European Communities producers was accepted in this investigation to fully represent the European Communities producers, the sample of exporting producers likewise should have been considered to fully represent the Indian exporters.

3. Article 17.6 of the *Anti-Dumping Agreement* and Article 11 of the DSU

23. India submits that the Panel did not properly discharge its duties under Article 17.6 of the *Anti-Dumping Agreement* and Article 11 of the DSU in concluding that the European Communities did have information before it on all relevant economic factors listed in Article 3.4 of the *Anti-Dumping Agreement* when making its injury determination.

24. India contends that the Panel misapplied the rules on the allocation of the burden of proof and, therefore, acted inconsistently with Article 11 of the DSU. India asserts that it had made a *prima facie* case before the Panel, showing that information on a number of economic factors had never been collected by the European Communities' investigating authorities. India argues that, as a consequence, the Panel should have required the European Communities to present evidence to rebut India's *prima facie* case. India submits that, by not shifting the burden of proof to the European Communities, the Panel failed to make an objective assessment of the facts as required by Article 11 of the DSU.

25. India asserts, furthermore, that if the Appellate Body were to conclude that the Panel correctly applied the rules on the allocation of the burden of proof, the Appellate Body should then find that the Panel distorted the evidence by accepting, as constituting evidence of a fact, a mere assertion by the European Communities that data was collected. Accordingly, India maintains that the Panel acted inconsistently with Article 11 of the DSU, which requires panels to make an objective assessment of the matter, including an objective assessment of the facts of the case.

26. Referring to the Appellate Body Report in *US – Hot-Rolled Steel*, India argues that Article 17.6(i) of the *Anti-Dumping Agreement* requires panels to actively review or examine the facts.[44] India submits that despite the existence of this obligation, the Panel did not actively review the assertions of the European Communities that it had collected data on all relevant economic factors listed in Article 3.4, nor did the Panel use its investigative power under Article 13 of the DSU to inquire about the missing information on stocks and capacity utilization. In India's view, the fact-specific nature of this dispute *required* the Panel to use its right to seek information under Article 13 of the DSU in order to discharge its obligation, under Article 17.6(i), to actively review or examine the facts. India argues, furthermore, that Article 17.6(i) requires the Panel to do more than to merely state that it was clear to it that the European Communities had the data in its record. In India's view, by failing to actively review the facts, the Panel acted contrary to the obligation contained in Article 17.6(i) of the *Anti-Dumping Agreement*.

[44] Appellate Body Report, *US – Hot-Rolled Steel*, para. 55.

4. Article 3.5 of the *Anti-Dumping Agreement*

27. India submits that, if the Appellate Body were to conclude that the Panel erred in dismissing, as not being properly before it, India's claim challenging EC Regulation 1644/2001 as inconsistent with the obligation in Article 3.5 of the *Anti-Dumping Agreement* to ensure that injuries caused by "other factors" are not attributed to the dumped imports, then the Appellate Body should examine the Panel's finding, in the alternative, that the European Communities did not act inconsistently with that provision. First, India challenges the Panel's finding that India could not rely upon recital (50) of EC Regulation 1644/2001 as evidence of the fact that the European Communities was aware of other factors simultaneously causing injury to the European Communities industry. In India's view, the Panel was wrong to dismiss India's argument on the grounds that recital (50) of the redetermination is included in the section entitled "Conclusion on injury", and not in the section on "Causation". India contends that a factual finding does not cease to be a factual finding solely because it is contained in the preamble, conclusion, or other section of the same document.

28. Second, India contends that the conclusions of the Panel are based on a misrepresentation of the facts and an incorrect causation analysis. India argues that the Panel reviewed the findings of the European Communities on the basis of *ex post* justifications, instead of analyzing whether the European Communities (i) had properly examined the possible injurious effects of inflation and of the increase in the cost of raw cotton and (ii) had separated and distinguished the injury caused by those factors. Thus, India argues that the Panel erred in its analysis by relying upon explanations which are not discernible from EC Regulation 1644/2001 and the record of the investigation.

29. In addition, India argues that the Panel's misrepresentation of the facts of the case is a consequence of two other errors. First, India asserts that the Panel erred in reading into Article 3.5 an arbitrary distinction between "independent" and "dependent" factors causing injury, and in mistakenly assigning the authorship of this distinction to India. India submits that it never made such a distinction. In India's view, the effect of the Panel's distinction between independent and dependent causes of injury is to render redundant the requirement to demonstrate a causal relationship between the dumped imports and the injury to the domestic industry. India explains that, if the Panel's theory were followed, investigating authorities would be able to argue (i) that the injurious effects of every other known factor could have been remedied through an increase in price and (ii) that this increase was not possible due to price suppression. As a result, India argues, the injury in its entirety would automatically be attributed to the dumped imports. According to India, this approach cannot be considered to be consistent with the aim of Article 3.5, which is to establish that injury to the domestic industry is indeed caused by the dumped imports.

30. Second, in India's view, the Panel also erred by disregarding the guidance provided by the Appellate Body in *US – Hot-Rolled Steel* on the interpretation of Article 3.5.[45] India submits that, in *US – Hot-Rolled Steel*, the Appellate Body made it clear that if an investigating authority has come to the conclusion that a known factor, other than the dumped imports, is causing injury to the domestic industry, that authority must ensure that the injurious effects of this other factor are not attributed to the dumped imports. India argues that, although the European Communities "tried" in recital (103) of Commission Regulation (EC) No 1069/97[46] to follow the Appellate Body's guidance, it failed to do so.[47]

31. India argues, finally, that the Panel misunderstood India's argument with respect to inflation and again based its conclusions on a misrepresentation of facts. India disagrees with the Panel's finding that the European Communities did not identify the inability of bed linen prices to keep pace with inflation in prices of consumer goods as a cause of injury. India contends that, in recital (50) of EC Regulation 1644/2001, the European Communities does identify inflation in consumer prices as a cause of injury. India submits that, in spite of this, the European Communities failed to mention, let alone examine and distinguish, in its causation analysis the injurious effects of the inability of European Communities producers to keep pace with inflation. India notes that, although the Panel interpreted the inability of bed linen prices to increase commensurate with inflation as an *indicator* (instead of a cause) of injury, in India's view, the inability of bed linen prices to keep pace with inflation is a factor partly responsible for declining profitability of the European Communities industry.

B. *Arguments of the European Communities – Appellee*

1. Article 21.5 of the DSU

32. The European Communities submits that the Panel correctly dismissed India's claim that the European Communities violated Article 3.5 of the *Anti-Dumping Agreement* by failing to ensure that injuries caused by "other factors" not be attributed to the dumped imports, because that claim was not properly before the Panel. According to the European Communities, the determination on the "other factors" is an element of the original measure that was not modified and thus cannot be regarded as part of the implementation measure. Consequently, that determination cannot be challenged before an Article 21.5 panel.

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[45]Appellate Body Report, *US – Hot-Rolled Steel*, paras. 221-223.

[46]Commission Regulation (EC) No 1069/97, 12 June 1997, imposing a provisional anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan, published in the Official Journal of the European Communities, 13 June 1997, L-series, No. 156 ("EC Regulation 1069/97").

[47]India's appellant's submission, para. 178.

33. The European Communities contends that Article 21.5 of the DSU is not intended to provide a "second service" to complainants which, by negligence or calculation, have omitted to raise or argue certain claims during the original proceedings.[48] In the European Communities' view, India's reading of Article 21.5 would diminish the procedural rights of defending parties, altering the balance of rights and obligations of Members that the DSU purports to maintain.

34. According to the European Communities, in *US – FSC*[49], *Mexico – Corn Syrup (Article 21.5 – US)*[50], and *US – Offset Act (Byrd Amendment)*[51], the Appellate Body emphasized that procedural actions under the DSU must be taken in a timely fashion. The European Communities submits that, in a similar way, the right to make a claim must be exercised promptly. Consequently, Article 21.5 must be interpreted as excluding the possibility of raising a claim for the first time before an Article 21.5 panel when such claim could have been pursued before the original panel.

35. Furthermore, the European Communities contends that the decision of the original panel rejecting India's claim "has *res judicata* effects" between the parties.[52] Therefore, in the view of the European Communities, India is precluded from reasserting the same claim before another panel. The European Communities asserts, in this regard, that the applicability of the principle of *res judicata* to disputes under the DSU was confirmed in *US – Shrimp (Article 21.5 – Malaysia)*, where the Appellate Body noted that Appellate Body Reports that are adopted by the DSB must be treated by the parties to a particular dispute as a final resolution to that dispute.[53] The same principle applies, according to the European Communities, to adopted panel reports.

36. The European Communities argues that India's allegation that the European Communities did not suffer prejudice is irrelevant and wrong. According to the European Communities, the defendant is not required to demonstrate prejudice. In addition, the European Communities submits that prejudice to the defending party arises whenever a claim that could have been pursued in the original proceedings is brought before an Article 21.5 panel, because, as a result, the defending party will be deprived of the possibility of correcting the alleged violation within a reasonable period of time, if indeed a violation is found.

37. The European Communities argues that whether or not India acted in good faith is also irrelevant for the interpretation of Article 21.5 of the DSU. The European Communities contends

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[48]European Communities' appellee's submission, para. 140.

[49]Appellate Body Report, *US – FSC*, para. 166.

[50]Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 50.

[51]Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 314.

[52]European Communities' appellee's submission, para. 150.

that, as explained by the Panel, a decision on this issue does not turn on the facts of any particular dispute. In the European Communities' view, even though India might not, in this specific case, have acted in bad faith, India's proposed interpretation of Article 21.5 would allow the kind of litigation techniques that are incompatible with the good faith requirement set out in Article 3.10 of the DSU.

38. According to the European Communities, the Panel's ruling is consistent with earlier decisions of the Appellate Body. The European Communities submits that, contrary to India's arguments, the facts of the present dispute are different from those in *Canada – Aircraft (Article 21.5 – Brazil)*, where Brazil raised claims against a new and different measure.[54] In the present case, in contrast, India's claim relates to an element that is not part of the new measure, because the findings on the "other factors" included in the original determination were not affected by the redetermination. Furthermore, the European Communities asserts that the present case differs from *US – FSC (Article 21.5 – EC)* because, in the latter case, the United States did not object to the claim raised by the European Communities under Article III:4 of the GATT 1994.[55] In that case, moreover, the claim brought by the European Communities under Article III:4 against the measure "taken to comply" was different from the claims that the European Communities could have brought under the same provision before the original panel, because the United States had repealed the measure at issue in the original dispute and replaced it with an entirely new measure. The European Communities argues that, in the current appeal, India is challenging findings that were not modified in the implementation measure and, therefore, cannot be considered as part of the measure "taken to comply".

2. Paragraphs 1 and 2 of Article 3 of the *Anti-Dumping Agreement*

39. The European Communities asserts that the Panel did not err in finding that the European Communities did not act inconsistently with paragraphs 1 and 2 of Article 3 of the *Anti-Dumping Agreement* when determining the volume of "dumped imports" for purposes of making a determination of injury.

40. The European Communities first notes that the Panel's observation that the European Communities' investigating authorities did not use a "statistically valid sample", within the meaning of the first option in the second sentence of Article 6.10 of the *Anti-Dumping Agreement*, is a factual finding beyond the scope of appellate review. The European Communities submits that the group of exporters selected for purposes of the dumping examination represents the largest percentage of the

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[53]Appellate body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 97.

[54]Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 8-14.

[55]Appellate Body Report, *US – FSC (Article 21.5 – EC)*, paras. 40-44.

volume of exports which could reasonably be investigated, within the meaning of the second option in the second sentence of Article 6.10. Therefore, the Panel's factual observation that the European Communities did *not* resort to a "statistically valid sample" is correct. According to the European Communities, the selection of companies of different types was aimed at improving the representativeness of the selection, but it cannot be considered sufficient to produce a "statistically valid sample".

41. In addition, the European Communities explains that the fact that its investigating authorities, on a few occasions, referred to the group of examined exporters as a "sample", does not mean that the dumping examination was based on a "statistically valid sample" within the meaning of Article 6.10. The European Communities notes that if all "samples" were by definition "statistically valid", it would have been superfluous to add that precision into Article 6.10. According to the European Communities, the investigating authorities used the term "sample" because, in European Communities law and practice, the terms "sampling" and "sample" are used to designate indistinctly either of the two options envisaged in Article 6.10 of the *Anti-Dumping Agreement*. Similarly, the references made by the original panel and the Article 21.5 Panel to a "sample" merely reflect the European Communities' use of that term.

42. The European Communities states that, in any event, the Panel did not attach any legal consequences to the finding that the European Communities did not use a statistically valid sample. The Panel's conclusion that the European Communities did not act inconsistently with paragraphs 1 and 2 of Article 3 would be equally valid were the Appellate Body not to agree with this finding of fact. The European Communities contends that, even if the examined exporters selected by the investigating authorities constituted a "statistically valid sample", there would still be no basis to assume that the proportion of imports found to be dumped within the sample is positive evidence of the proportion of imports outside the sample which would have been found to be dumped had all the exporters been examined individually.

43. The European Communities asserts that "dumped imports" are those imports for which a positive determination of dumping, whether individual or collective, has been made. The European Communities contends that, following this reasoning, its investigating authorities determined that all the imports from the unexamined exporters (cooperating and non-cooperating) were dumped. As India has not challenged the dumping determination in these proceedings, it is illogical and contradictory for India now to claim that some of those imports should be considered not dumped for purposes of making a determination of injury. According to the European Communities, the obligation to determine dumped imports objectively and on the basis of positive evidence is satisfied

where the imports have been found to be dumped in accordance with the relevant provisions of the *Anti-Dumping Agreement* governing the determination of dumping.

44. The European Communities agrees with the Panel's conclusion that Article 3 of the *Anti-Dumping Agreement* contains no guidance with respect to the determination of the volume of dumped imports. In the European Communities' view, the general requirement to make an objective examination of injury based on "positive evidence", set forth in Article 3.1, cannot be read as imposing a new obligation with respect to the determination of dumping where none is provided in the relevant provisions of the *Anti-Dumping Agreement*.

45. In addition, the European Communities argues that India's proposed interpretation would lead to an absurd result—where the same imports could be simultaneously considered dumped and not dumped under different provisions of the *Anti-Dumping Agreement*—because Article 9.4 would allow the application of duties to imports which have been previously found not to be dumped for purposes of injury determinations under Article 3.

46. The European Communities contends, furthermore, that India's proposed interpretation assumes that no dumping margin needs to be assigned to unexamined exporters. However, in the European Communities' view, if the dumping margin of the unexamined exporters is not calculated, it is impossible to establish whether the country-wide dumping margin is above *de minimis*, as required by Article 5.8.

47. The European Communities states that, although the *Anti-Dumping Agreement* does not prescribe any specific rules for calculating the dumping margin of the unexamined exporters, it is implicit in Article 6.10 that, where the investigating authorities limit the investigation of dumping to some exporters, they may use the data collected for those examined exporters in order to calculate the dumping margin of the unexamined exporters. In addition, the European Communities refers to Article 9.3, which expressly states that there is a logical link between the level of the dumping margin and that of the dumping duty. Therefore, it contends that if Article 9.4 allows the investigating authorities to apply anti-dumping duties to *all* imports from the unexamined exporters, it is because *all* such imports can be considered dumped, including for purposes of paragraphs 1 and 2 of Article 3. In the light of this, the European Communities asserts that its investigating authorities were entitled to regard all imports from the unexamined exporters as dumped.

48. Finally, the European Communities argues that its investigating authorities were entitled to treat as "dumped" all imports from non-cooperating exporters, upon calculating the corresponding dumping margin for the non-cooperating exporters in accordance with the methodology set out in Article 6.8 and Annex II to the *Anti-Dumping Agreement*. In addition, the European Communities

contends that, even if India's interpretation were correct, the proportion of dumped imports from the examined exporters within the sample could not be considered as representative of the proportion of dumped imports from the non-cooperating exporters, because the non-cooperating exporters were not included in the pool of exporters from which the sample was selected.

3. Article 17.6 of the *Anti-Dumping Agreement* and Article 11 of the DSU

49. The European Communities argues that the Panel did not err in finding that the European Communities had information before it on all relevant economic factors listed in Article 3.4 of the *Anti-Dumping Agreement*, including stocks and capacity utilization, and thus acted consistently with Article 3.4. According to the European Communities, the Panel correctly applied the rules regarding the allocation of the burden of proof, did not distort the evidence before it, nor did it fail to actively review the facts.

50. The European Communities submits that because India did not properly establish a *prima facie* case that no data was collected by the European Communities' investigating authorities, the Panel did not fail to apply the rules on the allocation of the burden of proof. Alternatively, the European Communities argues that, even if India had established a *prima facie* case, this *prima facie* case had been refuted by the European Communities. Furthermore, the European Communities emphasizes that the weighing of evidence is within the discretion of the Panel as the trier of facts. Consequently, the European Communities argues that the Panel was entitled to conclude that the European Communities had the relevant information in its possession, and acted consistently with Article 11 of the DSU.

51. In the European Communities' view, the Panel did not distort the evidence. The European Communities argues that the information contained in EC Regulation 1644/2001 is not "a mere assertion" as claimed by India. Rather, the regulation explains the basis of the European Communities' conclusion that stocks and capacity utilization did not have a bearing on the state of the domestic industry. The European Communities refers to the statement in the Appellate Body Report in *EC – Hormones* to the effect that a claim of distortion implies that a panel committed an egregious error that calls into question its good faith. [56] The European Communities then underscores that India has explicitly admitted that it is not alleging that the Panel in this case committed an egregious error or acted in bad faith.

52. The European Communities submits that the Panel did not fail to actively review the facts as required by Article 17.6(i) of the *Anti-Dumping Agreement*. According to the European

[56] Appellate Body Report, *EC – Hormones*, para. 133.

Communities, India failed to demonstrate that the Panel's assessment of the evidence is inconsistent with Article 11 of the DSU; therefore, its identical claim under Article 17.6(i) is equally unfounded. In addition, the European Communities argues that the Panel's decision not to use its power of investigation under Article 13.2 of the DSU does not constitute a violation of Article 17.6(i), because a panel's right to seek information under Article 13.2 is discretionary. In the European Communities' view, the Appellate Body's ruling in *EC – Sardines* supports the conclusion that the Panel's decision not to seek information does not imply that the Panel failed to make an objective assessment of the facts. [57]

4. Article 3.5 of the *Anti-Dumping Agreement*

53. The European Communities argues that the Panel did not err in finding that the European Communities did not act inconsistently with Article 3.5 of the *Anti-Dumping Agreement* by failing to ensure that injuries caused by "others factors" were not attributed to the dumped imports. In the European Communities' view, the Panel's finding that the increase in the cost of raw cotton and inflation were not causes of injury is a factual finding and thus beyond the scope of appellate review.

54. The European Communities submits that India's arguments misrepresent the findings of the investigating authorities. According to the European Communities, the passages of EC Regulation 1644/2001 referred to by India demonstrate that the investigating authorities did not consider the increase in the cost of raw cotton as a separate cause of injury.

55. The European Communities notes that "price suppression" is one of the possible "effects" of dumping set forth in Article 3.2 of the *Anti-Dumping Agreement*. Accordingly, price suppression cannot be, at the same time, one of the "other causes" of injury to be examined under Article 3.5. The European Communities asserts that the increase in the cost of raw cotton is not the cause of price suppression, but rather the fact that renders necessary the price increase. According to the European Communities, this is in accordance with Article 3.2, which provides that the "cause" of the "price suppression" is the fact that "prevents" the price increase, and not the fact that renders necessary such price increase. The European Communities contends, moreover, that India has not argued that any other factor that was not examined by the investigating authorities prevented the European Communities producers from increasing their prices to reflect the increase in the cost of raw cotton.

56. Furthermore, the European Communities argues that the injurious effects of the increase in the cost of raw cotton cannot be separated and distinguished from the effects of the dumped imports. In the European Communities' view, the existence of "price suppression" presupposes the existence of

[57] Appellate Body Report, *EC – Sardines*, para. 302.

two elements: (i) a factor that renders a price increase necessary; and (ii) a factor that "prevents" such price increase. If either of these elements is absent, there can be no "price suppression" within the meaning of Article 3.2 and, consequently, no injury. The European Communities contends that the injurious effects of the two constituent elements of price suppression cannot, therefore, be "separated and distinguished".

57. The European Communities argues that, contrary to India's allegation, the Panel's reasoning does not render redundant Article 3.5, because a price increase cannot be said to remedy the injury caused by the factors listed in that Article. As an example, the European Communities explains that a price increase would not remedy the injurious effects of a contraction of demand, but rather would aggravate them.

58. The European Communities submits that its investigating authorities did not find, as alleged by India, that the failure of bed linen prices to keep pace with inflation in the prices of consumer goods was a cause of injury. According to the European Communities, EC Regulation 1644/2001 mentioned the failure of bed linen prices to keep pace with inflation as a further indication of the existence of price suppression. In any event, the European Communities contends that the failure of bed linen prices to keep pace with inflation cannot be a *cause* of injury in the form of declining and inadequate profitability. The European Communities notes that the profitability of bed linen is a *function* of its cost of production and of its sales price. The inflation rate for other consumer goods does not affect either of these two variables. Therefore, the European Communities argues, the inflation rate cannot be the cause of the injury suffered by the European Communities industry. Rather, it is an indication or symptom of injury, as indicated by the Panel.

C. *Arguments of the Third Participants*

1. Japan

59. Japan submits arguments relating only to the determination of the volume of dumped imports for purposes of making a determination of injury under Article 3 of the *Anti-Dumping Agreement*. Japan submits that an analysis of the text, the context, and the object and purpose of Article 9.4 of the *Anti-Dumping Agreement* demonstrates that Article 9.4 does not apply to the determination of dumping, injury, and causation under Articles 2 and 3 of the *Anti-Dumping Agreement*. Japan contends that Article 9.4 provides rules applicable only to the stage where duties are collected, which follows the investigating authorities' affirmative determination of dumping, injury, and causation.

60. Japan argues that the use of the term "duty" or "duties" in Article 9.4 confirms the understanding that Article 9.4 applies only to the stage of imposition of anti-dumping duties. In

addition, Japan contends that the use of the present perfect tense in Article 9.4 indicates that Article 9.4 becomes relevant only after the investigation phase has been completed and the investigating authorities have found dumping, injury, and causation. In Japan's view, the title of Article 9, as well as the principles set forth in Article 9.1, clarify that Article 9 sets forth rules concerning imposition and collection of duties, and that it does not affect the determinations of dumping, injury, and causation.

61. Japan also contends that Article 9.4 contains a very narrowly-focused set of rules that apply only in exceptional cases where an examination of all responding parties is "impracticable," as set forth in the second sentence of Article 6.10.

62. Japan finds support in the Appellate Body Report in *US – Hot-Rolled Steel* for its argument that the European Communities' position would dilute the requirement established in Article 3.1 that a determination of injury be based on "positive evidence" and an "objective examination."[58] Japan submits that the European Communities' methodology is inconsistent with the requirement that the evidence "must be of an affirmative, objective and verifiable character, and that it must be credible."[59] In addition, Japan alleges that by using the data of the sampled producers in a biased and unfair manner, the European Communities failed to comply with the requirement that a determination of injury must involve an objective examination—that is, that the "'examination' process must conform to the dictates of the basic principles of good faith and fundamental fairness."[60]

63. Japan contends, moreover, that its interpretation is supported by Article 17.6(i) of the *Anti-Dumping Agreement*. Japan argues that although Article 17.6(i) is directed to panels, the obligation of an unbiased and objective evaluation of facts applies equally to the investigating authorities, because panels review the investigating authorities' evaluation of facts in accordance with that standard.

2. United States

64. The United States agrees with the finding of the Panel that when a party's argument is rejected in a report adopted by the DSB, that party cannot raise new arguments on the same claim in a proceeding under Article 21.5 of the DSU. The United States disagrees with India's view that the mere inclusion of a finding in the legislative or administrative vehicle that implements a DSB recommendation makes it a measure taken to comply subject to Article 21.5 review. The text of that

[58]Appellate Body Report, *US – Hot-Rolled Steel*, paras. 192-193.

[59]*Ibid.*, para. 192.

[60]*Ibid.*, para. 193.

provision premises a panel's jurisdiction over a claim under Article 21.5 on whether that claim challenges measures that were taken to comply with DSB recommendations and rulings.

65. The United States submits that the Panel correctly concluded that investigating authorities may treat all imports from producers or exporters for which an affirmative dumping determination has been made as "dumped imports" for purposes of making a determination of injury. The United States submits that Article 2.1 of the *Anti-Dumping Agreement* defines dumped products "[f]or the purpose of [the Anti-Dumping] Agreement", on a country-wide basis, and that, therefore, the references to "dumped imports" in paragraphs 1 and 2 of Article 3 and throughout Article 3 refer to all imports of the product from the countries subject to the investigation.

66. In the United States' view, the *Anti-Dumping Agreement* requires investigating authorities to examine, on the one hand, the volume and price effects of the *dumped imports*, and, on the other hand, all relevant economic factors having a bearing on the state of the domestic industry. The United States argues that, through this examination of both the *dumped imports* and the injury factors, the investigating authorities examine the "consequent impact" of those *dumped imports* on the domestic industry, as set out in paragraphs 1 and 2 of Article 3 of the *Anti-Dumping Agreement*.

67. The United States contends that Article 9.4 confirms this conclusion, as that provision does not provide for any separation of imports from each non-examined producer or exporter into two categories—dumped and not dumped. Rather, the United States contends that the provision provides for a calculated duty to apply to *all* of the imports from each non-examined producer.

68. The United States believes that the Panel correctly recognized that, under the *Anti-Dumping Agreement*, an investigating authority may appropriately draw a distinction between the economic factors and indicia that indicate whether an industry's overall condition is declining, and "other factors" that may be causing such decline. Only the latter are subject to the non-attribution provisions of Article 3.5 of the *Anti-Dumping Agreement*.

69. The United States agrees with the Panel's finding that the European Communities properly found that the industry's rising raw material costs and inflation were not "other factors" causing injury subject to the non-attribution provision of Article 3.5. Even if the Appellate Body were to conclude that these factors should have been considered "other factors", subject to the provisions of Article 3.5, the United States believes that the European Communities' analysis of the effect of the factors on the industry represents a reasoned and adequate discussion that does not attribute to imports the effects, if any, of these two factors. The United States believes that the European Communities' analysis of the effects of rising raw material costs and inflation would satisfy the European Communities' non-attribution obligation under Article 3.5, as that obligation has been interpreted by the Appellate Body.

III. Issues Raised in this Appeal

70. The following issues are raised in this appeal:

(a) (i) whether the Article 21.5 Panel[61] erred in dismissing India's claim that the European Communities had acted inconsistently with Article 3.5 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*") —by failing to ensure that injuries caused by "other factors" was not attributed to the dumped imports—because that claim was not properly before the Panel; and, if so

(ii) whether the Panel erred in finding, in the alternative, that the European Communities had ensured that injuries caused by "other factors" was not attributed to the dumped imports and, therefore, had not acted inconsistently with Article 3.5 of the *Anti-Dumping Agreement*;

(b) whether the Panel erred in concluding that the European Communities had acted consistently with paragraphs 1 and 2 of Article 3 of the *Anti-Dumping Agreement* in calculating the volume of dumped imports, for purposes of determining injury; and

(c) whether the Panel failed to discharge its duties properly under Article 17.6 of the *Anti-Dumping Agreement* and Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), in finding that the European Communities had information before it on all relevant economic factors listed in Article 3.4 of the *Anti-Dumping Agreement*, including stocks and capacity utilization.

IV. Article 21.5 of the DSU

A. *Introduction*

71. We turn first to the issue raised by India that the Panel erred in dismissing India's claim that the European Communities had acted inconsistently with the requirement of Article 3.5 of the *Anti-Dumping Agreement* by failing to ensure that injuries caused by "other factors" was not attributed to the dumped imports. We recall that India claimed before the *original panel* that the European Communities had acted inconsistently with Article 3.5 of the *Anti-Dumping Agreement* by

[61] Hereinafter "the Panel".

failing to determine to what extent injuries caused by "other factors" were responsible for the injury allegedly suffered by the domestic industry. [62] The original panel ruled:

> 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. [63]

India did not appeal this panel finding in the original dispute. Thus, the panel report in the original dispute was adopted by the Dispute Settlement Body (the "DSB") without modification of this finding.

72. In order to comply with the recommendations and rulings of the DSB in the original dispute, the European Communities adopted Council Regulation (EC) No 1644/2001 [64], reflecting the investigating authorities' revised determinations of dumping and injury. In the light of these revised determinations, the European Communities also re-examined whether a causal link existed between the dumped imports and injury suffered by the domestic industry. [65] The European Communities did *not*, however, revise the analysis of "other factors" made in the original determination. [66] Rather, in EC Regulation 1644/2001, the European Communities confirmed the findings of the original determination in this respect, except for a minor change. [67]

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[62]Original Panel Report, para. 6.123. India also claimed under Article 3.5 that the European Communities had failed to establish the existence of a causal link between dumped imports and injury suffered by the domestic industry. According to India, by cumulating *all* imports from the countries under investigation, the European Communities had included in its calculation of "dumped imports" what India considered to be *non-dumped* import transactions. (*Ibid*., paras. 6.121-6.122) The original panel found *no* violation of Article 3.5 in relation to this particular claim. (*Ibid*., para. 6.142) India did not appeal this finding in the original dispute.

[63]*Ibid*., para. 6.144.

[64]Council Regulation (EC) No 1644/2001, 7 August 2001, amending Council 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 the Official Journal of the European Communities, 14 August 2001, L-series, No. 219 ("EC Regulation 1644/2001").

[65]*Ibid*., recitals (52)-(53).

[66]*Ibid*., recitals (59)-(64).

[67]The Panel noted that the European Communities expanded its findings in the redetermination with respect to the development of consumption of bed linen in order to take into account slightly different figures on domestic industry sales. The Panel stated that India's claim in the Article 21.5 proceedings did not rely on this minor change. (Panel Report, footnote 75 to para. 6.52)

73. Subsequently, before the *Article 21.5 Panel*, India claimed that the European Communities had violated Article 3.5, *inter alia*, because it had disregarded the obligation to not attribute to the dumped imports injuries caused by "other factors", and had failed to separate and distinguish injuries caused by those "other factors" from the injury caused by the dumped imports.[68] The European Communities responded with a request for a preliminary ruling, asking the Panel to dismiss India's claim under Article 3.5 insofar as it concerned aspects of the original determination which were the subject of a claim before the original panel, which was not pursued before that panel.[69] India asked the Panel to reject the European Communities' request for a preliminary ruling.[70]

74. The Panel stated 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.[71]

According to the Panel, neither Article 21.5 of the DSU nor any other provision entitles India to such a "second chance".[72] The Panel concluded 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.[73]

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[68]In addition, India claimed before the Article 21.5 Panel that the European Communities had acted inconsistently with Article 3.5 by failing to establish a causal link between dumped imports and the injury allegedly suffered by the domestic industry. (Panel Report, para. 6.218)

[69]*Ibid.*, para. 6.30.

[70]*Ibid.*, para. 6.34.

[71]*Ibid.*, para. 6.43. The Panel disagreed with India that the original panel's finding on India's claim under Article 3.5 concerning "other factors" was an exercise of *judicial economy*. In the Panel's view, it was a finding that India had failed to present a *prima facie* case of violation. (*Ibid.*, para. 6.44)

[72]*Ibid.*, para. 6.43.

[73]*Ibid.*, para. 6.53. However, the Panel did rule on the merits of another aspect of India's claim under Article 3.5, namely the existence of a causal link between dumped imports and injury. The Panel found that the European Communities' finding of a causal link is not inconsistent with Article 3.5. (*Ibid.*, para. 6.233) India has not appealed this finding.

75. In this appeal, India requests that we *reverse* the Panel's finding dismissing its claim under Article 3.5 relating to "other factors", and complete the legal analysis.[74] India argues that its claim under Article 3.5 forms part of the matter before the Article 21.5 Panel because India identified this claim in its request for the establishment of that Panel. In India's view, the Panel was not precluded from examining this claim, even though the original panel had dismissed it. Referring to our Report in *Canada – Aircraft (Article 21.5 – Brazil)*, India submits that the measure at issue in this implementation dispute is a *new* measure that is legally separate and distinct from the *original* measure.[75] India argues further that an implementation dispute is not confined to examining the measures taken to comply from the perspective of the claims, arguments, and factual circumstances related to the measure that was the subject of the *original* proceedings.[76] In support of this position, India asserts that, in the *US – FSC (Article 21.5 – EC)* implementation dispute, a claim under Article III of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994") was accepted on appeal, even though the European Communities could have raised it during the original proceedings, but did not.[77]

76. India also contends that the Panel erred in finding the situation in these implementation proceedings to be analogous to the situation in *US – Shrimp (Article 21.5 – Malaysia)*.[78] In India's view, the measure in *US – Shrimp (Article 21.5 – Malaysia)* was the *same* measure that had been found to be consistent with obligations of the World Trade Organization (the "WTO") in the original proceedings.[79] In this dispute, India notes that the European Communities re-examined causation in the redetermination as a consequence of revised dumping and injury findings. Therefore, in India's view, the causation analysis is a *new* component of the measure taken to comply that was not part of the measure before the original panel.[80]

77. The European Communities responds that we should *uphold* the Panel's ruling dismissing India's claim under Article 3.5 relating to "other factors".[81] The European Communities argues that it was under no obligation to correct, in the redetermination, its findings on "other factors", because the original panel had not ruled that these findings were inconsistent with Article 3.5.[82] The European

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[74]India's appellant's submission, para. 154.

[75]*Ibid.*, paras. 151-152, referring to Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 36 and 41.

[76]*Ibid.*, para. 136.

[77]*Ibid.*, para. 146.

[78]*Ibid.*, paras. 148 *ff*, referring to Panel Report, paras. 6.50 and 6.52.

[79]*Ibid.*, para. 149, referring to Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 89.

[80]India's statement at the oral hearing.

[81]European Communities' appellee's submission, para. 121.

[82]*Ibid.*, para. 142.

Communities concludes, therefore, that the aspects of the redetermination relating to "other factors" are not part of the measure "taken to comply" with the recommendations and rulings of the DSB in the original dispute.[83] According to the European Communities, claims challenging measures *other* than those taken to comply cannot form part of Article 21.5 proceedings. The European Communities agrees with the Panel's reliance on our findings in *US – Shrimp (Article 21.5 – Malaysia)*.[84] In the European Communities' view, the implementation disputes in *Canada – Aircraft (Article 21.5 – Brazil)* and in *US – FSC (Article 21.5 – EC)* can be distinguished from the present Article 21.5 proceedings because those disputes concerned *new* claims challenging *modified* aspects of the measure.[85] The European Communities emphasizes that the original panel's finding rejecting India's claim relating to "other factors" represents the final resolution of the dispute between the parties, because it forms part of a panel report adopted by the DSB. For this reason, the European Communities maintains that India is precluded from reasserting this claim in these Article 21.5 proceedings.

B. *Analysis*

78. In examining whether India's claim under Article 3.5 relating to "other factors" was properly before the Panel, we must first establish the appropriate *subject-matter* of Article 21.5 proceedings. Article 21.5 provides in relevant 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 such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel.

As in *original* dispute settlement proceedings, the "matter" in Article 21.5 proceedings consists of two elements: the specific *measures* at issue and the legal basis of the complaint (that is, the *claims*).[86] If a *claim* challenges a *measure* which is not a "measure taken to comply", that *claim* cannot properly be raised in Article 21.5 proceedings. We agree with the Panel that it is, ultimately, for an Article 21.5 panel—and not for the complainant or the respondent—to determine which of the

[83]European Communities' appellee's submission, para. 134.

[84]*Ibid.*, para. 149.

[85]*Ibid.*, paras. 136 and 160.

[86]Appellate Body Report, *Guatemala – Cement I*, paras. 72 and 76, interpreting Article 7 of the DSU.

measures listed in the request for its establishment are "measures taken to comply".[87] Although the issue raised by India in this appeal relates primarily to the scope of *claims* that may be raised in Article 21.5 proceedings, this issue is intertwined with the question of which *measures* may be considered as "measures *taken to comply*" with the DSB rulings in an original dispute.

79. We addressed the function and scope of Article 21.5 proceedings for the first time in *Canada – Aircraft (Article 21.5 – Brazil)*. There, we found that Article 21.5 panels are not merely called upon to assess whether "measures taken to comply" implement specific "recommendations and rulings" adopted by the DSB in the original dispute.[88] We explained there that the mandate of Article 21.5 panels is to examine either the "existence" of "measures taken to comply" or, more frequently, the "*consistency with a covered agreement*" of implementing measures.[89] This implies that an Article 21.5 panel is not confined to examining the "measures taken to comply" from the perspective of the claims, arguments, and factual circumstances relating to the measure that was the subject of the *original* proceedings.[90] Moreover, the relevant facts bearing upon the "measure taken to comply" may be different from the facts relevant to the measure at issue in the original proceedings. It is to be expected, therefore, that the claims, arguments, and factual circumstances relating to the "measure taken to comply" will not, necessarily, be the same as those relating to the measure in the original dispute.[91] Indeed, a complainant in Article 21.5 proceedings may well raise *new* claims, arguments, and factual circumstances different from those raised in the original proceedings, because a "measure taken to comply" may be *inconsistent* with WTO obligations in ways different from the original measure. In our view, therefore, an Article 21.5 panel could not properly carry out its mandate to

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[87]The Panel stated in paragraph 6.17 of the Panel Report:

> 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. (original boldface)

In paragraphs 6.13 ff of the Panel Report, the Panel refers, in support of this interpretation, to the panel reports in *Australia – Salmon (Article 21.5 – Canada)* (para. 7.10.22) and *Australia – Automotive Leather II (Article 21.5 – US)* (para. 6.4).

[88]Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 40.

[89]*Ibid.*, paras. 40-41. The panels in *EC – Bananas III (Article 21.5 – Ecuador)* (paras. 6.8-6.9) and *Australia – Salmon (Article 21.5 – Canada)* (para. 7.10.9) reached essentially the same conclusion.

[90]Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 41.

[91]*Ibid.*

assess whether a "measure taken to comply" is *fully consistent* with WTO obligations if it were precluded from examining claims additional to, and different from, the claims raised in the original proceedings.[92]

80. This appeal, however, raises an issue different from the issue that was before us in *Canada – Aircraft (Article 21.5 – Brazil)*. Here, India did not raise a *new* claim before the Article 21.5 Panel; rather, India reasserted in the Article 21.5 proceedings the *same* claim that it had raised before the *original* panel in respect of a component of the implementation measure which was the same as in the original measure. This *same* claim was dismissed by the original panel, and India did not appeal that finding.

81. Despite this previous dismissal, and despite India's decision not to appeal it, India insists that it should be entitled to reassert its claim under Article 3.5 relating to "other factors" in these Article 21.5 proceedings. India argues that it should be entitled to do so because the "measure taken to comply" in this dispute is "separate and distinct" from the measure subject to the original dispute.[93] For support, India refers to our Report in *Canada – Aircraft (Article 21.5 – Brazil)*, where we stated that:

> In principle, a measure which has been "taken to comply with the recommendations and rulings" of the DSB will *not* be the same measure as the measure which was the subject of the original dispute, so that, in principle, there would be two separate and distinct measures: the original measure which *gave rise* to the recommendations and rulings of the DSB, and the "measures taken to comply" which are – or should be – adopted to *implement* those recommendations and rulings.[94] (original italics; footnote omitted)

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[92] As we put it in *Canada – Aircraft (Article 21.5 – Brazil)*:

> Indeed, the utility of the review envisaged under Article 21.5 of the DSU would be seriously undermined if a panel were restricted to examining the new measure from the perspective of the claims, arguments and factual circumstances that related to the original measure, because an Article 21.5 panel would then be unable to examine fully the "consistency with a covered agreement of the measures taken to comply", as required by Article 21.5 of the DSU.

(Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 41) We defined the function of Article 21.5 proceedings in the same vein in our Report in *US – Shrimp (Article 21.5 – Malaysia)* (para. 87).

[93] India's appellant's submission, para. 151.

[94] Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 36. In *US – Shrimp (Article 21.5 – Malaysia)*, we recalled our rulings on this issue, explicitly referring to our Report in *Canada – Aircraft (Article 21.5 – Brazil)*. (Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 86)

82. Relying on this, India contends that it is *not*, in fact, challenging the same measure that was before the original panel. India maintains that, although some aspects of the measure remain the same, the redetermination must be considered "as a whole new measure" because it is not capable of being divided into separate elements.[95]

83. In contrast, the European Communities contends that there are *limits* to the scope of the claims that may be raised in Article 21.5 proceedings, even where such claims challenge "measures taken to comply" as inconsistent with WTO obligations, in contrast to measures that gave rise to the *original* proceedings. The European Communities refers to our Report in *US – Shrimp (Article 21.5 – Malaysia)*, on which the Panel also relied[96], where we stated:

> With respect to a claim that *has* been made when a matter is referred by the DSB for an Article 21.5 proceeding, Malaysia seems to suggest as well that a 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.[97] (original italics)

We concluded in that appeal that:

> … the [*US – Shrimp (Article 21.5 – Malaysia)*] Panel properly examined Section 609 as part of its examination of the totality of the new measure, correctly found that Section 609 had not been changed since the original proceedings, and rightly concluded that our ruling in *United States – Shrimp* with respect to the consistency of Section 609, therefore, still stands.[98]

84. In the light of these considerations, we turn to an examination of the measure taken to comply in this implementation dispute. In doing so, we look to the various aspects of the redetermination carried out by the European Communities in order to comply with the DSB rulings in the original dispute.

85. We agree with India that the investigating authorities of the European Communities were required to revise the original determination of dumping and injury in order to comply with the DSB recommendations and rulings. Towards this end, the European Communities recalculated the dumping margins *without* applying the practice of "zeroing" that had been found to be inconsistent with WTO obligations in the original dispute. According to the recalculation, two of the *individually*

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[95]India's response to questioning at the oral hearing.

[96]Panel Report, para. 6.50.

[97]Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 89.

[98]*Ibid.*, para. 96.

examined Indian producers were *not* dumping.[99] The investigating authorities deducted the imports attributable to those two producers from the *volume* of dumped imports, and, accordingly, the volume of dumped imports in the redetermination was *lower* than in the original determination. According to EC Regulation 1644/2001, the investigating authorities of the European Communities also "re-examined" whether a causal link between the two *revised* elements—dumped imports and the injury to the domestic industry—still existed, and the Panel reviewed that re-examination.[100]

86. The *amount* of dumped imports will, of course, have an impact on the assessment of the *effects* of the "dumped imports" for the purposes of determining *injury*. It is clear, therefore, that the revised findings on dumping and injury could have a bearing on whether a causal link exists between dumping and injury. But whilst a revised finding of *dumping* will, in all likelihood, have an impact on the "effect of *dumped* imports", we see no reason to conclude as well that this revised finding would have any impact on the "effects … of known factors *other than* the dumped imports" in this dispute.[101] Accordingly, we are of the view that the investigating authorities of the European Communities were not required to change the determination as it related to the "effects of other factors" in this particular dispute. Moreover, we do not see why that part of the redetermination that merely incorporates elements of the original determination on "other factors" would constitute an inseparable element of a measure taken to comply with the DSB rulings in the original dispute. Indeed, the investigating authorities of the European Communities were able to treat this element separately. Therefore, we do not agree with India that the redetermination can only be considered "as a whole new measure".[102]

87. We conclude, therefore, that, in these Article 21.5 proceedings, India has raised the *same* claim under Article 3.5 relating to "other factors" as it did in the original proceedings. In doing so, India seeks to challenge an aspect of the original measure which has not changed, and which the European Communities did not have to change, in order to comply with the DSB recommendations and rulings to make that measure consistent with the European Communities' WTO obligations.

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[99]In the original determination, the European Communities treated all imports from India as "dumped" because it found, in applying the practice of "zeroing", that all of the individually-examined producers were dumping. The original panel ruled that all import transactions attributable to a producer found to be dumping may be considered as "dumped" for purposes of making a determination of injury. (Original Panel Report, para. 6.137)

[100]Panel Report, paras. 6.228 and 6.233.

[101]We do not see how a change in the volume of "dumped imports" would affect the relationship between injury caused by "dumped imports" and injury caused by "other factors" in a situation where those "other factors" alone do *not* cause injury. However, a change in the volume of "dumped imports" could affect this relationship in a situation where "other factors" cause a certain amount of injury.

[102]India's response to questioning at the oral hearing.

88. For these reasons, we agree with the Panel's statement distinguishing, in this respect, the *Canada – Aircraft (Article 21.5 – Brazil*) dispute from these Article 21.5 proceedings:

> 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. [103] (original boldface)

We agree with the Panel that the *Canada – Aircraft (Article 21.5 – Brazil)* dispute involved a *new* claim challenging a *new* component of the measure taken to comply which was not part of the original measure. The situation in *Canada – Aircraft (Article 21.5 – Brazil)* was thus different from the situation in this appeal.

89. Nor does our finding in *US – FSC (Article 21.5 – EC)* support India's position in this appeal. [104] In that implementation dispute, the Article 21.5 panel ruled on a *new* claim under Article III of the GATT 1994 that the European Communities had not raised in the original proceedings. We upheld that ruling on appeal. In that dispute, the European Communities challenged a "foreign content limit" (which is similar to a local content requirement) imposed by the "FSC Repeal and Extraterritorial Income Exclusion Act of 2000 (ETI)" [105] on foreign trade property eligible for special tax treatment. That provision established a *different* "foreign content limit" from the one contained in the original "Foreign Sales Corporation (FSC) regime" [106], which the United States had *changed* in order to comply with the DSB recommendations and rulings in the original dispute. In other words, the *US – FSC (Article 21.5 – EC)* dispute involved a *new* claim challenging a *changed* component of the measure taken to comply, while this dispute, by contrast, concerns the *same* claim against an *unchanged* component of the implementation measure that was part of the

[103]Panel Report, para. 6.48.

[104]India's appellant's submission, para. 146.

[105]United States Public Law 106-519, 114 Stat. 2423 (2002).

[106]Sections 921-927 of the Internal Revenue Code and Related Measures Establishing Special Tax Treatment for Foreign Sales Corporations.

original measure and that was not found to be inconsistent with WTO obligations.[107] Therefore, the situation in *US – FSC (Article 21.5 – EC)* was different from the situation in this appeal.

90. Having distinguished the situations in these two previous implementation disputes from the situation in this appeal, we turn next to the question of the effect of a ruling adopted by the DSB in an original dispute for the parties to Article 21.5 proceedings. The European Communities argues that a ruling adopted by the DSB provides a final resolution to the dispute between the parties as it relates to the particular claim and the specific aspect of the measure.[108] As we have noted, the *US – Shrimp (Article 21.5 – Malaysia)* dispute involved a claim against an aspect of the implementation measure that was the *same* as in the *original* measure, and that we had found to be not *inconsistent* with WTO obligations in the original dispute. In that Article 21.5 dispute, we ruled:

> We wish to recall that panel proceedings under Article 21.5 of the DSU are, as the title of Article 21 states, part of the process of the "*Surveillance of Implementation of Recommendations and Rulings*" of the DSB. This includes Appellate Body Reports. To be sure, the right of WTO Members to have recourse to the DSU, including under Article 21.5, must be respected. Even so, it must also be kept in mind that Article 17.14 of the DSU provides not only that Reports of the Appellate Body "shall be" adopted by the DSB, by consensus, but also that such Reports "shall be … unconditionally accepted by the parties to the dispute. …" Thus, 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. In this regard, we recall, too, that Article 3.3 of the DSU states that the "prompt settlement" of disputes "is essential to the effective functioning of the WTO".[109] (underlining added)

91. Thus, we concluded there that an adopted Appellate Body Report must be treated as a *final resolution* to a dispute between the parties to that dispute. We based this conclusion on Article 17.14 of the DSU, which deals with the effect of adopted Appellate Body Reports (as opposed to *panel* reports). Article 17.14 reads, in relevant part:

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[107]We also agree with the Panel's statements, in paragraphs 6.46 and 6.49 of the Panel Report, that the claims raised in *EC – Bananas III (Article 21.5 – Ecuador)*, as well as those raised in *Australia – Salmon (Article 21.5 – Canada)*, concerned aspects of the "measures taken to comply" in those disputes which were *different* from the measures subject to the respective original disputes.

[108]European Communities' appellee's submission, paras. 150-151.

[109]Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 97.

Adoption of Appellate Body Reports

> An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members. (footnote omitted)

92. The issue raised in this appeal is similar to the issue we resolved in *US – Shrimp (Article 21.5 – Malaysia)*. In this appeal, however, the original panel's finding on India's claim under Article 3.5 relating to "other factors" was *not appealed* in the original dispute. Accordingly, the finding of the original panel relating to that claim was adopted by the DSB as part of a *panel* report, and, therefore, Article 17.14, which deals with the adoption of *Appellate Body* Reports, does not dispose of the issue before us.

93. All the same, in our view, an *unappealed* finding included in a panel report that is *adopted* by the DSB must be treated as a *final resolution* to a dispute between the parties in respect of the *particular* claim and the *specific* component of a measure that is the subject of that claim. This conclusion is supported by Articles 16.4 and 19.1, paragraphs 1 and 3 of Article 21, and Article 22.1 of the DSU. Where a panel concludes that a measure is inconsistent with a covered agreement, that panel shall *recommend*, according to Article 19.1, that the Member concerned bring that measure into conformity with that agreement. A panel report, including the *recommendations* contained therein, shall be *adopted* by the DSB within the time period specified in Article 16.4—unless appealed. Members are to *comply* with recommendations and rulings *adopted* by the DSB promptly, or within a reasonable period of time, in accordance with paragraphs 1 and 3 of Article 21 of the DSU. A Member that does not comply with the recommendations and rulings adopted by the DSB within these time periods must face the consequences set out in Article 22.1, relating to compensation and suspension of concessions. Thus, a reading of Articles 16.4 and 19.1, paragraphs 1 and 3 of Article 21, and Article 22.1, taken together, makes it abundantly clear that a panel finding which is not appealed, and which is included in a panel report *adopted* by the DSB, must be accepted by the parties as a *final* resolution to the dispute between them, in the same way and with the same finality as a finding included in an Appellate Body Report adopted by the DSB—with respect to the particular claim and the specific component of the measure that is the subject of the claim. Indeed, the European Communities and India agreed at the oral hearing that both panel reports and Appellate Body Reports would have the same effect, in this respect, once adopted by the DSB.[110]

[110]India's and the European Communities' responses to questioning at the oral hearing.

94. On this point, we recall that we resolved the question of the effect of findings adopted by the DSB as part of a *panel* report in the same vein in *Mexico – Corn Syrup (Article 21.5 – US).* In that implementation dispute, we relied on Article 3.2 of the DSU, which emphasizes the need for security and predictability in the trading system, and on Article 3.3 of the DSU, which stresses the necessity for the prompt settlement of disputes. There, we treated certain findings of the original panel that had *not* been appealed in the original proceedings, and that had been adopted by the DSB, as a final resolution to the dispute between the parties in respect of the particular claim and the specific component of the measure that was the subject of the claim. We observed there that "Mexico seems to seek to have us revisit the original panel report"[111], and added that:

> … the original panel report, regarding the *initial* measure (SECOFI's original determination), has been adopted and that these Article 21.5 proceedings concern a *subsequent* measure (SECOFI's redetermination). We also note that Mexico did not appeal the original panel's report, and that Articles 3.2 and 3.3 of the DSU reflect the importance to the multilateral trading system of security, predictability and the prompt settlement of disputes. We see no basis for us to examine the original panel's treatment of the alleged restraint agreement.[112] (original italics)

95. We, therefore, agree with the Panel in this dispute that:

> … the same principle [as that expressed in Article 17.14] 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.[113] (footnote omitted)

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[111]Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 78.

[112]*Ibid*., para. 79.

[113]Panel Report, para. 6.51. The Panel found support for its view in our finding in *Japan – Alcoholic Beverages II* that "[a]dopted panel reports are an important part of the GATT *acquis*. … 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*". (*Ibid*., footnote 73 to para. 6.51, quoting Appellate Body Report, *Japan – Alcoholic Beverages II*, at 108) (emphasis added)

96. We consider next whether the fact that the Panel dismissed India's claim because India had not established a *prima facie* case has any relevance for our decision on the effect of the adoption by the DSB of a finding of a panel report that was not appealed. We recall that, when we ruled in *US – Shrimp (Article 21.5 – Malaysia)* that a finding adopted by the DSB should be treated as a final resolution to a dispute, we relied on the fact that, in our original Report in *US – Shrimp*, we had found that the *unchanged* aspect of the measure, as such, was *consistent* with Article XX of the GATT 1994. Here, however, the original panel ruled that India had failed to present a *prima facie* case in respect of its claim under Article 3.5 relating to "other factors".[114] In our view, the effect, for the parties, of findings adopted by the DSB as part of a panel report is the same, regardless of whether a panel found that the complainant failed to establish a *prima facie* case that the measure is inconsistent with WTO obligations, that the Panel found that the measure is fully consistent with WTO obligations, or that the Panel found that the measure is not consistent with WTO obligations. A complainant that, in an original proceeding, fails to establish a *prima facie* case should not be given a "second chance" in an Article 21.5 proceeding, and thus be treated more favourably than a complainant that did establish a *prima facie* case but, ultimately, failed to prevail before the original panel, with the result that the panel did not find the challenged measure to be inconsistent with WTO obligations. Nor should a defending party be subject to a second challenge of the measure found not to be inconsistent with WTO obligations, merely because the complainant failed to establish a *prima facie* case, as opposed to failing ultimately to persuade the original panel. Once adopted by the DSB, both findings amount to a final resolution to the issue between the parties with respect to the particular

[114]The Panel stated that:

> 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.

(Panel Report, para. 6.52) (original boldface)

claim and the specific aspects of the measure that are the subject of the claim.[115] Moreover, here, India decided not to appeal the panel finding at issue in the original proceedings, even though it could have done so, inasmuch as the issue was not of an exclusively factual nature. Hence, India itself seems to have accepted the finding as final.

97. Therefore, we agree with the Panel's conclusion that:

> When considering the status of adopted panel reports, the Appellate Body has indicated that they are binding on the parties "with respect to that particular dispute". 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.[116] (footnotes omitted)

98. The Panel's ruling that India's claim under Article 3.5 relating to "other factors" was not properly before it is also consistent with the object and purpose of the DSU. Article 3.3 provides that the *prompt* settlement of disputes is "essential to the effective functioning of the WTO". Article 21.5 advances the purpose of achieving a prompt settlement of disputes by providing an expeditious procedure to establish whether a Member has fully complied with the recommendations and rulings of the DSB.[117] For that purpose, an Article 21.5 panel is to complete its work within 90 days, whereas a panel in an original dispute is to complete its work within 9 months of its establishment, or within

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[115]We note that, at the oral hearing, the participants agreed that a finding adopted by the DSB, expressed in terms of WTO-consistency or the failure to present a *prima facie* case, has the same effect in terms of providing a final resolution to a dispute, in this respect, between the parties.

We also recall that the Panel noted, in paragraph 6.44 of the Panel Report, that the original panel's dismissal of India's claim under Article 3.5 relating to "other factors" was *not* an exercise of "judicial economy". The issue raised in this appeal is different from a situation where a panel, on *its* own initiative, exercises "judicial economy" by not ruling on the substance of a claim. In this respect, we recall our statement in *Australia – Salmon* that:

> The principle of judicial economy has to be applied keeping in mind the aim of the dispute settlement system. This aim is to resolve the matter at issue and "to secure a positive solution to a dispute". To provide only a partial resolution of the matter at issue would be false judicial economy. A panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings "in order to ensure effective resolution of disputes to the benefit of all Members."

(Appellate Body Report, *Australia – Salmon*, para. 223) (footnotes omitted)

We believe that in a situation where a panel, in declining to rule on a certain claim, has provided only a partial resolution of the matter at issue, a complainant should not be held responsible for the panel's false exercise of judicial economy, such that a complainant would not be prevented from raising the claim in a subsequent proceeding.

[116]Panel Report, para. 6.52.

[117]*Ibid*., para. 6.45.

6 months of its composition. It would be incompatible with the function and purpose of the WTO dispute settlement system if a claim could be reasserted in Article 21.5 proceedings after the original panel or the Appellate Body has made a finding that the challenged aspect of the original measure is *not* inconsistent with WTO obligations, and that report has been adopted by the DSB. At some point, disputes must be viewed as definitely *settled* by the WTO dispute settlement system.

99. In the light of the foregoing, we conclude that the original panel's finding on India's claim under Article 3.5 relating to "other factors" provides a "final resolution" to the dispute in this respect[118] between the parties, because it was not appealed, and forms part of a panel report adopted by the DSB. Therefore, we *uphold* the Panel's finding, in paragraph 6.53 of the Panel Report, that India's claim under Article 3.5 of the *Anti-Dumping Agreement*, as far as it relates to the European Communities' consideration of "other factors", was not properly before the Panel.

100. As a result, we do not need to rule on the issue of whether the Panel erred, in its alternative finding, in paragraph 6.246 of the Panel Report, that the European Communities had ensured that injuries caused by "other factors" was not attributed to the dumped imports, and thus had not acted inconsistently with Article 3.5 of the *Anti-Dumping Agreement*. We recall that, at the oral hearing, India confirmed that its appeal against the Panel's alternative finding is conditional on our reversing the Panel's finding that India's claim under Article 3.5 relating to "other factors" was not properly before the Panel, and that, therefore, we need not reach this issue if we were to rule as we, in fact, have ruled. [119]

V. Paragraphs 1 and 2 of Article 3 of the *Anti-Dumping Agreement*

A. *Introduction*

101. India appeals the Panel's finding that the European Communities did not act inconsistently with paragraphs 1 and 2 of Article 3 of the *Anti-Dumping Agreement*.[120] India contends that the European Communities did act inconsistently with those provisions, because the investigating authorities of the European Communities found, for purposes of determining injury, that *all* imports attributable to Indian producers or exporters for which *no individual* margin of dumping was calculated were *dumped*. India argues that this "determination by the EC neither rested on positive evidence, nor was objective, and, accordingly, was inconsistent with Articles 3.1 and 3.2 of the

[118]By this we mean this particular claim and the specific component of the measure that was the subject of that claim.

[119]India's response to questioning at the oral hearing.

[120]India's appellant's submission, para. 84; Panel Report, para. 6.144.

Anti-Dumping Agreement."[121] According to India, the European Communities was required to determine the volume of dumped imports attributable to producers that *were not* examined individually on the basis of the *proportion* of imports found to be dumped from producers that *were* examined individually.[122] In other words, India argues that, where a certain proportion of the volume of the imports attributable to producers examined individually is found to be dumped, paragraphs 1 and 2 of Article 3 require the investigating authorities to determine the volume of dumped imports attributable to the producers that were *not* individually examined in the *same proportion*.

102. We begin by recalling the findings of the original panel and the Article 21.5 Panel insofar as they are relevant for resolving this issue. Before the *original panel*, India claimed that, by including import *transactions* for which there was no evidence of dumping in the volume of dumped imports when determining injury, the European Communities violated paragraphs 1 and 2 of Article 3. The European Communities contended that the volume of dumped imports, for purposes of Article 3, includes *all* imports originating in the investigated *country* found to be dumping. The original panel disagreed with India, and concluded that dumping is a determination made with reference to imports from a particular *producer* or *exporter*, and not with reference to individual *transactions*.[123] In the original panel's view, if a producer or exporter that is examined individually is found to be dumping, *all* import transactions attributable to that producer or exporter may be considered as dumped. The original panel found no violation of Article 3 in relation to the determination of the volume of dumped imports.[124] This latter finding of the original panel was *not* appealed.

103. In the *redetermination* that gave rise to this appeal, the investigating authorities of the European Communities recalculated dumping margins for the five Indian producers and exporters that had been examined *individually* in the original determination that led to the original measure. They did so without applying the practice of "zeroing", which had been found to be inconsistent with Article 2.4.2 in the original proceedings.[125] In this recalculation, the investigating authorities found that three of the five Indian producers examined individually were dumping, and two were *not*. It is undisputed between the parties that the two Indian producers found *not* to be dumping accounted for

[121]India's appellant's submission, para. 18.

[122]*Ibid*., para. 31.

[123]Original Panel Report, para. 6.136.

[124]*Ibid*., para. 6.142.

[125]The original panel found that the European Communities had acted inconsistently with Article 2.4.2 by establishing the margins of dumping based on a methodology which included zeroing negative price differences calculated for some models of bed linen. (*Ibid*., para. 6.119) We upheld this finding on appeal. (Appellate Body Report, *EC – Bed Linen*, para. 66)

53 percent of all imports attributable to the five producers which were examined individually. Based on this recalculation, the European Communities concluded that *all* imports attributable to *all other* Indian producers or exporters—which were *not* examined individually—*were dumped*. For purposes of determining injury, the investigating authorities *excluded* from the volume of dumped imports the imports from the two producers that were examined *individually* and found *not* to be dumping [126], but included all imports from Indian producers that had not been examined individually and for which, therefore, there was no direct evidence from the investigation.

104. Before the *Article 21.5 Panel*, India claimed that the European Communities violated paragraphs 1 and 2 of Article 3 by finding, in this redetermination, that *all* imports attributable to Indian producers or exporters that were *not* individually examined were *dumped*. In reply, the European Communities contended that nothing in the *Anti-Dumping Agreement* prohibits Members from including in the volume of dumped imports, the volume of all imports from producers which were examined individually and found to be dumping, as well as *all* imports from producers which were *not* examined individually.

105. The Panel found that the European Communities "did not act inconsistently with Articles 3.1 and 3.2 of the [Anti-Dumping] Agreement in its consideration of 'dumped imports' in this case". [127] The Panel's finding was premised essentially on the argument that paragraphs 1 and 2 of Article 3 "contain no guidance whatsoever regarding the determination of the volume of dumped imports". [128] In the Panel's view, the fact that "Article 9.4 allows anti-dumping duties to be **collected** on imports from producers for which an individual determination of dumping … was not made … necessarily entails that [imports attributed to] such producers are properly considered … as 'dumped imports' for the purposes of Articles 3.1 and 3.2". [129] The Panel concluded "that the [Anti-Dumping] 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." [130]

106. On appeal, India requests that we *reverse* this finding. In India's view, paragraphs 1 and 2 of Article 3 do not permit a determination of injury to be based on imports from producers for which

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[126]Panel Report, para. 6.117. The European Communities made alternative calculations of the volume of dumped imports from India; one calculation included imports attributable to the producers that were found *not* to be dumping, while the other did not. Under both alternative calculations, the European Communities found that the domestic industry was suffering injury. (EC Regulation 1644/2001, recital (22))

[127]Panel Report, para. 6.144.

[128]*Ibid*., para. 6.127.

[129]*Ibid*., para. 6.137. (original boldface)

[130]*Ibid*., para. 6.144. (original boldface)

there is "no evidence" of dumping.[131] India notes that the evidence from the sample of *examined* producers indicated that only 47 percent of the imports attributed to those producers were dumped. Therefore, according to India, the European Communities' determination, on the basis of this evidence alone, that 86 percent of the *total* imports from India were dumped, and, therefore, that this was the percentage of the "volume of the dumped imports", under paragraphs 1 and 2 of Article 3, did not result from an "objective examination" on the basis of "positive evidence", as required by the first paragraph of Article 3.[132] In India's view, imports from producers for which an *individual* determination of dumping is *not* made must be presumed *not* to have been dumped in the *same proportion* as imports determined *not* to have been dumped from producers for which an *individual* determination of dumping *was* made.[133]

107. The European Communities requests that we *uphold* the Panel's finding. The European Communities argues that it is entitled, for purposes of paragraphs 1 and 2 of Article 3, to treat as dumped *all* imports attributable to producers for which it did *not* make an affirmative determination of *no* dumping. According to the European Communities, this includes all imports attributable to producers that were examined *individually* and found to be dumping, as well as *all* imports attributable to producers that were *not* examined individually.[134] According to the European Communities, *all* imports attributable to producers that were *not* examined individually may be treated as *dumped*, for purposes of determining injury under Article 3, because Article 9.4 permits the imposition of the "all others" duty rate on imports attributable to *non-examined* producers.[135]

B. *Analysis*

108. We recall at the outset that the *Anti-Dumping Agreement* permits importing Members to counteract dumping by imposing anti-dumping measures on imports from companies of exporting

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[131]India's appellant's submission, para. 44.

[132]*Ibid.*, para. 47. The figure of 86 percent was derived from deducting from the total amount of imports the volume of imports attributable to the two Indian companies that were examined individually and found, in the redetermination, *not* to be dumping.

[133]India emphasizes that the results from the producers that were examined *individually* are *representative* of *all* Indian producers exporting bed linen to the European Communities, because those examined producers constituted a "statistically valid sample" within the meaning of the second sentence of Article 6.10. We return to Article 6.10 later in this Report, *infra*, paras. 134 *ff.*

[134]The European Communities argues that the Indian exporters that were examined *individually* are *not* necessarily representative of the *non*-examined exporters. In other words, the five Indian exporters examined individually were not a statistically valid sample, as India has claimed. Rather, according to the European Communities, the five exporters accounted for the largest percentage of the *export volume* that could be reasonably investigated, within the meaning of the second sentence of Article 6.10.

[135]The "all others" duty rate refers to the duty applied to imports from producers or exporters for which an individual margin of dumping is not established. (See Appellate Body Report, *US – Hot-Rolled Steel*, para. 115)

Members when an investigation demonstrates that all the requirements of that Agreement are fulfilled. It is useful also to recall the specific standard of review under the *Anti-Dumping Agreement* that the Panel was required to follow in this dispute. This standard of review is set out in Article 17.6 of the *Anti-Dumping Agreement*.[136] As to the facts, under Article 17.6(i), a panel "shall" determine whether the establishment of the facts by the investigating authorities was "proper" and whether the evaluation of those facts was "unbiased and objective". If the establishment of the facts was proper and the evaluation was unbiased and objective, then a panel "shall not" overturn that evaluation, even though it might have reached a different conclusion. As to the law, under Article 17.6(ii), first sentence, a panel "shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law." Under Article 17.6(ii), second sentence, where a panel finds from such an interpretation that a relevant provision of the *Anti-Dumping Agreement* "admits of more than one permissible interpretation", the panel "shall find the [investigating] authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations." We examine the issues raised in this appeal with this standard of review in mind.

109. We begin our analysis with an examination of Article 3 of the *Anti-Dumping Agreement*, which is entitled "Determination of Injury". Paragraphs 1 and 2 of Article 3 read as follows:

> 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. (emphasis added)
>
> 3.2 *With regard to the volume of the dumped imports*, the investigating authorities shall consider whether there has been a significant increase in *dumped imports*, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the *dumped imports* on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the *dumped imports* as compared with the price of a like product of the importing Member, or whether the effect of *such imports* is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance. (emphasis added)

[136] Appellate Body Report, *Thailand – H-Beams*, para. 114. Article 11 of the DSU defines generally a panel's mandate in reviewing the consistency with the covered agreements of measures taken by Members. In our Report in *US – Hot-Rolled Steel*, we found that there is no "conflict" between Article 11 of the DSU and Article 17.6 of the *Anti-Dumping Agreement*; rather, the two provisions complement each other. (Appellate Body Report, *US – Hot-Rolled Steel*, para. 55)

These obligations are absolute. They provide for no exceptions, and they include no qualifications. They must be met by every investigating authority in every injury determination.

110. In *Thailand – H-Beams*, we emphasized the relevance of Article 3.1 as an "overarching provision" that informs the more detailed obligations in the succeeding paragraphs of Article 3:

> Article 3 as a whole deals with obligations of Members with respect to the determination of injury. Article 3.1 is an overarching provision that sets forth a Member's fundamental, substantive obligation in this respect. Article 3.1 informs the more detailed obligations in succeeding paragraphs. These obligations concern the determination of the volume of dumped imports, and their effect on prices (Article 3.2) … The focus of Article 3 is thus on *substantive* obligations that a Member must fulfill in making an injury determination. [137] (original italics; underlining added)

111. It is clear from the text of Article 3.1 that investigating authorities must ensure that a "determination of injury" is made on the basis of "positive evidence" and an "objective examination" of the volume and effect of imports that *are dumped*—and to the exclusion of the volume and effect of imports that *are not dumped*. It is clear from the text of Article 3.2 that investigating authorities must consider whether there has been a significant increase in *dumped* imports, and that they must examine the effect of *dumped* imports on prices resulting from price undercutting, price depression, or price suppression.

112. Article 3.5 continues in the same vein as the initial paragraphs of Article 3 by requiring a demonstration that dumped imports are causing injury to the domestic industry "through the *effects of dumping*", which, of course, depends upon there being imports from producers or exporters that *are dumped*. In addition, Article 3.5 lists "volume and prices of imports *not* sold at dumping prices" as an example of "known factors *other than the dumped* imports" that are injuring the domestic industry at the same time as the dumped imports. Article 3.5 requires that this injury *not* be attributed to the dumped imports. Thus, injury caused by "volume and prices of imports *not* sold at dumping prices" must be *separated and distinguished* from injury caused by the "dumped imports". None of these provisions of the *Anti-Dumping Agreement* can be construed to suggest that Members may include in the volume of *dumped* imports the imports from producers that are *not* found to be dumping.

[137] Appellate Body Report, *Thailand – H-Beams*, para. 106.

113. Although paragraphs 1 and 2 of Article 3 do not set out a *specific* methodology that investigating authorities are required to follow when calculating the volume of "dumped imports", this does not mean that paragraphs 1 and 2 of Article 3 confer unfettered discretion on investigating authorities to pick and choose whatever methodology they see fit for determining the volume and effects of the dumped imports. Paragraphs 1 and 2 of Article 3 require investigating authorities to make a determination of injury on the basis of "positive evidence" and to ensure that the injury determination results from an "objective examination" of the volume of dumped imports, the effects of the dumped imports on prices, and, ultimately, the state of the domestic industry. Thus, whatever methodology investigating authorities choose for determining the volume of dumped imports, if that methodology fails to ensure that a determination of injury is made on the basis of "positive evidence" and involves an "objective examination" of *dumped* imports—rather than imports that are found *not* to be dumped—it is not consistent with paragraphs 1 and 2 of Article 3.

114. In *US – Hot-Rolled Steel*, we defined "positive evidence" as follows:

> The term "positive evidence" relates, in our view, to the *quality* of the evidence that authorities may rely upon in making a determination. The word "positive" means, to us, that the evidence must be of an *affirmative*, *objective* and *verifiable* character, and that it must be *credible*.[138] (emphasis added)

In that same appeal, we also defined an "objective examination":

> The term "objective examination" aims at a different aspect of the investigating authorities' determination. While the term "positive evidence" focuses on the facts underpinning and justifying the injury determination, the term "objective examination" is concerned with the investigative process itself. The word "examination" relates, in our view, to the way in which the evidence is gathered, inquired into and, subsequently, evaluated; that is, it relates to the conduct of the investigation generally. The word "objective", which qualifies the word "examination", indicates essentially that the "examination" process must conform to the dictates of the basic principles of good faith and fundamental fairness.[139] (footnote omitted)

[138] Appellate Body Report, *US – Hot-Rolled Steel*, para. 192.

[139] *Ibid.*, para. 193.

We summed up in that appeal the requirement to conduct an "objective examination" as follows:

> In short, 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.[140] (footnote omitted, emphasis added)

We observe that, in response to our questions at the oral hearing, both participants in this appeal confirmed that they agree with these interpretations of the terms "positive evidence" and an "objective examination", as set out in *US –Hot-Rolled Steel.*[141]

115. Moreover, at the oral hearing, none of the participants disagreed with the findings of the original panel and the Article 21.5 Panel relating to the treatment, for purposes of determining injury, of imports attributed to producers or exporters that were *examined individually* in an investigation. Accordingly, if a producer or exporter is found to be dumping, all imports from that producer or exporter may be *included* in the volume of dumped imports, but, if a producer or exporter is found *not* to be dumping, all imports from that producer or exporter must be *excluded* from the volume of dumped imports.[142]

116. The issue raised in this appeal, however, does not relate to imports from producers or exporters that *were examined individually* in an investigation. Rather, it relates to the appropriate treatment of imports from producers or exporters that *were not examined individually* in such an investigation. The appeal before us involves an investigation in which *individual* margins of dumping have *not* been determined for *each* Indian producer exporting to the European Communities. It is, of course, not necessary under the *Anti-Dumping Agreement* for investigating authorities to examine *each* producer and exporter. The second sentence of Article 6.10 authorizes investigating authorities, when determining margins of dumping, to *limit their examination* where the number of producers or exporters of the product under investigation is so large that the

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[140]Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.

[141]These requirements of paragraphs 1 and 2 of Article 3, as well as the requirements of Article 17.6(i), that investigating authorities establish the facts of the matter *properly* and evaluate those facts in an *unbiased and objective* manner, are mutually supportive and reinforcing. In *US – Hot-Rolled Steel*, we explained in respect of Article 17.6(i) that:

> … panels must assess if the establishment of the facts by the investigating authorities was *proper* and if the evaluation of those facts by those authorities was *unbiased* and *objective*. (original italics)

(*Ibid*., para. 56)

[142]Original Panel Report, paras. 6.138-6.140; Panel Report, paras. 6.121 and 6.131.

determination of an *individual* margin of dumping for *each* of them would be *impracticable*. This limited examination may be conducted in one of two alternative ways identified in Article 6.10: 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."

117. Thus, there is a right to conduct a limited examination in the circumstances described in the second sentence of Article 6.10. Paragraphs 1 and 2 of Article 3 must, accordingly, be interpreted in a way that permits investigating authorities to satisfy the requirements of "positive evidence" and an "objective examination" without having to investigate each producer or exporter individually. This does not, however, in any way, absolve investigating authorities from the absolute requirements in paragraphs 1 and 2 of Article 3 that the volume of dumped imports be determined on the basis of "positive evidence" and an "objective examination".

118. We have noted that neither paragraph 1 nor paragraph 2 of Article 3—nor any other provision of the *Anti-Dumping Agreement*—sets forth a *specific* methodology that must be followed by investigating authorities when calculating the volume of dumped imports for purposes of determining injury. Still, whatever methodology investigating authorities choose for calculating the volume of "dumped imports", that calculation and, ultimately, the determination of injury under Article 3, clearly must be made on the basis of "positive evidence" and involve an "objective examination". These requirements are not ambiguous, and they do not "admit of more than one permissible interpretation" within the meaning of the second sentence of Article 17.6(ii). Therefore, as in *US – Hot-Rolled Steel*, our interpretation of these requirements is based on customary rules of interpretation of public international law, as required by the first sentence of Article 17.6(ii).[143] This leaves no room, in this appeal, for recourse to the second sentence of Article 17.6(ii) in interpreting paragraphs 1 and 2 of Article 3.

119. India argues that the European Communities failed to determine the volume of dumped imports attributable to *non*-examined producers on the basis of "positive evidence" and an "objective examination". Although the Indian producers that were *examined* individually and found to be dumping accounted for only 47 percent of imports attributable to all examined producers, the European Communities determined that *all* imports attributable to *non*-examined producers were dumped. India submits that an "objective examination" of the "positive evidence" from *examined* producers would lead to the conclusion that the same proportion, that is 47 percent, of imports

[143] Appellate Body Report, *US – Hot-Rolled Steel*, para. 130.

attributable to *non*-examined producers were dumped. The European Communities contends that its conclusion, for purposes of determining injury, that *all* imports attributable to *non*-examined producers are dumped, is based on "positive evidence" and an "objective examination", as required by paragraphs 1 and 2 of Article 3, because it is justified by Article 9.4. Article 9.4 defines the maximum anti-dumping duty that may be applied to imports from producers for which an individual dumping margin has *not* been separately calculated—commonly referred to as the "all others" duty rate.[144] The European Communities argues that, inasmuch as Article 9.4 does *not* limit the *volume* of imports from *non*-examined producers to which the "all others" duty rate may be applied, the practice of the European Communities must be permissible because the *volume* of imports subject to anti-dumping duties under Article 9 must be the *same* as the *volume* considered to be dumped for purposes of determining injury under Article 3.[145]

120. Regarding the requirement of "positive evidence", the European Communities maintains that it determined the volume of dumped imports on the basis of "positive evidence" under Article 3 because its investigating authorities calculated the "all others" duty rate under Article 9.4 on the basis of the weighted average of the dumping margins established for the three producers that were examined and found to be dumping. Regarding the requirement of an "objective examination", the European Communities points to the fact that Article 9.4 permits the imposition of the "all others" duty rate on *all* imports from all *non*-examined producers, and argues on this basis that the European Communities is entitled to include *all* imports from non-examined producers in the

[144]Article 9.4 of the *Anti-Dumping Agreement* reads:

> 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. (emphasis added)

[145]European Communities' statement at the oral hearing.

volume of *dumped* imports, when determining injury under Article 3.[146] In the view of the European Communities, this approach must necessarily constitute an "objective examination" for purposes of Article 3 because, if this approach were not "objective and unbiased"[147], the drafters of the *Anti-Dumping Agreement* would not have adopted it in Article 9.4. Accordingly, the European Communities concludes that the approach applied in this investigation satisfies the requirements of paragraphs 1 and 2 of Article 3 to base the determination of the volume of dumped imports and, ultimately, the determination of injury, on "positive evidence" and an "objective examination".

121. India rejects the European Communities' interpretation of the "volume of dumped imports" in Article 3 as including the volume of imports subject to the application of the "all others" duty rate under Article 9.4. India submits that the determination of the dumping "margin" is separate and distinct from the imposition and collection of anti-dumping "duties".[148] In India's view, Article 9.4 comes into play only *after* the investigating authorities have determined that all the conditions for the imposition of anti-dumping duties (namely, dumping, injury, and causation) have been fulfilled. According to India, Article 9.4 cannot be read to permit a derogation from the explicit requirements of paragraphs 1 and 2 of Article 3, namely that a determination of injury must be made on the basis of "positive evidence" and an "objective examination" of the volume and the effect of the dumped imports.

122. We turn now to an examination of Article 9, entitled "Imposition and Collection of Anti-Dumping Duties". Article 9.1 confers on Members the discretion to decide whether to impose an anti-dumping duty in cases where all the requirements for such imposition "*have been fulfilled*".[149] Where these requirements "*have been fulfilled*"[150], Article 9.4 defines the maximum anti-dumping duty that may be applied to exports from producers not individually examined when the investigating

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[146]Consistent with Article 9.4, the investigating authorities excluded from the calculation of that weighted average the negative or zero dumping margins established for the two examined producers that were found *not* to be dumping.

[147]European Communities' statement at the oral hearing.

[148]India's appellant's submission, para. 32. India also argues that the European Communities and the Panel confuse the imposition of dumping *duties* with the calculation of dumping *margins*. (See Panel Report, paras. 6.137-6.138)

[149]Article 9.1 of the *Anti-Dumping Agreement* reads in relevant part:

> The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition *have been fulfilled*, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member. (emphasis added)

[150]Article 9.1 also entitles Members to decide whether to impose an anti-dumping duty in the full amount of the margin of dumping, or a "lesser duty".

authorities "*have limited*" their examination in accordance with either alternative provided in the second sentence of Article 6.10.[151]

123. Japan contended in its third party submission, and also in its statement at the oral hearing, that the use of the present perfect tense in paragraphs 1 and 4 of Article 9 ("have been fulfilled" and "have limited") is significant.[152] In our view, too, the use by the drafters of the present perfect tense is significant; it indicates that the imposition and collection of anti-dumping duties under Article 9 is a separate and distinct phase of an anti-dumping action that necessarily occurs *after* the determination of dumping, injury, and causation under Articles 2 and 3 has been made.[153] Members have the right to impose and collect anti-dumping duties only *after* the completion of an investigation in which it *has been established* that the requirements of dumping, injury, and causation "*have been fulfilled*". In other words, the right to impose anti-dumping duties under Article 9 is a *consequence* of the prior determination of the existence of dumping margins, injury, and a causal link. The determination, by the investigating authorities of a Member, that there is injury caused by a certain volume of dumping necessarily precedes and gives rise to the *consequential* right to impose and collect anti-dumping duties.[154]

124. When examining the practice of "zeroing" in the original dispute, we noted that the requirements of Article 9 do not have a bearing on Article 2.4.2, because the rules on the *determination* of the margin of dumping are distinct and separate from the rules on the *imposition and collection* of anti-dumping duties.[155] Similarly, in this implementation dispute, we are of the view that Article 9.4, which specifies what action may be taken only *after* certain prerequisites have

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[151]Appellate Body Report, *US – Hot-Rolled Steel*, para. 116.

[152]Japan's third participant's submission, paras. 4 *ff.*

[153]According to Article 33.3 of the *Vienna Convention on the Law of Treaties*, where treaties have been authenticated in two or more languages, "[t]he terms of the treaty are presumed to have the same meaning in each authentic text." The Spanish terms ("se han cumplido" and "hayan limitado"), in paragraphs 1 and 4 of Articles 9, have the same temporal meaning as the English terms ("have been fulfilled" and "have limited"). The French terms ("sont remplies" and "auront limité") can also accommodate this temporal meaning.

[154]Korea too rejects the European Communities' interpretation that all imports from non-examined producers subject to the "all others" duty rate under Article 9.4 may be treated as dumped imports for purposes of Article 3. (Korea's statement at the oral hearing)

[155]In *EC – Bed Linen*, we noted that:

> … Article 2.4.2 is not concerned with the collection of anti-dumping duties, but rather with the determination of "the existence of margins of dumping". Rules relating to the "prospective" and "retrospective" collection of anti-dumping duties are set forth in Article 9 of the *Anti-Dumping Agreement*. The European Communities has not shown how and to what extent these rules on the "prospective" and "retrospective" collection of anti-dumping duties bear on the issue of the establishment of "the existence of dumping margins" under Article 2.4.2.

(Appellate Body Report, *EC – Bed Linen*, footnote 30 to para. 62)

been determined, is of little relevance for interpreting Article 3, which sets out those prerequisites. We do not see how Article 9.4, which authorizes the imposition of a certain maximum anti-dumping *duty* on imports from non-examined producers, is relevant for interpreting paragraphs 1 and 2 of Article 3, which deal with the determination of injury based on the *volume* of "dumped imports". Paragraphs 1 and 2 of Article 3 make no reference at all to Article 9.4, or to the specific methodology set out in Article 9.4 for calculating the "all others" duty rate, which comes into play only when imposing and collecting anti-dumping duties. Likewise, Article 9.4 does not mention the term "dumped imports" or the "volume" of such imports. In our view, the right to impose a certain maximum amount of anti-dumping *duties* on imports attributable to *non*-examined producers under Article 9.4 cannot be read as permitting a derogation from the express and unambiguous requirements of paragraphs 1 and 2 of Article 3 to determine the *volume* of dumped imports—including dumped import volumes attributable to *non*-examined producers—on the basis of "positive evidence" and an "objective examination". Thus, we see no basis for the European Communities' view that Article 9.4 establishes a methodology for calculating the volume of dumped imports from *non*-examined producers for purposes of determining injury on the basis of "positive evidence" and an "objective examination" under paragraphs 1 and 2 of Article 3.

125. Moreover, Article 9.4, which relates to the imposition of anti-dumping duties on imports from non-examined producers, has, by its own terms, a limited purpose as an *exception* to the rule in Article 9.3. Article 9.3 provides that "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2."[156] When individual dumping margins are determined for *each* producer or exporter, the *volume* of imports attributable to producers that were examined individually and found to be dumping will match the *volume* of imports attributable to those producers for which anti-dumping duties are collected. However, as noted earlier, where the determination of individual dumping margins for each producer is *impracticable*, the second sentence of Article 6.10 permits investigating authorities—as an exception to the rule in the first sentence of Article 6.10[157]—to *limit* their examination to some—and not all—producers. In such cases, as an *exception* to the rule in Article 9.3, Article 9.4 permits the imposition of a certain maximum amount of anti-dumping duties on imports attributable to producers that were *not*

[156]As a result, the amount of the anti-dumping duty collected from the individually-examined producer will *correspond* to the individually-calculated dumping margin. Pursuant to Article 9.1, the investigating authorities may decide, however, that it is sufficient to apply a duty of *less* than the dumping margin.

[157]The first sentence of Article 6.10 requires, "as a rule", that individual dumping margins be established for *each* producer or exporter.

examined individually [158], irrespective of whether those producers would have been found to be dumping had they been examined individually. It is likely, therefore, that this "all others" duty rate will be imposed on imports attributable at least to some producers that, in reality, might *not* be dumping. Hence, the reliance by the European Communities on Article 9.4, in interpreting paragraphs 1 and 2 of Article 3, is misplaced.

126. In sum, Article 9.4 provides no guidance for determining the volume of dumped imports from producers that *were not* individually examined on the basis of "positive evidence" and an "objective examination" under Article 3. The exception in Article 9.4, which authorizes the imposition of anti-dumping *duties* on imports from producers for which *no* individual dumping margin has been calculated, *cannot be assumed* to extend to Article 3, and, in particular, in this dispute, to paragraphs 1 and 2 of Article 3. For the same reasons, we do not see why the volume of imports that has been found to be dumped by non-examined producers, for purposes of determining *injury* under paragraphs 1 and 2 of Article 3, must be *congruent* with the volume of imports from those non-examined producers that is subject to the *imposition of anti-dumping duties* under Article 9.4, as contended by the European Communities and the Panel. [159]

127. Having concluded that Article 9.4 does not provide justification for considering *all* imports from *non*-examined producers as *dumped* for purposes of Article 3, we turn now to consider whether the European Communities' determination of the volume of dumped imports and, ultimately, of injury, in this investigation, was in accordance with paragraphs 1 and 2 of Article 3. To do so, we must examine whether this determination was made on the basis of "positive evidence" and involved an "objective examination" of the volume of dumped imports and their effect on prices and on domestic producers.

128. As we have already noted, it is not in dispute between the participants that the evidence from the five *examined* Indian producers exporting to the European Communities shows that the producers accounting for 47 percent of all imports attributable to all examined producers were found to be dumping; nor is it in dispute that the evidence also shows that the producers accounting for 53 percent of those imports were found *not* to be dumping. [160] The European Communities confirmed at

[158]According to Article 9.4(i), this so-called "all others" duty rate for non-examined producers may be based on the *weighted average* of more than *de minimis* dumping margins of producers and exporters selected for individual examination pursuant to the second sentence of Article 6.10. Margins established under the circumstances referred to in Article 6.8 shall also be disregarded in calculating this weighted average. Article 9.4(ii) provides for a different calculation method for cases where the liability for payment of anti-dumping duties is calculated on the basis of a *prospective* normal value.

[159]European Communities' statement at the oral hearing; Panel Report, para. 6.141.

[160]However, the European Communities believes that Article 9.4 entitles it in any event to treat all imports subject to the "all others" duty rate as "dumped imports" for purposes of Article 3.

the oral hearing that the evidence from the five examined producers is the entirety of the evidence on which the determination by the European Communities of the volume of dumped imports (attributable to examined and non-examined producers) was based[161]; thus, the participants agree that there is no other evidence on the record of this investigation that could serve as "positive evidence" for determining the volume of dumped imports. Therefore, it is undisputed that the *only* available evidence for determining which import volumes can be attributed to *non*-examined producers that are dumping is the evidence obtained from the five examined producers.

129. We observe that, in other anti-dumping investigations, there may be different and additional types of evidence that properly could be considered as "positive evidence" and relied upon when determining, on the basis of an "objective examination", the volume of dumped imports.[162] That, however, is not the case before us.

130. In this dispute, we agree with the participants that the evidence on dumping margins established for the producers that were examined individually is "positive" in the sense that we defined it in *US – Hot-Rolled Steel*, namely that it is "affirmative, objective, verifiable, and credible".[163] We also agree with India that evidence on *dumping* margins of more than *de minimis* for examined producers is relevant as "positive evidence" in this investigation for determining which import volumes may be attributed to *non*-examined producers that are *dumping*.[164] In our view, both these qualities of evidence are probative of the existence of dumping in the circumstances of this investigation. Therefore, we conclude that the European Communities met the first requirement of paragraphs 1 and 2 of Article 3 by basing its determination on that "positive evidence".

131. Having established this, we must next assess whether the determination at issue of the volume of dumped imports attributable to non-examined producers was based on an "objective examination" of that positive evidence. India argues that, in the light of the facts of this dispute, an "objective examination" could *not* have led the European Communities to conclude that *all* imports attributable to *non*-examined producers were dumped; nor, India argues, could an "objective examination" have led to the conclusion in the redetermination that 86 percent of *total* imports from

[161]European Communities' responses to questioning at the oral hearing.

[162]In response to questioning at the oral hearing, the United States referred, for example, to evidence such as witness testimony and different types of documentary evidence about critical aspects of the market, conditions of competition, production characteristics, and statistical data relating to the volume, prices, and effects of imports. In the circumstances of a specific investigation, such categories of evidence may qualify as affirmative, objective, and verifiable, and thus form part of the "positive evidence" that an investigating authority may properly take into account when determining, on the basis of an "objective examination", whether or not imports from non-examined producers are being dumped.

[163]India's and the European Communities' responses to questioning at the oral hearing; Appellate Body Report, *US – Hot-Rolled Steel*, para. 192.

[164]India's appellant's submission, para. 31.

all examined *and non*-examined Indian producers were dumped.[165] The European Communities contends that import volumes subject to the "all others" duty rate under Article 9.4 may be considered as "dumped imports" under paragraphs 1 and 2 of Article 3. As explained earlier, the European Communities is of the view that the approach authorized under Article 9.4 meets the "objective examination" requirement of Article 3.1.

132. We disagree with the European Communities. We recall our statement in *US – Hot-Rolled Steel* that:

> … the investigating authorities' evaluation of the relevant factors must respect the fundamental obligation, in Article 3.1, of those authorities to conduct an "objective examination". If an examination is to be "objective", the identification, investigation and evaluation of the relevant factors must be *even-handed.* Thus, investigating authorities are *not* entitled to conduct their investigation in such a way that it becomes *more likely that, as a result of the fact-finding or evaluation process, they will determine that the domestic industry is injured*.[166] (emphasis added)

The approach taken by the European Communities in determining the volume of dumped imports was not based on an "objective examination". The examination was not "objective" because its result is predetermined by the methodology itself. Under the approach used by the European Communities, whenever the investigating authorities decide to *limit* the examination to some, but not all, producers—as they are entitled to do under Article 6.10—*all* imports from *all non*-examined producers will *necessarily always be included* in the volume of dumped imports under Article 3, as long as any of the producers examined individually were found to be dumping. This is so because Article 9.4 permits the imposition of the "all others" duty rate on imports from *non*-examined producers, *regardless* of which alternative in the second sentence of Article 6.10 is applied. In other words, under the European Communities' approach, imports attributable to *non*-examined producers are simply *presumed*, in all circumstances, to be *dumped*, for purposes of Article 3, solely because they are subject to the imposition of anti-dumping duties under Article 9.4. This approach makes it "more likely [that the investigating authorities] will determine that the domestic industry is

[165]In their alternative calculation, the European Communities' investigating authorities *deducted* from the volume of dumped imports the imports attributable to the two Indian producers that were examined individually and found *not* to be dumping. (EC Regulation 1644/2001, recital (22)) According to India, the result of this deduction was that 86 percent of *total* imports from India by examined and non-examined producers and exporters were found to be dumped. The European Communities has not challenged this calculation by India. It believes, however, that the calculation is irrelevant, because Article 9.4 entitles it to subject all imports from non-examined producers to the "all others" duty rate and to treat the same import volumes as dumped for purposes of determining injury under Article 3.

[166]Appellate Body Report, *US – Hot-Rolled Steel*, para. 196.

injured"[167], and, therefore, it cannot be "objective". Moreover, such an approach tends to favour methodologies where *small numbers* of producers are examined individually. This is because the *smaller* the number of individually-examined producers, the *larger* the amount of imports attributable to *non*-examined producers, and, therefore, the larger the amount of imports *presumed* to be *dumped.* Given that the *Anti-Dumping Agreement* generally requires examination of *all* producers, and only exceptionally permits examination of only *some* of them, it seems to us that the interpretation proposed by the European Communities cannot have been intended by the drafters of the Agreement.

133. For these reasons, we conclude that the European Communities' determination that *all* imports attributable to *non*-examined producers were dumped—even though the evidence from *examined* producers showed that producers accounting for 53 percent of imports attributed to examined producers were *not* dumping—did not lead to a result that was *unbiased*, *even-handed*, and *fair*.[168] Therefore, the European Communities did not satisfy the requirements of paragraphs 1 and 2 of Article 3 to determine the volume of dumped imports on the basis of an examination that is "*objective*".

134. India also challenges the Panel's finding relating to Article 6.10.[169] As we have indicated, in this investigation, the European Communities did not determine individual dumping margins for each Indian producer exporting bed linen to the European Communities, as permitted by Article 6.10. The Panel found that the European Communities chose the second alternative in Article 6.10, and limited its examination to producers and exporters representing the largest percentage of the volume of the exports from India that could reasonably be investigated.[170]

135. On appeal, India asks us to find that the European Communities chose, instead, the first option in Article 6.10, and selected for *individual* examination a "statistically valid sample"

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[167] Appellate Body Report, *US – Hot-Rolled Steel*, para. 196.

[168] *Ibid.*, paras. 193-194 and 196.

[169] Article 6.10 reads in relevant 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. 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. (emphasis added)

[170] Panel Report, para. 6.135.

representative of all Indian producers exporting to the European Communities.[171] In India's view, the proportion of dumped imports attributable to *examined* producers is even more relevant for determining, on the basis of "positive evidence" and an "objective examination", the volume of dumped imports attributable to *non*-examined producers, when the examined producers are found to constitute a statistically valid sample representative of all Indian producers. The European Communities contends that the Panel's finding that the investigating authorities applied the *second* alternative in Article 6.10 is a factual finding beyond appellate review. In the alternative, the European Communities maintains that its investigating authorities relied upon the second alternative and examined the largest percentage of the volume of exports which could reasonably be investigated.

136. Article 6 is entitled "Evidence", and there is no indication in Article 6—or elsewhere in the *Anti-Dumping Agreement*—that Article 6 does not apply generally to matters relating to "evidence" throughout that Agreement. Therefore, it seems to us that the subparagraphs of Article 6 set out evidentiary rules that apply throughout the course of an anti-dumping investigation, and provide also for due process rights that are enjoyed by "interested parties" throughout such an investigation.

137. Turning to that part of Article 6 referred to by India, we note that Article 6.10 deals specifically with the determination of *margins* of dumping. Clearly, it does *not stipulate* that investigating authorities must follow a specific *methodology* when determining the *volume* of dumped imports under paragraphs 1 and 2 of Article 3. However, this does not mean that *evidence* emerging from the determination of margins of dumping for *individual* producers or exporters pursuant to Article 6.10 is irrelevant for the determination of the volume of dumped imports in paragraphs 1 and 2 of Article 3. To the contrary, such evidence may well form part of the "positive evidence" on which an "objective examination" of the volume of dumped imports for purposes of determining injury may be based. Indeed, in cases where the examination has been limited to a select number of producers under the authority of the second sentence of Article 6.10, it is difficult to conceive of a determination based on "positive evidence" and an "objective examination" that is made other than through some form of *extrapolation* of the evidence. This could be done, for example, by extrapolating from the import volumes attributed to *examined* producers found to be dumping to the import volumes attributed to *non*-examined producers. We recall that we considered that evidence on *dumping* margins of more than *de minimis* for *examined* producers is relevant as "positive evidence" in this investigation for determining which import volumes may be attributed to *non*-examined producers that are *dumping*.

[171] India's appellant's submission, paras. 27-29.

138. India's suggestion that the investigating authorities should consider the *same* proportion of import volumes attributable to *non*-examined producers as *dumped*, as the proportion of import volumes attributed to *examined* producers that were found to be dumping, may be one way of adducing "positive evidence" from the record of an investigation and of conducting an "objective examination", especially if producers selected for individual examination constitute a statistically valid sample representative of all producers. Even if the producers selected for individual examination account, instead, for the *largest percentage of exports* that could reasonably be investigated, we do not exclude the possibility that the evidence from those *examined* producers could, nonetheless, qualify as part of the "positive evidence" that might serve as a basis for an "objective examination" of import volumes that can be attributed to the remaining *non*-examined producers. There may, indeed, be other ways of making these calculations that satisfy the requirements of paragraphs 1 and 2 of Article 3.

139. Although Article 6.10 is relevant from an evidentiary point of view, it is, nevertheless, as we explain below, not necessary here for us to decide whether the Indian producers and exporters selected for individual examination in this investigation constitute a "statistically valid sample" or "the largest percentage of the volume of exports" within the meaning of the second sentence of Article 6.10. In this respect, we recall the European Communities' argument that import volumes subject to the "all others" duty rate under Article 9.4 may be considered as dumped imports when determining injury under Article 3. As we have explained, Article 9.4 permits the imposition of the "all others" duty rate on imports from non-examined producers, regardless of whether those producers were excluded from individual examination on the basis of the first, or the second, alternative in Article 6.10. We have already concluded that imports attributable to *non*-examined producers that are subject to the "all others" duty rate under Article 9.4 cannot simply be presumed to be dumped for purposes of determining injury under Article 3. Our conclusion was *not* premised on whether producers were excluded from individual examination on the basis of the first, or the second, alternative in Article 6.10. Therefore, our ruling that the European Communities failed to determine the volume of dumped imports with respect to non-examined producers on the basis of "positive evidence" and an "objective examination", as required by paragraphs 1 and 2 of Article 3, is not premised on which of the alternatives in Article 6.10 for limiting the examination was chosen by the European Communities in this investigation. For this reason, we decline to reverse, as requested by India, the finding of the Panel, in paragraph 6.135 of the Panel Report, that the European Communities chose here the second alternative under the second sentence of Article 6.10, because it is not necessary to make such a finding to resolve the issue in dispute here. Accordingly, it is not necessary for us to decide whether that finding was exclusively a factual one and is, therefore, beyond the scope of appellate review.

140. Finally, we turn to the arguments of the third participants in this dispute. Japan and Korea agree with India that the European Communities' determination of the volume of dumped imports in this investigation is not consistent with paragraphs 1 and 2 of Article 3. Our earlier discussion, in particular of Article 9, addresses in detail the arguments of Japan and Korea.[172] In contrast to Japan and Korea, the United States maintains, for its part, that the European Communities' determination of the volume of "dumped imports" is consistent with paragraphs 1 and 2 of Article 3. According to the United States, in addition to Article 9, Articles 2.1 and 3.3 are also significant for interpreting the volume of "dumped imports" in paragraphs 1 and 2 of Article 3.

141. The United States asserts that "Article 2.1 … defines *dumped* products '[f]or the purpose of [the AD] Agreement', on a countrywide basis."[173] In the view of the United States, "that phrase from the beginning to the end refers only to countries and products. It does not refer to producers."[174] Therefore, according to the United States, "the references to 'dumped imports' in Articles 3.1 and 3.2 and throughout Article 3 refer to all imports of the product from the countries subject to the investigation."[175] In other words, when determining injury, "the concept of whether or not there are dumped imports is country-specific."[176]

142. We do not agree. Article 2.1 reads:

> *Determination of Dumping*
>
> For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

Nowhere in the text of Article 2.1 is there authority for treating all imports from *non*-examined producers as dumped for purposes of determining injury under Article 3. The subsequent paragraphs of Article 2 set out in detail how the export price, normal value and, thus, the margins of dumping, are to be established for specific producers or exporters. Nowhere in those paragraphs is there authority for treating imports from *non*-examined producers as dumped for purposes of determining injury under Article 3.

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[172]See *supra*, paras. 123 *ff.*

[173]United States' third participant's submission, para. 2. (original italics; underlining added)

[174]United States' response to questioning at the oral hearing.

[175]United States' third participant's submission, para. 2.

[176]United States' response to questioning at the oral hearing.

143. As we have explained, under Article 6.10, dumping margins are to be established for each producer and exporter or, if impracticable, for some of them. We have explained that Article 9 permits the imposition and collection of anti-dumping duties on imports from specific producers or exporters, or groups thereof. We also recall that the original panel confirmed that "dumping is a determination made with reference to a product from a particular producer [or] exporter, and not with reference to individual transactions".[177] We see no conflict between the provisions requiring producer-specific determinations and the need to calculate, for purposes of determining injury, the total volume of dumped imports from producers or exporters originating in a particular exporting country as a whole. This can be done, and has to be done, by adding up the volume of imports attributable to producers or exporters that are dumping, whether on the basis of an individual examination or on the basis of an extrapolation. Further, we see nothing in the text of Article 2.1 that permits a derogation from the express requirements in paragraphs 1 and 2 of Article 3 to determine the volume of dumped imports on the basis of "positive evidence" and an "objective examination".

144. The United States also argues that the interpretation that *all* imports attributable to *non*-examined producers may be considered as "dumped" is necessary to give meaning and effect to Article 3.3.[178] This provision concerns situations where an importing country conducts an anti-dumping investigation with respect to imports of a product from more than one exporting country.[179] Article 3.3 defines the circumstances where the investigating authorities may *cumulatively* assess the volume and price effects of imports from *different* exporting countries. The United States argues that it would create an anomaly if, in multi-country investigations, authorities are entitled to assess the effects of *all* imports from the subject country, "as long as each countrywide margin was more than *de minimis*", while, under India's theory, in single-country investigations, authorities, finding no

[177]Original Panel Report, para. 6.136. Thus, we agree with the United States' argument that import transactions attributable to a particular producer or exporter need not be separated into two categories—dumped and non-dumped transactions. (United States' third participant's submission, para. 3)

[178]United States' third participant's submission, para. 17.

[179]Article 3.3 of the *Anti-Dumping Agreement* reads:

> Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that *(a)* the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible and *(b)* a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

dumping for an individual company, "would be required to disregard some of the imports covered by the countrywide margin". [180]

145. India's appeal does not extend to the requirements of Article 3.3. We do not see, however, how the cumulative assessment of the effects of imports from different exporting countries under Article 3.3 implies that all imports attributable to *non*-examined producers must be considered as dumped for purposes of determining injury. The investigation and the *cumulation* of dumped imports from different countries for purposes of determining injury can be carried out in conformity with the producer-specific provisions of the *Anti-Dumping Agreement*, even when several countries are involved. [181] The provisions regarding the cumulative assessment of imports pursuant to Article 3.3 must be interpreted consistently with the provisions of the *Anti-Dumping Agreement* that deal with the determinations of dumping margins or the application of anti-dumping duties with respect to specific producers or groups thereof. Similarly, the right under Article 3.3 to conduct anti-dumping investigations with respect to imports from different exporting countries does not absolve investigating authorities from the requirements of paragraphs 1 and 2 of Article 3 to determine the volume of dumped imports on the basis of "positive evidence" and an "objective examination".

146. For these reasons, we are of the view that the Panel has not properly interpreted paragraphs 1 and 2 of Article 3 in applying those provisions in this implementation dispute. Therefore, we conclude that, with respect to import volumes attributable to producers or exporters that were *not examined individually* in this investigation, the European Communities has failed to determine the "volume of dumped imports" on the basis of "positive evidence" and an "objective examination" as explicitly required by the text of paragraphs 1 and 2 of Article 3 of the *Anti-Dumping Agreement*. However, we agree with the Panel "that the [Anti-Dumping] 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" [182] according to the *specific methodology* suggested by India in this appeal. For these reasons, we *reverse* the Panel's finding, in paragraph 6.144 of the Panel Report, and find that the European Communities has acted inconsistently with the requirements of paragraphs 1 and 2 of Article 3 of the *Anti-Dumping Agreement*.

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[180]United States' third participant's submission, para. 18.

[181]Accordingly, as explained earlier, imports attributable to producers or exporters who were *individually examined* and for which, consistently with the *Anti-Dumping Agreement*, a *positive* dumping margin (more than *de minimis*) was found, may be *included* in the calculation of the volume of dumped imports; imports attributable to individually-examined producers or exporters for which *no* such dumping margin was found must be *excluded* from that calculation.

[182]Panel Report, para. 6.144. (original boldface)

VI. Article 17.6 of the *Anti-Dumping Agreement* and Article 11 of the DSU

A. *Introduction*

147. India claims on appeal that the Panel failed to comply with the requirements of Article 17.6 of the *Anti-Dumping Agreement* and of Article 11 of the DSU in concluding that the European Communities *did have* information before it on all relevant economic factors listed in Article 3.4 of the *Anti-Dumping Agreement* when making its determination of injury.[183] India alleges, in particular, that the European Communities did *not* have such information, because the European Communities failed to collect data on stocks and capacity utilization. India requests us to conclude that the Panel did not comply with the requirements of Article 17.6 of the *Anti-Dumping Agreement* and of Article 11 of the DSU, and, consequently, to *reverse* the Panel's finding that the European Communities acted consistently with paragraphs 1 and 4 of Article 3 of the *Anti-Dumping Agreement*.[184]

148. Before examining India's arguments on appeal, we will recall briefly the findings of the original panel and of the Article 21.5 Panel on this issue, as far as they are relevant to the issue raised on appeal.

149. India claimed before the original panel that the European Communities did not examine all relevant economic factors having a bearing on the state of the industry and, therefore, failed to act consistently with its obligations under Article 3.4 of the *Anti-Dumping Agreement*.[185] The original panel stated that it appeared from the European Communities' regulation imposing provisional anti-dumping measures that data had not been collected for all relevant economic factors listed in Article 3.4, and that, "[w]hile some of the data collected … 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."[186] The original panel then found that:

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[183]India's appellant's submission, para. 130.

[184]*Ibid.*

[185]Original Panel Report, para. 6.145.

[186]*Ibid.*, para. 6.167. The Regulation which imposed provisional anti-dumping duties is Commission Regulation (EC) No 1069/97, 12 June 1997, imposing a provisional anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan, published in the Official Journal of the European Communities, 13 June 1997, L-series, No. 156 ("EC Regulation 1069/97"). Council Regulation (EC) No 2398/97, 28 November 1997, imposing a definitive anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan, published in the Official Journal of the European Communities, 4 December 1997, L-series, No. 332 ("EC Regulation 2398/97"), refers, in part, to the findings contained in EC Regulation 1069/97.

> … where factors set forth in Article 3.4 are not even referred to in the determination being reviewed, if there is nothing in the determination to indicate that the authorities considered them not to be relevant, the requirements of Article 3.4 were not satisfied. [187]

150. The European Communities did not appeal this finding of the original panel. In the redetermination—EC Regulation 1644/2001—the European Communities addressed the relevant economic factors listed in Article 3.4, including stocks and capacity utilization, on the basis of information that it had collected during the original investigation. It is undisputed between the participants that the European Communities did not collect additional data for purposes of the redetermination. [188]

151. Before the Article 21.5 Panel, India alleged that the European Communities had "never" collected data on stocks and capacity utilization, and also that the European Communities had not properly carried out an overall re-evaluation of those factors.[189] The Panel rejected both arguments. India has not appealed the Panel's finding with respect to the adequacy of the *evaluation*.

152. In rejecting India's claim that the European Communities had not collected information on all relevant economic factors listed in Article 3.4, the Panel found that:

> 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. [190]

[187]Original Panel Report, para. 6.168.

[188]Panel Report, para. 6.165.

[189]*Ibid*., paras. 6.146-6.150.

[190]*Ibid*., para. 6.169.

153. In reaching this conclusion, the Panel first stated that India had misunderstood the "import" and "context" of the statement of the original panel that, in India's view, suggested that data had not been collected.[191] The Panel then went on to clarify the meaning of that statement as follows:

> 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.[192] (original boldface; footnote omitted)

154. The Panel concluded that it was clear that the European Communities had "in its record" information on stocks and capacity utilization—the two factors India had focused on—and that "unlike the original determination, the EC's consideration of these factors is clearly set out on the face of the redetermination."[193]

155. India appeals from this finding of the Panel, arguing, first, that the Panel failed to meet its obligations under Article 11 of the DSU by incorrectly applying the rules on burden of proof that we set out in *US – Wool Shirts and Blouses*.[194] India argues that it had presented a *prima facie* case

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[191]Panel Report, para. 6.164. The full paragraph containing the original panel's statement at issue is reproduced below. India relies on the sentence in italics:

> *It appears from this listing that data was not even collected for all the factors listed in Article 3.4, let alone evaluated by the EC investigating authorities*. Surely a factor cannot be evaluated without the collection of relevant data. While some of the data collected for the factors that are mentioned in the Provisional Regulation by the EC authorities may have included data for the factors not mentioned, we cannot be expected to assume that this was the case without some indication to that effect in the determination. Nor is the relevance or lack thereof, as assessed by the EC authorities, of the factors not mentioned under the heading "Situation of the Community industry" at all apparent from the determination.

(Original Panel Report, para. 6.167) (emphasis added)

[192]Panel Report, para. 6.164.

[193]*Ibid*., para. 6.167.

[194]Appellate Body Report, *US – Wool Shirts and Blouses*, at 335.

that data on a number of injury factors had never been collected and that, therefore, the Panel should have shifted the burden of proof to the European Communities to rebut that *prima facie* case.[195]

156. In the alternative, India submits that the Panel distorted the evidence by accepting for a fact the "mere" assertion by the European Communities, in EC Regulation 1644/2001, that it had collected data on all relevant economic factors, including stocks and capacity utilization.[196] India argues that this constitutes a failure by the Panel to make an objective assessment of the matter, including an objective assessment of the facts of the case, as required by Article 11 of the DSU.[197]

157. Regarding Article 17.6 of the *Anti-Dumping Agreement*, India argues that the Panel failed to "actively" review the facts, pursuant to subparagraph (i) of that provision, as we interpreted it in *US – Hot-Rolled Steel*.[198] India asserts that, by refusing India's request for the Panel to use its investigative powers under Article 13 of the DSU, and by concluding that the European Communities had the data in the record of the investigation without offering any real proof or reasoning to support such a conclusion, the Panel failed to comply with Article 17.6(i) of the *Anti-Dumping Agreement*.[199]

158. In reply, the European Communities contends that the Panel properly discharged its duties under Article 11 of the DSU and Article 17.6 of the *Anti-Dumping Agreement* in concluding that the European Communities *did have* information before it on all the relevant economic factors listed in Article 3.4 of the *Anti-Dumping Agreement*, including stocks and capacity utilization, when making its injury determination. The European Communities asserts that the Panel correctly applied the rules on the burden of proof.[200] The European Communities denies that EC Regulation 1644/2001 contains "mere" assertions and notes that, although India alleges that the Panel distorted the evidence, India concedes that the Panel has not committed an egregious error calling into question its good faith.[201] The European Communities also contends that the Panel could not have failed to comply with

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[195]India alleges that it had established a *prima facie* case by: (i) pointing to the statement made by the original panel to the effect that the panel could not assume that data on certain injury factors was collected where it was not mentioned in the final determination; (ii) showing that the non-confidential replies to the questionnaires sent by the European Communities to its domestic producers did not contain such data; (iii) indicating that EC Regulation 1644/2001 does not contain *facts* or *data* concerning stocks and capacity utilization; and (iv) requesting that the European Communities provide this information during the Article 21.5 proceedings and by the European Communities' failure to do so. (India's appellant's submission, paras. 112-113)

[196]India's appellant's submission, para. 124.

[197]*Ibid.*

[198]Appellate Body Report, *US – Hot-Rolled Steel*, para. 55.

[199]India's appellant's submission, paras. 128-129.

[200]European Communities' appellee's submission, para. 105.

[201]*Ibid.*, para. 108.

Article 17.6 of the *Anti-Dumping Agreement* by exercising its discretion pursuant to Article 13.2 of the DSU.[202]

B. *Analysis*

159. India does not challenge directly the Panel's finding on Article 3.4 of the *Anti-Dumping Agreement*. Rather, India argues on appeal that the Panel did not discharge its duties under Article 11 of the DSU and Article 17.6 of the *Anti-Dumping Agreement* in its examination of India's claim that the European Communities did not have information before it on stocks and capacity utilization when making its injury determination. India requests that, in the event that we agree with India regarding Article 17.6 and Article 11, we *reverse* the Panel's finding that the European Communities acted consistently with paragraphs 1 and 4 of Article 3 of the *Anti-Dumping Agreement*.

160. Article 11 of the DSU defines generally a panel's mandate in reviewing the consistency with the covered agreements of measures taken by Members. The provision reads, in relevant part:

> The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, *including an objective assessment of the facts of the case* and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. (emphasis added)

161. We recently explained that Article 11 of the DSU:

> … requires panels to take account of the evidence put before them and forbids them to wilfully disregard or distort such evidence. Nor may panels make affirmative findings that lack a basis in the evidence contained in the panel record. Provided that panels' actions remain within these parameters, however, we have said that "it is generally within the discretion of the Panel to decide which evidence it chooses to utilize in making findings" , and, on appeal, we "will not interfere lightly with a panel's exercise of its discretion".[203] (footnotes omitted)

162. Article 17.6 of the *Anti-Dumping Agreement*, for its part, "clarif[ies] the powers of review of a panel established under the *Anti-Dumping Agreement*."[204] Subparagraph (i) of Article 17.6

[202]European Communities' appellee's submission, para. 114.

[203]Appellate Body Report, *US – Carbon Steel*, para. 142.

[204]Appellate Body Report, *Thailand – H-Beams*, para. 114.

"place[s] limiting obligations on a panel, with respect to the review of the establishment and evaluation of facts by the investigating authority."[205] The provision reads, in relevant part:

> 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.

163. In *US – Hot-Rolled Steel*, we stated that "[a]lthough the text of Article 17.6(i) is couched in terms of an obligation on *panels* … the provision, at the same time, in effect defines when *investigating authorities* can be considered to have acted inconsistently with the *Anti-Dumping Agreement*".[206] We further explained that the text of Article 17.6(i) of the *Anti-Dumping Agreement*, as well as that of Article 11 of the DSU, "requires panels to 'assess' the facts and this … clearly necessitates an active review or examination of the pertinent facts."[207]

164. Turning specifically to India's claim that the Panel did not discharge its duties under Article 11 of the DSU and under Article 17.6(i) of the *Anti-Dumping Agreement*, we are mindful that we have found previously that there is no "conflict" between Article 11 of the DSU and Article 17.6 of the *Anti-Dumping Agreement*; rather, the two provisions complement each other.[208] We begin our analysis here with India's argument relating to Article 17.6(i), because this provision, which sets out the standard of review that panels must follow in reviewing the establishment of the facts

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[205] Appellate Body Report, *Thailand – H-Beams*, para. 114.

[206] Appellate Body Report, *US – Hot-Rolled Steel*, para. 56. (original italics)

[207] *Ibid.*, para. 55.

[208] In our Report in *US – Hot-Rolled Steel*, we stated:

> … Article 17.6(i) requires panels to make an "*assessment* of the *facts*". The language of this phrase reflects closely the obligation imposed on panels under Article 11 of the DSU to make an "*objective assessment* of the *facts*". Thus the text of both provisions requires panels to "assess" the facts and this, in our view, clearly necessitates an active review or examination of the pertinent facts. Article 17.6(i) of the *Anti-Dumping Agreement* does not expressly state that panels are obliged to make an assessment of the facts which is "*objective*". However, it is inconceivable that Article 17.6(i) should require anything other than that panels make an *objective* "assessment of the facts of the matter". In this respect, we see no "conflict" between Article 17.6(i) of the *Anti-Dumping Agreement* and Article 11 of the DSU.

(Appellate Body Report, *US – Hot-Rolled Steel*, para. 55) (original italics; underlining added) Both the European Communities and India agree with this interpretation of the relationship between Article 17.6 of the *Anti-Dumping Agreement* and Article 11 of the DSU. (India's and the European Communities' responses to questioning at the oral hearing)

by investigating authorities in anti-dumping investigations, is particularly relevant to the appeal before us.[209]

165. India asserts that the Panel failed to review the facts actively, as we required in *US – Hot-Rolled Steel*, because "[i]t neither used its powers under Article 13 [of the] DSU nor reviewed these facts otherwise."[210] Although India recognizes that a panel's power to seek information under Article 13 of the DSU is *discretionary*, India argues that the Panel was required to seek information from the European Communities as part of the Panel's obligation to "*actively review or examine* the facts" pursuant to Article 17.6 of the *Anti-Dumping Agreement*.[211] Consequently, we understand India's claim to relate to the first part of the first sentence of Article 17.6(i), namely to the Panel's task of determining "whether the authorities' establishment of the facts was proper".[212]

166. We have previously stated that a panel's right to seek information pursuant to Article 13 of the DSU is *discretionary* and not mandatory, as India itself recognizes.[213] Furthermore, in *EC – Sardines*, where a claim was brought under Article 11 of the DSU, we concluded that:

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[209]Appellate Body Report, *US – Lead and Bismuth II*, para. 47.

[210]India's appellant's submission, para. 128.

[211]*Ibid*., para. 127. (original italics)

[212]India's claim on appeal is limited to the Panel's finding that the European Communities did in fact collect and have information before it on stocks and capacity utilization before making its injury determination. India's appeal does not encompass the Panel's conclusion with respect to the European Communities' *evaluation* of these factors. (*Ibid*., para. 130)

[213]Appellate Body Report, *EC – Sardines*, para. 302. Article 13 of the DSU reads:

> *Right to Seek Information*
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> 1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.
>
> 2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4.

> [a] contravention of the duty under Article 11 of the DSU to make an objective assessment of the facts of the case cannot result from the *due* exercise of the discretion permitted by another provision of the DSU, in this instance Article 13.2 of the DSU.[214] (emphasis added)

167. Similarly, a panel's duty to "actively review the pertinent facts" in order to comply with Article 17.6(i) of the *Anti-Dumping Agreement* does not, in our view, imply that a panel *must* exercise its right to seek information under Article 13 of the DSU, which explicitly states that the exercise of that right is *discretionary*. Indeed, there is nothing in the texts of Article 17.6(i) of the *Anti-Dumping Agreement* or Article 13 of the DSU to suggest that a reading of these provisions, in combination, would render *mandatory* the exercise of a panel's *discretionary* power under Article 13 of the DSU. At the oral hearing, India sought to draw a distinction between the case before us and our ruling in *EC – Sardines* by arguing that, in the present case, the Panel's exercise of its discretion was not "due" because "there was no exercise at all".[215] We do not agree. In our view, it is for panels to decide whether it is necessary to request information from any relevant source pursuant to Article 13 of the DSU. The mere fact that the Panel did not consider it necessary to seek information does not, by itself, imply that the Panel's exercise of its discretion was not "due". We, therefore, reject India's allegation that the Panel failed to comply with the requirements of Article 17.6 of the *Anti-Dumping Agreement* by not seeking information from the European Communities pursuant to Article 13 of the DSU.

168. In addition to its argument relating to the Panel's right to seek information under Article 13 of the DSU, India argues that the Panel failed to "review[] these facts otherwise".[216] In support of this argument, India asserts that the "Panel merely stated that it was 'clear' to it that the EC had the data in its record", without offering any proof or reasoning other than what was stated in EC Regulation 1644/2001 itself.[217]

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[214]Appellate Body Report, *EC – Sardines*, para. 302.

[215]India's response to questioning at the oral hearing.

[216]India's appellant's submission, para. 128.

[217]*Ibid*. (footnotes omitted)

169. We have said previously that panels must not, under Article 17.6(i) of the *Anti-Dumping Agreement*, "engage in a new and independent fact-finding exercise".[218] Furthermore, in our view, the discretion that panels enjoy as triers of facts under Article 11 of the DSU[219] is equally relevant to cases governed also by Article 17.6(i) of the *Anti-Dumping Agreement*. Thus, as under Article 11 of the DSU, we "will not interfere lightly with [a] panel's exercise of its discretion" under Article 17.6(i) of the *Anti-Dumping Agreement*.[220]

170. An appellant must persuade us, with sufficiently compelling reasons, that we should disturb a panel's assessment of the facts or interfere with a panel's discretion as the trier of facts. As India points out, the Panel stated that it was apparent to the Panel from "the face of the redetermination" that the investigating authority *did* have information on the relevant economic factors listed in Article 3.4.[221] The Panel, however, also noted that "it is clear that the EC had, in its *record*, information on stocks and utilisation of capacity".[222] In the light of this statement, we conclude that, contrary to India's contention, the Panel did not arrive at an affirmative conclusion that information on these two factors was before the investigating authorities based exclusively "on the face" of the redetermination.

171. We observe, in this regard, that the Panel also had before it explanations as to how the European Communities had collected information on stocks and capacity utilization. According to the European Communities, it had collected information on both factors through the questionnaire sent to the domestic industry and during the on-site verification visits.[223] Moreover, the European

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[218]Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 84. In the context of cases brought under the *Agreement on Safeguards*, we have also said that, in making an objective assessment of the facts pursuant to Article 11 of the DSU, panels may not conduct a *de novo* review of the evidence nor substitute their judgement for that of the competent authorities. (Appellate Body Report, *US – Lamb*, para. 106; Appellate Body Report, *US – Cotton Yarn*, para. 74)

[219]For example, in *EC – Hormones*, we stated that "it is generally within the discretion of the Panel to decide which evidence it chooses to utilize in making findings." (Appellate Body Report, *EC – Hormones*, para. 135)

[220]Appellate Body Report, *US – Wheat Gluten*, para. 151.

[221]Panel Report, para. 6.169.

[222]*Ibid*., para. 6.167. (emphasis added)

[223]Section VI.A of the questionnaire sent by the investigating authorities of the European Communities to its domestic industry reads:

> Please *describe the effects of the imports* under consideration on your own business of producing the types of bed linen covered by the investigation, [e.g.] on market share, sales, prices, production, *capacity utilisation, stocks*, employment, profitability, ability to invest[,] etc. (emphasis added)

(European Communities' Anti-dumping Questionnaire, attached to India's oral statement to the Panel) See also, European Communities' response to Question 18 posed by the Panel during the Panel proceedings; Panel Report, Annex E-2, p. 37, para. 8.

Communities explained that it obtained additional information on stocks from audited accounts that were either annexed to the questionnaire replies, or verified during the on-site visits.[224] The European Communities added that data on stocks could also be derived by comparing verified data on production and sales volume.[225] As for capacity utilization, the European Communities stated that it had received information on production capacity from Eurocoton—the complainant in the anti-dumping investigation.[226] In the light of these observations, we are not persuaded that we should interfere with the Panel's finding of fact on this matter. Therefore, we reject India's argument that the Panel "otherwise" failed to review the facts actively under Article 17.6(i) of the *Anti-Dumping Agreement.*

172. We turn next to the arguments submitted by India in support of its claim that the Panel failed to meet its obligation under Article 11 of the DSU to examine the facts of the case objectively. India's first argument is that the Panel misapplied the rules on the allocation of the burden of proof that we set out in *US – Wool Shirts and Blouses*.[227]

[224]European Communities' response to Question 18 posed by the Panel during the Panel proceedings; Panel Report, Annex E-2, p. 37, para. 8.

[225]*Ibid*., p. 38, para. 11.

[226]European Communities' appellee's submission, para. 100, quoting excerpts from the European Communities' first written submission to the Panel.

[227]In that case, we stated that:

> … it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.

(Appellate Body Report, *US – Wool Shirts and Blouses*, at 335) (footnote omitted)

173. The Panel discussed the principles regarding burden of proof at the outset of the Panel Report. The Panel stated:

> 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. 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. 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. [228] (footnotes omitted)

174. India is not alleging that, on this particular issue, the Panel should have allocated the burden of proof differently. Instead, India asserts that the Panel should have *shifted* the burden to the European Communities once India had established a *prima facie* case.[229] There is nothing in the Panel's reasoning, however, to suggest that the Panel premised its ultimate conclusion on whether or not India had presented a *prima facie* case. From our perspective, the Panel assessed and weighed all the evidence before it—which was put forward by both India and the European Communities—and, having done so, ultimately, was persuaded that the European Communities did, in fact, have information before it on all relevant economic factors listed in Article 3.4 of the *Anti-Dumping Agreement*.

175. We agree, therefore, with the European Communities' assertion that India's argument is, for all practical purposes, one related to the Panel's weighing and appreciation of the evidence.[230] As the European Communities pointed out, we have previously stated that the "[d]etermination of the credibility and weight properly to be ascribed to (that is, the appreciation of) a given piece of evidence is part and parcel of the fact finding process and is, in principle, left to the discretion of a panel as the trier of facts."[231]

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[228]Panel Report, para. 6.7.

[229]India's response to questioning at the oral hearing.

[230]European Communities' appellee's submission, para. 93.

[231]Appellate Body Report, *EC – Hormones*, para. 132.

176. We have, furthermore, explained that:

> In assessing the panel's appreciation of the evidence, we cannot base a finding of inconsistency under Article 11 simply on the conclusion that we might have reached a different factual finding from the one the panel reached. Rather, we must be satisfied that the panel has exceeded the bounds of its discretion, as the trier of facts, in its appreciation of the evidence. As is clear from previous appeals, we will not interfere lightly with the panel's exercise of its discretion. [232] (footnote omitted)

177. India has not persuaded us that the Panel in this case exceeded its discretion as the trier of facts. In our view, the Panel assessed and weighed the evidence submitted by both parties, and ultimately concluded that the European Communities had information on all relevant economic factors listed in Article 3.4. It is not "an error, let alone an egregious error" [233], for the Panel to have declined to accord to the evidence the weight that India sought to have accorded to it. We, therefore, reject India's argument that, by failing to *shift* the burden of proof, the Panel did not properly discharge its duty to assess objectively the facts of the case as required by Article 11 of the DSU.

178. We reach now India's alternative argument on this issue, which is that, even if the Panel properly applied the rules on the burden of proof, the Panel failed to meet its obligations under Article 11 of the DSU because it "distorted the evidence [b]y accepting for a fact a mere assertion contained in the EC *Regulation 1644/2001*—while India had submitted *prima facie* evidence on the *absence* of data collection". [234] India contends that, in doing so, "the Panel attached greater weight to the mere assertion" of the European Communities, while failing to explain why the Panel considered the assertion "sufficient to rebut the *prima facie* evidence of India that the EC had not collected such data." [235]

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[232] Appellate Body Report, *US – Wheat Gluten*, para. 151. We note, moreover, that in *Korea – Alcoholic Beverages*, we refused to "second-guess" the panel's appreciation of certain studies submitted into evidence or "review the relative weight" ascribed to the evidence. (Appellate Body Report, *Korea – Alcoholic Beverages*, para. 161) In *Australia – Salmon*, we concluded that "[p]anels … are not required to accord to factual evidence of the parties the same meaning and weight as do the parties." (Appellate Body Report, *Australia – Salmon*, para. 267)

[233] Appellate Body Report, *Korea – Alcoholic Beverages*, para. 164.

[234] India's appellant's submission, para. 124. (original italics)

[235] *Ibid.*

179. In *EC – Hormones*, we described how a panel could fail to make an objective assessment of the facts by "distorting" the evidence:

> The deliberate disregard of, or refusal to consider, the evidence submitted to a panel is incompatible with a panel's duty to make an objective assessment of the facts. The wilful distortion or misrepresentation of the evidence put before a panel is similarly inconsistent with an objective assessment of the facts. 'Disregard" and "distortion" and "misrepresentation" of the evidence, in their ordinary signification in judicial and quasi-judicial processes, imply not simply an error of judgment in the appreciation of evidence but rather *an egregious error that calls into question the good faith of a panel*. A claim that a panel disregarded or distorted the evidence submitted to it is, in effect, a claim that the panel, to a greater or lesser degree, *denied the party submitting the evidence fundamental fairness*, or what in many jurisdictions is known as due process of law or natural justice.[236] (emphasis added; footnote omitted)

180. India expressly states that "it does not assert that the Panel committed an egregious error calling into question its good faith."[237] At the oral hearing, India argued that, in disputes where we have found a violation of Article 11 of the DSU, "it has not always been the situation that the panel had made an egregious error calling into question its good faith".[238] Indeed, we have found a violation of Article 11 of the DSU when panels have failed to ensure that a competent authority evaluated all relevant economic factors and that the authority's explanation of its determination is reasoned and adequate.[239] In those instances, the error related to the evaluation conducted by the *competent authorities*. We also found that a panel exceeded its mandate under Article 11 by considering evidence that was not in existence at the time of a Member's determination imposing a safeguard measure on imports of textiles.[240] In another case, we determined that the panel had not made an objective assessment of the *matter before it* because it examined a *claim* that had not been raised by the complainant.[241]

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[236]Appellate Body Report, *EC – Hormones*, para. 133.

[237]India's appellant's submission, para. 87.

[238]India's response to questioning at oral hearing.

[239]Appellate Body Report, *US – Wheat Gluten*, paras. 161-162; Appellate Body Report, *US – Lamb*, para. 149.

[240]Appellate Body Report, *US – Cotton Yarn*, para. 80.

[241]Appellate Body Report, *Chile – Price Band System*, para. 177.

181. In our view, none of these examples assists India with the claim it raises on appeal. India does not appeal the Panel's conclusion with respect to the *evaluation* by the investigating authorities of the European Communities of the relevant economic factors listed in Article 3.4.[242] India directs its arguments on appeal to the Panel's assessment of the *facts of the case*, and does not argue that the Panel failed otherwise to make an objective assessment of the *matter* before it. Specifically, India argues that the Panel did not make an objective assessment of the facts of the case because the Panel *distorted* the evidence by placing greater weight on the statements made by the European Communities than on those made by India.[243] As we stated earlier, the weighing of the evidence is within the discretion of the Panel as the trier of facts, and there is no indication in this case that the Panel exceeded the bounds of this discretion.[244] We thus reject India's argument that the Panel distorted the evidence before it.

182. For all these reasons, we *find* that the Panel properly discharged its duties under Article 17.6 of the *Anti-Dumping Agreement* and Article 11 of the DSU. We, therefore, *uphold* the Panel's finding, in paragraph 6.169 of the Panel Report, that the European Communities had information before it on the relevant economic factors listed in Article 3.4 of the *Anti-Dumping Agreement* when making its injury determination.

[242]See *supra*, footnote 212 to para.165.

[243]In response to questioning at the oral hearing, India explained that "[i]f there is a heavy balance on one side and nothing on the other side, and the panel nevertheless finds it is the other way around, then we feel [it] is a distortion of the evidence".

[244]See *supra*, para. 177.

VII. Findings and Conclusions

183. For the reasons set out in this Report, the Appellate Body:

(a) (i) *upholds* the Panel's finding, in paragraph 6.53 of the Panel Report, that India's claim under Article 3.5 of the *Anti-Dumping Agreement*—that the European Communities failed to ensure that injuries caused by other factors was not attributed to the dumped imports—was not properly before the Panel; and, consequently,

(ii) *declines* to rule on the issue of whether the Panel erred, in its alternative finding, in paragraph 6.246 of the Panel Report, that the European Communities acted consistently with Article 3.5 of the *Anti-Dumping Agreement*;

(b) (i) *reverses* the Panel's finding, in paragraph 6.144 of the Panel Report, that the European Communities did not act inconsistently with paragraphs 1 and 2 of Article 3 of the *Anti-Dumping Agreement*, and *finds* that the European Communities acted inconsistently with paragraphs 1 and 2 of Article 3 of the *Anti-Dumping Agreement* in determining the volume of dumped imports for purposes of making a determination of injury; and

(ii) *declines* to rule on the Panel's finding, in paragraph 6.135 of the Panel Report, that the European Communities applied the second alternative in the second sentence of Article 6.10 for limiting its examination in this investigation; and

(c) *finds* that the Panel properly discharged its duties under Article 17.6 of the *Anti-Dumping Agreement* and Article 11 of the DSU and, therefore, *upholds* the Panel's finding, in paragraph 6.169 of the Panel Report, that the European Communities had information before it on the relevant economic factors listed in Article 3.4 of the *Anti-Dumping Agreement* when making its injury determination.

184. The Appellate Body recommends that the DSB request the European Communities to bring its measure, found in this Report to be inconsistent with its obligations under the *Anti-Dumping Agreement*, into conformity with that Agreement.

Signed in the original at Geneva this 24th day of March 2003 by:

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Georges Abi-Saab
Presiding Member

_____ _____

James Bacchus
Member

Yasuhei Taniguchi
Member

ANNEX 1

WORLD TRADE ORGANIZATION

WT/DS141/16
9 January 2003

(03-0095)

Original: English

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

Recourse to Article 21.5 of the DSU by India

Notification of an Appeal by India
under paragraph 4 of Article 16 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU")

The following notification, dated 8 January 2003, sent by India to the Dispute Settlement Body ("DSB"), is circulated to Members. This notification also constitutes the Notice of Appeal, filed on the same day with the Appellate Body, pursuant to the *Working Procedures for Appellate Review*.

Pursuant to Article 16 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Rule 20 of the *Working Procedures for Appellate Review*, India hereby notifies its decision to appeal to the Appellate Body certain issues of law and legal interpretations covered in the Panel Report 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* (WT/DS141/RW, dated 29 November 2002).

The appeal relates to the following issues of law and legal interpretations developed by the Panel in its Report:

(a) The Panel erred in law in concluding that the EC did not act inconsistently with Articles 3.1 and 3.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") in paragraph 6.144 of the Panel Report and reasoning leading thereto;

(b) The Panel erred in law in finding that the EC did have information before it on the injury factors under Article 3.4 of the Anti-Dumping Agreement in paragraph 6.169 of the Panel Report and reasoning leading thereto. In reaching this conclusion the Panel failed in its obligations under Article 17.6 of the Anti-Dumping Agreement and Article 11 of the DSU; and

(c) (i) The Panel erred in law in finding that India's claim 6 under Article 3.5 of the Anti-Dumping Agreement was not properly before it in paragraph 6.53 of the Panel Report and reasoning leading thereto;

(ii) The Panel erred in law in finding that the EC's measure is not inconsistent with Article 3.5 of the Anti-Dumping agreement for failure to ensure that injuries caused by other factors are not attributed to dumped imports in paragraph 6.246 of the Panel Report and reasoning leading thereto.

Accordingly, India requests the Appellate Body to reverse the conclusions reached by the Panel in paragraphs 7.1-7.3 of the Report as it considers them to be error in law and based upon erroneous findings on issues of law and related legal interpretations.