

ANNEX 1-1

FIRST SUBMISSION OF INDIA

(6 March 2000)

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EXECUTIVE SUMMARY

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

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

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

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

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

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

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

A. DUMPING ISSUES

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

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

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

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

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

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

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

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

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

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

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

B. INJURY AND CAUSALITY ISSUES

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

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

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

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

The EC thus acted inconsistently with Article 3.4.

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

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

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

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

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

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

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

C. PROCEDURAL ISSUES

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

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

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

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

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

D. OTHER ISSUES

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

I. INTRODUCTION

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

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

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

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

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

II. GENERAL FACTUAL BACKGROUND

1. The measure concerned²

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

2.2 In 1997 the EC imposed definitive anti-dumping duties on bed linen from India, Egypt and Pakistan by Regulation 2398/97.⁴ As far as India is concerned, duties were imposed up to 24.7 per cent, the weighted average duty being 11.6 per cent, and the residual duty being 24.7 per cent.⁵ This definitive anti-dumping measure is the subject of the present WTO dispute settlement proceeding.

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

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

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

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

2. History: the first Bed linen proceeding

2.3 On 25 January 1994 the Commission initiated an anti-dumping proceeding concerning bed linen⁶ from India, Pakistan, Thailand and Turkey [hereinafter: “Bed Linen I”] (notice of initiation in Annex 2).⁷ The complainant was the Committee of the Cotton and Allied Textile Industries of the EC [“Eurocoton”]. This organisation is the EC federation of national producers’ associations of cotton textile products. The complaint⁸ in the Bed Linen I proceeding is attached as Annex 3.

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

2.5 The cooperation of Indian exporters in the Bed linen I proceeding was exemplary: 41 Indian exporters submitted a confidential questionnaire response and a non-confidential summary thereof.⁹ By contrast, the large majority of Community producers refused to submit questionnaire responses or, at least, no or virtually no non-confidential summaries from them were made available in the non-confidential file. After some time (and, as far as India believes, after some secret correspondence between the European Commission and the complainant), Eurocoton withdrew the complaint. The Bed linen I anti-dumping proceeding was consequently terminated on 10 July 1996.¹⁰ In the Decision terminating this proceeding the European Commission noted that:

“[t]he complainant Community producers formally withdrew the complaint concerning imports of certain types of bedlinen originating in India, Pakistan, Thailand and Turkey. The Commission considers that a termination in this context would not be contrary to the interest of the Community.

Consequently, the anti-dumping proceeding concerning imports of certain types of bedlinen originating in India, Pakistan, Thailand and Turkey should be terminated without imposition of protective measures.” (Annex 5)

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

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

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

⁸ In EC parlance, the application is called “*complaint*”. In this submission the two terms are used interchangeably.

⁹ Evidence attached as Annex 4.

¹⁰ OJ (1996) L 171/27.

3. The second Bed linen proceeding

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

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

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

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

4. Dispute settlement thus far

2.10 On 3 August 1998 India requested consultations with the European Community pursuant to Article 17 of the ADA and Article 4 of the Understanding on Rules and Procedures governing the Settlement of Disputes [“the DSU”] concerning this issue. This request was notified to the Dispute Settlement Body and was circulated to WTO Members.¹⁶ Pakistan requested to be joined in the consultations on 25 August 1998.¹⁷

2.11 The first round of consultations was held in Geneva on 18 September 1998¹⁸ (list of questions raised by India attached as annex 10; verbatim report drafted by the Indian delegation attached as

¹¹ The complaint is attached as Annex 6.

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

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

¹⁴ Commission Regulation (EC) No 1069/97 of 12 June 1997 imposing a provisional anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan, OJ (1997) L156/11.

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

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

¹⁷ WT/DS141/2 of 25 August 1998.

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

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

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

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

2.13 The legal representatives of Texprocil again requested access to the non-confidential file in April 1999, but this was refused in May 1999.¹⁹

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

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

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

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

1. Facts²⁰

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

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

(Emphasis added)

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

¹⁹ Annex 78.

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

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

- the turnover in local currency of cotton-type bed linen sold for export to the Community during the period 1 July 1995 to 30 June 1996,
- the turnover in local currency of cotton-type bed linen sold on the domestic market during the period 1 July 1995 to 30 June 1996, . . . ”

The relevant part of the letter requested the same information:

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

- the turnover in local currency of cotton-type bed linen sold for export to the Community during the period 1 July 1995 to 30 June 1996;
- the turnover in local currency of cotton-type bed linen sold on the domestic market during the period 1 July 1995 to 30 June 1996. . . . ”

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

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

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

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

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

²¹ Please refer to Annex 16.

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

“No 15 Madhu Industries . . .

1. *Turnover . . . for export to the community . . . is Rs 24,46,30,080 and Kgs 9,02,989 (detail statement enclosed).*
2. *The Turnover . . . of bedlinen sold on the domestic market . . . is NIL.”*

“No 16 Standard Mills . . .

- I. *Turnover . . . of bedlinen sold for export to the community . . . Kgs 71090, Value Lac Rs. 260.7*
- II. *The turnover of bedlinen sold on the domestic market . . . Kgs 87000, Value Lac Rs 249.92”*

“No 27 Omkar Exports . . .

6. *. . .turnover of . . . bed linen exported to the EC . . . Kgs 915321, Rupees 20,54,47,090*
7. *. . .turnover of . . . bed linen sold in India . . . : NIL”*

“No 64 Prakash Cotton . . .

1. *. . . . turnover . . . for export to the Community . . . Rs 4274.84 Lacs and Qty 17.260 Lacs Kgs. . . .*
2. *. . . turnover . . . of bedlinen sold on domestic market . . . : NIL”*

“No 73 Bombay Dyeing . . .

5. *. . . turnover of bed linen to the EC: 748 metric tonnes, Rs 150.8 Millions*
6. *turnover of cotton type bed linen sold in India; 465 metric tonnes, Rs 100.6 Millions”*

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

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

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

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

“page 42 Anglo French Textiles . . .

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

²² Please refer to Annex 17.

²³ Annex 18.

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

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

“As it has already been discussed during our meeting of 1 October 1996 the following criteria should be taken into account in the selection of the sample:

- 1. size of company with regard to export sales to the EU;*
- 2. size of company with regard to domestic sales;*
- 3. stages of production performed by the company.*

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

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

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

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

3.9 In its response dated 9 October 1996 Texprocil’s legal representatives made a counterproposal²⁴ on the basis of suggestions made by Texprocil (attached to the same fax):

“You will note that we propose that the sample be changed slightly as follows:

- 1. Prakash Cotton Mills*
- 2. Bombay Dyeing & Mfg*
- 3. Standard Industries*
- 4. Hindoostan Spg & Wvg Mills*
- 5. Madhu Industries*

Reserve:

- 1. Anglo French Textiles*
- 2. Omkar Exports”*

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

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

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

²⁴ Please refer to Annex 20.

²⁵ Please refer to Annex 21.

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

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

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

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

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

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

2. Pre-selection of the sample

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

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

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

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

3. Selection of the sample

²⁶ Please refer to Annex 22.

²⁷ Please refer to Annex 23.

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

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

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

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

4. Individual examination of companies not selected in the sample

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

D. DUMPING

1. Normal value

(a) India

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

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

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

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

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

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

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

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

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

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

...

2. Export price

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

...

3. Comparison

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

The adjustments made were as follows:

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

...

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

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

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

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

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

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

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

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

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

...

4. Dumping margins

(a) General methodology

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

...

(b) Methodology for groups of companies

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

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

(c) Specific application

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

...

(d) Dumping margins for companies in the sample

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

India

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

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

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

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

— India 13.6 per cent,
...

(f) Dumping margin for non-cooperating companies

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

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

— India 27.3 per cent,
...

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

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

3.15 The EC also provided company-specific disclosures²⁸, the relevant excerpts of which are quoted hereunder.

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

“Although Bombay Dyeing had representative global domestic sales of the product concerned, it had no representative domestic sales made in the ordinary course of trade during the investigation period (see section C.1.(a) of the Disclosure Document) [corresponding to recital (23) of the provisional Regulation]. Its related company Nowrosjee Wadia had no domestic sales at all. Normal value had, therefore, to be constructed for each type of bed linen exported to the EU during the investigation period for both companies in accordance with Article 2(3) of Regulation (EC) No 384/96.

...

2. NORMAL VALUE

As indicated in section C.1.(a) of the Disclosure Document, the five representative domestic types of Bombay Dyeing (D14, D22, D36, D37, D51) were sold in the domestic market at a loss. Consequently, constructed values have been calculated for all export types reported in the ECSALUR listings of both companies.

= cost of production (COP) of exported types plus selling, general and administrative expenses (SG&A) incurred in domestic sales plus profit realized on domestic sales.

**COST OF PRODUCTION: use of COP as given in ECCOP - Annex III 1.2.f. . .*

**SG&A: the amount for SG&A used was based on the average SG&A expenses incurred by Bombay Dyeing on its global domestic bed linen sales during the investigation period and it is 10.39 per cent on turnover (see attached summary of DMPROFIT - Annex III 1.2.g).*

**PROFIT: the profit margin used was the weighted average profit margin realized by the same company on its global domestic sales of profitable sales of bed linen and it is 18.65 per cent on turnover (see attached summary of DMPROFIT - Annex III 1.2.g.) . . .*

NORMAL VALUE = $COP / (1 - 0.2904) = \underline{COP / 0.7096}$

*ALLOWANCES on Normal Value:
actual packing cost*

REMARKS:

As explained in section C.3 of the Disclosure Document, Bombay Dyeing failed to justify the adjustments claimed on Normal Value for level of trade, brand promotion and credit costs . . .”

²⁸ Attached as Annex 24.

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

3.18 For Prakash:

*“NORMAL VALUE: Constructed value (no domestic sales of the product under investigation)
= cost of production (COP) of exported types plus a reasonable amount for selling, general and administrative expenses (SG&A) and a reasonable amount for profit.*

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

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

NORMAL VALUE = $COP/(1-(29.04\%)) = COP/(1-0.2904) = \underline{COP/0.7096} . . .$ ”

3.19 For Omkar Exports:

*“NORMAL VALUE: Constructed value (no domestic sales of the product under investigation)
= cost of production (COP) of exported types plus a reasonable amount for selling, general and administrative expenses (SG&A) and a reasonable amount for profit.*

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

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

NORMAL VALUE = $COP/(1-(29.04\%)) = COP/(1-0.2904) = \underline{COP/0.7096} . . .$ ”

3.20 For Madhu Industries:

*“NORMAL VALUE: Constructed value (no domestic sales of the product under investigation)
= cost of production (COP) of exported types plus a reasonable amount for selling, general and administrative expenses (SG&A) and a reasonable amount for profit.*

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

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

NORMAL VALUE = $COP/(1-(29.04\%)) = COP/(1-0.2904) = \underline{COP/0.7096} . . .$ ”

3.21 And for Anglo French:

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

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

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

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

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

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

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

3.23 Anglo-French:²⁹

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

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

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

²⁹ Annex 25.

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

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

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

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

“(I) NORMAL VALUE:

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

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

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

³⁰ Annex 26.

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

3.26 Comments made on behalf of Texprocil:³¹

“2.2 Apart from the fact that profits were not reliable [as per point 2.1], the Commission Services have acted not in accordance with the law by applying Article 2(6)(a). The application of this Article is not allowed under the current factual circumstances. Hence, Article 2(6)(b) or 2(6)(c) should be applied for the determination of a ‘reasonable’ profit as per Article 2(3)

Apart from the fact that profits were not reliable [as per point 2.1], the Commission Services have also acted not in accordance with the law by applying Article 2(6)(a). The very language of Article 2(6)(a) does not allow a profit to be inferred from one producer only: it should be a “weighted average” of [other] “exporters or producers.” A weighted average by its nature can only be inferred from more than one producer. Also the wording exporters or producers makes clear that it was the intention of the legislator that the law of averages be applied so that there is no distortion due to the special status of one single producer or exporter. In the present case the single producer/exporter whose profit margins have been used has a special status as discussed hereinafter.

In the view of our client therefore the admonition in Article 2(6)(a) has not been respected. The Commission Services are therefore not allowed to apply Article 2(6)(a) and should apply Article 2(6)(b) or Article 2(6)(c).

2.3 Even if the Commission Services insist on applying non-reliable profits as well as Article 2(6)(a), it is submitted that the provisions of Article 2(3) i° 2(6)(c) were not respected. The concept of a profit determined under a “reasonable” method is clearly defined in Article 2(6)(c) and no heed has been given to this provision

It is observed by our client that the Commission Services in its current determination have in the construction of the normal values for four companies extrapolated an extra-ordinary profit of 18.65 per cent which was determined on the basis of the profitable sales only of Bombay Dyeing. Such unrealistic and unreasonable profit addition is due to a blind application of only Article 2(6)(a), without any consideration being given to the complete letter of the law and the entire structure of Article 2, most notably Articles 2(3) and Article 2(6)(c).

Article 2(3) mandates that in a situation where the normal value is constructed, “a reasonable amount for . . . profits” [emphasis added] should be added. While Article 2(3) itself does not define the concept of ‘reasonable’, Article 2(6)(c) explicitly provides that a profit which is established under a reasonable method “shall not exceed the profit normally realized . . . in the same general category in the domestic market.” Any reasonable profit as per Article 2(3) is therefore mandatorily limited to the profit normally realized in the same general category in the domestic market.

The following table shows at a glance which profits are attained by the producers in the same general category of products:

³¹ Annex 27.

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

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

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

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

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

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

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

<i>Anglo-French</i>	<i>165.42%</i>
<i>Madhu</i>	<i>159.46%</i>
<i>Omkar</i>	<i>131.82%</i>
<i>Prakash</i>	<i>201.04%</i>

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

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

<i>Country</i>	<i>Profit</i>
<i>Egypt:</i>	<i>5.8</i>
<i>Pakistan:</i>	<i>7.4</i>
<i>EC:</i>	<i>5</i>
<i>Average:</i>	<i>6.06</i>

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

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

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

“2. *Dumping Margin*

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

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

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

³³ Annex 28.

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

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

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

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

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

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

³⁴ Annex 29.

“2. The concept of a reasonable profit margin and SG&A

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

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

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

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

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

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

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

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

...

3.d. Level of Trade

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

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

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

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

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

³⁵ Annex 30.

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

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

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

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

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

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

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

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

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

³⁶ Annex 31.

³⁷ Annex 32.

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

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

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

3.33 In response to the above-cited comments submitted in writing and during the hearing, the Commission Services provided replies in the definitive disclosure documents of 3 October 1997.³⁸ With respect to the text of the general disclosure we refer to the definitive Regulation³⁹ which contains—as far as the dumping determination is concerned—the same text. With respect to the company-specific disclosures, the relevant excerpt is similar for each of the five sample companies:

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

2. Normal value

No changes.

...

- SGA
No changes.
- Profit
No changes . . .”

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

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

³⁸ Annex 33.

³⁹ Please refer to Annex 9.

⁴⁰ Annex 34: Anglo-French; Annex 35: Bombay Dyeing; Annex 36: Omkar; Annex 37: Madhu; Annex 38: Prakash.

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

3.36 In the definitive Regulation⁴² the EC provided the following comments on the issue:

“D. DUMPING

1. Normal value

(a) Methodology for the construction of normal value

...

(d) Domestic profit margin

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

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

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

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

⁴² Please refer to Annex 9.

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

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

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

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

...

3. Comparison

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

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

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

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

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

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

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

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

...

4. Dumping margins

(a) General methodology

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

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

(b) Dumping margins for companies in the sample

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

India

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

...

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

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

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

India 11.6 per cent

...

(d) Dumping margin for non-cooperating companies

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

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

India 24.7 per cent . . . ”

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

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

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

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

...

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

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

...

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

...

Mr Seth: On the questions concerning the sequencing in 2.2.2 we reserve our rights.

[EC]: In principle all options are reasonable unless there is any factor rendering them unreasonable. This was not the case here . . .”

3.37 In its letter of 1 October 1998⁴⁴ the EC further answers pertaining to and relevant in the context of Articles 2, 2.2., and 2.2.2:

“Question 48

Would the EC agree that it is necessary to establish per Article 2.2 that the amounts for SGA and profit applied in the constructed value are reasonable?

It is evident that Article 2.2 of the WTO Anti-Dumping Agreement (the Agreement) requires that the investigating authorities establish reasonable amounts of selling, general and administrative costs (SGA), and profits, for use in all constructions of normal value.

Questions 49 to 57 and 61 to 71

Concerning the methodology to be used to establish the amounts of SGA and profits for constructing normal value.

For discussion in a new round of oral consultations.

Questions 58 to 60 and 72 to 74

Concerning the treatment of exporters’ claims concerning the level of profit used in the construction of normal value.

Recitals (23) to (26) of Regulation (EC) No 1069/97 imposing a provisional anti-dumping duty specify which provisions of Regulation (EC) 384/96 (the Basic Regulation)—and thereby the WTO Anti-dumping Agreement—have been followed.

Recital (18) of Regulation (EC) No 2398/97 imposing a definitive anti-dumping duty replies to all claims raised by the Indian exporters in the course of the administrative procedure with regard to the profit used in the construction of the normal value.”

3.38 Discussion on the subject also took place during the second round of consultations:⁴⁵

⁴⁴ Please refer to Annex 12.

⁴⁵ The verbatim report on the discussions during the second round of consultations is attached as Annex 13.

“ . . . Mr Seth: I will now turn to questions 49-57 and 61-71. As you will recall, these questions concerned the concept of “reasonable” profit in the context of Article 2.2 and 2.2.2. The EC in its letter of 1 October 1998 referred to a second round of consultations, during which it would reply to the questions 49-57 and 61-71 raised by India. We are at your disposal now.

[EC]: We are talking about alternative methods that the [Agreement] provides. Any of these methods are reasonable as long as the methods are stable and the elements for their application are present. 2.2.2(iii) only gives an alternative to 2.2.2 chapeau and (i)/(ii). So there are three methods plus an alternative in 2.2.2(iii). There is no preference between methods (i)-(iii). . . .

...

Mr Seth: Concerning us [question 50] there was a failure to check whether the result of 2.2.2(ii) was reasonable and that is inconsistent with 2.2.

[EC]: Our response is that the profit established was reasonable.

Mr Seth: Would the EC agree that Article 2.2.2(iii) suggesting that to apply a profit which does not exceed the profit normally realized by other exporters or producers on sales of the same general category of products is a reasonable method? [question 51]

[EC]: The use of any method is reasonable. That does answer your question. Even in this case it was reasonable. The WTO Agreement entitles a Member to develop a method that as long as it is followed consistently it is reasonable.

Mr Seth: Thank you. Would the EC agree that a profit applied in the constructed normal value which is three times higher than profits normally realized by other exporters or producers on sales of products of the same general category in the domestic market is not reasonable in the sense of Article 2.2.2(iii)?

[EC]: I just reiterate that the EC has developed a method such as existed in your case. We have followed the method in your case and we follow it. We do not change the method when the profit is very low and we also do not change it when the profit is very high.

...

4. Mr Seth: I refer to questions 60 and 61. Would the Community agree that the application of SGA and profits of one producer only is not allowed under the text of 2.2.2(ii) which mandates that a weighted average be used of exporters or producers.

[EC]: Is your position that the Agreement does not permit the use of the profit and SGA of one company?

Mr Seth: In Article 2.2.2(ii) it talks of the weighted average of companies.

[EC]: This is a very interesting interpretation. We do not read it like that.

...”

3.39 In its letter of 29 June 1999⁴⁶ the EC further provided the following answers in the context of Article 2.2.2:

“Questions 49 to 57 and 61 to 71

Concerning the methodology to be used to establish the amounts of SGA and profits for constructing normal value.

The answers repeat recitals (23) through (26) of the Regulation imposing provisional measures.”

Questions 58 to 60 and 72 to 74

Recitals (23) to (26) of the provisional duty Regulation specify which provisions of the basic Regulation have been followed and therefore the Community consider that its methodology has been justified and recital (18) of the definitive duty Regulation replies to all claims raised by the Indian exporters in the course of the administrative procedure with regard to the profit used in the construction of the normal value.

As already mentioned above, the findings of the investigation, which relied on the responses to the questionnaires and the information obtained during the on-spot verifications of the Community investigators, showed that only one of the five companies selected in the sample had representative domestic sales of the like product. Domestic sales of that company were made through three channels: a) to exclusive wholesalers -- branded products, b) to other wholesalers -- non-branded products and c) to industrial users such as hotels, hospitals etc. -- non-branded products. The average profit margin realized by the company in question on profitable types of non-branded products in the domestic market was 39 per cent higher than the overall average profit realized on profitable branded and non-branded types of the like product in the same market. It should be noted that had the Community followed the request of the company itself and constructed normal value using the SG&A and profit realized only on non-branded products, instead of the overall SG&A and profit which it actually used, the normal value and consequently the dumping margin would have been higher than that calculated by the Community.”⁴⁷

2. The text of Article 2.2.2

3.40 The relevant part of Article 2.2.2 of the ADA sets forth that:

“2.2 When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation

⁴⁶ Annex 14.

⁴⁷ Note that the answer does not address the questions. For example, question 60: “Would the EC agree that the application of amounts for SGA and profit inferred from one producer is not allowed as per Article 2.2.2(ii)?” is not answered, nor is question 71. It is further noted that the recurring references to the dumping margin having been lower if the request of the company had been followed is only partially correct: while a comparison between the branded and the total of the non-branded sales reveals 4.02 per cent higher SG&A and profits for non-branded sales, the situation is the reverse when the (non-comparable) industrial channel is not considered in this comparison. A comparison between the branded and the similar normal non-branded sales channel (which both incur virtually similar SG&A expenses) reveals that the profit on non-branded sales is 5% lower [17.84 per cent vs. 12.21 per cent].

or the low volume of the sales in the domestic market of the exporting country⁴⁸, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits .

..

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

...

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

3.41 The ‘corresponding’⁴⁹ provisions in the basic EC Anti-Dumping Regulation are Articles 2(3) and 2(6), which provide that:

“2(3) When there are no or insufficient sales of the like product in the ordinary course of trade, or where because of the particular market situation such sales do not permit a proper comparison, the normal value of the like product shall be calculated on the basis of the cost of production in the country of origin plus a reasonable amount for selling, general and administrative costs and for profits, or on the basis of export prices, in the ordinary course of trade, to an appropriate third country, provided that those prices are representative.

...

2(6). The amounts for selling, for general and administrative costs and for profits shall be based on actual data pertaining to production and sales, in the ordinary course of trade, of the like product, by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:

(a) the weighted average of the actual amounts determined for other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;”

3.42 The last paragraph of Recital (18) of the Regulation imposing definitive measures makes clear that the EC in fact applied Article 2(6)(a) of its domestic legislation:

⁴⁸ Footnote in original: Sales of the like product destined for consumption in the domestic market of the exporting country shall normally be considered a sufficient quantity for the determination of the normal value if such sales constitute 5 per cent or more of the sales of the product under consideration to the importing Member, provided that a lower ratio should be acceptable where the evidence demonstrates that domestic sales at such lower ratio are nonetheless of sufficient magnitude to provide for a proper comparison.

⁴⁹ This is not to say that the obligations laid down in Article 2(6) are identical to those of Article 2.2.2 of the ADA.

“Moreover, the reference in Article 2(6)(a) of the basic Regulation . . . Consequently, it is not considered justified to establish the amount for profits in accordance with Article 2(6)(b) or 2(6)(c) of the basic Regulation, as claimed by the Indian companies concerned”

3. Claims under Article 2.2.2 (Claims 1-6)

3.43 Six claims follow from the facts and legal text as described above.

3.44 First, the EC has acted inconsistently with Article 2.2.2 in its calculation of the dumping margins.

3.45 Second, the EC has acted inconsistently with Article 12.2.1, by failing to sufficiently explain why and how it applied Article 2.2.2.

3.46 Third, the EC has acted inconsistently with Article 12.2.2, by failing to sufficiently explain why and how it applied Article 2.2.2.

3.47 Fourth, the EC has acted inconsistently with Article 2.2 in its calculation of the dumping margins.

3.48 Fifth, the EC has acted inconsistently with Article 12.2.1, by failing to sufficiently explain why and how it applied Article 2.2.

3.49 Sixth, the EC has acted inconsistently with Article 12.2.2, by failing to sufficiently explain why and how it applied Article 2.2.

4. Claim 1: Inconsistency with Article 2.2.2

3.50 There are three arguments under the first claim as to why the EC has acted inconsistently with Article 2.2.2.

3.51 The first argument of the first claim is that while the EC has applied the calculation method as foreseen in Article 2.2.2(ii), this method was not open to it. This method could not be applied since its requirements for application were not met.

3.52 The second argument of the first claim is that even within the application of Article 2.2.2(ii), the EC has acted inconsistently with the provision. Instead of inferring the amounts from other producers or exporters which were ‘*incurred and realized*’ (12.09 per cent), the EC inferred the amounts from other producers or exporters which were ‘*determined*’ (18.65 per cent).

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

4.1 The first argument of the first claim relating to Article 2.2.2: while the EC has applied the calculation method as foreseen in Article 2.2.2(ii), this method was not open to it. This method could not be applied since its requirements for application were not met

3.54 As noted above, Article 2.2.2(ii) sets forth that, when amounts for SG&A and profits cannot be determined on the basis of the method foreseen in the chapeau of Article 2.2.2, the amounts in question may among others be determined on the basis of:

“the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;”

3.55 The wording of this option merits attention. First of all, the Article mandates the use of a ‘weighted average’.

3.56 The *Oxford Concise Dictionary* defines ‘average’ as: “an amount obtained by dividing the total of given amounts by the number of amounts in the set”.⁵⁰ *Websters New Collegiate Dictionary* defines ‘average’ a “a single value (as a mean, mode, or median) that summarises or represents the general significance of a set of unequal values.”⁵¹ *Oxford Student’s Dictionary* defines ‘average’ as: “the result of adding several quantities together and dividing the total by the number of quantities”.⁵² *Webster’s New World Dictionary* defines ‘average’ as “the numerical result obtained by dividing the sum of two or more quantities by the number of quantities.” The common note in all these definitions is that the group (set) over which the average is to be taken, should consist of more than one unit.

3.57 The next word is ‘weighted’. ‘Weighted’ is used as an adjective to ‘average.’ *Websters New Collegiate Dictionary* defines ‘weighted’ as: “having a statistical weight attached”.⁵³

3.58 The two words together, ‘weighted average’ could henceforth be described as an average that attributes statistical weight to (each of) the parameters that are being summarised into a single value. In the context of anti-dumping a ‘weighted average’ is often contrasted with a ‘simple average.’ A ‘simple average’ could be described as an average that does not attribute statistical weight to each of the parameters that need to be summarised into a single value.

3.59 In any event, it is clear that the word ‘average’ relates to the fact that more than one parameter needs to be summarised. The fact that such summarisation needs to take place by use of a statistical weight stresses the fact that more than one factor needs to be taken into account.

3.60 The question is then to what the ‘weighted average’ actually refers. In this regard, the text of Article 2.2.2(ii) explicitly refers to “the actual amounts incurred and realized by other exporters or producers.” Clearly, the average should be of the amounts incurred and realised by other exporters or producers.

3.61 As a sub-question one may ask to what the word ‘amounts’ refers. In this connection the chapeau of Article 2.2.2 provides sufficient clarity:

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

⁵⁰ Excerpt attached as Annex 41.

⁵¹ Excerpt attached as Annex 42.

⁵² Excerpt attached as Annex 43.

⁵³ Excerpt attached as Annex 44.

...

(ii) the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;” [emphasis added]

3.62 The chapeau makes abundantly clear that amounts in Article 2.2.2(ii) relates to the amounts for “*administrative, selling and general costs and for profits*”. For example, the word “*such*” in the last sentence of the chapeau clearly refers to the words “*amounts for administrative, selling and general costs and for profits*” in the first sentence of the chapeau. In Article 2.2.2(ii) it is therefore clearly the amounts “*for administrative, selling and general costs and for profits*” from “*other producers or exporters*” for which a ‘weighted average’ needs to be established.

3.63 Yet, despite the clear and explicit wording of the Article, the EC tersely mentioned in the definitive Regulation that:

“(18) . . . Moreover, the reference in Article 2(6)(a) of the basic Regulation to a weighted average amount [sic] for profits determined for other exporters or producers, does not exclude that such amount [sic] can be determined by reference to a weighted average of transactions and/or product types of a single exporter or producer . . . ”

3.64 First of all, the EC changes the word “*amounts*” to ‘amount’, thereby reducing the plural which needs to be averaged into one singular ‘amount’. Second, the EC disconnected the explicit relation in the ADA between the “*weighted average*” and the “*amounts incurred and realized by other exporters or producers*”. Instead, the EC suddenly takes the view that when one amount itself is a weighted average, this would also serve the purpose of constituting a weighted average of amounts.

3.65 In other words, the EC blurs the distinction between more than one amount that needs to be averaged and one single amount that is based on a weighted average itself. Clearly, this is contrary to the explicit wording of the ADA, which mandates that amounts of other exporters or producers need to be averaged, and not that an amount itself (of one single exporter or producer) has to be established by means of using a method involving weighted averages.

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

3.67 Nevertheless, the EC applied just one amount from one producer. It is clear that no average of amounts from more than one exporter or producer was ever applied. Instead, the EC purposely and purely used one amount (of 29.04 per cent) inferred from Bombay Dyeing.⁵⁴

3.68 It is therefore indisputable that the explicit requirements of Article 2.2.2(ii) were simply not met. The EC has acted *ultra vires* by stating that the SG&A and profit data from a single producer is the same as the data from “*other exporters or producers*”. The EC’s ‘interpretation’ of the text of Article 2.2.2(ii) has clearly trespassed the boundaries of a permissible use of Article 2.2.2(ii) and violates its plain meaning.

⁵⁴ See also the provisional disclosure documents for Anglo-French, Madhu, Omkar, and Prakash.

3.69 Indeed, this very case shows how the EC's logic perverts the text of Article 2.2.2(ii): The calculation of the constructed normal values for companies without domestic sales is coloured by factors unique to one sole producer whose SG&A and profits amounts were used, thereby artificially finding dumping for all where none for most in reality exists. One can imagine that it was precisely to avoid such extreme effects that the Agreement requires that the weighted average of data of at least two exporters or producers be used. This rationale can be clearly inferred from the main rule of the chapeau of Article 2.2, namely that the application of SG&A and profit should be "reasonable". How can the SG&A and profit from one peculiar and extraordinary company be considered reasonable? Nevertheless, this is precisely what happened in Bed linen II: the company whose data were used for the determination of SG&A and profit (Bombay Dyeing) is wholly a-typical in India.⁵⁵ The specific reference in Article 2.2.2(ii) to amounts, exporters and producers in the plural is a specific application of the requirement of reasonableness in the chapeau of Article 2.2. It is a recognition of the fact that the method contained in Article 2.2.2(ii) is a substitute for the normal circumstance wherein SG&A and profit is determined by reference to actual data of the exporter or producer under investigation. As such, this substitute method is more prone to inaccuracies and distortion than the actual data, and it is precisely to minimize such possible distortion that Article 2.2.2(ii) requires the inclusion of at least two exporters or producers.

3.70 Despite the clear and explicit wording of the ADA, the EC did infer the data in question from only one sole producer. It follows that the EC, by determining the SG&A and profit for all Indian exporters on the basis of the data of one company only, has acted inconsistently with Article 2.2.2(ii) since the terms of this option were not met in the Bed linen II proceeding.⁵⁶

3.71 Furthermore, the EC misleadingly stated the following in recital (18) of the definitive Regulation that:

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

3.72 This recital suggestively announces that at the time of the selection of the sample there were two companies that had declared to have domestic sales. However, when one looks at the actual sample selection process, as described in detail in section III.A.1 above, it is evident that the investigating authorities knew or could have known that there was only one company in the main sample for which there would be *representative* domestic sales: Bombay Dyeing.

3.73 With respect to the other company referred to in recital (18), Anglo-French, it was very clear at the moment of the selection of the sample that its domestic sales were insignificant if not

⁵⁵ For details as to why Bombay Dyeing is wholly a-typical for India we refer to the disclosure comments as submitted during the proceeding by Texprocil and by Anglo-French, Madhu, Omkar, and Prakash (please refer to Annexes 25-32).

⁵⁶ Except of course for Bombay Dyeing for whom its own data were used.

meaningless. It is recalled that Anglo-French itself had stated at the moment of the sample selection that:⁵⁷

*“1) For the period . . . we have exported 9,02,467 kgs of Cotton bed Linen to the European Community and the total invoice value of this quantity is Indian Rs 161.11 million.
2) With respect to sales of Cotton Bed Linen in the Domestic market for the period . . . we wish to bring your kind attention that we are selling Bed Linen qualities only in the Export market, and that the value of Bed Linen sold in the domestic market will be less than 0.25 per cent of our total turnover of around Indian Rs.1,200 million, and hence our turnover for Cotton Bed Linen in the Domestic market will be less than Indian Rs.3.00 million. . . .”*

3.74 It was therefore abundantly clear from this moment (30 September 1996) that Anglo-French with Rs 3 million worth of domestic sales, and Rs 161.11 worth of export sales, would not have representative domestic sales in the sense that the 5 per cent threshold would not be met [it was only $(3 \div 161.11) * 100 = 1.86\%$]. It was in fact also made clear in Anglo-French' questionnaire responses that the company did not have sufficient domestic sales.

3.75 It is further recalled that the company Standard Industries, which Texprocil at the time of the sample selection insisted upon having included in the sample, did have sufficient representative domestic sales (as declared at the time of sample selection).⁵⁸ However, the Commission refused to include Standard.

3.76 Moreover, during the investigation nothing would have prevented the EC to investigate one more company *with* representative domestic sales, namely Standard Industries. The questionnaire response of this company was readily available for investigation because of its selection in the reserve sample.⁵⁹

3.77 The insinuation in recital (18) that it was the fault of the Indian exporters that there were not sufficient exporters with representative domestic sales in the main sample and that the EC somehow tried to select the main sample with sufficient domestic sales is therefore not borne out by the facts.⁶⁰

⁵⁷ Please refer to the declaration by Anglo-French attached in Annex 18.

⁵⁸ It is clear from the fact description that on two occasions in the final stage of the sample selection process Texprocil requested, in writing, to have Standard included in the sample. The Commission could plainly know from Standard's declaration that it was willing to be sampled that the company had sufficient domestic sales. This declaration, submitted well before the sample was negotiated, is attached as Annex 45. See also Annex 16.

⁵⁹ The fact that additional companies are sometimes included into the main sample and investigated is for example witnessed by the EC anti-dumping proceeding concerning Flat pallets of wood originating in Poland (published in Official Journal of the EC (year 1997) L-series Number 150 page 4, Regulation imposing provisional duties, at recitals (12) and (13)):

“(12) One Polish exporter selected for the sample did not reply to the questionnaire. Another Polish exporter, which did not produce pallets and did not sell on the domestic market, replied to the questionnaire; however its suppliers, whose cooperation was indispensable for establishing normal value, refused to cooperate. Accordingly, the Commission had to disregard the information submitted by the exporter concerned.

(13) In these circumstances, the Commission considered it appropriate to add to the initial sample two or more producers, in order to reinforce the representative of the sample, both in quantitative terms and in relation to the conditions of the Polish domestic market for pallets. . . .”

⁶⁰ Indeed, in this respect recital (18) contradicts the statement contained in the EC letter of 11 October 1996 (reference 060644; Annex 22) where it is stated that: “ . . . we insist on maintaining this company [Standard] in the reserve because of its significant domestic sales.” If it was so clear to the EC that Standard had significant domestic sales, and the Indian side insisted on having Standard in the main sample,

In any event, it follows from the argument above that it is not relevant for Article 2.2.2 whether the EC knew at the time of sample selection whether there was only one company with sufficient domestic sales.

4.2 The second argument of the first claim relating to Article 2.2.2: even within the application of Article 2.2.2(ii), the EC has acted inconsistent with the provision. Instead of using ‘the actual amounts incurred and realised’ by other producers or exporters the EC has used amounts for SG&A and profits that were restricted to sales in the ‘ordinary course of trade’

3.78 The application by the EC of Article 2.2.2(ii) in Bed Linen II constitutes paramount inconsistency with the methodology set forth therein with respect to the calculation of amounts for SG&A and profits. It is recalled that the relevant part of Article 2.2.2(ii) provides that the amounts for SG&A and profits shall be based on: “. . . *the actual amounts incurred and realized by other producers or exporters. . .*” (Emphasis added). However, the EC did in fact not apply “*the actual amounts incurred and realized by other producers or exporters*”. Rather, the EC has resorted to applying amounts for SG&A and profits in the ordinary course of trade only. A summary table illustrates the difference.⁶¹

Item	The actual amounts <i>incurred and realized:</i>	Amounts in the ordinary course of trade:
SG&A	10.39%	10.39%
<i>Actual profit amounts incurred as a % of turnover</i>	12.09%	
<i>Profit % pertaining to sales in the ordinary course of trade</i>		18.65%
Total	22.48%	29.04%

Source: Table of DMprofit in disclosure document for Bombay Dyeing (excerpt attached as Annex 46)

3.79 Whilst it is not clear from the published determinations or otherwise as to why the EC has deviated from the text of Article 2.2.2(ii), several theories appear possible, all of which, however, are inconsistent with the mandatory nature of Article 2.2.2.

3.80 First of all, it could be possible that the EC, in application of Article 2(6)(a) of its domestic legislation, has used SG&A and profits that were “*determined*” for other producers and exporters.⁶² This use of the word “*determined*” in the EC’s domestic legislation could then have led to a discrepancy with the actual amounts that had in fact been ‘*incurred and realized*’ by other exporters or producers.⁶³

then why does recital (18) suggest that is it the fault of the Indian exporters that there were not sufficient exporters with representative domestic sales?

⁶¹ In short, the difference is that in the profit determination the sales below cost are systematically excluded, thus inflating the profit margin and therewith the constructed normal value.

⁶² It is recalled that Article 2(6)(a) of the relevant EC legislation in question provides that:

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

(a) *the weighted average of the actual amounts determined for other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;*

⁶³ This is also the view held by literature in the field.

3.81 In other words, the amounts of SG&A and profits for those producers for whom the method of the chapeau of Article 2.2.2 is followed, are merely transplanted' to Article 2.2.2(ii), since this was the amount that had been 'determined' under Article 2.2.2 chapeau. In doing so, there is failure to recognize that 'the actual amounts incurred and realized' by other producers in Article 2.2.2(ii) is in fact different from the 'amounts determined' in the chapeau of Article 2.2.2. *In casu*, this has led to an overstatement of (29.04 per cent (amount determined) - 22.48 per cent (amount incurred and realized)) = 6.56 per cent.⁶⁴ Clearly, such EC application of Article 2.2.2(ii) would be incorrect since the factual deviation from the actual amounts incurred and realized, as mandated, is massive.

3.82 A second possibility would be that the EC has wrongly interjected within the provision of Article 2.2.2(ii) the requirement of the chapeau in that SG&A and profits shall be calculated based on sales 'in the ordinary course of trade'. The EC would therefore have only included profitable sales with respect to its calculation under Article 2.2.2(ii). While the method for calculating SG&A and profits in the chapeau of Article 2.2.2 does indeed include the restriction that SG&A and profits shall be based on data pertaining to sales 'in the ordinary course of trade', this requirement is excluded in the method contained in Article 2.2.2(ii). Indeed, Article 2.2.2(ii) makes no reference to any requirement that the amounts incurred and realized be restricted to those in the 'ordinary course of trade' only.

3.83 In order to agree with such EC's interpretation of Article 2.2.2(ii), *i.e.* that SG&A and profits under 2.2.2(ii) only includes amounts incurred or realized 'in the ordinary course of trade', it would be necessary to find that the wording of Article 2.2.2(ii) implicitly refers back to and incorporates the reference to 'ordinary course of trade' in the chapeau of Article 2.2.2. However, such an approach is demonstrably inconsistent with the express wording of Article 2.2.2(ii). The chapeau of Article 2.2.2 and Article 2.2.2(ii) provide that:

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

...

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

3.84 The first part of the first sentence of Article 2.2.2 defines the subject of what is to be calculated; namely "*. . . the amounts for administrative, selling and general costs and for profits . . .*" The second part of the first sentence, introduced by the clause "*. . . shall be based on . . .*" then provides the specific method by which the SG&A and profits shall be calculated under the chapeau of Article 2.2.2.

3.85 It is important to note that the word "*amounts*" in the chapeau refers only to the amounts for SG&A and profit; this word does not refer to amounts for SG&A and profits "*. . . in the ordinary course of trade*". Rather, the first sentence of the chapeau of Article 2.2.2 stipulates that, for the purposes of the method detailed there, the 'amounts' for SG&A and profits shall be 'based on' (actual

⁶⁴ In other words, the amounts that were 'incurred and realized' were overstated in the calculations by almost one-third: $(6.56 \div 22.48) \times 100 = 29.18\%$ of overstatement.

data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation). In other words, the basis, or factors which are to be used in order to arrive at the amounts for SG&A and profits under the specific method detailed in the chapeau are “*actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation.*”

3.86 Websters’ New Collegiate Dictionary defines the word ‘basis’ as: ‘Foundation. Something on which something else is constructed or established” (emphasis added). Similarly, the word ‘base’ is defined as “Foundation. The bottom of something considered as its support.”⁶⁵ In other words, the “amounts for SGA and profits” constitute, in the context of the chapeau of Article 2.2.2 and subparagraph (ii), by definition ‘something else’ i.e., a value or amount that is conceptually distinct from the ‘foundations’ or ‘basis’ upon which it is constructed or established. The amounts for SG&A and profits is what is to be established; the “actual data . . . in the ordinary course of trade . . . investigation” is (one of) the means to establish it.

3.87 Therefore, when the second sentence of the chapeau of Article 2.2.2 states that when “*such amounts*” cannot be determined on the basis of the chapeau of Article 2.2.2, then the method in Article 2.2.2(ii) (among others) may be used; the words “*such amounts*” refer to “*amounts*” as described in the first sentence of the chapeau. Indeed the entire purpose of Article 2.2.2(ii) is to provide for a different and alternative basis upon which to establish SG&A and profits (from the basis contained in the chapeau of Article 2.2.2).

3.88 As has been noted, the definition of the words “*amounts for SG&A and profits*” in the first sentence of the chapeau does not include the words “*ordinary course of trade*”. Instead, since in the chapeau of Article 2.2.2 the words “*ordinary course of trade*” occur after the words “*based on*”, this requirement is clearly intended to form part of the specific basis or foundation for the specific method provided under the chapeau. Consequently, the words “*such amounts*” in the second sentence of the chapeau cannot logically be taken to refer back to SG&A and profits “*in the ordinary course of trade*”, but instead only to SG&A and profits. Thus, the word ‘amounts’ used for the purposes of Article 2.2.2(ii) do not include any requirement that the amounts be incurred or realised in the ordinary course of trade.

3.89 It is equally impossible to interpret Article 2.2.2(ii) as referring back to the remainder of the text of the chapeau of Article 2.2.2. As noted above, the words “*ordinary course of trade*” in the chapeau occur after the words “*based on*”. Consequently, if the EC is to argue that Article 2.2.2(ii) refers back to and includes the requirement of “*ordinary course of trade*”, it must argue that the basis provided in Article 2.2.2(ii) for calculating SG&A and profits refer back to and include the basis provided in Article 2.2.2 chapeau. Such an argument would be logically impossible and inherently contradictory. Again, the entire purpose of Article 2.2.2(ii) is to provide a different basis for calculating SG&A and profits from the basis provided under the chapeau. If the purpose of article 2.2.2(ii) is to provide for a different basis, or foundation, upon which to establish SG&A and profits than the basis provided under Art. 2.2.2 chapeau, it would of course be logically absurd to then argue that the foundations referred to under 2.2.2(ii) shall be interpreted as referring back to and implicitly including the same foundations that are present in the chapeau of 2.2.2. Indeed, the second sentence of Article 2.2.2 chapeau expressly states that one is only entitled to resort to the methodology under 2.2.2(ii) when the foundations under the chapeau of the 2.2.2 “*cannot*” be used. It is a clear ‘either-or’ situation.

⁶⁵ Excerpt attached as Annex 47.

3.90 Consequently, there is no basis for inferring a requirement under Article 2.2.2(ii) that only profitable sales shall be taken into account for the purposes of calculating SG&A and profits under the methodology provided therein.

3.91 This interpretation is further confirmed by specifically contrasting the wording of the method provided in the chapeau against the wording of the method contained in Article 2.2.2(ii). Under the method in Article 2.2.2 chapeau, SG&A and profits shall be calculated “. . . based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation . . .” (emphasis added). Under the method in Article 2.2.2(ii) on the other hand, SG&A and profits shall be based on “the weighted average of the actual amounts incurred or realized by other producers or exporters subject to investigation . . .” (emphasis added). Article 2.2.2(ii) clearly stipulates that the data which is to be taken into account under this method are the weighted average of “. . . the actual amounts incurred and realized . . .”

3.92 The context in which the word “*actual*” is used in this paragraph is important. The *Concise Oxford dictionary* defines the word “*actual*” as “*existing in fact; real (often as distinct from ideal).*” (Emphasis added). Likewise, *Websters’ New Collegiate Dictionary* defines “*actual*” as “*Existing in fact . . . and not merely potentially.*”⁶⁶

3.93 In other words, if one refers to the *actual* amounts (for SG&A and profit), one is expressly referring to the complete amounts which in fact exist; nothing more and nothing less. It follows that this formulation expressly excludes any qualification or limitation of the amounts for SG&A and profit which are to be included in the calculation under this method (provided that these amounts are generated in respect of production and sales of the like product *etc.*). Consequently, the use of the word ‘actual’ in this context is intended to specifically clarify that it is the complete amounts which are to be taken into account under this method, as opposed to amounts which have been artificially qualified or limited in some way.

3.94 The wording of Article 2.2.2(ii) should be contrasted with the wording of the chapeau of Article 2.2.2. The word “*actual*” in this paragraph is used in an entirely different context. Article 2.2.2 chapeau does not provide that the relevant amounts should be determined on the basis of the “*actual amounts incurred and realized* . . .” Rather it states that the “*amounts*” shall be determined on the basis of “*actual data*”. The term data is immediately qualified and defined as “*data pertaining to production and sales in the ordinary course of trade.*” Thus, Article 2.2.2 chapeau artificially qualifies and limits the “*actual data*” to be used (and thereby the ‘amounts’ which will be ascertained) to “. . . data pertaining to production and sales in the ordinary course of trade . . .”

3.95 Therefore, given the fact that Article 2.2.2(ii) specifically refers to “*actual amounts incurred and realized*”, and the meaning of this formulation as demonstrated above, and given that the reference to “*ordinary course of trade*” is excluded from Article 2.2.2(ii), it is clear that this paragraph is expressly differentiated from Article 2.2.2 chapeau in that the ‘ordinary course of trade’ qualification does not apply.

3.96 It follows that the EC misapplied sub-paragraph 2.2.2(ii) and thus acted inconsistently with Article 2.2.2 of the ADA.

⁶⁶ Excerpts of both dictionaries attached as Annex 48.

4.3 The third argument of the first claim relating to Article 2.2.2: By switching the order of preference contained in Article 2.2.2 the EC has acted inconsistently with that Article

3.97 The EC has, instead of using the (available) alternative that Article 2.2.2(i) provides, used the alternative provided in Article 2.2.2(ii). It is recalled that Article 2.2.2 provides for four possible SG&A and profit calculation methods in Article 2.2 situations:

1. Actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation (Article 2.2.2 chapeau);
2. Actual amounts incurred and realized by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products (Article 2.2.2(i));
3. Weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production or sales of the like product in the domestic market of the country or origin (Article 2.2.2(ii));
4. Any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of the same general category in the domestic market of the country of origin (Article 2.2.2(iii)).

3.98 From the context of the Article and the very concept of dumping, it is clear that method 2 is both preferred and preferable over methods 3-4 (it being understood that method 1 is preferred over methods 2-4). Namely, method 2, being the first alternative mentioned to the main rule, relies on the specific situation of the producer concerned. Dumping being a highly producer-specific concept⁶⁷ should by its intrinsic nature be calculated as much as possible on the basis of the data of the producer whose behaviour is under scrutiny. In this regard the order of the Agreement makes sense, since it establishes a preference for producer-specific data. This preference for data of the producer is first reflected in the main rule of the chapeau of Article 2.2.2 and repeated in its first alternative. In context, the wording of Article 2.2.1.1 could be considered: in the context of the cost calculations all data are to be inferred from the producer/exporter under consideration (and not from other producers or exporters). Hence, when it comes to SG&A expenses and profits, it makes sense to follow this same preference and rely as much as possible on producer-specific data. Only where this is no longer possible could further alternatives be considered.

3.99 Indeed, the text of the Agreement reveals a gradually declining scale in the order of options as far as the relation with the producer is concerned: the first alternative of the chapeau being the actual dumping situation and the fourth option being the most alternative method. Recourse to methods 3-4 normally deprives an exporter not only of the possibility to check his own dumping margin calculation (because he does not have access to the SG&A and profit amounts of his competitors), at least in the EC system, it furthermore makes it impossible for him to prevent dumping because he will never know whether he is dumping in the first place.⁶⁸ It therefore makes all the more sense that these third and fourth options are ranked at a place where their use would be less easily available than the

⁶⁷ In one and the same country in the same proceeding in the same investigation period, one producer may found dumping while another producer may not be found dumping.

⁶⁸ In the absence of a system of disclosure of confidential information under administrative protective order, the EC's system precludes producers without sufficient domestic sales from checking or knowing their very own dumping margin calculations.

first option of the chapeau, or the second option of 2.2.2(i) which, respectively, have a direct or indirect link with the producer concerned.

3.100 Therefore, on the basis of the wording of Article 2.2.2 as well as a systemic interpretation of the concept of dumping and the ADA, the GOI believes that Article 2.2.2 establishes a preference for use of producer-specific data.

3.101 It is noted, however, that the EC basic Regulation turns around methods 2 and 3 and, to that extent, does not follow the order of the ADA. Thus, Article 2(6) of Regulation 384/96 of the EC domestic legislation provides as follows:

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

- (a) the weighted average of the actual amounts determined for other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;*
- (b) the actual amounts applicable to production and sales, in the ordinary course of trade, of the same general category of products for the exporter or producer in question in the domestic market of the country of origin;*
- (c) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.”*

3.102 In other words, the options listed in Articles 2.2.2(i) and 2.2.2(ii) of the Agreement are switched around in Article 2(6) of Regulation 384/96. While the facts of the matter would appear clear-cut, a summary table may clarify the contradiction between the EC law and practice, vis-à-vis the relevant WTO provision:

Methods of inferring SG&A and profit	Article 2.2.2 ADA	Article 2(6) EC legislation
First option	From domestic sales of like product of exporter/producer in question	From domestic sales like product of exporter/producer in question
Second option	From domestic sales of same general category of products <i>of exporter/producer in question</i>	From weighted average of domestic sales of like product <i>of other exporters/producers</i>
Third option	From weighted average of domestic sales of like product of other exporters/producers	From domestic sales of same general category of products of exporter/producer in question
Fourth option	Any other reasonable method	Any other reasonable method

3.103 In fact, the explicit switching of the first two options in the basic EC Regulation would appear to suggest that the European Community implicitly does consider the order of the options to be relevant. Indeed, in recital (18) of the definitive Regulation it becomes clear that the EC does consider that Article 2(6)(a) has preference over 2(6)(b) and 2(6)(c). In this recital it is implicitly observed that Articles 2(6)(b) and 2(6)(c) could have been applied, but that such application was not justified in the circumstances of the situation, because Article 2(6)(a) was already applicable:

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

3.104 The EC therefore did not even consider which option would be most reasonable, but only posited that Article 2(6)(a) applied and that for that reason Articles 2(6)(b) or (c) could not apply. The fact that Article 2(6)(b) could indeed have been applied is for example illustrated by the situation of (*inter alia*) Prakash Cotton Mills, which had domestic sales of other products in the same general category on the domestic market.⁶⁹ This is the first indication that the EC considers the order laid down in Article 2(6) of the basic Regulation, which differs from the order of the ADA, as mandatory. Incidentally, the EC method also led to the most disadvantageous result possible for the Indian industry.

3.105 It should further be noted that it has also been confirmed by case law of the European Court of Justice that the order in which the three alternatives must be considered is the order in which they are presented in the provision.⁷⁰ In fact, one may argue that where the European Court of Justice considers that the order of the Regulation is of a mandatory nature, the order of the ADA contains the same imperative character.

3.106 Finally, as far as the EC's domestic legislation is concerned, it is noted that recent EC literature on the subject confirms that in practice the order as set out in the Regulation is followed.⁷¹ While there may therefore not be a *de jure* preference (apart from the Court judgements mentioned), there is certainly a practice which exists *de facto* as witnessed by the Bed Linen II proceeding. This *de facto* preference as established by the EC therefore establishes an inconsistency with the order of preference as established by the ADA.

3.107 In conclusion it may be summarised that the ADA contains thorough, solid, and logical rules with respect to the methods of determining SG&A and profits. The EC legislation deviates from these rules and moreover does so in a manner which makes it difficult, if not impossible, for a producer to predict his potential dumping exposure in certain instances where such possibility would have existed under the rules of the ADA. The EC's legislation on this point, as well as its practice in this regard is inconsistent with its WTO obligations.

5. Claim 2: inconsistency with Article 12.2.1

5.1 The text of Article 12.2.1

3.108 It is recalled that Articles 12.2 and 12.2.1 of the ADA provide in relevant part as follows:

⁶⁹ *I.e.* the method as per Article 2.2.2(i) was available to at least for example Prakash, but it could also be considered to be applicable to Anglo-French and Madhu.

⁷⁰ Case C-105/90, *Goldstar Co. Ltd vs Council*, [1992] ECR I-677 (paragraph 35); Case C-69/89, *Nakajima All Precision Co. Ltd vs Council*, [1991] ECR I-2069 (paragraph 61).

⁷¹ Muller, Khan, Neumann, *EC Anti-Dumping Law—A commentary on Regulation 384/96*, Wiley (1998) at 97: “*The Community legislation also falls short of imposing a strict legal hierarchy, but in practice, unless there are good reasons to the contrary, the order as set out in the Regulation is followed.*”

“12.2 Public notice shall be given of any preliminary or final determination, whether affirmative or negative . . . of the termination of a definitive anti-dumping duty. Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities . . .

12.2.1 A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular: . . .

- (iii) the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2; . . .*
- (v) the main reasons leading to the determination.”*

5.2 Legal arguments relating to the claims relating to Article 12.2.1

3.109 The second claim is that the EC has acted inconsistently with Article 12.2.1, by failing to sufficiently explain why and how it applied Article 2.2.2 in the provisional Regulation. This claim consists of three arguments:

3.110 The first argument of the second claim is that in contradiction to Article 12.2.1, the EC has not provided a sufficient explanation as to why it decided to apply an option for which the requirements were not fulfilled.

3.111 The second argument of the second claim is that in contradiction with Article 12.2.1 the EC did not explain why it resorted to the amounts ‘determined’ that only related to data based on profitable sales, instead of to the actual amounts incurred and realised.

3.112 The third argument of the second claim is that despite the fact that the EC’s choice was heavily contested, the EC has nowhere provided a sufficient explanation in the public notice (or made available in a separate report) as to why it applied option 2.2.2(ii) instead of 2.2.2(i). This is inconsistent with the requirements of Article 12.2.1 of the ADA.

6. Claim 3: inconsistency with Article 12.2.2

6.1 The text of Article 12.2.2

3.113 It is recalled that Article 12.2.2 of the ADA provides in relevant part as follows:

“A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures . . ., due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information

described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers . . .”

6.2 Legal arguments relating to the claims relating to Article 12.2.2

3.114 The third claim is that the EC has acted inconsistently with Article 12.2.2 by failing to sufficiently explain why and how it applied Article 2.2.2 in the definitive determination.

3.115 As noted in section III.A.1, Indian exporters made very detailed arguments on these issues. Nevertheless, in the definitive Regulation the EC’s explanations of these arguments was little more than the statement in recital (18) that:

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

3.116 This ‘justification’ for applying 2(6)(a) (corresponding to Article 2.2.2(ii)) was little more than noting that the conditions for its application were—in the eyes of the EC—fulfilled and application of other options was therefore out of the question. There are four reasons why this ‘explanation’ is inconsistent with Article 12.2.2:

3.117 The first argument is that contrary to Article 12.2.2, the EC has not provided a sufficient explanation as to why it decided to apply an option for which the requirements were not fulfilled.

3.118 The second argument is that contrary to Article 12.2.2 the EC did not explain why it resorted to the amounts ‘determined’ instead of to the amounts ‘incurred and realised’.

3.119 The third argument is that contrary to Article 12.2.2 the EC did not explain why it considered the profit so established reasonable as per Article 2.2.2(iii).

3.120 The fourth argument is that despite the fact that the EC’s choice was heavily contested, the EC has nowhere provided a sufficient explanation in the public notice or made available in a separate report as to why it applied option 2.2.2(ii) instead of 2.2.2(i). This contradicts the requirements of Article 12.2.2.

3.121 It follows that the EC acted inconsistently with Article 12.2.2 of the ADA.

7. Claim 4: inconsistency with Article 2.2

7.1 The text of Articles 2.2 and 2.2.2

3.122 It is recalled that Articles 2.2 and 2.2.2 provide in relevant part as follows:

“2.2 When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison

with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.

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

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

3.123 As a first observation it is noted that Article 2.2.2 refers to 2.2 in its opening words (“[f]or the purpose of paragraph 2”). Furthermore, the distinction is noted between the phrase “reasonable amount for administrative, selling and general costs and for profits” in Article 2.2 and the phrase “amounts for administrative, selling and general costs and for profits” in Article 2.2.2. Read in combination and context, it follows that the “amounts for administrative, selling and general costs and for profits” of Article 2.2.2 are covered by Article 2.2 as well. Article 2.2 instructs Article 2.2.2, as re-confirmed by the very cross-reference in Article 2.2.2. It subsequently follows that the amounts in Article 2.2.2 must be “reasonable” as per the last sentence of the chapeau of Article 2.2.

7.2 Legal arguments relating to the claims relating to Article 2.2

3.124 The fourth claim is that the EC has acted inconsistently with Article 2.2 of the ADA by not adding a ‘reasonable’ amount of SG&A and for profits. The chapeau of Article 2.2 sets forth that:

“When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.” (Emphasis added)

3.125 A distinction must be made here between the procedural aspects (how are SG&A and profits determined?) and the substantive aspects (what are the limitations on the end result?).

3.126 How the “amount for administrative, selling and general costs and for profits” is to be determined is laid down in Article 2.2.2. It is noted that this latter provision does not contain exactly the same formula as 2.2. If 2.2.2 had read as follows: “For the purpose of paragraph 2, the reasonable amounts for administrative, selling and general costs and for profits”, then there was no question that the remainder of 2.2.2 elaborates the concept of “reasonable”. Then the four methods laid down in 2.2.2 could be considered to be the statement of what could be reasonable.

3.127 However, 2.2.2 does not explain how the reasonable amounts for SG&A and for profits are to be determined, but merely how “the amounts for administrative, selling and general costs and for profits” are to be established. It follows that the word “reasonable” in 2.2 has maintained its separate

function: the “*amount for administrative, selling and general costs and for profits*” in 2.2 are explained in 2.2.2, not the “*reasonable amount for administrative, selling and general costs and for profits*”. The ‘reasonable’ test in 2.2 is thus an over-arching requirement in addition to the requirements of 2.2.2, rather than a rule, concretized by Article 2.2.2. This is also in accordance with the plain meaning of Article 2.2 and the structure of the Article.

3.128 The next question then becomes what “*reasonable*” in 2.2 means. It cannot be a procedural requirement: the possible procedures for determining SG&A and profits are elaborated in 2.2.2. It follows that “*reasonable*” must be interpreted as a substantive requirement: whatever method under Article 2.2.2 is used, Article 2.2 requires that the result of the method used must be “*reasonable*”.

3.129 Contrary to what might be expected, the ADA does not at first sight appear to contain any explicit definition of the word ‘reasonable’. However, upon closer reading of the three alternative options contained in Article 2.2.2, the third option does in fact contain an implicit definition of the notion of ‘reasonable’:

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

3.130 Thus, the text suggests that while any other method may be used to establish SG&A and profits, any such method may not lead to an addition of a profit that exceeds profits normally realised by other exporters or producers. In other words, if the profit under option three exceeds the profit that is normally realised by other exporters or producers on sales of products of the same general category in the domestic market, the method is not considered reasonable.

3.131 Accordingly, for a method—and therefore a profit—to be reasonable, it should not exceed profit normally realised by other exporters or producers (on sales of products of the same general category in the domestic market of the country of origin).

3.132 Nothing in the text of Article 2 would appear to suggest that this criterion for reasonableness as defined in the third option does not apply with respect to the rest of Article 2. Indeed, failing any indication to the contrary, the criterion in option (iii) is the only guideline as to the notion of ‘reasonable’ contained in Article 2.2 of the ADA. The third option refers not to a specific method but instead to a general, abstract, open-ended category of “*any other reasonable method.*” It is therefore clear that the words that follow in the third option are intended to define reasonableness in terms of a general criterion which all reasonable methods must fulfil. Thus the wording of the third option expressly defines a reasonable method as one which does not result in excess profits as defined above.⁷²

⁷² This conclusion fits with the structure of Article 2.2.2. As noted earlier, Article 2.2.2 contains four alternative methods for determining SG&A and profits (namely, the normal method in the chapeau and the three alternative methods in sub-paragraphs (i)-(iii)). Whatever one’s views on the order of these alternatives, it seems evident from the wording that the method laid down in sub-paragraph (iii) is a residual one, so to speak, one of last recourse if all other methods fail. This would—apart from its place at the bottom of the provision—follow from the words “*any other*”. The ADA thus provides three reasonably accurately described methods for determining SG&A and profits, plus the residual ‘any other’ method of the third sub-paragraph. Contrary to the first three methods, sub-paragraph (iii) does not so much lay down the procedure to be used, but rather constrains the result. Since the term “*reasonable*” in Article 2.2 also is a substantive rather than a procedural requirement, there is a large degree of correspondence between the two words.

3.133 As noted, there seem to be no further indications in the text of the ADA which elaborate on the notion of 'reasonable.' As far as the literature on the subject is concerned one may note the observation of one internationally recognised scholar with respect to Article 2:4 of the 1979 Anti-Dumping Code: "*international obligations [mandate] . . . that a realistic method be used to compute the constructed cost and prices based on constructive cost.*"⁷³ [emphasis added] As far as concrete percentages are concerned, it might be recalled that in the Panel Report concerning US—imposition of anti-dumping duties on Atlantic salmon from Norway⁷⁴, the EC observed as third party and therefore supposedly because of systemic reasons that:⁷⁵

“ . . . it had to be borne in mind that the Department of Commerce did not have access to data on domestic sales in Norway of fresh Atlantic salmon and that therefore a reasonable estimate had to be made of the amount for profit. In the absence of any other information, it did not seem unreasonable to use a figure which after all represented only about 5 per cent on turnover. In addition, the EEC considered these figures as not inappropriate for the Atlantic salmon industry.”

3.134 Turning to the factual situation of the Bed linen proceeding under consideration it is recalled that while not all producers had sales of the product concerned on the domestic market, some producers did have sales of other products in the same general category (textiles). As far as these other producers were concerned it is recalled that the following companies realised the following profits in their same general category of products and (especially for some companies, failing such categories) obtained the following overall profit:

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

The Commission has never contested these figures.

3.135 It is further recalled that the profits obtained for Bed Linen were determined as follows for the other countries in the proceeding:

<i>Country</i>	<i>Profit</i>
<i>Egypt:</i>	<i>5.8</i>
<i>Pakistan:</i>	<i>7.4</i>
<i>Average:</i>	<i>6.1</i>

3.136 It is also recalled that the profit determined on the basis of the profitable sales of one Indian company and applied to all others was 18.65 per cent.

⁷³ Jackson, *The World Trading System* (1989) at 235.

⁷⁴ United States—Imposition of anti-dumping duties on imports of fresh and chilled Atlantic Salmon from Norway, Report of the Panel adopted by the Committee on Anti-Dumping Practices on 27 April 1994 (ADP/87).

⁷⁵ *Ibid.*, recital 323.

3.137 Last, it is recalled that the reasonable profit imputed to the EC industry was 5 per cent.

3.138 It is evident from the above that in comparison with all other amounts for profits that have been relevant in the context of the proceeding, 18.65 per cent stands out as a complete anomaly. This does not in any way reflect the profit actually realised by the Bed Linen producers inside and outside India. In fact, the particular profit is more than three times higher than the average profit determined for the other two countries involved in the investigation, as well as the EC's own Bed Linen industry.

3.139 If the word reasonable is defined by reference to the criteria indicated in the third option of Article 2.2.2, the inconsistency is equally obvious and paramount. The profit so established does not fit the definition of Article 2.2 since it is contrary to any perception of reasonable ness that can and may exist in and outside the textile industry.

8. Claim 5: inconsistency with Article 12.2.1

8.1 The text of Article 12.2.1

3.140 Please refer to section III.A.5.1, above.

8.2 Legal arguments relating to the claims relating to Article 12.2.1

3.141 The provisional Regulation merely contained a brief statement on the calculation of SG&A and profit, which read in relevant part that:

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

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

3.142 The fifth claim is that the EC has acted inconsistently with Article 12.2.1 by failing to sufficiently explain in the provisional Regulation or the disclosure document why and how it applied Article 2.2, and especially, why it considered the uniquely established and exceptionally high profit margin 'reasonable'. This is inconsistent with Article 12.2.1.

9. Claim 6: inconsistency with Article 12.2.2

9.1 The text of Article 12.2.2

3.143 Please refer to section III.A.6.1, above.

9.2 Legal arguments relating to the claims relating to Article 12.2.2

3.144 The sixth claim is that the EC has acted inconsistently with Article 12.2.2 by failing to sufficiently explain why and how it applied Article 2.2. Despite extensive and detailed arguments

from exporters and Texprocil⁷⁶, the EC did not sufficiently explain in the public notice, or make available through separate a report, why it considered the uniquely established and exceptionally high profit margin ‘reasonable’.

3.145 As noted in section III.A.1 above, following the provisional Regulation and provisional disclosure the Indian exporters made extensive arguments on the interpretation of ‘reasonable’. Although the EC in recital (18) noted the issue of the interpretation of ‘reasonable’, it never replied to the claims by Indian exporters that the profit and SG&A determined were not reasonable as per Article 2(3) of the basic Regulation (Article 2.2 of the ADA). This is all the more serious in view of the very tangible impact of this issue on the dumping margins. The EC therewith acted inconsistently with Article 12.2.2.

B. CLAIM 7: ARTICLE 2.4.2: ZEROING OF NEGATIVE DUMPING AMOUNTS

3.146 Summary: the EC acted inconsistent with Article 2.4.2 by zeroing negative dumping amounts on a per-type basis (**claim 7**).

1. Facts

3.147 First, reference is made to the facts described above in section III.A, above. The following facts may be added to this description. It is recalled that during the first round of consultations, the following question was asked:⁷⁷

“114. Would the EC indicate what the basis under the WTO Anti-Dumping Agreement is for the practice of per-type zeroing when weighted average normal values are compared to weighted average export prices as per Article 2.4.2? (In other words, why does the EC apply inter-type zeroing?)”

3.148 In response, the EC answered at the time:

“[EC]: The basis for such practice is the requirement that prices be ‘comparable’. We compare therefore, within one like product, on a type-by-type basis. Why zeroing? Because if we would not zero negative amounts, the requirement that we compare like with like would not be respected.”

3.149 During the second round of consultations this matter was again discussed in detail.⁷⁸

3.150 In its letter of 29 June 1998⁷⁹ the EC provided the following answer with respect to question 114 regarding Article 2.4.2:

“Question 114

Would the EC indicate what the basis under the WTO Anti-Dumping Agreement is for the practice of per-type zeroing when weighted average normal values are compared to weighted average export prices as per Article 2.4.2? (In other words, why does the EC apply inter-type zeroing?)

⁷⁶ Please refer to section III.A.1, above.

⁷⁷ See Annex 11.

⁷⁸ For the verbatim report please refer to Annex 13.

⁷⁹ Annex 14.

It should be noted that the methodology described in recital (46) of the provisional duty Regulation for the calculation of dumping margins, i.e. weighted average constructed normal value by type compared to weighted average export price by type, was never disputed during the administrative procedure. Article 2 (11) of the basic Regulation, which deals with this aspect, is clearly restricted to sales within a particular type -- that does not address how the results found for each type are averaged which is dealt with in Article 2 (12). The latter is more a question of how findings are imposed in the form of measures of duties [sic] and in this case the Community as per consistent practice imposed an average rate of dumping to cover all types with non-dumped types given a zero margin for the quantity concerned."

2. The relevant part of the text of article 2.4.2

3.151 It is recalled that Article 2.4.2 of the ADA provides that:

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

3. Claim relating to Article 2.4.2

3.152 Inconsistently with Article 2.4.2, the EC zeroed negative dumping incurred for certain types when comparing the overall weighted average per-type normal values with per-type weighted average export prices.

3.153 It appears that Article 2.4.2 provides for three possibilities to establish a dumping margin:

1. A comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions;
2. A comparison of normal value and export prices on a transaction-to-transaction basis; or
3. A normal value established on a weighted average basis may be compared to prices of individual export transactions

3.154 In the provisional Regulation the EC stated that *"(46) In general, weighted average constructed normal value by type was compared with weighted average export price by type."*

All six other dumping margins for India did not exceed 17 per cent. Clearly, any use of a 'reasonable' profit margin (*i.e.* any profit margin lower than the excessive 18.65 per cent), such as had been suggested countless times during the proceeding, would have led to lower dumping margins.

3.155 It would therefore appear that the EC opted to apply the first possibility of establishing a dumping margin as per Article 2.4.2. This view is also confirmed by the discussions that took place during the two rounds of consultations.

3.156 It appears therefore unquestionable that in its calculations of the dumping margins, the EC had decided to apply the 'first option' of establishing a dumping margin as per Article 2.4.2 which is to establish "... a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions."

3.157 As noted in the claim above, it is submitted that the EC has not *de facto* made such a comparison. Instead, it has zeroed the 'negative dumping' which was found for certain models. This has led to overstatement of the dumping margins for four companies. For one company this has even led the EC to find dumping where dumping did not exist. More precisely, the overstatement of the actual dumping margins has been as follows:

Name	CIF Value of Exports	Actual Dumping Result	Actual DM Percentage	Dumping Amount as per EC	EC DM Percentage
Anglo-French	126,464,037	30,820,812	24.37%	31,287,342	24.74%
Bombay Dyeing	100,924,637	5,612,587	5.56%	7,842,226	7.77%
Madhu	183,063,049	30,898,430	16.87%	31,169,522	17.03%
Omkar	212,877,521	28,025,198	13.16%	30,328,190	14.25%
Prakash	314,529,134	-1,328,119	-0.42%, <i>i.e.</i> 0	8,412,131	2.67%

Source: Based on Data provided in Disclosure documents

3.158 How this overstatement came about may be illustrated by the details of the calculations of Prakash:

PRODUCT CONTROL NUMBER	Data			
	Sum of CIF VALUE IN CURRENCY OF EXPORTING COUNTRY	Sum of DUMPING RESULT	DUMPING AMOUNT AS PER EC	%
1	54,595,034.24	2,444,661.168	2,444,661.17	4.48%
2	28,379,349.81	-840,871.6374	0.00	0.00%
3	35,119,956.8	787,797.5404	787,797.54	2.24%
4	26,940,135.47	-1,923,730.158	0.00	0.00%
5	21,859,280.04	-977,723.0105	0.00	0.00%
6	19,426,021.26	2,132,781.439	2,132,781.44	10.98%
7	15,915,117.53	-255,135.296	0.00	0.00%
8	14,604,200.8	156,272.4031	156,272.40	1.07%
9	12,526,247.49	225,785.7921	225,785.79	1.80%
10	10,064,340.52	391,620.1423	391,620.14	3.89%
11	9,195,177.3	-2,114,764.402	0.00	0.00%
12	7,182,757.11	1,195,525.219	1,195,525.22	16.64%
13	6,578,793.64	-921,095.2336	0.00	0.00%
14	7,783,783.55	73,158.60636	73,158.61	0.94%
15	7,355,982.32	435,593.6285	435,593.63	5.92%
16	7,968,378.95	-903,413.7129	0.00	0.00%
17	6,127,736.67	-691,408.4469	0.00	0.00%
18	4,812,847.04	-239,001.1542	0.00	0.00%
19	6,543,607.06	-567,224.405	0.00	0.00%
22	3,552,510.28	-188,257.2337	0.00	0.00%
25	4,164,049.29	327,548.0475	327,548.05	7.87%

46	1,510,123.95	-117,626.1048	0.00	0.00%
63	577,254.4	150,550.1243	150,550.12	26.08%
68	869,897.26	77,215.41208	77,215.41	8.88%
70	876,551.29	13,621.79908	13,621.80	1.55%
Grand total	31,452,9134.1	-1,328,119.472	8,412,131.32	2.67%

Source: Based on Data provided in Disclosure documents

3.159 Clearly, to models where negative dumping existed, the EC attributed a zero margin. The issue is material since in the absence of this peculiar practice no dumping for the largest exporter from India would have been found:

Total CIF Value	Actual Dumping Result	Actual Dumping Margin
314,529,134.1	-1,328,119.472	-0.42% , i.e. 0

Source: Based on Data provided in Disclosure documents

3.160 The fact that the practice as applied in the Bed Linen proceeding is not always followed by the EC may be illustrated by the attached disclosure of a calculation in another EC anti-dumping proceeding.⁸⁰ In that other case it may be clear from the tables that the negative dumping which existed for certain models was allowed to offset the dumping found for other models which were positively dumped.

3.161 Hence, it is first of all clear that Commission practice is not always consistent on this point.

3.162 Second, regard should be had to the exact wording of the text of Article 2.4.2. The text of this Article comprises the following elements:

1. a comparison of;
2. a weighted average normal value;
3. a weighted average of prices of all comparable export transactions.

3.163 The elements of 'comparison' and 'weighted average normal value' do not seem in dispute. A comparison has been made, and a weighted average normal value has been established for all models that were exported.

3.164 The question then becomes what exactly is meant by the '*weighted average of prices of all comparable export transactions.*' This third element comprises five notions:

1. weighted average
2. of prices
3. of all
4. comparable
5. export transactions.

3.165 Out of these five, the key notions are the notion of 'weighted average', the notion of 'all', and the notion of 'comparable.'

3.166 As noted in section III.A.4.1 above, the *Oxford Concise Dictionary* defines 'average' as "an amount obtained by dividing the total of given amounts by the number of amounts in the set."

⁸⁰ Annex 49.

3.167 Clearly, for establishing an average, there is no justification to exclude certain amounts. The definition of 'average' clearly relates to the total of given amounts and not to a number of given amounts from where a selection can then be made as to which ones are to be averaged.

3.168 This view on the notion of average is further underlined by the use of the word 'all' within the text of Article 2.4.2. By no stretch of imagination could it be understood that instead of 'all' one could also read 'some' or 'a number of', *etc.*

3.169 Finally the word 'comparable' merits attention. Clearly it is understood that in order for a comparison to be effectuated the comparable models will first have to be compared with each other. Assigning various product control numbers to the various models accomplish this: for each respective model the relevant normal value is compared with the appropriate export price. However, this does then not mean that for the eventual weighing of the overall dumping margins the negative dumping should be attributed a zero value. This latter practice is contrary to the concept of weighing and in fact distorts the process of actually weighing the dumping margin. The fact that the actual process of weighing is being distorted is clearly shown by the above-cited calculations with respect to Prakash that clearly showed a no dumping situation in case the weighted average of all comparable transactions was properly compared.

3.170 The EC, by suddenly inserting a new, unwritten, rule into the text of Article 2.4.2 has thereby acted inconsistently with the concept of a weighted average dumping margin. In fact, it is recalled that paragraph (349) of the (unadopted) ATC Panel report provides that ". . . [i]n the view of the Panel, the issue of "zeroing" would not arise in cases where the comparison was made between an average normal value and an average export price."

3.171 We note that, contrary to the ATC issue on negative dumping, the EC method always will lead to a higher dumping margin compared to the unqualified method envisaged by the ADA. [Except of course in the exceptional situation where all models are dumped, in which rare case the results would be the same (a situation which did not occur in the Bed Linen case)].

3.172 The EC, by unilaterally deviating from the text of the ADA, has therefore acted inconsistently with Article 2.4.2 of the ADA.

IV. CLAIMS RELATED TO THE INJURY DETERMINATION AND THE EXPLANATION THEREOF

A. ARTICLE 3.1: CONSIDERATION OF OTHER THAN 'DUMPED IMPORTS'

4.1 Summary: the EC considered, for the purposes of the injury determination, all imports from India to have been dumped, even though much bed linen from India exported during the investigation period was clearly found not to be dumped. By including such non-dumped imports for the injury determination, the EC acted inconsistently with Article 3.1 of the ADA (**claim 8**).

The EC further failed to properly explain its reasoning, and consequently acted inconsistently with Article 12.2.1 (**claim 9**) and 12.2.2 (**claim 10**).

1. Facts

4.2 The Indian exporters argued from the beginning that their exports of bed linen to the EC had not caused injury. Such arguments were made in the submission on injury (Annex 50), during their first injury hearing on 13 January 1997, and in the post-hearing brief submitted on 6 February 1997.

4.3 In its provisional Regulation the EC made a determination on Community industry and injury which for the convenience of the Panel is quoted here *in toto*:

“E. COMMUNITY INDUSTRY

1. Definition of the Community industry

(52) After elimination from the list of companies included in the complaint of seven of them found not to be complainants, the Commission found that the remaining companies represented a major proportion of Community production of bed linen and satisfied the requirements of Article 5(4) of the basic Regulation.

After initiation of the proceeding, a number of organizations representing exporters and importers of bed linen from the countries concerned alleged that several of the producers which made up the Community industry were also importing the dumped product from the countries subject to the proceeding. In these circumstances, the Commission re-examined whether, in the light of the provisions of Article 4(1)(a) of the basic Regulation, these companies should be excluded from 'the Community industry'.

(53) For the purposes of carrying out this re-examination, and in accordance with consistent practice of the Community institutions, it appeared appropriate to determine whether those companies were primarily producers in the Community with an additional activity based on imports and merely supplementing their Community production, in order to be able to offer a complete range of products, or whether they were importers with relatively limited additional production in the Community.

(54) In all but one case, companies alleged to be importing bed linen from the countries concerned were among those selected in the sample of Community producers (see recitals (58) to (61)). The Commission was therefore able to examine the extent of these imports during the course of its on-the-spot verification visits. For all but one of these sampled companies, the investigation showed that the imports of dumped products from the countries concerned had accounted for less than 10 per cent of the turnover of the companies in question in the period examined. It is therefore the opinion of the Commission that these companies were not shielded from the effects of dumped imports and that for the purposes of Article 4 of the basic Regulation these companies may be considered along with the other cooperating producers, as belonging to the Community industry.

In the case of the one other sampled company, it was found that a higher proportion of its bed linen sales in the investigation period were of Pakistani origin and also that only a minor part of its sales were of its own production. It appeared in addition that the company's future activity was likely to be further focused on imports. This company, whose core interests were deemed clearly not to be in the production of bed linen within the Community, was therefore eliminated from the Community industry.

(55) Since all but one of the sampled companies alleged to be importing bed linen from the countries concerned were found, on examination, not to be doing so in quantities sufficient to warrant exclusion, it has been considered that the allegations made by the exporters in this regard were excessive and unreliable. Consequently, on the basis of the findings concerning the sample, no exclusion of the one non-sampled company is warranted. This company

should, therefore, be retained in the definition of the Community industry. In any event, this issue has no substantial influence on the question of the representativity of the Community industry.

(56) Three other companies were eliminated. In one case the company was found no longer to produce bed linen. In two other cases the companies did not respond to the requests for information which were addressed, via Eurocoton and the national associations, to those complainants which were not selected in the sample of Community producers, in order to obtain information on the Community industry as a whole.

(57) The remaining 35 companies, which cooperated with the enquiry and are located in France, Germany, Italy, Spain, Portugal, Austria and Finland, represented a major proportion of total Community production in the investigation period. These companies were therefore deemed to make up the Community industry under the terms of Article 4 (1) of the basic Regulation.

2. Sampling

(58) Because of the number of companies in the Community industry it was decided to resort to sampling, in accordance with Article 17 of the basic Regulation.

(59) 27 of the 35 companies, representing 96.7 per cent of Community industry production and 32.5 per cent of total Community production in 1995, (the latest figures available at the time of sample selection) were situated in Germany, Italy, France and Portugal.

(60) As a general rule, Community producers sell a large proportion of their bed linen production in their own Member State, in part because of differences between Member States in standard products and sizes. This is true of Germany, France and Italy which are both the largest producers of bed linen in the Community and very important importers. The producers in these Member States were therefore clear candidates for assessing the impact of the imports on the Community industry.

Producers in Portugal, for their part, sell a large proportion of their production in other Member States and represent about one third of the production of complainant companies. Even though Portugal is not a significant importer, therefore, it was decided that the effect of the imports on the producers there should be assessed and that Portugal should be represented in the sample.

(61) In consultation with the complainant Eurocoton an initial list of 19 companies was arrived at (eight from France, six from Germany, four from Italy and one from Portugal).

In the course of the enquiry one of these companies was eliminated from the sample for failing to cooperate with the enquiry. As a result of this exclusion, and of the exclusion of the other company under Article 4(1)(a) of the basic Regulation (see recital (54)), in the following injury analysis information given for 'sampled producers' is based on information supplied by the remaining 17 producers which represented 20,7 per cent of total Community production and 61.6 per cent of the production of the Community industry. They included the largest Community industry companies in Germany, Italy and Portugal, and also smaller producers. The Commission therefore considered this sample to be representative of the Community industry.

F. INJURY

1. Collection of data

(62) Data for the examination of injury caused to the Community industry was collected and analysed at three different levels, as follows:

- at the level of the entire Community (EU-15), for trends concerning production, consumption in the Community, imports, exports and market share. Data was obtained from Eurocoton and from recognized industry sources, notably the CITH (Centre d'Information Textile et Habillement) which produces a series of production figures across the Community for the whole of textile category 20. This category is very slightly broader than the definition of the product concerned in the present proceeding. However, the difference is very slight, as the extra products it includes are of very minor significance,
- at the level of the Community industry, as defined above, for trends concerning production, sales by value and employment,
- at the level of the sampled Community producers, for the factors mentioned above and also for trends concerning prices and profitability.

2. Consumption

(63) Community consumption of the product concerned (as measured by production plus imports minus exports) decreased from 200 000 tonnes in 1992 to 186 000 tonnes in the investigation period, a decrease of 7 per cent.

3. Cumulative assessment of the effects of the dumped imports

(64) The Commission considered, in the light of Article 3(4) of the basic Regulation, whether cumulative assessment of injury caused by the three exporting countries was justified.

(65) With regard to the conditions laid down in Article 3(4)(a) the margin of dumping established in relation to the imports from each country is more than the minimis and the volume of imports from each country is not negligible. In this respect India and Pakistan are both subject to quotas on their exports of bed linen to the Community. Both countries used these quotas in full (at least 98 per cent) in each of the 1993, 1994 and 1995 quota years and increased the effective quotas by transferring quota allocation from other categories. In addition, it appears that in 1995, India exported to the Community a volume of bed linen 20 per cent higher than the amount licensed for the 1995 quota year.

All three exporting countries involved in this proceeding increased their exports of the product concerned between 1992 and the investigation period. The largest exporter, Pakistan, increased its exports by volume by 6 per cent, and the second largest, India, increased its exports by 56 per cent. Exports from Egypt, which are not subject to quotas, rose by 282 per cent between 1992 and the investigation period though remained well below the other two countries.

In accordance with the terms of Article 3(4)(b), the conditions of competition between imported products, and between imported products and the like Community products, were analysed. It was found that the imports compete directly with each other and with the like Community product, and that in particular a number of large purchasers of bed linen buy both from the Community industry and from the countries concerned. While there are variations in the proportions by type and destination of exports from each of the countries concerned, it was found that products from each exporting country were substitutable and competed with each other and with the products of Community producers on the Community market.

(66) It was therefore held that a cumulative assessment of the effects of the imports was appropriate in terms of Article 3(4) of the basic Regulation.

4. Volume and market share of dumped imports

(67) Dumped imports from the three countries concerned increased from 33 825 tonnes in 1992 to 46 656 tonnes during the investigation period i.e. an increase of 12 831 tonnes or 38 per cent. During the same period their market share increased from 16,9 per cent to 25,1 per cent.

5. Prices of the imports concerned

(68) The Commission examined whether the exporting producers' sales in the Community were at prices that undercut the prices of the sampled Community producers during the investigation period.

(69) Given the great diversity of products involved, the Commission defined certain reference products of particular importance in each of the principal markets analysed (France, Germany, Italy) for which price and cost data would be determined for the sampled Community producers. Because of different habits and traditions these products were different in each of the Member States examined.

For each of the reference products and for certain other bed linen products of particular interest in specific markets sold by the sampled Community producers the Commission established average prices during the investigation period using information obtained from the sampled Community producers. These prices were then compared with imported products of similar size, weaving construction and finish, where these were sold to clients in the Member State concerned.

(70) Certain exporters contended that even when products corresponded in size, weaving construction and finish they should not be regarded as comparable, in particular because the imported goods were of poorer quality. These quality differences were alleged to arise, for example, from lower weaving production technology.

(71) Differences in production technology do not of themselves, however, mean that there are physical differences between the articles produced. In addition, the Commission received evidence that exporters in the countries concerned produced bed linen using the most modern machinery.

It was also found that the products were often sold alongside each other, for example appearing on the same page of mail order catalogues without any indication of origin. In any event, no quality differences could be established.

The Commission therefore considered that there were no reasons not to compare the prices of products corresponding in size, weaving construction and finish, as envisaged in recital (69) above.

(72) Certain exporters also claimed that the imported and Community products were sold through different sales channels and were not therefore in competition. They alleged that while the exporters sold to large hypermarket chains, mail order companies etc, in particular for lower-priced 'promotion' sales, the European producers concentrated on branded goods sold through specialists or department stores etc.

On examination it was found that the mix of sales channels did indeed differ to the Community producers and for importers, and indeed differed between Community producers. However, large purchasers such as hypermarkets and mail order companies were also important to the majority of the sampled Community producers, and were sometimes their dominant clients. It was also found that selling to these clients for promotional sales was an important part of this output. It was therefore held that prices of imported and Community-produced goods could be compared.

(73) The Commission examined how quantities and prices of the imports concerned and of the sampled Community producers varied by sales channel. The results varied between Member States. In France and Germany, for example, Community producers made more than 80 per cent of their sales directly to retailers, and small quantities at relatively high prices to wholesalers and distributors. Imports were divided between retail and wholesalers and some exporters sold exclusively to wholesalers. In these circumstances the Commission considered that a comparison of prices by sales channel would not be appropriate: the prices of Community producers to wholesalers and distributors could not be considered to be representative ones with which the prices of imports sold in higher volumes could be compared.

(74) The comparison was therefore made between average prices of the imports, expressed duty paid cif Community frontier, and average ex-works prices of the Community producers for each reference product. The prices of the Community producers were adjusted downwards by a margin calculated to give the average price through the cheapest sales channel (eg. discount stores in Germany, hypermarkets in France). The resulting price was further adjusted to take account of importers' costs.

(75) Certain exporters observed that some product types (notably a particular quality called seersucker, and white (bleached) products which are often destined for use by institutions such as hotels and hospitals) were important in their exports but were not represented among the reference products. They claimed that this showed that the products they exported to the Community and the products sold by Community producers were not in competition with each other, that a valid undercutting analysis could not be carried out or that these types should be excluded from any measures imposed.

(76) The Commission considered these arguments but concluded that a difference of product mix did not invalidate the finding that there was competition between the products sold by the

exporters and the products sold by Community producers. The Commission found that the concentration by Community producers on other products was a reflection of the level of competition from the dumped imports, and decided that the analysis undertaken according to the methodology set out above was a valid measure of the degree of price undercutting practised by the exporters.

(77) The reference products used for the undercutting analysis, which in effect represent a product sample, were found to be represented among the Community sales of all the sampled exporters from the countries concerned except one Egyptian company, with a variable degree of importance among the rest. Where the degree of representativity was particularly low, the Commission examined the prices of other products (or a per kilo basis) to check that those used for the undercutting analysis were in line with the prices of the rest of their sales to the Community.

(78) The Egyptian company whose exports to the Community contained no reference products was one of the three State-owned producers. The company exported almost exclusively bleached articles to the Community in the investigation period. A calculation was made using the prices of these articles which matched reference products in all respects apart from the fact that they were bleached, adjusted upwards for dyeing costs.

(79) All the sampled exporters were found to be undercutting the prices of the reference products of the Community producers. In India, the level of undercutting ranged from 13.8 per cent to 40.8 per cent, in Pakistan from 11.9 per cent to 34.7 per cent and in Egypt from 23.8 per cent to 53.7 per cent, expressed as percentages of the adjusted average prices of the Community industry.

(80) The Commission assessed the development of the average prices of imports from the countries concerned. It was established that since 1992 the prices of Indian and Egyptian imports had fallen by up to 18 per cent. While the prices of Pakistani imports had risen in that period, the rise had been at a much slower rate than the very sharp increases in the world price of raw cotton.

6. Situation of the Community industry

(a) Production

(81) Total output of bed linen by producers in the Community fell by 9,6 per cent from 138,400 tonnes in 1992 to 125,100 tonnes in the investigation period. This fall in production arose essentially through the closure of enterprises or their cessation of bed linen production within the Community (see recital (91) below). It should also be noted that total exports by Community producers have increased by 50 per cent, from 14,027 tonnes in 1992 to 21,756 in the investigation period. Without this export performance, Community bed linen production would have suffered further than the figures given above.

The pattern observed for total Community production was not replicated at the level of the 35 producers of the Community industry, whose production rose by 8.7 per cent from 39,370 tonnes in 1992 to 42,781 tonnes in the investigation period. The Commission concluded that the Community industry represented those companies which were strong enough to survive the competition from dumped imports and which to a certain extent had benefited from the demise of those which had not so survived.

Indeed, in the course of its investigation the Commission acquired evidence of 29 companies other than the Community industry which ceased or reduced bedlinen production in the Community between 1992 and the investigation period. It is estimated that total loss of production amounted to at least 10,000 tonnes per annum.

The sales, employment and profits of companies which have since disappeared are not included in the aggregated data for the Community industry, thus artificially improving the apparent trends for the survivors.

(b) Sales by volume

(82) At the level of the total Community producers, sales by volume in the Community, as measured by production minus exports, fell by 17 per cent from 124,400 tonnes in 1992 to 103,350 tonnes in the investigation period.

Sales by the sampled producers of the Community industry also declined, from 23,706 to 23,347 tonnes, a decrease of 1.5 per cent.

(c) Sales by value

(83) Sales by the Community industry rose by 4.2 per cent from ECU 428.6 million in 1992 to ECU 446.6 million in the investigation period. Sales by the sampled producers also rose, from ECU 280.6 million in 1992 to ECU 285.3 million (a rise of 1.7 per cent). It should be noted that these rises in nominal terms do not take account of inflation and represent a fall in real terms, since consumer prices in ecus rose by 5.5 per cent over the same period for the EU-15 countries. It should also be noted that these rises were overtaken by rises in the price of raw cotton (see recital (88) below).

It should be noted that among the sampled producers it was observed that sales have been maintained by seeking higher value market niches as the lower value, mass market items are undercut by imports. This pattern is indicated by developments on prices (see recital (87) below).

(d) Market share

(84) The market share by volume of producers at the level of the entire Community fell from 62.2 per cent in 1992 to 55.6 per cent in the investigation period. In that period the sampled producers from the Community industry increased their market share slightly, from 10.7 per cent to 11.3 per cent. The reason why the market share of survivors has slightly increased is that they have taken over some of the sales of those which had not survived the competition from dumped imports, particularly the sales of higher value niche products.

(85) An estimated analysis was done of market share by value. The patterns observed were the same as for market share by volume: producers at the level of the entire Community lost market share (from 77.8 per cent in 1992 to 72.0 per cent in the investigation period), while the Community industry as a whole and sampled producers gained market share, from 22.4 per cent to 25.1 per cent and from 14.7 per cent to 16.0 per cent respectively.

(e) Price development

(86) *The Commission examined the development in average prices achieved by the sampled Community producers for the defined reference products between 1993 and the investigation period, using a constant product mix of the reference products. This showed that prices, in index terms, fell from 100 in 1993 to 97.6 in 1994, recovering to 98.3 in 1995 and 99.2 in the investigation period. This represents a greater fall in real terms, since in the same period average consumer prices measured in ECUs rose by 5.5 per cent in the Community.*

(87) *The development in average prices per kilogram of the sampled producers was also measured. This measure showed an average price development from 100 in 1992 to 97.8 in 1993 to 103.2 in the investigation period. The fact that this measure has developed more positively than prices for the defined reference products further reflects the fact the sampled producers have been forced to move into niche markets and away from high volume, mass market products.*

(88) *The Commission also examined the development of the standard measure for prices of cotton, the principal raw material. This measure showed increases of 48 per cent from 1992 to the investigation period and of 59 per cent between 1993 and the investigation period. Since the raw material can represent typically 15 per cent of the costs of the finished product, it follows that the prices achieved by the sampled Community producers were far from reflecting the rises in the costs of that material.*

(f) Profitability

(89) *The profitability of the sampled companies declined by more than 50 per cent between 1992 and the investigation period, from a figure of 3.6 per cent to 1.6 per cent of sales. This is well below the figure of 5 per cent which can be regarded as a minimum level which was achieved by these companies in 1991 when the dumped imports concerned were 30 per cent lower than in the investigation period. It is also below profit levels achieved by importers, which explains why certain producers have ceased production and switched to importing.*

(90) *It should be recalled again that the sampled companies are among those which have been able to survive the competition of dumped imports. It should also be noted that the industry in question is not capital intensive and that it contains a large number of SMEs, which means that any move into loss-making can lead to immediate exit rather than remaining in business waiting for better times. This is why the companies that are left are those that are profitable or, as in this case, only just profitable.*

(g) Employment

(91) *Direct employment by the 35 companies of the Community industry on the product concerned declined by 5.3 per cent between 1992 and the investigation period, from around 7,000 jobs to 6,700.*

In analysing data on the Community industry, account should be taken of the 29 companies other than the Community industry which ceased or reduced bed linen production in the Community between 1992 and the investigation period (see recital (81)). The associated job losses numbered over 2,400.

(h) Conclusion on injury

(92) *The Commission took into account all the economic indicators mentioned above in determining whether or not the Community industry was suffering material injury. Account was taken of the fact that the number of companies making up the Community industry was reduced in comparison with the start of the injury investigation period. The production, sales, employment and profits of companies which have since disappeared are not included in the aggregated data for the Community industry, thus improving the apparent trends for the survivors.*

(93) *The Commission noted the decline in the total production and market share of Community producers. This background demonstrates the difficult conditions in which the remaining Community industry was operating. The fact that these surviving companies were able to maintain production and market share should not detract from the assessment of the overall situation. Above all, the remaining Community industry suffered declining and inadequate profitability, as further evidenced by prices which had not been able to reflect increases in the costs of raw cotton or to keep pace with inflation in prices of consumer goods.*

(94) *Accordingly the Commission reached the view that the Community industry had suffered material injury.*

G. CAUSATION

1. Introduction

(95) *The Commission examined the volume and prices of the dumped products from the exporting countries concerned and their consequent impact on the situation of the Community industry. As part of this examination the Commission also examined the effects of other factors in order to ensure that these effects were not incorrectly attributed to the dumped imports. This examination had to take into account the existence of quotas, which might have limited the potential for growth in sales on the Community market by the countries concerned and other third countries.*

2. Effects of the dumped imports from the countries concerned

(96) *The investigation of the Community industry showed as the main injury indicator the unsatisfactory development of sales prices and the consequent declining profitability. It was also established that the dumped imports were sold at prices which significantly undercut those of the Community producers and in substantial and increasing quantities, reaching 25 per cent market share in the investigation period.*

(97) *In order to assess the full impact of the dumped imports, it should be noted that the market for bed linen is characterised by product substitutability and transparency. Large retailers were found to sell the imported products and the Community-produced products alongside each other, without the ultimate consumer being informed of the product's origin. The transparency of the market was found not to be significantly affected by the differences in standard products among Member States: several sampled exporters in the countries concerned sold products in three or more Member States, in each case adapting their production to supply the standard products of the territory concerned. In view of the price sensitivity of the large purchasers it can be concluded that the consistently low prices of the*

imports concerned, coupled with their substantial and increasing market share (see recitals (67) to (80)), have applied continuous downward pressure on prices on the Community market.

(98) It was observed among sampled producers that they had been obliged increasingly to shift production and sales to high value niche markets in order to maintain production and sales levels. The undercutting calculation provided evidence that this shift was caused by the imports concerned. Undercutting margins were lower in the lower value qualities, indicating that the imports significantly influence price levels in this market segment and have forced down Community producers' prices. Where higher value items were imported the undercutting margins were higher, indicating that imports of these qualities were not yet at sufficient volume to bring down Community prices to the same extent.

It is worth noting that the Commission has received indications from importers, from Community producers and from suppliers of textile machinery to the exporting countries to the effect that exporters in the countries concerned are increasingly moving to higher value items.

(99) Since price suppression and consequent decreasing profitability to inadequate levels were the main indicators on which the Commission's finding of injury was based, and in view of the coincidence in time between the deterioration of the situation of the Community industry and the significant increase of the dumped imports, it can be concluded that there was a direct causal link between these imports and the material injury found.

3. Effects of other factors

(a) Imports from third countries

(100) Imports from other third countries not covered by this proceeding fell between 1992 and the investigation period, both in absolute terms (from 41 600 tonnes to 35 800 tonnes) and in terms of market share (from 20.8 per cent in 1992, considerably above the total of the countries concerned in this proceeding, to 19.3 per cent in the investigation period, considerably below). These imports originate in a wide range of third countries outside the countries concerned by this investigation. The most significant in terms of volume was, with its 1995 market share, Turkey (3.6 per cent). However Eurostat statistics show that imports from Turkey declined between 1992 and 1995 and were imported at prices significantly above those of the countries concerned by this investigation. Countries with prices comparable to those of the countries concerned by this investigation include Romania, Slovakia and Estonia. However, their combined market share of 2.8 per cent in 1995 is just over 10 per cent of the combined share of the countries concerned by this investigation.

(101) It follows from the foregoing that imports from countries not concerned which undercut the Community industry's prices could also have contributed to the injury suffered by the Community industry. However, the Commission considered that the link between the dumped imports and the injury to the Community industry was sufficiently clear and direct as to consider that injury from these other sources, which had only a small market share, had not been wrongly attributed in the analysis. In this respect, there was shown to be a reasonable coincidence in timing between, on the one hand, the degree of the effects of low prices and rising volumes of the dumped imports and, on the other, the material injury attributed to the dumped imports.

(b) Increase in raw cotton prices

(102) *The world raw cotton price, as measured by the Cotton Outlook A index (converted from US\$ into ECUs) rose by 48 per cent between 1992 and the investigation period. Over the same period prices on the Community market of the product concerned by this proceeding were experiencing strong downward pressure because of price undercutting by the dumped imports. In this period the sampled producers were not able to achieve a satisfactory price development. As noted in recital (86) above, prices of the reference products fell on average in real terms.*

(103) *The Commission concluded that increases in raw material prices had caused injury. However, the extent of such injury depends on the ability of the producers to pass on some or all of the increased cost. In this case, it was reasonable to assess that the dumped imports were the main reason why such pass-through did not occur.*

(c) Developments in Community consumption and demand

(104) *Certain exporters suggested that any injury being suffered by the Community industry could be ascribed to the steady decrease in total consumption of the product concerned, by 7 per cent between 1992 and the investigation period.*

(105) *It is clear that the decline in consumption between 1992 and the investigation period has contributed to the situation of the Community industry. However, the fall did not affect all operators equally. During this period the total volume of sales by Community producers fell by an amount 50 per cent higher than the total fall in consumption. While sales by the Community industry have remained relatively stable, benefiting from the disappearance of other Community producers, the dumped imports from the countries concerned increased by 48 per cent. Imports from other third countries decreased by 14 per cent. Because total sales by Community producers fell by 50 per cent more than the total fall in consumption and sales by other imports declined, it can be concluded that increased dumped imports through severe price undercutting gained at least one third of the sales volumes lost by Community producers. This clearly constitutes a cause of material injury not attributable to the decline in consumption.*

(106) *In addition, even if the decline in consumption contributed to some extent to the situation of the Community industry, in particular because it strengthened the position of large purchasers in price negotiations with Community producers, this strengthened position depended critically on the availability to these purchasers of the dumped imports undercutting the Community industry's prices.*

(d) Competition from non-complainant producers in the Community

(107) *The Community industry represents only a part of total Community production. It should therefore be examined whether competition from other producers within the Community affects the situation of the Community industry. Other producers of bed linen are known to include, in particular, a large number of 'converters', i.e. producers who make bed linen from grey cloth woven elsewhere, whereas the Community industry consists largely of integrated producers who weave most or all of their own grey cloth. As has been found, on a provisional basis, in the separate proceeding concerning imports of grey cloth from India,*

Pakistan, Egypt, China, Indonesia and Turkey, important sources of supply of this product were imported into the Community at dumped prices which would have provided these producers with an unfair advantage over the Community industry in the present proceeding. It cannot therefore be ruled out that distorted competition from this source contributed to the situation of the Community industry.

(108) Nevertheless it should be noted that the production and market share of the non-complainant producers have fallen between 1992 and the investigation period. Indeed the fall in production across the Community has been due to reduction by the non-complainants rather than by complainants. Since the imports concerned have increased over this timescale, the Commission decided that competition by non-complainants did not invalidate the conclusion that the imports concerned caused the injury observed.

4. Conclusion on causation

(109) As has been shown above, there is a direct causal link between the increased volume and the price effect of the dumped imports and the material injury suffered by the Community industry. The direct link in this case is demonstrated by the existence of heavy undercutting which can reasonably explain the significant increase in market share of the dumped imports from 16.9 per cent in 1992 to 25.1 per cent in the investigation period and the corresponding negative consequences on volumes and prices of sales of Community producers. In terms of volumes, Community producers' market share decreased from 62.2 per cent in 1992 to 55.6 per cent in the investigation period. This fall was not reflected at the level of individual producers of the Community industry because they obtained sufficient benefit from the demise of other Community producers to keep their sales volume relatively stable. However, as far as the prices of the dumped imports are concerned, they have had an evident impact on the sampled producers, many of them being SMEs, whose profitability has fallen from 3.6 per cent to 1.6 per cent. In this respect, the Commission noted that such a situation can cause particular difficulty for SMEs given their lack of resources and the reluctance of banks to finance any losses.

(110) The consequent impact of the low-priced dumped imports has to be considered at two levels. Firstly, they have resulted in the exit of a significant number of firms with a considerable number of jobs lost. This is an on-going process which is likely to continue if dumping persists. Secondly, as to the surviving producers, they face continuing injury on two fronts. For low-value products the injury is very heavy since they are gradually pushed out of the corresponding market segment. For higher-value products, these producers have done considerably better but dumped imports are now progressively targeting this segment with the result that profitability is also falling in this respect.

In connection with this it should be noted that the larger Community industry producers, however, have a production capacity which cannot be utilized at a reasonable rate on the basis of high value items only. This capacity utilization can only be maintained through production of mass-market lower value items the market for which is now highly penetrated by imported goods.

(111) The analysis of the effects of other factors than the dumped imports on the state of the Community industry has in fact confirmed the above direct causal link. Imports from some countries not concerned, increases in raw material prices, contraction in demand and competition from non-complainant bed linen producers had or may have negatively affected

the Community industry. However, even the combined effect of these other factors could not break the direct causal link established since it can reasonably be concluded that the Community industry could, in the absence of the dumped imports, have adapted to these other factors without being materially injured. The dumped imports themselves were therefore determined to have caused material injury within the terms of Article 3(6) of the basic Regulation.”

4.4 Texprocil made substantial arguments following this determination (Annex 51).

4.5 In the definitive Regulation the EC provided the following explanations on the state of the domestic industry:

“(40) Exporters from all the exporting countries claimed that the Commission's analysis of injury was defective in that it referred to the significant decline in total Community production of bed linen in assessing the situation of the Community industry. They claimed in particular that information concerning companies not included in the definition of the Community industry or which no longer produce bed linen cannot be used to construe a finding of material injury.

These claims were examined carefully. It should however be remarked that the principal basis for the finding of material injury was the reduced profitability and price suppression of the Community industry as observed among the sampled companies.

(41) In the assessment of injury pursuant to Article 3 of the basic Regulation, the Community institutions have to assess the economic situation of the Community industry. This assessment usually covers the analysis of a time period of four to five years as in the present case ('assessment period'). Such an assessment is commonly based on an analysis of the complaining industry and not necessarily on companies accounting for the totality of Community production on the ground that the situation of a major proportion of the Community production is representative for its totality. Such an assessment, however, also has to take into account the structure and the nature of the industry under consideration. In the present case this industry is characterized by a high number of operators, in many cases small- and medium-sized companies, and by the fact that it is a sector with relatively low barriers to exit. The latter is mainly due to the fact that machinery can be sold or used for other products relatively simply. This has the effect that material injury is likely to manifest itself through the exit of economic operators within the assessment period.

Consequently, to limit the assessment of injury only to companies which are still operational at the end of the assessment period (i.e. at the time of the lodging of the complaint) and thus able actively to support a complaint would mean that any injury caused to companies which have closed down before this point in time would go unconsidered in the analysis. Furthermore, it should be noted that this distortion could even be aggravated as the surviving complaining companies of the Community industry may have benefited, possibly only temporarily, from the disappearance of other companies, causing their positive development to be overestimated.

In the present case, it should be noted that 29 companies of the bed linen industry have closed down or ceased production: that is to say, that a substantial number of companies have ceased operation. Furthermore, given the substantial price undercutting established, the strong increase in the volumes of the imports concerned and their consequent rise in market

share, any relatively positive development of the complaining producers must be seen as threatened in the absence of anti-dumping measures.” (Emphasis added)

4.6 During the first round of consultations, India raised its concern that imports other than dumped imports had been taken into account for the assessment of injury:⁸¹

“Mr Seth: Several provisions in Article 3 of the Agreement require that injury caused by dumped imports be determined. Article 3.1 requires that

[a] determination of injury . . . shall . . . involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.’

Similarly, Articles 3.2, 3.4, 3.5, 3.6 and 3.7 refer to ‘dumped imports’ as opposed to ‘all imports of the product concerned’. The European Community has in two different ways included non-dumped imports in its determination and this affects each and all of these provisions.

. . . it is clear from the disclosure documents that the EC in its injury determination implicitly considers all Indian exports to the EC during the investigation period to have been dumped, even though the case handlers in the dumping team have ascertained that not all Indian exports during the investigation period (1 July 1995 to 30 June 1996) were dumped.

India believes that, for these two reasons, the EC has determined injury and causality inconsistently with Articles 3.1, 3.2, 3.4 and 3.5.

...

[EC]: You recognise that this is normal practice. I cannot deny there is an assumption element. We make the dumping calculation over the like product. On this basis we found that the dumping determination covered all imports during the IP. We compensated for this by using WA-to-WA comparison in the dumping margins.

Mr Seth observes that no such compensation takes place due to the zeroing practice . . . ”

4.7 During the second round of consultations the matter was raised again:⁸²

“Mr Seth: I’ll move on to a slightly different aspect now. Did the EC agree that it assumed for the injury analysis that all imports from India were dumped?

[EC]: Yes. This responds to your questions 19 to 24. Article 2.1 requires that dumping is established for a ‘product’. On this basis, we put dumping results of types in an average form. Thus, the result is an average.”

4.8 In its letter of 29 June 1999⁸³, the EC provided the following written answers:

⁸¹ The verbatim report of this first round is attached as Annex 11.

⁸² The verbatim report of the second round is attached as Annex 13.

⁸³ Annex 14.

“Questions 19 to 24

Concerning dumped imports as opposed to all imports in the injury and causality determinations

In this case, the Community calculated dumping for the like product as a whole.

Dumping was investigated for a period of 1 year prior to the initiation of the proceeding. For injury, data was also examined for the investigation period though some factors were addressed for a longer period mainly to enable trends to be established.”

2. EC practice

4.9 In EC practice, the injury determination consists of two elements. An injury [underselling (or sometimes undercutting)] margin is calculated per investigated exporter.⁸⁴ In Bed linen II the investigation period [“IP”] covered the period from 1 July 1995 to 30 June 1996.⁸⁵ This underselling margin is calculated over the investigation period.

4.10 Second, the investigating authorities make an assessment of the total imports and prices, and of the state of the domestic industry (the determinations required by Articles 3.1 through 3.6 ADA, inclusive). The remainder of this claim concentrates on the second determination, and notably on Article 3.1.

4.11 For the determination of the volume of “dumped” imports, the EC implicitly considers all Indian exports to the EC during the investigation to have been dumped. This is standard practice: “The injury analysis concerning the examination of the volume and price effects of the dumped imports will also take into consideration imports with no or de minimis dumping margins . . .”⁸⁶

3. Claims

4.12 Several claims flow from the facts as described above.

4.13 First, India considers the EC determination to automatically assume that all imports of bed linen from India during the investigation period were dumped to lead to a finding inconsistent with Article 3.1.

4.14 Second, in the provisional Regulation the EC has insufficiently explained the basis for its consideration of all imports of bed linen from India as being “dumped”. (If the EC has not taken account of non-dumped imports, this is not evident from the provisional Regulation and the provisional disclosure document.) Consequently, the EC acted inconsistently with Article 12.2.1 of the ADA.

4.15 Third, in the definitive Regulation the EC has insufficiently explained the basis for its consideration of all imports of bed linen from India as being “dumped”. (If the EC has not taken account of non-dumped imports, this is not evident from the definitive Regulation and the definitive disclosure document.) Consequently, the EC acted inconsistently with Article 12.2.2 of the ADA.

⁸⁴ On the basis of this, the sample injury margin and the residual injury margin are determined.

⁸⁵ Provisional Regulation at recital (9).

⁸⁶ See in this respect Müller, Khan, Neumann, *EC Anti-Dumping Law—A Commentary on Regulation 384/96*, Wiley (1998) at 189.

4. Claim 8: inconsistency with Article 3.1

4.1 The text of Article 3.1

4.16 Articles 3.1, 3.2, 3.4, 3.5, and 3.6 of the ADA require that injury caused by “dumped” imports be determined:

“Determination of Injury¹

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

3.2 With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree . . .

3.4 The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices . . .

3.5 It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include inter alia the volume and prices of imports not sold at dumping prices

3.6 The effect of the dumped imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers’ sales and profits. If such separate identification of that production is not possible, the effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

. . .

Footnote 1. Under this Agreement the term ‘injury’ shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.”

(Emphasis added)

4.17 First, throughout Article 3 the language is consistent: the injury to the domestic industry must have been caused by “*dumped imports*”.⁸⁷ The first issue is thus what the meaning is of “*dumped imports*”.

4.18 Thus, the plain meaning of the provision is clear in as much as it refers to imports. In this context, Article 2.1 of the ADA is of relevance:

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

4.19 Article 2.1 is not limited to “*for the purpose of this Article*”; rather the definition of “*dumped*” contained in it is also applicable to other Articles of the ADA. In other words, imports in Article 3 are only considered to be “*dumped*” if they have been introduced into the commerce of the EC at less than their normal value, if their export price is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

4.20 It may be observed that under Article 17.6(ii) of the ADA the Panel will interpret:

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

4.21 However, in the clear language (plain meaning) of the Agreement as interpreted in accordance with the customary rules of interpretation of public international law “*dumped imports*” means “*dumped imports*”, and not “*dumped and non-dumped imports of the like product*”. To consider “*dumped imports*” to include “*dumped and non-dumped imports*” is a leap in logic not authorized by the ADA. The issue of Article 17.6(ii) therefore does not arise in this context.

4.2 Legal arguments relating to the Article 3.1 claim

4.22 For its injury determination the EC cumulated the volume of imports from all three targeted countries. It is clear from page 13 of the provisional disclosure document⁸⁸ that the volume taken into account for the purposes of Article 3 is the total imports from these three countries, and not just the volume of “*dumped imports*”:

⁸⁷ It is noted that the main difference between Article 3.4 of the ADA and its predecessor, Article 3.3 of the 1979 Anti-Dumping Code is that in the ADA the words “*of the dumped imports*” were added to the opening words “*The examination of the impact on the industry concerned . . .*”

⁸⁸ Annex 23.

“4. Volume and market share of dumped imports (Annex 3)

Dumped imports from the three countries concerned increased from 33,825 tonnes in 1992 to 46,656 tonnes during the investigation period i.e. an increase of 12,831 tonnes or 38 per cent. During the same period their market share increased from 16.9 per cent to 25.1 per cent.”

4.23 The amount of 46,656 tonnes can be found back on page 32 of the same document, if the total imports (total product concerned—tonnes) for the three targeted countries are added:

India:	18,428 tonnes
Pakistan:	21,514 tonnes
Egypt:	<u>6,714</u> tonnes
Total:	46,656 tonnes

4.24 It follows from Annex 3 to the same document (page 33) that the market share of 25.1% mentioned by the European Commission also refers to this 46,656 tonnes ($46,656 \div$ total apparent consumption of 185,825 = 25.1%).

4.25 A considerable amount of the exports by the sampled companies was found not to have been dumped. The percentages of sets found not to be dumped, on the basis of the disclosure documents of the European Commission, is as follows (disclosure calculation sheets attached as Annex 52):

Name company	Total q'ty non-dumped sets	Total q'ty exported sets	Percentage non-dumped out of total exported
Omkar	111,409	1,363,149	8.17%
Prakash	808,464	1,616,859	50.00%
Madhu	39,352	859,152	4.58%
Anglo-French	20,130	1,210,043	1.66%
Bombay Dyeing	209,254	620,655	33.71%
Total sample	1,188,609	5,669,858	20.96%

4.26 Moreover, if the EC had not zeroed negative dumping inconsistently with the ADA, the company Prakash would have been found not to be dumping at all. In view of the fact that this company accounted for 28.5 per cent⁸⁹ of the volume of all exports to the EC of bed linen of the sample, it is evident that the total amount of “*non-dumped imports*” accounted for more than one-third of India’s exports [*i.e.* all exports of Prakash plus non-dumped sets of other companies].⁹⁰

4.27 Due to the confidentiality rules in force, India cannot know the amount of non-dumped imports from Egypt and Pakistan that have similarly been taken into account. But if the percentage of these would be in the same order as for India, it would imply that the total market share of the “*dumped imports*” has been overstated with more than one-fifth, and should be [$25.1\% \times (1 - 0.2096) =$] 19.8 per cent instead. Additionally, if the errors in the dumping calculation are corrected, it would likely dwindle to only a fraction of this amount.

4.28 It is granted that the EC cannot review the overview of ‘dumped imports’ from the period preceding the investigation period up to the investigation period, simply because the EC has no information on the level of any ‘dumped imports’ in the years preceding the investigation period. This does not, however, imply a licence to consider all imports of bed linen during the investigation

⁸⁹ $[1,616,859 \div 5,669,858] \times 100 = 28.5\%$.

⁹⁰ $[1,188,609 + (1,616,859 - 808,464) \div 5,669,858] \times 100 = 35.2\%$

period as being dumped. Especially when the EC determines the investigation period market shares of EC producers and producers of the targeted countries, it should have referred to the market share during the investigation period of “*dumped imports*” only.⁹¹ By considering the total volume and market share of imports during the investigation period rather than that of dumped imports, the EC grossly overstated their volume and market share.

4.29 In this context the *obiter dictum* of the Panel in EC—Imposition of anti-dumping duties on imports of cotton yarn from Brazil is noted:⁹²

“... the Panel noted that in responding to a question by the Panel the EC had stated ‘Regarding the volume to be considered for injury purposes, the Community took into account all imports, whether dumped or non-dumped, for the reasons mentioned above.’ Articles 3:2 and 3:4 of the Agreement required that the investigating authorities examine the volume and effects of the ‘dumped’ imports. The Panel noted that the EC stated in its response that it had, for the purposes of its injury analysis, taken into account the effects of all imports from Brazil, whether dumped or non-dumped. As Brazil had not made a claim that the EC had thereby acted inconsistently with the Agreement, the Panel could not pronounce itself on any such claim.” (Single underlined emphasis in original; Double underlined emphasis added)

4.30 Unlike Brazil in the above-mentioned GATT panel proceeding, India does claim that the EC’s determination is inconsistent with Article 3 of the Agreement.

4.31 The EC indicated during the consultations that it could legitimately consider the total amount of imports to have been dumped, since per company it had averaged the dumping results of non-dumped and dumped products. This argument, in India’s view, is incorrect. To begin with, it negates the clear wording of Article 3 and imputes injury where the clear wording of the ADA will have none.

4.32 Additionally, in Article 2.1 “a product is to be considered as being dumped” if “*the export price of the product . . . is less than the comparable price . . . for the like product when destined for consumption in the exporting country*”. In EC practice (as applied in the Bed linen II proceeding) the EC first compares normal value and export prices on a per-type basis. Then the total dumping amount is calculated, and this is divided by the total CIF border price. The oft-stated reason for this calculation method, in which the total dumping amount is ‘spread’ over all types, appears to be that it would be impractical to impose an anti-dumping duty on a per-type basis. However, that does not automatically imply that the types for which no dumping is found then suddenly become “*dumped*” for purposes of the injury determination: These are two completely different issues. If on average for a type the export price was not less than the comparable price for the like product sold in India⁹³, then that type was not “*dumped*”; and it does not become “*dumped*” in retrospect merely because the EC averages the dumping margin calculated at the very end of the dumping margin calculation.

4.33 Furthermore, in EC practice, even if one or more companies of the sample would have been found not to be dumping, and only some other companies were, the EC would still consider all

⁹¹ Without prejudice to India’s views on the appropriateness of the sample chosen, the EC could have calculated the amount of non-dumped imports by reference to the total amount of non-dumped exports of the sample during the IP, as a percentage of the total exports of the sample.

⁹² EC—Imposition of anti-dumping duties on imports of cotton yarn from Brazil, ADP/137 of 4 July 1995 at § 525.

⁹³ Or, in case of comparisons between a weighted average normal value with export transactions on a transaction-by-transaction basis: if in no case the export price of a transaction of the type concerned was less than the comparable price of the like product sold in India.

imports of the product concerned from all companies for the purposes of Article 3.1. If the EC had not made the errors in the dumping calculation noted in Part III of this submission, this would have been directly relevant for the situation of at least the company Prakash.

4.34 Last, the conceptual consequence of the EC's practice should be considered in its extreme application: if just one model out of a hundred models under investigation causes a weighted average dumping margin slightly over the *de minimis* threshold, dumping will be found overall and all imports will be considered dumped for the injury analysis.

4.35 India considers that the failure of the EC to examine dumped transactions only for the purpose of the injury determination in the Bed linen II proceeding is inconsistent with Articles 3.1, 3.2, 3.4, 3.5, and 3.6 ADA.

5. Claim 9: inconsistency with Article 12.2.1

5.1 The text of Article 12.2.1

4.36 It is recalled that Articles 12.2 and 12.2.1 of the ADA provide in relevant part as follows:

"12.2 Public notice shall be given of any preliminary or final determination, whether affirmative or negative . . . Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities . . .

12.2.1 A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular . . .

- (iv) considerations relevant to the injury determination as set out in Article 3;*
- (v) the main reasons leading to the determination."*

5.2 Legal arguments relating to the claims relating to Article 12.2.1

4.37 In anti-dumping proceedings the investigating authorities have a very dominant position as far as knowledge of the facts is concerned. This is especially so in the EC, where contrary to the AD systems in the United States and Canada, the European Commission is the only entity having access to all facts relating to the investigation. Article 12 fulfils the crucial rôle of ensuring a certain minimum degree of transparency. In this context the dictum of the Panel in Korea—Anti-dumping duties on imports of polyacetal resins from the United States is recalled:⁹⁴

"In the view of the Panel, the purpose of this provision would be frustrated if in a dispute settlement proceeding . . . a Party were allowed to defend a challenged . . . determination by reference to alleged reasons for such determination which were not part of a public statement of reasons accompanying that determination . . ."

⁹⁴ Korea—Anti-dumping duties on imports of polyacetal resins from the United States, Report of the Panel, ADP/92 and Corr.1 of 2 April 1993 at § 209.

4.38 If the EC took account for the purposes of Article 3 in any way of only the dumped imports, there is nothing in the published Regulations or the non-confidential file to show for it. The volume and market share of “*dumped imports*” would seem to be a matter of vital importance to any injury determination. Under these circumstances, the EC can hardly claim that the provisional Regulation or the provisional disclosure explained “*in sufficient detail the findings and conclusions reached on all issues of fact and law considered material*”. Nor can it claim that these documents properly explained the “*considerations relevant to the injury determination as set out in Article 3*”.

4.39 For the above reasons India considers that the EC, even if it did consider only the impact of the “*dumped imports*” for the purpose of Article 3, acted inconsistently with Article 12.2.1.

6. Claim 10: inconsistency with Article 12.2.2

6.1 The text of Article 12.2.2

4.40 The text of Article 12.2.2 differs somewhat from that of Article 12.2.1:

“A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures . . . In particular, the notice or report shall contain the information described in subparagraph 2.1 . . .” (Emphasis added)

6.2 Legal arguments relating to the claims relating to Article 12.2.2

4.41 Reference is made to the logic in section 5.2, above. India believes that neither the definitive Regulation nor the definitive disclosure or the non-confidential file explained the EC’s determination on Article 3 in the light of its use of all imports from India rather than only “*dumped imports*”. The Regulation thus suffers from the same defect under Article 12.2.2 as it does under Article 12.2.1

B. ARTICLE 3.4: THE EC FAILED TO EVALUATE ALL RELEVANT ECONOMIC FACTORS AND INDICES HAVING A BEARING ON THE STATE OF THE DOMESTIC INDUSTRY

4.42 Summary: for the purpose of the determination required under Article 3.4 the EC failed to evaluate all relevant factors and indices having a bearing on the state of the domestic industry (**claim 11**). The EC further failed to properly explain its reasoning, and consequently acted inconsistently with Article 12.2.1 (**claim 12**) and 12.2.2 (**claim 13**). This also violates the rights of defence as contained in Article 6 (**claim 14**).

1. Facts

4.43 After the initiation of the Bed linen II proceeding, the European Commission selected a sample from the companies determined to constitute the domestic industry.⁹⁵ This sample was asked to complete questionnaires.⁹⁶

⁹⁵ The determination and use of the domestic industry are issues addressed in separate claims (see notably section IV.C of this submission).

⁹⁶ India believes that the EC has acted inconsistently with Article 3.4 in several ways. This section (IV.B) discusses the EC’s failure to evaluate all relevant factors and indices listed in Article 3.4. Section IV.C

4.44 On 25 October 1996 Texprocil filed a brief concerning injury issues (Annex 50) in which it provided comments on the information (such as it was) available on return on investments, capacity and capacity utilisation, cash flow, inventories, wages, growth, and investments.

4.45 After the non-confidential summaries of the questionnaire responses of the EC sample (Annex 53) were filed⁹⁷, the Indian exporters were able to provide more detailed comments on these factors. During their first injury hearing on 13 January 1997 Texprocil argued in detail why the non-confidential questionnaire responses (as far as any had been made available by that time) did not indicate material injury caused to the domestic industry. This was followed up by the post-hearing brief filed on 6 February 1997 (Annex 54), which noted amongst others the following:

“4.7 Capacity and capacity utilisation

The complainant acknowledges that it has no statistics on the capacity or capacity utilisation of bed linen because such statistics are ‘far too specific.’ This statement does not make sense: one of the criteria called in support of the like product definition mentioned by the complaint is ‘the equipment used’ for the production of bed linen. It is hard to see why EC producers of bed linen would be unable to supply information on the development of their capacity utilisation.

The allegation that capacity utilisation followed the trend in production is little more than a simple assertion, unsubstantiated by relevant evidence and should therefore be ignored . . .

Since there is no other evidence on capacity utilisation pointing towards injury, it follows that there is nothing on capacity utilisation indicating that imports of bed linen from India caused material injury to the Community industry.

4.8 Cash flow

No information on cash flow whatsoever has been provided suggesting that imports of bed linen from India caused material injury to the Community industry.

If such information has been provided in the confidential questionnaire responses of the EC sample, it has not been summarised in non-confidential form and should be left without consideration by the Commission.

4.9 Inventories

No information whatsoever has been provided in the non-confidential version of the complaint suggesting that imports of bed linen from India caused material injury to the Community industry.

discusses the EC's failure to correctly determine whether the 'domestic industry' has suffered material injury. Section IV.D discusses the EC's determination concerning imports from before the investigation period.

⁹⁷ Under the EC's practice of confidentiality producers have to submit—next to the confidential versions of their questionnaire responses and briefs—non-confidential summaries thereof. Especially in cases where the complainants are (generally) not stock-listed, such non-confidential summaries are often the major source of relevant information available to the exporters. This footnote is not intended as criticism of the EC's rules on confidentiality per se.

If such information has been provided in the confidential questionnaire responses of the EC sample, it has not been summarised in non-confidential form and should be left without consideration by the Commission . . .

4.11 Wages

No information whatsoever has been provided in the non-confidential version of the complaint suggesting that imports of bed linen from India caused material injury to the Community industry.

4.12 Growth

No information whatsoever has been provided in the non-confidential version of the complaint suggesting that imports of bed linen from India caused material injury to the Community industry.

4.13 Investments

No information whatsoever has been provided in the non-confidential version of the complaint suggesting that imports of bed linen from India caused material injury to the Community industry.

If such information has been provided in the confidential questionnaire responses of the EC sample, it has not been summarised in non-confidential form and should be left without consideration by the Commission.” (Footnotes omitted)

4.46 In the provisional Regulation and the provisional disclosure document the European Commission discussed the following factors and indices listed in Article 3.4:

- (a) production: recital (81);
- (b) sales by volume: recital (82);
- (c) sales by value: recital (83);
- (d) market share: recitals (84) and (85);
- (e) prices: recitals (86)-(88);
- (f) profitability: recitals (89) and (90); and
- (g) employment: recital (91).

4.47 Specifically, the EC did not comment in the provisional disclosure or the provisional Regulation on

- productivity;
- return on investments;
- capacity and capacity utilisation;
- factors affecting domestic prices;
- actual and potential negative effects on cash flow;
- inventories;
- wages;
- growth; and
- investments.

4.48 In the definitive disclosure document and definitive Regulation the EC confirmed its provisional assessment of the factors and indices having a bearing on the state of the domestic industry (recitals (40)-(42)), again without further mentioning or explaining the following factors and indices:

- productivity;
- return on investments;
- capacity and capacity utilisation;
- factors affecting domestic prices;
- actual and potential negative effects on cash flow;
- inventories;
- wages;
- growth; and
- investments.

4.49 During the first round of consultations between India and the EC the failure of the EC to evaluate some of the injury factors and indices listed in Article 3.4 was discussed:⁹⁸

“Mr Seth: . . . The following issue again concerns Article 3.4.

In the provisional duties Regulation the EC discussed the following factors affecting the domestic industry: production, sales by volume, sales by value, market share by volume, market share by value, price development, and profitability and employment. In the definitive duties Regulation these determinations were not altered.

Neither in the provisional, nor in the definitive duties Regulation did the EC discuss or consider the following factors listed in Article 3.4:

- *productivity, return on investments, or utilization of capacity;*
- *factors affecting domestic prices;*
- *the magnitude of the margin of dumping;*
- *actual and potential negative effects on cash flow, inventories, wages, growth, ability to raise capital or investments.*

It is recognised that Article 3.4 provides that ‘[t]his list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.’ In other words, if the investigating authorities find that not all factors listed in Article 3.4 point towards an injury finding, they may nevertheless conclude that material injury exists if a sufficiently good case can be made.

However, it follows from this, and from the literal wording of Article 3.4, that the investigating authorities first must discuss the factors listed in Article 3.4. In casu this has not happened for the factors indicated above. The EC thus acted inconsistently with Article 3.4. . .

[EC]: Which point has not been dealt with? We believe all points are covered. Moreover, Article 3.4 is not exhaustive, the phrase ‘not . . . guidance’ means ‘not relevant’.”

4.50 In its letter of 1 October 1998 the EC provided an answer in writing on this issue (Annex 12):

⁹⁸ The verbatim report of the first round of consultations is attached as Annex 11.

“Question 45

Would the EC agree that it did not discuss or consider the following injury factors listed in Article 3.4?

- ***productivity, return on investments, or utilisation of capacity;***
- ***factors affecting domestic prices;***
- ***the magnitude of the margin of dumping;***
- ***actual and potential negative effects on cash flow, inventories, wages, growth, ability to raise capital or investments.***

It is the general practice of the European Community to consider all possible injury factors. In this proceeding, the following injury indicators were considered particularly relevant for the purpose of assessing injury to the Community industry:

- (a) -Production -recital (81) of provisional duty Regulation
- (b) -sales by volume -recital (82)
- (c) -sales by value -recital (83)
- (d) -market share -recital (84) and (85)
- (e) -price development -recital (86) to (88)
- (f) -profitability -recital (89) and (90)
- (g) -employment -recital (91)

In recitals (93) to (94) of the provisional duty Regulation as well as in recital (40) of the definitive duty Regulation, it was concluded that the decisive injury indicators which led to the conclusion of material injury suffered by the Community industry were its declining and inadequate profitability, price suppression and the low level of its sales prices in the Community market.”

4.51 The EC therefore clearly acknowledged that it did not discuss all Article 3.4 factors. Despite this acknowledgement in its answer to question 45, the EC in its letter of 29 June 1999⁹⁹ stated that:

“Question 46

Would the EC agree that the text of Article 3.4 -- while recognising that “[t]his list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance” -- does require at least discussion of each of the factors?

As stated in the answer to Q 45 above, it is the practice of the European Community to consider all possible factors in the overall assessment of injury as well as to identify the most important aspects as regards injury.

Question 47

Could the EC indicate where in the provisional and definitive Regulations (or elsewhere) it has done so?

See reply to Q 46 above.”

⁹⁹ See Annex 14.

2. Claims

4.52 Three claims flow from the facts described above.

4.53 First, the EC's failure to evaluate all relevant economic factors and indices having a bearing on the state of the industry is inconsistent with Article 3.4 of the ADA.

4.54 Second, even if the EC did make an evaluation of all factors and indices having a bearing on the state of the industry, it failed to properly explain this in a sufficiently detailed manner in the provisional Regulation or in the provisional disclosure document. This is inconsistent with Article 12.2.1.

4.55 Third, even if the EC did make an evaluation of all factors and indices having a bearing on the state of the industry, it failed to properly explain this in a sufficiently detailed manner in the definitive Regulation or in the definitive disclosure document. This is inconsistent with Article 12.2.2.

3. Claim 11: inconsistency with Article 3.4

3.1 The text of Article 3.4

4.56 It is recalled that Article 3.4 provides as follows:

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

4.57 The first key word would seem to be "shall". In the words of the Appellate Body:¹⁰⁰

"The chapeau of Article 5.5 clearly states that the schedule in the body of that provision is mandatory. The word used in the chapeau is 'shall', not 'may'. There is no qualifying language, and there is no language that permits any method other than that set out in the schedule in Article 5.5 as a basis for the calculation of additional duties."

4.58 There is no reason why this logic would be any different in the context of Article 3.4 of the ADA.¹⁰¹ It follows that the evaluation mentioned in Article 3.4 "shall" by necessity include "all relevant . . . factors". The word "all" indicates that all relevant factors must be included in this "evaluation". The word "evaluation" implies an assessment or weighing of these factors: in Korea—

¹⁰⁰ European Communities—Measures affecting the importation of certain poultry products, AB-1998-3, WT/DS69/AB/R of 13 July 1998 at § 165.

¹⁰¹ It is noted that the interpretative standard in Article 17.6(ii), last sentence only comes into play if the interpretation "in accordance with customary rules of interpretation of public international law" would lead to more than one result. *In casu*, however, the interpretation of the ordinary meaning to be given to the terms of Article 3.4 in their context and in the light of its object and purpose supports only the interpretation of the Appellate Body quoted above.

Anti-dumping duties on imports of polyacetal resins¹⁰² the Panel noted (in the context of the 1979 Anti-Dumping Code) that:

“While the relative weight to be accorded to each of [the] factors [in Article 3.3 of the 1979 Anti-Dumping Code] depended upon the circumstances of each particular case, the overall context of an analysis of the specific factors mentioned in Article 3:3 was that of ‘an evaluation of all relevant economic factors and indices having a bearing on the state of the industry’ . . .”

4.59 In order for this assessment or weighing to lead to a correct result, it is by necessity imperative that all relevant factors and indices are considered.

4.60 The word “all” is given further meaning by the word “including”. It follows from this term that at a minimum the factors and indices listed in the remainder of the sentence must be considered (evaluated). The last sentence adds that there may in fact be additional factors and indices which, if relevant to the state of the domestic industry, should also be evaluated; but this does not mean that the factors and indices explicitly mentioned in the first sentence should not all be evaluated.¹⁰³

3.2 Legal arguments relating to the claim relating to Article 3.4

4.61 There are two issues involved.

4.62 First, the wording of Article 3.4 is not specific to the ADA. Similar or identical wording featured in Article 3.3 of the 1979 Anti-Dumping Code¹⁰⁴, Article 6(3) of the 1979 Agreement on interpretation and application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade¹⁰⁵; and in Article 15.4 of the Agreement on Subsidies and Countervailing Measures.¹⁰⁶

¹⁰² Korea—Anti-dumping duties on imports of polyacetal resins from the United States, Report of the Panel, ADP/92 and Corr.1 of 2 April 1993 at § 276.

¹⁰³ This interpretation was recently confirmed in the Panel Report on Mexico—Anti-dumping investigation of high fructose corn syrup (HFCS) from the United States, WT/DS132/R of 28 January 2000. Regarding the interpretation of Article 3.4, the Panel stated at § 7.218 that:

“In our view, [the language of Article 3.4] makes it clear that the listed factors in Article 3.4 must be considered in all cases. There may be other relevant economic factors in the circumstances of a particular case, consideration of which would also be required. In a threat of injury case, for instance, the AD Agreement itself establishes that consideration of the Article 3.7 factors is also required. But consideration of the Article 3.4 factors is required in every case, even though such consideration may lead the investigating authority to conclude that a particular factor is not probative in the circumstances of a particular industry or a particular case, and therefore is not relevant to the actual determination. Moreover, the consideration of each of the Article 3.4 factors must be apparent in the final determination of the investigating authority.”

¹⁰⁴ *“The examination of the impact on the industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry such as actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.”*

¹⁰⁵ *“The examination of the impact on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry such as actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investment and, in the case of agriculture, whether there has been an increased burden on Government support programmes. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.”*

4.63 In the context of these Agreements there has been consistent Panel jurisprudence on the necessity to examine ‘all’ relevant factors and indices. In Brazil—countervailing duties on milk the Panel made such an analysis:¹⁰⁷

“333. The Panel noted that the list of factors mentioned in Article 6:3 in this provision was illustrative in nature, and the last sentence made it clear that the provision did not prejudge the weight to be given to any particular factor mentioned in the provision. At the same time, Article 6:3 clearly required investigating authorities to conduct in each case a comprehensive analysis of ‘all relevant economic factors and indices having a bearing on the state of the industry’. The Panel was of the view that to consider only the stagnation of domestic production in the analysis of the impact of imports on the domestic industry was inconsistent with this comprehensive character of the examination required under Article 6:3.

...

340. In light of the foregoing considerations, the Panel concluded that the analysis and findings of the Brazilian authorities regarding the impact of the imports of milk powder from the EEC were inconsistent with the requirements of Article 6:3 because . . . the considerations in Administrative Order No. 569 did not permit the Panel to find that the Brazilian authorities had carried out a comprehensive analysis of ‘all relevant economic factors and indices having a bearing on the state of the industry’.” (Emphasis added)

4.64 The Panel in Korea—Anti-dumping duties on resins went along a similar route:¹⁰⁸

“For the reasons set forth in the preceding paragraphs, the Panel was of the view that it was unable to ascertain from the text of the determination on what factual basis the KTC had found that the level of net profit in 1989 was insufficient to enable the industry ‘to maintain normal operations and development.’ While there might have been relevant information before the KTC in this regard, the determination did not enable the Panel to determine how this information had been evaluated by the KTC in making this finding. The Panel recalled its statement in paragraphs 227 and 228 regarding the considerations by which it was guided in reviewing whether the KTC’s determination was based on positive evidence. The Panel concluded that the KTC’s finding that the level of net profit in 1989 was not sufficient to permit the industry ‘to maintain normal operations and development’ was not adequately substantiated by positive evidence and was thereby inconsistent with Korea’s obligations under Article 3:1 of the Agreement.”

¹⁰⁶ “The examination of the impact of the subsidized imports on the domestic industry shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments and, in the case of agriculture, whether there has been an increased burden on government support programmes. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.”

¹⁰⁷ Brazil—Imposition of provisional and definitive countervailing duties on milk powder and certain types of milk from the EEC, Report of the Panel adopted on 28 April 1994, SCM/179, and Corr.1 at §§ 333 and 340.

¹⁰⁸ Korea—Anti-dumping duties on imports of polyacetal resins from the United States, Report of the Panel, ADP/92 and Corr.1 of 2 April 1993 at § 254.

4.65 In the context of Article 3.3 of the 1979 Anti-Dumping Code the Panel in United States—Salmon noted that:¹⁰⁹

“an essential element of a review of whether a determination of material injury was in conformity with Article 3 was an examination of whether the factors set forth in Articles 3:2 and 3:3 had been properly considered by the investigating authorities.”

4.66 This was also the EC’s own view:¹¹⁰

“420. . . . Specifically, the EC while continuing to assert that Article 3 imposed purely ‘procedural’ requirements, had stated that:

‘[I]t is inconceivable on the other hand that injury could be found, where the consideration or evaluation of the factors and indices did not yield a positive result; the consideration or evaluation must make clear that for each of the elements (volume, price and consequent impact on the domestic industry) all the factors or indices have been considered . . .’ [emphasis added]

4.67 One may also recall that in the recent Panel Proceeding concerning Argentina—Safeguard Measures the EC argued that:¹¹¹

“Argument of the European Communities

5.217 The European Communities notes that Article 4.2(a) of the Agreement on Safeguards requires that the investigation of serious injury, or the threat thereof, evaluate “all relevant factors of an objective and quantifiable nature having a bearing on the situation of the domestic industry, in particular the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilisation, profits and losses, and employment.” According to the European Communities, this provision lays down the principle that an injury investigation must be complete (“all relevant factors”) and reliable (“factors of an objective and quantifiable nature having a bearing on the situation of that industry”). Furthermore, an investigation must be consistent, adequate, complete, clear and precise for its conclusions to be sufficiently motivated and transparent. The European Communities notes that this position finds support in two recent Panel reports¹¹² which dealt with the standard of “serious damage” set forth in Article 6.3 of the Agreement on Textiles and Clothing (ATC)¹¹³. Both Panel Reports stressed the obligation to examine each of the

¹⁰⁹ United States—Imposition of anti-dumping duties on imports of fresh and chilled Atlantic salmon from Norway, Report of the Panel adopted on 27 April 1994, ADP/87 on § 493.

¹¹⁰ EC—Anti-dumping duties on audio tapes in cassettes originating in Japan, not adopted.

¹¹¹ Argentina—Safeguard Measures on Imports of Footwear, Report of the Panel adopted on 25 June 1999, WT/DS121/R.

¹¹² [Footnote 208 in original]: “See Panel Report on ‘United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India’, 6 January 1997, WT/DS33/R; and Panel Report on ‘United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear’, WT/DS24/R, 8 November 1996. Both Panel Reports were subject to review by the Appellate Body which did not, however, rule on the standard of serious damage.”

¹¹³ [Footnote 209 in original]: “Article 6:3 ATC reads: “In making a determination of serious damage, [...] the Member shall examine the effect of those imports on the state of the particular industry, as reflected in changes in such relevant economic variables as output, productivity, utilization of capacity, inventories, market

*enumerated injury factors in detail. In United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*¹¹⁴, the Panel criticised the US for providing *inconsistent and inadequate* information. The Panel in *United States – Measure Affecting Woven Wool Shirts and Blouses from India* stated¹¹⁵ that, “[a]t a minimum, the importing Member must be able to demonstrate that it has considered the relevance or otherwise of each of the factors listed [...]”. Since the United States examined only eight out of eleven listed factors, while some of the information provided by the United States was either *incomplete, vague or imprecise*, the Panel ruled that the requirements of Article 6.3 of the Agreement on Textiles and Clothing had not been respected.¹¹⁶

5.218 The European Communities argues that even though the wording of Article 6.3 of the Agreement on Textiles and Clothing is slightly different from Article 4.2(a) of the Agreement on Safeguards, both provisions nevertheless contain a list of injury factors which must be evaluated properly by the investigating authority. Therefore, in accordance with the rationale stated in the above-mentioned Panel Reports, the European Communities submits that, at a minimum, a “serious injury” determination under the Agreement on Safeguards must demonstrate that the relevance or otherwise of each of the factors listed in Article 4.2(a) of the Agreement on Safeguards was considered. The European Communities further submits that that provision requires each injury factor to be properly analysed. All listed factors have to be investigated completely and in full. The result of the analysis cannot be inconsistent, inadequate, incomplete, vague or imprecise. Therefore, in the EC view, if Argentina investigates five separate sectors of the footwear industry, but fails – as mentioned earlier – to investigate import trends, market share, profits and losses and employment for each market segment, it violates its obligations under the Agreement on Safeguards.” [Emphasis in original and emphasis added]

4.68 Even though the wording of Article 4.2(a) of the Agreement on Safeguards is slightly different from Article 3.4 ADA, both provisions nevertheless contain a list of injury factors which must be evaluated properly by the investigating authority. All listed factors have to be investigated completely and in full. The result of the analysis cannot be inconsistent, inadequate, incomplete, vague or imprecise.

4.69 It is recalled that the Panel agreed with this argument:¹¹⁷

“8.123 We note, first, that the text of Article 4.2(a) of the Safeguards Agreement explicitly requires the evaluation of “all relevant factors”, in particular those listed in that article. Second, Article 6.4 of the ATC¹¹⁸ contains no such express requirement and recognises that

share, exports, wages, employment, domestic prices, profits and investments; none of which, either alone or combined with other factors, can necessarily give decisive guidance.” (emphasis added).”

¹¹⁴ [Footnote 210 in original]: “Panel Report on ‘United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear’, WT/DS24/R, 8 November 1996, at paragraph 7.45.”

¹¹⁵ [Footnote 211 in original]: “See Panel Report on ‘United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India’, 6 January 1997, WT/DS33/R, at paragraph 7.26.”

¹¹⁶ [Footnote 212 in original]: “Idem, at paragraph 7.51.”

¹¹⁷ Argentina—Safeguard Measures on Imports of Footwear, Report of the Panel adopted on 25 June 1999, WT/DS121/R.

¹¹⁸ [Footnote 510 in original]: “Article 6.4 of the ATC: “... The Member or Members to whom serious damage, or actual threat thereof ... is attributed, shall be determined on the basis of a sharp and substantial increase in imports, actual or imminent, from such a Member or Members individually, and on the basis of the level of imports as compared with imports from other commercial transaction; none of these factors, either alone or combined with other factors, can necessarily give decisive guidance. ...”.”

"none of these factors ... can necessarily give decisive guidance. Nonetheless, the panels on United States - Underwear and United States - Shirts and Blouses ruled that each and every injury factor mentioned in Article 6.4 of the ATC has to be considered by the national authority. With regard to the obligation to evaluate "all relevant factors" we consider these past panel reports relevant. Consequently, in accordance with the text of the Safeguards Agreement and past practice, we consider that an evaluation of all factors listed in Article 4.2(a) is required." [Emphasis added]

It is further recalled that the Appellate Body confirmed the view of the Panel on this issue:¹¹⁹

"136. We agree with the Panel's interpretation that Article 4.2(a) of the Agreement on Safeguards requires a demonstration that the competent authorities evaluated, at a minimum, each of the factors listed in Article 4.2(a) as well as all other factors that are relevant to the situation of the industry concerned."

4.70 It is further recalled that the EC raised the same argument, and the Panel was of the same view, in the Proceeding concerning Korean Safeguard measures on Dairy products:¹²⁰

"Failure to examine correctly all relevant factors of an objective and quantifiable nature having a bearing on the situation of the domestic industry"

4.296 Article 4.2(a) of the Agreement on Safeguards requires that the serious injury investigation evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of the domestic industry, in particular the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.

4.297 This provision lays down the principle that an injury investigation must be complete ("all relevant factors"). Only factors that are not relevant, or not objective or quantifiable, or do not have a bearing on the situation, may be excluded. Clearly, it is necessary to examine a factor before it can be considered that it is not relevant, or not objective or quantifiable, or does not have a bearing on the situation. The European Communities note that this position has been supported in two recent Panel reports¹²¹ which dealt with the standard of "serious damage" set forth in Article 6.3 of the ATC.¹²² Both Panel reports stressed the obligation to examine each of the enumerated injury factors. In the US - Underwear case, the Panel criticized the United States for providing inconsistent and inadequate information. The Panel in the US - Shirts and Blouses case stated that "at a minimum, the importing Member must be able to demonstrate that it has considered the

¹¹⁹ Argentina—Safeguard Measures on Imports of Footwear, Report of the Appellate Body adopted on 14 December 1999, WT/DS121/AB/R

¹²⁰ Korea—Safeguard Measures on Imports of Dairy Products, Report of the Panel adopted on 21 June 1999, WT/DS98/R.

¹²¹ See, Panel report in *US - Shirts and Blouses*, 6 January 1997, WT/DS33/R; *US - Underwear*, WT/DS24/6, 8 November 1996. Both Panel reports were subject to review by the Appellate Body that did, however, not rule on the standard of serious damage.

¹²² "In making a determination of serious damage, [...] the Member shall examine the effect of those imports on the state of the particular industry, as reflected in *changes in such relevant economic variables* as output, productivity, utilization of capacity, inventories, market share, exports, wages, employment, domestic prices, profits and investments; none of which, either alone or combined with other factors, can necessarily give decisive guidance." (emphasis added)

*relevance or otherwise of each of the factors listed [...]”.*¹²³ *Since the United States did not examine eight of these factors in the context of the particular industry without giving any explanation for not doing so, the requirements of Article 6 of the Agreement on Textiles and Clothing were not respected.*¹²⁴

4.298 *Even though the wording of Article 6.3 of the Agreement on Textiles and Clothing is slightly different from Article 4.2 (a) of the Agreement on Safeguards, both provisions nevertheless contain a list of injury factors which shall be evaluated by the investigating authority. Therefore, in accordance with the rationale stated in the above Panel reports, the European Communities submit that, at a minimum, a serious injury determination under the Agreement on Safeguards must demonstrate that the relevance or otherwise of each of the factors listed in Article 4.2(a) of the Agreement on Safeguards was considered. The European Communities would further submit that that provision requires each injury factor to be properly analysed unless it is explained for what reason the injury factor may be disregarded.”*

The Panel agreed:

“7.58 . . . In assessing the serious injury to the whole domestic industry, . . . all factors listed in Article 4.2 must be addressed. . . .”

The Appellate Body did not overturn this view.

4.71 The interpretative standard in Article 17.6(ii), last sentence does not come into play since the interpretation of the ordinary meaning to be given to the terms of Article 3.4 in their context and in the light of its object and purpose leaves no doubt on their interpretation.

4.72 As noted in the description of the facts, the EC has failed to take account of several factors and indices mentioned in Article 3.4 of the ADA, and especially the following factors and indices:

- productivity;
- return on investments;
- capacity and capacity utilisation;¹²⁵
- factors affecting domestic prices;
- actual and potential negative effects on cash flow;
- inventories;
- wages;
- growth; and
- investments.

¹²³ See, *US - Shirts and Blouses*, para. 7.26.

¹²⁴ See, *id.* at para. 7.52.

¹²⁵ § 110 of the provisional Regulation states that:

“In connection with this it should be noted that the larger Community industry producers, however, have a production capacity which cannot be utilized at a reasonable rate on the basis of high value items only. This capacity utilization can only be maintained through production of mass-market lower value items the market for which is now highly penetrated by imported goods.”

This reference in passing to capacity utilisation—not in the section dealing with the determination but in the section on causality—, without any further substantiation, can hardly count as a determination on capacity utilisation, or a proper explanation of such determination.

4.73 The investigating authorities thus failed to make a proper evaluation of all relevant economic factors and indices¹²⁶, and consequently acted inconsistently with Article 3.4 of the ADA.

4.74 Second, without prejudice to the argument presented above, it is recalled that the Indian exporters had made specific arguments relating to the available information on

- capacity and capacity utilisation;
- cash flow;
- inventories;
- wages;
- growth; and
- investments.

4.75 Admittedly, in view of the paucity of the non-confidential summaries made available by the complainants, it was not possible for Indian exporters to make a meaningful analysis of these factors. Nonetheless, India believes that the failure of the sampled domestic industry producers to provide meaningful non-confidential summaries of the data concerning these factors cannot shield the investigating authorities from their obligations under Article 3.4. It would rather seem that, in view of the failure of the domestic industry to provide meaningful non-confidential data on these factors, the investigating authorities had, if anything, an additional responsibility to investigate and evaluate these matters. Otherwise it would be very easy for a domestic industry to manipulate an injury determination by providing information only on negative factors and not on positive factors.

4.76 In summary, the EC has acted inconsistently with Article 3.4 by not evaluating all relevant economic factors and indices mentioned in Article 3.4 of the ADA.

4. Claim 12: inconsistency with Article 12.2.1

4.1 The text of Article 12.2.1

4.77 It is recalled that Articles 12.2 and 12.2.1 of the ADA provide in relevant part as follows:

“12.2 Public notice shall be given of any preliminary or final determination, whether affirmative or negative . . . Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities . . .

12.2.1 A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular . . .

- (iv) considerations relevant to the injury determination as set out in Article 3;*
- (v) the main reasons leading to the determination.”*

¹²⁶ Even though India does not believe that it would have made a difference, it is noted that the EC at no point during the administrative proceeding has indicated or recorded anywhere in the file that these factors and indices would not be “*relevant*”, or explained why this would be so.

4.2 Legal arguments relating to the claims relating to Article 12.2.1

4.78 As stated, the European Commission is the only entity having access to all facts relating to the initiation. Article 12 fulfils in this context a crucial rôle to ensure a certain degree of transparency.¹²⁷

4.79 If the EC took account of productivity, return on investments, capacity and capacity utilisation, factors affecting domestic prices, actual and potential negative effects on cash flow, inventories, wages, growth, and investments, there is nothing in the published Regulations, the disclosure documents or elsewhere to attest to it.

4.80 First, it would seem that the Article 3.4 determination, which is required under Article 3.1, letter (b) of the ADA, is by definition an issue “*of fact and law considered material*” as implied by Article 12.2.

4.81 Second, in any event, the determination required by Article 3.4 would be (an important) part of the “*considerations relevant to the injury determination as set out in Article 3*” as intended by Article 12.2.1(iv). The wording of Article 12.2.1 is mandatory (“*shall . . . contain in particular*”).

4.82 Third, India believes that a proper determination on the state of the domestic industry belongs to “*the main reasons leading to the determination*” as per Article 12.2.1(v).

4.83 In summary, if the EC did in fact include in its evaluation all relevant economic factors and indices having a bearing on the state of the industry, it acted inconsistently with Article 12.2.1 by failing to properly explain its determination.

5. Claim 13: inconsistency with Article 12.2.2

5.1 The text of Article 12.2.2

4.84 It is recalled that Article 12.2.2 requires that:

“[a] public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures . . . In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers . . .”
(Emphasis added)

5.2 Legal arguments relating to the claims relating to Article 12.2.2

4.85 First, Article 12.2.2 refers back to subparagraph 2.1 of Article 12.2. Since the EC made no further explanations available in the definitive Regulation or elsewhere on productivity, return on

¹²⁷ In this context the dictum of the Panel in Korea—Anti-dumping duties on imports of polyacetal resins from the United States, Report of the Panel, ADP/92 and Corr.1 of 2 April 1993 at § 209 is recalled:

“In the view of the Panel, the purpose of this provision would be frustrated if in a dispute settlement proceeding . . . a Party were allowed to defend a challenged . . . determination by reference to alleged reasons for such determination which were not part of a public statement of reasons accompanying that determination . . .”

investments, capacity and capacity utilisation, factors affecting domestic prices, actual and potential negative effects on cash flow, inventories, wages, growth, and investments, the infringement of Article 12.2.1 noted in the second claim is by the same token an infringement of Article 12.2.2.

4.86 Moreover, in view of the arguments made by the Indian exporters the EC was under an additional obligation to provide explanations on the evaluation of these factors and indices (“*as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers*”). Its failure to do so implies in itself an inconsistency with Article 12.2.2.

6. Claim 14: inconsistency with Article 6

4.87 To the extent that the EC were to argue that it has fulfilled its obligations under Article 12, the Indian exporters were not aware of this. Accordingly the EC has, in addition to acting contrary to Article 12, also acted inconsistently with the right of defence, as set forth in Article 6 of the ADA.

6.1 The text of Article 6

4.88 It is recalled that the relevant parts of Article 6 require that:

Article 6: Evidence

6.2 Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests.

...

6.4 The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.

...

6.9 The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.”

6.2 Legal Arguments pertaining to Article 6

4.89 In view of the failure of the EC to disclose to the Indian exporters *that* and *how* it has in fact considered all factors in Article 3.4, it has also acted inconsistently with Article 6.2, 6.4, and 6.9.

4.90 Article 6.2 requires that throughout the investigation all interested parties shall have a full opportunity for the defence of their interest. To the extent that information on numerous relevant factors in Article 3.4 were never divulged, this has not been the case and the EC has acted inconsistently with Article 6.1.

4.91 Article 6.4 requires that the authorities shall provide the opportunity to see all information that is relevant. This has never happened in view of the absence on information on numerous relevant factors in Article 3.4.

4.92 Article 6.9 requires that interested parties shall be informed of the essential facts under consideration. Clearly this has never happened with respect to numerous relevant factors mentioned in Article 3.4.

C. ARTICLE 3.4: THE EC FAILED TO MAKE A CONSISTENT DETERMINATION OF THE STATE OF THE 'DOMESTIC INDUSTRY'

4.93 **Claim 15:** The EC has chosen a sample from the domestic industry, but did not consistently base its injury determination on this sample. In addition, the EC has explicitly determined that the domestic industry consists of 35 companies, but relied in its injury determination on companies outside this group in order to determine injury. Last, the EC chose to rely on different 'levels' of industry for different injury indices without any apparent reason other than goal-oriented 'picking and choosing' of injury. For each of these three reasons the EC acted inconsistently with Article 3.4. Moreover, the claim that the sample was representative is mathematically incorrect and therefore inconsistent with Article 6.10 (**claim 16**).

The EC further failed to properly explain its reasoning, and consequently acted inconsistently with Article 12.2.1 (**claim 17**) and 12.2.2 (**claim 18**).

1. Facts

4.94 It is recalled that under EC law, the 'domestic industry' is defined by reference to the standing determination. The relevant provisions are Articles 4(1) and 5(4) of the EC basic anti-dumping Regulation:

Article 4(1): *"For the purposes of this Regulation, the term 'Community industry' shall be interpreted as referring to the Community producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion, as defined in Article 5(4), of the total Community production of those products, except that: . . ."*

Article 5(4): *"An investigation shall not be initiated pursuant to paragraph 1 unless it has been determined, on the basis of an examination as to the degree of support for, or opposition to, the complaint expressed by Community producers of the like product, that the complaint has been made by or on behalf of the Community industry. The complaint shall be considered to have been made by or on behalf of the Community industry if it is supported by those Community producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the Community industry expressing either support for or opposition to the complaint. However, no investigation shall be initiated when Community producers expressly supporting the complaint account for less than 25 per cent of total production of the like product produced by the Community industry."* (Emphasis added)

4.95 Apart from the emphasised text, the provisions seem materially similar to the Articles 4.1 and 5.4 of the ADA. It follows (and has not been and could not be denied) that the concept of 'Community industry' in EC law for all practical purposes corresponds to that of 'domestic industry' in the ADA.

4.96 Article 3 of the basic Regulation follows the ADA in requiring that the injury determination be made for the domestic industry ('Community industry').¹²⁸ For example, Article 3(1) provides that:

"Pursuant to this Regulation, the term 'injury' shall, unless otherwise specified, be taken to mean material injury to the Community industry, threat of material injury to the Community industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article."

4.97 Similarly, Article 3(5) of the basic Regulation (which largely mirrors Article 3.4 of the ADA) requires that the state of the "Community industry" be ascertained:

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

4.98 At maximum, the domestic industry ("Community industry") whose injury must be determined can thus consist of the domestic industry defined for standing purposes. Under EC practice it is possible that, after the initiation, the investigating authorities determine that one or more companies have been wrongly included in the Community industry. Such companies are then excluded. Indeed, this happened in the Bed linen II proceeding before the provisional anti-dumping measures were imposed, as is evident from the quotation from the provisional Regulation below.

4.99 In the Bed linen II proceeding, the European Commission made an explicit determination on the domestic industry:

"1. Definition of the Community industry

(52) After elimination from the list of companies included in the complaint of seven of them found not to be complainants, the Commission found that the remaining companies represented a major proportion of Community production of bed linen and satisfied the requirements of Article 5(4) of the basic Regulation.

...

(54) In all but one case, companies alleged to be importing bed linen from the countries concerned were among those selected in the sample of Community producers (see recitals (58) to (61)). The Commission was therefore able to examine the extent of these imports during the course of its on-the-spot verification visits. For all but one of these sampled companies, the investigation showed that the imports of dumped products from the countries concerned had accounted for less than 10 per cent of the turnover of the companies in question in the period examined. It is therefore the opinion of the Commission that these

¹²⁸ In the ADA Article 4.1 defines the domestic industry whose injury must be determined under Article 3.

companies were not shielded from the effects of dumped imports and that for the purposes of Article 4 of the basic Regulation these companies may be considered along with the other cooperating producers, as belonging to the Community industry.

In the case of the one other sampled company, it was found that a higher proportion of its bed linen sales in the investigation period were of Pakistani origin and also that only a minor part of its sales were of its own production. It appeared in addition that the company's future activity was likely to be further focused on imports. This company, whose core interests were deemed clearly not to be in the production of bed linen within the Community, was therefore eliminated from the Community industry.

(55) Since all but one of the sampled companies alleged to be importing bed linen from the countries concerned were found, on examination, not to be doing so in quantities sufficient to warrant exclusion, it has been considered that the allegations made by the exporters in this regard were excessive and unreliable. Consequently, on the basis of the findings concerning the sample, no exclusion of the one non-sampled company is warranted. This company should, therefore, be retained in the definition of the Community industry. In any event, this issue has no substantial influence on the question of the representativity of the Community industry.

(56) Three other companies were eliminated. In one case the company was found no longer to produce bed linen. In two other cases the companies did not respond to the requests for information which were addressed, via Eurocoton and the national associations, to those complainants which were not selected in the sample of Community producers, in order to obtain information on the Community industry as a whole.

(57) The remaining 35 companies, which cooperated with the enquiry and are located in France, Germany, Italy, Spain, Portugal, Austria and Finland, represented a major proportion of total Community production in the investigation period. These companies were therefore deemed to make up the Community industry under the terms of Article 4(1) of the basic Regulation.”

4.100 According to the EC, these 35 companies represented approximately 34 per cent of total production in the EC. These 35 remaining companies were basically the complainants in the case.

4.101 For its injury determination, the European Commission took a sample from these 35 companies; thus, the provisional determination states:

“(58) Because of the number of companies in the Community industry it was decided to resort to sampling, in accordance with Article 17 of the basic Regulation.

(59) 27 of the 35 companies, representing 96.7 per cent of Community industry production and 32.5 per cent of total Community production in 1995, (the latest figures available at the time of sample selection) were situated in Germany, Italy, France and Portugal.

(60) As a general rule, Community producers sell a large proportion of their bed linen production in their own Member State, in part because of differences between Member States in standard products and sizes. This is true of Germany, France and Italy which are both the largest producers of bed linen in the Community and very important importers. The

producers in these Member States were therefore clear candidates for assessing the impact of the imports on the Community industry.

Producers in Portugal, for their part, sell a large proportion of their production in other Member States and represent about one third of the production of complainant companies. Even though Portugal is not a significant importer, therefore, it was decided that the effect of the imports on the producers there should be assessed and that Portugal should be represented in the sample.

(61) In consultation with the complainant Eurocoton an initial list of 19 companies was arrived at (eight from France, six from Germany, four from Italy and one from Portugal).

In the course of the enquiry one of these companies was eliminated from the sample for failing to cooperate with the enquiry. As a result of this exclusion, and of the exclusion of the other company under Article 4(1)(a) of the basic Regulation (see recital (54)), in the following injury analysis information given for ‘sampled producers’ is based on information supplied by the remaining 17 producers which represented 20.7 per cent of total Community production and 61.6 per cent of the production of the Community industry. They included the largest Community industry companies in Germany, Italy and Portugal, and also smaller producers. The Commission therefore considered this sample to be representative of the Community industry.”

4.102 Subsequently, the provisional Regulation set out that

“(62) Data for the examination of injury caused to the Community industry was collected and analysed at three different levels, as follows:

- at the level of the entire Community (EU-15), for trends concerning production, consumption in the Community, imports, exports and market share. Data was obtained from Eurocoton and from recognized industry sources, notably the CITH (Centre d'Information Textile et Habillement) which produces a series of production figures across the Community for the whole of textile category 20. This category is very slightly broader than the definition of the product concerned in the present proceeding. However, the difference is very slight, as the extra products it includes are of very minor significance,*
- at the level of the Community industry, as defined above, for trends concerning production, sales by value and employment,*
- at the level of the sampled Community producers, for the factors mentioned above and also for trends concerning prices and profitability.”*

4.103 The provisional Regulation then sets out the determination on the state of the domestic industry:

“(a) Production

(81) Total output of bed linen by producers in the Community fell by 9.6 per cent from 138,400 tonnes in 1992 to 125,100 tonnes in the investigation period. This fall in production arose essentially through the closure of enterprises or their cessation of bed linen production

within the Community (see recital (91) below). It should also be noted that total exports by Community producers have increased by 50 per cent, from 14,027 tonnes in 1992 to 21,756 in the investigation period. Without this export performance, Community bed linen production would have suffered further than the figures given above.

The pattern observed for total Community production was not replicated at the level of the 35 producers of the Community industry, whose production rose by 8.7 per cent from 39,370 tonnes in 1992 to 42,781 tonnes in the investigation period. The Commission concluded that the Community industry represented those companies which were strong enough to survive the competition from dumped imports and which to a certain extent had benefited from the demise of those which had not so survived.

Indeed, in the course of its investigation the Commission acquired evidence of 29 companies other than the Community industry which ceased or reduced bedlinen production in the Community between 1992 and the investigation period. It is estimated that total loss of production amounted to at least 10,000 tonnes per annum.

The sales, employment and profits of companies which have since disappeared are not included in the aggregated data for the Community industry, thus artificially improving the apparent trends for the survivors.

(b) Sales by volume

(82) At the level of the total Community producers, sales by volume in the Community, as measured by production minus exports, fell by 17 per cent from 124,400 tonnes in 1992 to 103,350 tonnes in the investigation period.

Sales by the sampled producers of the Community industry also declined, from 23,706 to 23,347 tonnes, a decrease of 1.5 per cent.

(c) Sales by value

(83) Sales by the Community industry rose by 4.2 per cent from ECU 428.6 million in 1992 to ECU 446.6 million in the investigation period. Sales by the sampled producers also rose, from ECU 280.6 million in 1992 to ECU 285.3 million (a rise of 1.7 per cent) . . .

It should be noted that among the sampled producers it was observed that sales have been maintained by seeking higher value market niches . . .

(d) Market share

(84) The market share by volume of producers at the level of the entire Community fell from 62.2 per cent in 1992 to 55.6 per cent in the investigation period. In that period the sampled producers from the Community industry increased their market share slightly, from 10.7 per cent to 11.3 per cent. The reason why the market share of survivors has slightly increased is that they have taken over some of the sales of those which had not survived the competition from dumped imports, particularly the sales of higher value niche products.

(85) An estimated analysis was done of market share by value. The patterns observed were the same as for market share by volume: producers at the level of the entire Community lost

market share (from 77.8 per cent in 1992 to 72.0 per cent in the investigation period), while the Community industry as a whole and sampled producers gained market share, from 22.4 per cent to 25.1 per cent and from 14.7 per cent to 16.0 per cent respectively.

(e) Price development

(86) The Commission examined the development in average prices achieved by the sampled Community producers for the defined reference products between 1993 and the investigation period, using a constant product mix of the reference products . . .

(87) The development in average prices per kilogram of the sampled producers was also measured. This measure showed an average price development from 100 in 1992 to 97.8 in 1993 to 103.2 in the investigation period. The fact that this measure has developed more positively than prices for the defined reference products further reflects the fact the sampled producers have been forced to move into niche markets and away from high volume, mass market products.

...

(f) Profitability

(89) The profitability of the sampled companies declined by more than 50 per cent between 1992 and the investigation period, from a figure of 3.6 per cent to 1.6 per cent of sales . . .

(90) It should be recalled again that the sampled companies are among those which have been able to survive the competition of dumped imports. It should also be noted that the industry in question is not capital intensive and that it contains a large number of SMEs, which means that any move into loss-making can lead to immediate exit rather than remaining in business waiting for better times. This is why the companies that are left are those that are profitable or, as in this case, only just profitable.

(g) Employment

(91) Direct employment by the 35 companies of the Community industry on the product concerned declined by 5.3 per cent between 1992 and the investigation period, from around 7,000 jobs to 6,700.

In analysing data on the Community industry, account should be taken of the 29 companies other than the Community industry which ceased or reduced bed linen production in the Community between 1992 and the investigation period (see recital (81)). The associated job losses numbered over 2,400.

(h) Conclusion on injury

(92) The Commission took into account all the economic indicators mentioned above in determining whether or not the Community industry was suffering material injury. Account was taken of the fact that the number of companies making up the Community industry was reduced in comparison with the start of the injury investigation period. The production, sales, employment and profits of companies which have since disappeared are not included in the

aggregated data for the Community industry, thus improving the apparent trends for the survivors.

(93) *The Commission noted the decline in the total production and market share of Community producers. This background demonstrates the difficult conditions in which the remaining Community industry was operating. The fact that these surviving companies were able to maintain production and market share should not detract from the assessment of the overall situation. Above all, the remaining Community industry suffered declining and inadequate profitability, as further evidenced by prices which had not been able to reflect increases in the costs of raw cotton or to keep pace with inflation in prices of consumer goods.*

(94) *Accordingly the Commission reached the view that the Community industry had suffered material injury.*

G. CAUSATION

...

2. Effects of the dumped imports from the countries concerned

(96) *The investigation of the Community industry showed as the main injury indicator the unsatisfactory development of sales prices and the consequent declining profitability. It was also established that the dumped imports were sold at prices which significantly undercut those of the Community producers . . .*

(98) *It was observed among sampled producers that they had been obliged increasingly to shift production and sales to high value niche markets in order to maintain production and sales levels . . .*

(99) *Since price suppression and consequent decreasing profitability to inadequate levels were the main indicators on which the Commission's finding of injury was based, and in view of the coincidence in time between the deterioration of the situation of the Community industry and the significant increase of the dumped imports, it can be concluded that there was a direct causal link between these imports and the material injury found.*

...

(105) *It is clear that the decline in consumption between 1992 and the investigation period has contributed to the situation of the Community industry. However, the fall did not affect all operators equally. During this period the total volume of sales by Community producers fell by an amount 50 per cent higher than the total fall in consumption. While sales by the Community industry have remained relatively stable, benefiting from the disappearance of other Community producers, the dumped imports from the countries concerned increased by 48 per cent. Imports from other third countries decreased by 14 per cent. Because total sales by Community producers fell by 50 per cent more than the total fall in consumption and sales by other imports declined, it can be concluded that increased dumped imports through severe price undercutting gained at least one third of the sales volumes lost by Community producers. This clearly constitutes a cause of material injury not attributable to the decline in consumption . . .*

(d) Competition from non-complainant producers in the Community

(107) *The Community industry represents only a part of total Community production. It should therefore be examined whether competition from other producers within the Community affects the situation of the Community industry. Other producers of bed linen are known to include, in particular, a large number of ‘converters’, i.e. producers who make bed linen from grey cloth woven elsewhere, whereas the Community industry consists largely of integrated producers who weave most or all of their own grey cloth. As has been found, on a provisional basis, in the separate proceeding concerning imports of grey cloth from India, Pakistan, Egypt, China, Indonesia and Turkey, important sources of supply of this product were imported into the Community at dumped prices which would have provided these producers with an unfair advantage over the Community industry in the present proceeding. It cannot therefore be ruled out that distorted competition from this source contributed to the situation of the Community industry.*

(108) *Nevertheless it should be noted that the production and market share of the non-complainant producers have fallen between 1992 and the investigation period. Indeed the fall in production across the Community has been due to reduction by the non-complainants rather than by complainants. Since the imports concerned have increased over this timescale, the Commission decided that competition by non-complainants did not invalidate the conclusion that the imports concerned caused the injury observed.*

4. Conclusion on causation

(109) *As has been shown above, there is a direct causal link between the increased volume and the price effect of the dumped imports and the material injury suffered by the Community industry. The direct link in this case is demonstrated by the existence of heavy undercutting which can reasonably explain the significant increase in market share of the dumped imports from 16.9 per cent in 1992 to 25.1 per cent in the investigation period and the corresponding negative consequences on volumes and prices of sales of Community producers. In terms of volumes, Community producers' market share decreased from 62.2 per cent in 1992 to 55.6 per cent in the investigation period. This fall was not reflected at the level of individual producers of the Community industry because they obtained sufficient benefit from the demise of other Community producers to keep their sales volume relatively stable. However, as far as the prices of the dumped imports are concerned, they have had an evident impact on the sampled producers, many of them being SMEs, whose profitability has fallen from 3.6 per cent to 1.6 per cent. In this respect, the Commission noted that such a situation can cause particular difficulty for SMEs given their lack of resources and the reluctance of banks to finance any losses . . .” (Emphasis added)*

4.104 In their comments to the provisional disclosure¹²⁹, the Indian exporters argued in detail that this determination was incorrect, since it was based on a ‘pick and choose’ method inconsistent with Article 3:

“2.2 *Definition of Community industry*

The European Commission explains in Recital 62 of the provisional duties Regulation that the injury assessment has been made at three levels, to wit:

¹²⁹ Annex 51.

- at the level of the entire Community (EC-15);
- at the level of the Community industry; and
- at the level of the sampled producers.

As a general point, Texprocil wishes to disagree with the Commission's double injury determination. In this proceeding many producers chose not to support the complaint. Even Eurocoton admits in its complaint that about one half of the EC producers did not support it.¹³⁰

The Commission subsequently determined in the provisional duties Regulation that:

"The remaining 35 companies, which cooperated with the enquiry and are located in France, Germany, Italy, Spain, Portugal, Austria and Finland, represented a major part of total Community production in the investigation period. These companies were therefore deemed to make up the Community industry under the terms of Article 4(1) of the basic Regulation." (Recital 57)

Texprocil does not contest the right of the Commission to limit the Community industry to those companies supporting the complaint. Indeed, in past proceedings the Commission has repeatedly excluded companies from the Community industry because these companies were related to exporters, or for other reasons¹³¹ . . .

. . . Article 3(1) of the basic Regulation restricts the injury determination to 'the Community industry'. This is a term of art, defined in Article 4(1). The Commission has in fact in the Bed linen Regulation determined that the 'Community industry' consists of the co-operating 35 companies.

It follows that the Commission cannot eat the cake and have it too by on the one hand restricting the Community industry to 35 companies for price undercutting purposes, and on the other hand looking at data covering all producers for the state of the Community industry determination.¹³²

Texprocil notes that any injury determination which is based on data of producers explicitly not part of the Community industry contravenes Article 3(1) of the basic Regulation.

The Commission's reasoning in Recitals 84 and 96 et seq. that the Community industry is only taking over the business of companies which went out of business is fallacious and strained, since it is based on the assumption that exactly and only these 35 companies are economically viable and able to compete, whereas the two-thirds of EC producers who do not co-operate were unable to take over market share from such allegedly disappeared firms. This raises the question why economically viable companies would complain about alleged dumping, while allegedly not-viable companies do not support this complaint.

¹³⁰ Footnote in original: Non-confidential complaint at 3.

¹³¹ Footnote omitted.

¹³² Footnote in original: Moreover, it is submitted that the sample of the Community industry should be considered representative for *all* injury factors, just as the sample of the co-operating Indian industry is considered representative for that industry.

In summary, the Commission cannot make a legally valid injury determination including other companies than those constituting the Community industry as defined in Recital 57 of the provisional duties Regulation.”

4.105 Texprocil then argued that the available data on the state of the ‘Community industry’ (domestic industry) clearly did not point toward injury. These arguments were repeated during the second injury hearing and in the second post-hearing brief¹³³ of 17 July 1997 (Annex 55).

4.106 In the definitive disclosure document (Annex 56) the EC made the following comments on the issue:

“3. Situation of the Community industry

Exporters from all the exporting countries claimed that the Commission's analysis of injury was defective in that it referred to data concerning total Community production of bed linen in assessing the situation of the Community industry. They claimed in particular that information concerning companies not included in the definition of the Community industry or which no longer produce bed linen cannot be used to construe a finding of material injury.

The Commission services examined these claims carefully. It should however be remarked that the principal basis for the finding of material injury was the reduced profitability and price suppression of the Community industry as observed among the sampled companies.

The Commission services nevertheless consider that data concerning total Community production of bed linen provide indicators of the conditions in which the Community industry was operating during the period considered. The suggestion that such data cannot be used ignores the nature of the industry under consideration. In capital-intensive sectors with high barriers to market entry and exit, material injury is less likely to manifest itself through the disappearance of economic operators. In a sector such as textiles, by contrast, difficult trading conditions will more quickly force market exit. To ignore the disappearance of significant numbers of economic operators would therefore distort the analysis of material injury between different sectors.

The Commission's finding of material injury is therefore confirmed.

H. CAUSATION

Exporters from all three countries concerned claimed that any material injury could be ascribed to the fall in consumption of 7 per cent between 1992 and the investigation period. However, as noted in recital (105) of the provisional Regulation, the total fall in sales by all Community producers significantly exceeded the total fall in consumption. As to the exporters' argument that data concerning the totality of Community production were not relevant to the determination of whether the dumped imports caused material injury, the Commission services reject this suggestion (see above, G.3) and therefore confirm the finding that the fall in consumption does not contradict the finding that the dumped imports, taken in isolation, have caused material injury to the Community industry.”

¹³³ See section 4.2 and further of that document.

4.107 In their comments on the definitive disclosure, the Indian exporters again argued that the EC's determination of the state of the domestic industry relied on companies outside the domestic industry, inconsistently with Article 3:

"4.2.1 Multi-layered injury determination

Texprocil argued during its second hearing and in its comments on the provisional disclosure that the Commission is obliged to determine whether the Community industry has suffered injury. It was argued that, apart from the question whether the Commission should take account of the 66 per cent of EC producers who explicitly are not part of the Community industry, the Commission, by taking recourse to sampling, was obliged to base its determination on the results found for the sample. In the definitive disclosure the Commission apparently did not quite understand the argument and merely noted that: [quote from definitive disclosure document]

This ignores several relevant factors. First, an injury determination is a legal assessment. The European Community agreed in the GATT/WTO context to certain rules giving guidance as to how such assessment must be made.

The EC producers can be distinguished in the following groups:

- (1) the Community industry, which represent (roughly) 34 per cent or less of existing producers;*
- (2) other EC producers, who represent over 66 per cent of EC production;*
- (3) producers who have disappeared before the IP.*

The argument made by Texprocil was that the Commission cannot legally base its injury determination on data including group (2). Moreover, the Commission's reliance on the 'disappearance' of group (3) companies does not explain why over 66 per cent, i.e., well over two-thirds of still existing producers, does not support this proceeding.

Last, there is another falsifying factor. As the Commission will undoubtedly know, the EC textile industry has gone through a major restructurization process in the past years. This involved, among others, the merger of many smaller companies in more viable units.

If, four years ago, company A was purchased by company B, the Commission's logic seems to be as follows: company A has disappeared, which is a sign of injury, notwithstanding the fact that company B has expanded its production. Such 'logic', however, does not withstand scrutiny.

Texprocil notes that the Commission, apart from the observation on pages 13-14 of the disclosure documents, has not further addressed the legal concerns of the Indian exporters.

It is submitted that this creative and highly original manner of explaining away the natural consolidation processes in the EC textile industry is not supported by letter or spirit of Articles 3 and 4 of the WTO Anti-Dumping Agreement. Texprocil regrets that the Commission's three-level injury determination could create the unfortunate impression of a 'pick-and-choose' injury assessment. In order to avoid any such impression, the Commission is again invited to explain its position vis-à-vis Texprocil's arguments in a meaningful manner, in accordance with Article 12 of the WTO Anti-Dumping Agreement."

4.108 In the definitive Regulation the EC changed the statements in the definitive disclosure document somewhat:

“E. COMMUNITY INDUSTRY

...

(34) . . . the finding that the 35 complainant companies represent a major proportion of total Community production within the meaning of Article 5(4) of the basic Regulation and that they therefore constitute the Community industry within the meaning of Article 4(1) of the basic Regulation is confirmed.

F. INJURY

...

3. Situation of the Community industry

(40) Exporters from all the exporting countries claimed that the Commission's analysis of injury was defective in that it referred to the significant decline in total Community production of bed linen in assessing the situation of the Community industry. They claimed in particular that information concerning companies not included in the definition of the Community industry or which no longer produce bed linen cannot be used to construe a finding of material injury.

These claims were examined carefully. It should however be remarked that the principal basis for the finding of material injury was the reduced profitability and price suppression of the Community industry as observed among the sampled companies.

(41) In the assessment of injury pursuant to Article 3 of the basic Regulation, the Community institutions have to assess the economic situation of the Community industry. This assessment usually covers the analysis of a time period of four to five years as in the present case ('assessment period'). Such an assessment is commonly based on an analysis of the complaining industry and not necessarily on companies accounting for the totality of Community production on the ground that the situation of a major proportion of the Community production is representative for its totality. Such an assessment, however, also has to take into account the structure and the nature of the industry under consideration. In the present case this industry is characterized by a high number of operators, in many cases small- and medium-sized companies, and by the fact that it is a sector with relatively low barriers to exit. The latter is mainly due to the fact that machinery can be sold or used for other products relatively simply. This has the effect that material injury is likely to manifest itself through the exit of economic operators within the assessment period.

Consequently, to limit the assessment of injury only to companies which are still operational at the end of the assessment period (i.e. at the time of the lodging of the complaint) and thus able actively to support a complaint would mean that any injury caused to companies which have closed down before this point in time would go unconsidered in the analysis. Furthermore, it should be noted that this distortion could even be aggravated as the surviving complaining companies of the Community industry may have benefited, possibly only

temporarily, from the disappearance of other companies, causing their positive development to be overestimated.

In the present case, it should be noted that 29 companies of the bed linen industry have closed down or ceased production: that is to say, that a substantial number of companies have ceased operation. Furthermore, given the substantial price undercutting established, the strong increase in the volumes of the imports concerned and their consequent rise in market share, any relatively positive development of the complaining producers must be seen as threatened in the absence of anti-dumping measures.

4. Conclusion

(42) The finding of material injury, within the meaning of Article 3 (1) of the basic Regulation, is therefore confirmed.”

4.109 During the consultations India expressed its concern that the EC’s determination of the state of the ‘Community industry’ was inconsistent with Article 3.4 (Annex 11):

“Mr Seth: . . . the EC concluded in Recital (57) of the provisional duties Regulation that a certain group of 35 companies constituted ‘the Community industry under the terms of Article 4(1) of the basic Regulation.’ In the definitive duties Regulation the EC confirmed this finding.

It thus follows that injury must be determined with respect to this domestic industry.

Notwithstanding this conclusion, the EC determined injury data at three levels as explained in Recital (62) of the provisional duties Regulation:

- 1) at the level of all EC producers (i.e., domestic industry + the almost two-thirds of EC producers not reckoned to be part of the domestic industry);*
- 2) at the level of the domestic industry (i.e., the 35 companies determined to be part of the Community industry); and*
- 3) at the sample level (i.e., on the basis of the sample taken from the domestic industry).*

Only as a result of occasionally including the almost two-thirds of Community producers who did not support the complaint and who patently do not belong to the ‘domestic industry’, the European Community was able to ‘determine’ that imports of bed linen from India, Pakistan and Egypt caused injury.

India believes such determination to be inconsistent with Article 3, and notably with Articles 3.1, 3.4 and 3.5.

In this respect we would like to raise the following questions 25 – 32 [see Annex 11 for details]:

[EC]: I will make some general comments. I could say that the wording of the provisional Regulation is not the best. We confirm that the ‘domestic industry’ in Article 3 is the same as that of Article 4.1. It is not true that we established injury for a larger group. For example for market share we need data from all producers in order to be able to determine the market share of the domestic industry. Therefore we have to collect data for all producers. It is

normal that, when we sample the EC industry, not all data can be obtained from the sample. Therefore, we do not see any incompatibility.

[The Indian delegation] clarifies the issue: this is factually not quite correct. For example, in Rec. 82 of the provisional Regulation the EC clearly seems to rely for other injury factors than market share on the producers not part of the domestic industry.

[EC]: No single factor is decisive. Some factors are not clearly negative. In such cases we have provided additional explanations by comparing with other competitors. This should not be confused with making an injury determination for extra-domestic industry companies. Admittedly, the Regulation is not a literary masterpiece.

...

2.3 The European Community acted inconsistently with Article 3.1 of the Agreement by not respecting the result of the EC sample

Mr Seth: There is another issue pertaining to the 'layered' injury determination.

On the EC side, the Commission selected a sample of 17 companies from the 35 companies making up the 'domestic industry'. It is noted that, as far as India is aware, the EC sample has been selected by the European Commission investigators in collaboration with and with the approval of the complainant, Eurocoton. It may be expected that the sample thus reflects the companies where the Commission is most likely to find data suggesting injury. In this sense, the sample is likely to be skewed and to present a more negative picture of the domestic industry than the domestic industry as a whole.

...

While it is acknowledged that the European Community is not obliged to sample the Community industry, it appears that, if the European Community investigators decide to limit their investigation of Indian exporters by taking recourse to sampling in accordance with Article 6.10 of the Agreement, and the result of such sample is applied to all other co-operating Indian exporters, then the result of the domestic industry sample must equally be fully applied to the whole domestic industry. Disregard of EC sample data in favour for more 'favourable' data of another group of EC producers would imply that 'the authorities' establishment of the facts' could hardly be said to be 'proper'; nor would 'their evaluation of those facts [be] unbiased and objective' as required by implication by Article 17.6 of the Agreement.

By not basing the determination whether material injury had been caused solely on the data of the Community industry sample, the European Community has acted inconsistently with Articles 3.1 and 3.4 of the Agreement. Consequently, the European Community has acted also inconsistent with Article 1 of the Agreement.

The EC sample is not 'statistically valid'

There is a third issue here. Article 6.10 of the Agreement lays down that the EC may sample 'interested parties' provided such sample is 'statistically valid'. Article 6.11 defines as an 'interested party' among others, 'a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in

the territory of the importing Member.’ This implies that the sample must be chosen from the ‘producer[s] of the like product in the importing Member’ (sampling of associations is not at play here).

Whatever the meaning of ‘statistically valid’, it would seem certain that it excludes the possibility of taking a sample from only producers supporting the application. The EC sample is therefore statistically not valid and the injury determination based on it, vitiated by errors of facts and law. India believes that the EC has acted inconsistently with Article 6.10.

...

[EC]: as far as the sample from the Community industry is concerned: we have to take the information from the Community industry. We could not include companies not part of the domestic industry. There is no clear definition of ‘statistically valid’. The main characteristics relevant to the dumping determination of the universe concerned should be reflected in the sample. These are:

- the volume of production,*
- the location of the company,*
- the integration of the producer, and*
- the range of products.*

...

If Eurocoton agreed to the Community industry sample suggestion (we worked on the basis of information from the EC), there was agreement . . . ”

4.110 The EC, in its letter of 1 October (Annex 12), provided the following additional answers:

“Question 27

Would the EC agree that the domestic industry was determined by the investigating authorities to consist of 35 companies, apparently representing around 34 per cent of EC production?

As indicated in recital (57) of the provisional duty Regulation, 35 companies were deemed to make up the Community industry. In recital (32) of the definitive duty Regulation, it is stated that all exporters from all three exporting countries observed that the complainant Community producers taken to be the Community industry made up just 34 per cent of total Community production.

Question 28

Would the EC agree that in Bed linen II it made the injury assessment on three levels, namely at?

- 1) the level of all EC producers (i.e., domestic industry + the almost two-thirds of EC producers not reckoned to be part of the domestic industry);***
- 2) the level of the domestic industry (i.e., the 35 companies determined to be part of the Community industry); and***
- 3) the sample level (i.e., on the basis of the sample taken from the domestic industry).***

The injury assessment has been made for the domestic (Community) industry only. In order to put this assessment into the adequate economic framework, as specified in recital (62) of the provisional duty Regulation, data was collected and analysed at the level of the entire Community, the level of the Community industry and at the level of the sampled Community producers depending on the economic indicators concerned.

Question 29

Can the EC explain how the inclusion of companies not belonging to the domestic industry and not supporting the proceeding is compatible with Article 3 (footnote), Article 3.4, 3.5 and 4.1?

No companies not belonging to the domestic (Community) industry have been included in the injury assessment. As is indicated in recital (93) and (94) of the provisional duty Regulation, the Community reached the view that the domestic industry (Community industry) had suffered material injury.

This approach was confirmed in recital (40) of the definitive duty Regulation.

Question 31

Would the EC agree that in the Regulation imposing provisional duties it did not even comment on sales by volume by the Community industry (domestic industry), but merely looked at data concerning all producers and the sample of 17 companies taken from the Community producers?

In recital (82) of the provisional duty Regulation, the Community has defined the framework of the Community market as far as the total sales volume of the product under investigation is concerned.

As far as the injury analysis is concerned, the Community has considered the sales volume pertaining to the sample of complaining Community producers. As set out in recitals (58) to (61) of the provisional duty Regulation, this sample was considered representative of the domestic industry (Community industry).

Question 32

Would the EC agree that in recitals (84) and (85) of the provisional duties Regulation, the injury finding hinges very strongly on the data concerning all producers, since the data concerning the Community industry do not point towards injury (increasing market share of the 'domestic industry')?

As already mentioned in the reply to your questions No. 28 and 29, the findings which led to the conclusion of material injury to the Community industry were based on injury indicators pertaining to this industry. The injury indicators which led to the conclusion of material injury to the Community industry are set out in recitals (93) and (94) of the provisional duty Regulation.

As far as the question concerning the positive developments in market share is concerned, as is rightly pointed out in your question 46 and Article 3.2 of the Agreement, one or several injury factors cannot necessarily give decisive guidance in the determination of injury.

...

Question 34

Would the EC agree that the EC sample, which has been taken entirely from companies supporting the complaint, was agreed between the EC and the complainant Eurocoton?

The sample representative of the Community industry was determined 'in consultation' with the complainant as indicated in recital (61) of the Provisional duty Regulation.

The exporters had the opportunity to comment on the selection of the sample but they did not choose to do so."

2. Claims

4.111 Three claims flow from the facts as described above:¹³⁴

4.112 First, the determination on the state of the domestic industry is inconsistent with Article 3.4 of the ADA, since

- the EC has chosen a sample from the domestic industry, but did not consistently base its injury determination on this sample;
- the EC has explicitly determined that the domestic industry consists of 35 companies, but relied in its injury determination on companies outside this group in order to determine injury;
- the EC chose to rely on different 'levels' of industry for different injury indices without any apparent other reason than goal-oriented 'picking and choosing' of injury.

4.113 Second, even if the determination on the state of the domestic industry would not have been made inconsistently with Article 3.4, the EC failed to properly explain it in the provisional Regulation and the provisional disclosure. This would entail an inconsistency with Article 12.2.1 of the ADA.

4.114 Third, even if the determination on the state of the domestic industry would not have been made inconsistently with Article 3.4, the EC failed to properly explain it in the definitive Regulation and the definitive disclosure. This would entail an inconsistency with Article 12.2.2 of the ADA.

3. Claim 15: inconsistency with Article 3.4

3.1 The text of Article 3.4

4.115 Article 3.4 ADA requires that:

"[t]he examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including . . ." (Emphasis added)

¹³⁴ It is recalled that other claims pertaining to article 3.4 are discussed separately in this submission (sections IV.B and IV.D).

4.116 As noted above, ‘domestic industry’ is defined in Article 4.1 as:

“the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products.”¹³⁵

4.117 As noted earlier in this submission¹³⁶, there have been and are provisions in GATT/WTO law with similar or identical wording to that of Article 3.4. In the context of those provisions, the concept of “domestic industry” has been scrutinized by GATT panels on prior occasions. Notably, in United States—Definition of industry concerning wine and grape products, in the context of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade:¹³⁷

“. . . the Panel held the view that Article VI of the GATT and the corresponding Code provision should, because they permitted action of a non-m.f.n. nature otherwise prohibited by Article I, be interpreted in a narrow way.

Article 6:5 of the Code gave a precise definition of a ‘domestic industry’, a definition which in the view of the Panel could not be interpreted extensively . . .”

4.118 In the same case the European Community delegation observed that:

“the EEC delegation based its views on the provisions of the Code with respect to the definition of industry. It considered the language of the Code to be precise and unequivocal in that it stipulated that countervailing duties could only be imposed if subsidized imports were causing injury to a domestic industry in the importing country as defined in Article 6:5 of the Code and the footnote to Article 6:1.”¹³⁸ (Emphasis added)

4.119 This—commendable—narrow interpretation of Article VI has thus been the standard view of the EC itself. In Canada—countervailing duty proceeding against EEC exports of boneless manufacturing beef:¹³⁹

“[t]he EEC noted that Article 6:5 of the Code defined domestic industry as domestic producers of the like product. The EEC argued that the use of the word ‘shall’ made this definition mandatory . . . The concept of ‘domestic industry’ as defined in Article 6:5 also determined the interpretation of the term ‘industry affected’ in Article 2:1. This precise definition did not allow for a creative interpretation which would upset the delicate balance of rights and obligations which was the result of laborious negotiations during the Tokyo Round.”¹⁴⁰ (Emphasis added)

¹³⁵ The exceptions in sub-paragraphs (i) and (ii) of Article 4.1 are not at play in this claim.

¹³⁶ See footnote 104 and following in section IV.B of this submission, above.

¹³⁷ Doc. SCM/71 of 24 March 1986 at § 4.5-4.6.

¹³⁸ United States—Definition of industry concerning wine and grape products, doc. SCM/71 of 24 March 1986 at § 3.10.

¹³⁹ Canada—countervailing duty proceeding against EEC exports of boneless manufacturing beef, SCM/85 (unadopted), distributed on 13 October 1987 at § 3.6.

¹⁴⁰ Ibid. at § 3.4.

4.120 Quite apart from the fact that the text of Articles 3.4 and 4.1 is crystal clear, these statements are perfectly correct and do not allow for any expansive interpretation of the ‘domestic industry’.

3.2 Legal arguments relating to the claims relating to Article 3.4

4.121 Within the context of the ‘domestic industry’ issue, there are three main arguments why the EC acted inconsistently with Article 3.4. First, the EC did rely on companies outside the domestic industry in order to find injury (section 3.2.1 of this claim). Second, the EC, once it selected a sample from among the domestic industry, was not entitled to subsequently deviate from that sample in order to find injury (section 3.2.2). Third, the EC has at no point indicated or made clear why exactly it relied on which industry level for each injury factor (section 3.2.3).

3.2.1 The EC did in fact rely on companies outside the domestic industry to find injury

4.122 It transpires from the EC’s replies given during and after the oral consultations that it considers that injury was in fact determined for the ‘domestic industry’ and that it did not rely on companies outside the domestic industry to find injury (see, for example, the written reply to question 29). This, however, is not corroborated by a careful analysis of the EC’s published provisional determination (which was confirmed by the definitive Regulation). All further references in this sub-section are to the provisional Regulation, as quoted above in section 1. Notably, India would like to draw attention to the following five points:

4.123 a. Production. If the EC did not rely on the production data for the EU-15 producers¹⁴¹, the first sub-paragraph of recital (81) is, to put it mildly, pointless. Moreover, that sub-paragraph refers to recital (91):

“(81) Total output of bed linen by producers in the Community fell by 9,6 per cent from 138 400 tonnes in 1992 to 125 100 tonnes in the investigation period. This fall in production arose essentially through the closure of enterprises or their cessation of bed linen production within the Community (see recital (91) below) . . .”

4.124 Recital (91) in turn, states in relevant part that:

“(91) . . . In analysing data on the Community industry, account should be taken of the 29 companies other than the Community industry which ceased or reduced bed linen production in the Community between 1992 and the investigation period (see recital (81)). The associated job losses numbered over 2 400.”

4.125 In other words, the EC “took account” of the companies “other than the Community industry” for the injury determination. Took account for what? Logically, for the “evaluation of all relevant economic factors and indices having a bearing on the state of the industry” as required by Article 3.4.

4.126 The word “evaluation” would seem to denote that the investigating authorities have “to judge or determine the worth or quality of; appraise”.¹⁴² Some factors may point towards a no-injury finding, whereas other factors might point towards a positive finding. The investigating authorities

¹⁴¹ Following the language of provisional Regulation at § (62) “EU-15” denotes all producers of the like product in the EC.

¹⁴² Similarly *Webster’s New World Dictionary*, 3rd College Edition, 1994, excerpt attached as Annex 57.

will have to weigh these factors. The metaphor springing to mind is that of a weighing scale, where the factors and indices concerning the domestic industry are weighted. Some factors will be negative and draw the scales toward an injury finding. Some other factors will be positive, and may militate towards a no-injury finding. Thus, in the final analysis not all factors will have to point towards injury, as long as, objectively seen, the investigating authorities could reasonably conclude that on the whole material injury existed and was caused by the “*dumped imports*”. That would imply that, in order to make an objective appraisal of the different injury factors, the determinations on each of these factors must have been relevant, objective, and in conformity with the ADA. On balance, the evaluation should point toward injury or no-injury, whereby no single factor will necessarily be decisive. However, what the EC did in recital (81) is to use the ‘injury’ allegedly and unprovably suffered by non-domestic industry producers to somehow ‘justify’ or ‘support’ the injury finding as far as production data are concerned. The image that evokes is of weighing scales where, besides the product to be weighed, the grocer performing the weighing secretly pushes a scale with his finger.

4.127 It is further noted that the production increase of 8.7 per cent for the domestic industry mentioned in the second paragraph of recital (81)¹⁴³ hardly counts as a factor indicating injury, in view of the substantial consumption decrease during the same period. Thus, it becomes clear that the Commission included non-complaining producers in order to find a decline in output.

4.128 The EC further noted that:

“the Community industry represented those companies which were strong enough to survive the competition from dumped imports and which to a certain extent had benefited from the demise of those which had not so survived.”

4.129 It would seem that every time one Community producer took over the activities of another, the Commission counted one disappeared company (attributed to dumped imports), whatever the reason for the take-over, and whatever the consequences for total production. In the climate of re-organisation of the textile industry in the EC in the beginning of the 1990s, this premise is, to use a charitable word, dubious.

4.130 This determination raises another fundamental question: how could the EC properly conclude that “*the Community industry represented those companies which were strong enough to survive the competition from dumped imports*”? The data in the Regulation point in a totally different direction, namely, that the Community industry companies thrived and took over considerable business and market share from their EC competitors. Under such circumstances, even if the Commission’s data were accepted, it is patently clear that, as far as production data are concerned, the domestic industry, *i.e.*, the 35 companies, did very well. The reply by the Commission to question 29 thus appears incongruous with the published determination.

4.131 b. Sales. Under the heading “[*s*]ales by volume” recital (82) provides data on EU-15 level, and on the level of the sampled producers. No information is provided on the domestic industry. During the consultations India asked why the EC included the first sentence of recital (on the EU-15 producers) when it did not base its decision on it. The EC answered in its written replies that:

¹⁴³ It is recalled that the second paragraph of Recital (81) reads: “*The pattern observed for total Community production was not replicated at the level of the 35 producers of the Community industry, whose production rose by 8.7 per cent from 39,370 tonnes in 1992 to 42,781 tonnes in the investigation period. The Commission concluded that the Community industry represented those companies which were strong enough to survive the competition from dumped imports and which to a certain extent had benefited from the demise of those which had not so survived.*”

“In recital (82) of the provisional duties Regulation, the Community has defined the framework of the Community market as far as the total sales volume of the product under investigation is concerned.

As far as the injury analysis is concerned, the Community has considered the sales volume pertaining to the sample of complaining Community producers . . .”

4.132 This, however, does not seem to correspond with the text of the Regulation: recital (92) clearly notes that

“[t]he Commission took into account all the economic indicators mentioned above in determining whether or not the Community industry was suffering material injury. Account was taken of the fact that the number of companies making up the Community industry was reduced in comparison with the start of the injury investigation period. The production, sales, employment and profits of companies which have since disappeared are not included in the aggregated data for the Community industry, thus improving the apparent trends for the survivors.” (Emphasis added)

4.133 In other words, the Commission did base itself on “all” the economic factors “above”, i.e., also on the first paragraph of recital (82). “All” the economic factors “above” thus implies that the Commission did base itself on the EU-15 production data. Again, this would appear to contradict the reply to question 29. Moreover, in view of the close linkage between market share data and sales data, the reply is—to put it diplomatically—unlikely.

4.134 c. Market share. Recital (84) gives information on market share by volume, which may be summarised as follows: the market share of the EU-15 producers allegedly fell, while the market share of the domestic producers increased. The Commission notes that “*[t]he reason why the market share of survivors has slightly increased is that they have taken over some of the sales of those which had not survived the competition from dumped imports*”. The EC does not explain or proffer its evidence for the unproven assumptions that (1) imports from the targeted countries destroyed EC producers, while (2) subsequently the market share of these was taken over by the domestic industry.

4.135 More important in the context of question 29 is that the Commission mentions in recital (93) that “*[t]he Commission noted the decline in the total production and market share of Community producers*”. Whose market share? Not that of the Community industry: that increased. The market share, which the Commission specifically “noted” in recital (93), is that of the EU-15 producers. The “*patterns observed*” for market share by value “*were the same*” (recital (85)). Here too, it was only the market share of the EU-15 producers that allegedly decreased, while the market shares of the domestic industry and of the sample increased! The Commission’s reply to question 29 is again irreconcilable with the text of the Regulation.

4.136 India believes to have understood the oral reply of the Commission during the first round of consultations as implying that the market share data for the EU-15 producers were only included in the Regulation since such data are necessary for making a finding on market share of the domestic industry. If this is indeed the EC’s view, it is clearly contradicted by the wording of recital (93), where the Commission placed special emphasis on the decline of the market share of the EU-15 producers.

4.137 d. Employment. In recital (91) the Commission noted that

“[i]n analysing data on the Community industry, account should be taken of the 29 companies other than the Community industry which ceased or reduced bed linen production in the Community between 1992 and the investigation period . . . The associated job losses numbered over 2 400.”

4.138 Recital (41) of the definitive duties Regulation further dealt with this issue:

“to limit the assessment of injury only to companies which are still operational at the end of the assessment period (i.e. at the time of the lodging of the complaint) and thus able actively to support a complaint would mean that any injury caused to companies which have closed down before this point in time would go unconsidered in the analysis.”

4.139 The question is begged how the EC can know that these companies would have been complainants and thus part of the Community industry if they still had existed at the time of the complaint. Even in the Commission’s determination, only 34% of EU-15 production existing at the time of the complaint supported the complainant and thus were included in the domestic industry. The Commission’s gratuitous and full inclusion of companies that disappeared well before the investigation period for the determination of employment factors clearly implies the inclusion of companies outside the 35 that make up the domestic industry. Furthermore, how can the Commission, without any evidence whatsoever, attribute such disappearance to imports that occurred in years with respect to which dumping was never established?

4.140 e. Allegedly disappeared companies. Recital (105) is noted:

“sales by the Community industry have remained relatively stable . . . Because total sales by Community producers fell by 50 per cent more than the total fall in consumption and sales by other imports declined, it can be concluded that increased dumped imports through severe price undercutting gained at least one third of the sales volumes lost by Community producers. This clearly constitutes a cause of material injury not attributable to the decline in consumption.” (Emphasis added)

4.141 The EC’s causality analysis here hinges very strongly on the sales volume of the EU-15 producers, especially since sales by the domestic industry actually increased with 4.2 per cent.¹⁴⁴

4.142 We further point to recital (92) of the provisional duties Regulation, in which the Commission clarifies that “[a]ccount was taken of the fact that the number of companies making up the Community industry was reduced in comparison with the start of the injury investigation period.” In other words, the Commission did not only base itself on the 35 companies which constituted the domestic (Community) industry, but also took “account” of other companies not belonging to the Community industry, some of which were no longer existing during the investigation period.

4.143 In summary on this argument, during the first round of consultations the Commission delegation noted that not one single factor can be decisive for an injury finding. This is, of course, correct. But that is not the issue here. Virtually the whole injury determination in the provisional Regulation is—explicitly or implicitly—based on EU-15 data. Recitals (92) and (93) indicate which factors were specifically important for the Commission to come to its finding. The Commission

¹⁴⁴ As per recital (83) of the provisional Regulation.

specially mentions production, sales, employment and profits. Of these four factors, three (production, sales and employment) were clearly based on EU-15 data.

4.144 The provisional Regulation, and consequently the definitive Regulation confirming it, is thus vitiated by an inconsistency with Article 3.4 of the ADA.

3.2.2 The EC, once it selected a sample from among the domestic industry, was not entitled to subsequently deviate from that sample in order to find injury

4.145 India takes no issue with the EC's right to resort to sampling of the domestic industry for the injury determination. This would seem evident if Articles 6.10 and 6.11 are read together:

“6.10 . . . In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties . . . by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection . . .

6.11 For the purposes of this Agreement, ‘interested parties’ shall include: . . .

(iii) a producer of the like product in the importing Member . . .” (Emphasis added)

4.146 As a first observation it is noted that the sample is drawn from the domestic industry (i.e., the 35 companies that supported the complaint), and not from the universe of EU production (therefore including the 66 per cent of EC producers that did not complain). India takes no issue with that per se: the sample should reflect the domestic industry, not total EU production. Moreover, it may be impractical to try to obtain the co-operation of the 66 per cent of EU production that did not support the complaint to start with. The point to be taken, however, is that the sample thus established is taken exclusively from companies supporting the complaint and thus, by the natural course of things, is already tilted in comparison with total EU-15 production.

4.147 As a second observation India would like to compare the treatment of the EC sample with that of the Indian sample. As discussed earlier in this submission, in this proceeding, the Indian industry was sampled, too.¹⁴⁵ Cooperation of Indian companies with the EC was 82 per cent¹⁴⁶, which compares with only 34 per cent co-operation by EC producers. Unlike the Bed linen I proceeding, the investigating authorities in Bed linen II no longer required all Indian producers to submit a full questionnaire response before selecting the sample; this time five companies were selected, as may be recalled, without agreement being obtained between Texprocil and the European Commission. Notwithstanding this lack of agreement, the EC applied the resulting sample dumping margin rigorously and mechanically to all cooperating Indian exporters¹⁴⁷ and subjected the remainder to a high residual anti-dumping duty:

“because it would constitute a bonus for non-cooperation to assume that the dumping margin attributable to exporters/producers which did not make themselves known is lower than the highest found for a cooperating exporter/producer.”¹⁴⁸

¹⁴⁵ Please refer to section III.A.1, above.

¹⁴⁶ Recital (16) of the provisional Regulation.

¹⁴⁷ With the exception, of course, of the investigated companies who got their individual dumping margins.

¹⁴⁸ Recital (51) of the provisional Regulation.

4.148 The treatment of the Indian sample contrasts with that accorded the EC sample. First, unlike the Indian sample, the European Commission obtained the agreement from the industry concerned for the EC sample. Then, the EC did not stick to the results of the sample, but rather made a determination of the state of the industry where for some factors it relied on the sample, but for many others not. For a number of factors, sample data are not even mentioned, even though such data would normally be available to the investigating authorities in the confidential versions of the questionnaire responses of the sample. It transpires from the determination that the EC especially did not rely on the sample for those factors where the data for the domestic industry or the EU-15 producers pointed to 'more injury' than the data for the sample.

4.149 In India's view, the EC was free to make its determination of the state of the domestic industry by resorting to sampling of the domestic industry. However, when it decided to do so, it should have relied on the results for that sample, and not reverted to other levels of industry when these were better suited for an injury determination.

4.150 Indeed, the EC's failure to stick to the results of the sample, especially when compared with the rigorous and mechanical application of the results of the Indian sample to India, cannot be considered an 'unbiased and objective' evaluation of the factors and indices listed in Article 3.4, within the meaning of Article 17.6(i). It follows that the EC's determination of the state of the domestic industry is inconsistent with Article 3.4 of the ADA.

3.2.3 The EC has at no point indicated or made clear why exactly it relied on which industry level for each injury factor

4.151 The provisional determination in the relevant part may be summarised as follows:

Recital	Factor or index	Industry level	Tendency
(81)	Production	EU-15 Domestic industry	Decrease of 9.6% Increase of 8.7%
(82)	Sales by volume	EU-15 Sample	Decrease of 17% Decrease of 1.5%
(83)	Sales by value	Domestic industry Sample	Increase of 4.2% Increase of 1.7%
(84)	Market share by volume	EU-15 Sample	Decrease from 62.2 to 55.6% Increase from 10.7 to 11.3%
(85)	Market share by value	EU-15 Domestic industry Sample	Decrease from 77.8 to 72% Increase from 22.4 to 25.1% Increase from 14.7 to 16%
(86)-(88)	Price development	EU-15 Sample	Decrease of 0.8% Increase of 3.2%
(89)-(90)	Profitability	Sample	Decrease from 3.6 to 1.6%
(91)	Employment	Domestic industry	Decrease of 5.3%

4.152 Even if the EC's replies to India's questions 28-32 on the 'levels of industry'¹⁴⁹ issue would be correct (*quod non*) this does not explain on what basis the EC took which factor as predominant. The EC did not indicate why it failed to even mention production by the sample; sales (volume) by the domestic industry; the market share (volume) of the domestic industry; employment of the sample; or failed to provide any information or indications on the price developments and profitability situation of the domestic industry.

4.153 There is no apparent logic as to why the EC mentioned which industry level with which injury factor. For example, why did the Commission base its conclusions for sales by volume on data concerning EC-15 production and the sample, while data on sales by value were based on the Community industry and sampled producers? Why is there no indication of the market share by volume for the domestic industry?

¹⁴⁹ The term 'industry level' is used merely as shorthand for the three levels of industry investigated by the EC, namely, the EU-15 producers, the domestic industry (the 35 producers), and the sample from the domestic industry (17 producers).

4.154 The Commission has in its written answer No 32 relied on Article 3.2 of the Agreement, which provides that “[n]o one or several of these factors can necessarily give decisive guidance”. This is true. But it cannot mean that the EC, when making an injury determination, can ‘pick and choose’ for each factor in Article 3.4, without providing any reasonable basis thereof, which industry level it will rely on to arrive at an injury finding.

4.155 The EC’s failure to indicate any basis on which it determined which element should be appropriately considered at which level, implies that the evaluation of the factors and indices was not unbiased and objective. Consequently, this determination is inconsistent with Article 3.4 of the ADA.

4.156 In summary, for the reasons indicated in IV.C.3.2.1, IV.C.3.2.2 and IV.C.3.2.3 the EC acted inconsistently with Article 3.4.

4.157 As an additional observation India notes that these infringements are not ‘repaired’ by the special rule of interpretation laid down in the second sentence of Article 17.6(ii). That rule only comes into play where the provisions of the Agreement allow for more than one interpretation. That, however, is not an issue in this case.

4. Claim 16: Inconsistency with Articles 6.10 and 6.11

4.1 The text of Articles 6.10 and 6.11

4.158 The relevant of Article 6.10 and 6.11 provides in the relevant part that:

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

6.11 For the purposes of this Agreement, ‘interested parties’ shall include:

...

(iii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.

This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties.”

4.2 Legal argument relating to Article 6.10 and 6.11

4.159 In recital (61) of the Regulation imposing provisional duties it is clear that the EC deemed its sample to be statistically valid: *“The Commission therefore considered this sample to be representative of the Community industry.”*

4.160 However, one does not have to be a mathematician or statistician to understand that the sample as drawn could never ever be representative and therefore not statistically valid. Article 6.11

defines as an ‘interested party’ among others, ‘a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.’ This implies that the sample must be chosen from the ‘producer[s] of the like product in the importing Member’ (sampling of associations is not at play here).

4.161 Whatever the exact meaning of ‘statistically valid’, it would seem certain that it excludes the possibility of taking a sample from only producers supporting the application. The EC sample was therefore statistically not valid and the injury determination based on it, vitiated by errors of facts and law. India believes that the EC has acted inconsistently with Article 6.10 and 6.11.

5. Claim 17: inconsistency with Article 12.2.1

5.1 The text of Article 12.2.1

4.162 It is recalled that Articles 12.2 and 12.2.1 of the ADA provide in relevant part as follows:

“12.2 Public notice shall be given of any preliminary or final determination, whether affirmative or negative . . . Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities . . .

12.2.1 A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular . . .

- (iv) considerations relevant to the injury determination as set out in Article 3;*
- (v) the main reasons leading to the determination.”*

5.2 Legal arguments relating to the claims relating to Article 12.2.1

4.163 Earlier in this submission, the argument was already made in the context of Article 12.2.1 that India should be able to rely on the published determinations and disclosure documents to ascertain what the basis was for the EC’s determinations.¹⁵⁰ This is equally true in the context of the issue here. There are three issues here:

4.164 First, if the EC did not rely on companies outside the domestic industry in order to determine injury, it did not explain this clearly in the provisional disclosure document or in the provisional Regulation.

4.165 Second, the EC failed to explain why for many injury factors it did not rely on the sample which it had selected in agreement with the complainant, but reverted to the domestic industry or the EU-15 producers instead.

4.166 Third, the EC has at no point indicated or made clear why it relied on which industry level for each injury factor. If there was any logical or proper motive behind this choice, it has not been made known to the Indian exporters.

¹⁵⁰ See section IV.A.5.2, above.

4.167 Fourth, the EC has at no point explained why it considered the selected sample representative (statistically valid).

4.168 In view of the importance of these issues for the Article 3.4 determination, India believes that the EC failed to explain “*in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities*” as required by Article 12.2 of the ADA. Moreover, the EC’s provisional Regulation and the provisional disclosure document thus do not contain “*sufficiently detailed explanations for the preliminary determination on injury*” as required by Article 12.2.1.

4.169 Additionally, during Texprocil’s first injury hearing and in the subsequent post-hearing brief filed by Texprocil¹⁵¹, detailed comments were made on behalf of the Indian exporters on, e.g., production data and employment data for the sample. However, the EC did not mention or comment on the production and employment data for the sample. It follows that the EC failed to “*refer to the matters of fact and law which have led to arguments being accepted or rejected*” as required by Article 12.2.1.

4.170 In summary, the EC acted inconsistently with Article 12.2.1 of the ADA.

6. Claim 18: inconsistency with Article 12.2.2

6.1 The text of Article 12.2.2

4.171 Article 12.2.2 provides in relevant part that:

“A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty . . . shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures . . . In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers . . .” (Emphasis added)

6.2 Legal arguments relating to the claims relating to Article 12.2.2

4.172 Reference is made to section IV.C.5.2, above. The three issues which were mentioned there were similarly present during the definitive stage:

4.173 First, if the EC did not rely on companies outside the domestic industry in order to determine injury, it did not explain this clearly in the definitive disclosure document or in the definitive Regulation.

4.174 Second, the EC failed to explain why for many injury factors it did not rely on the sample which it had selected in agreement with the complainant, but reverted to the domestic industry or the EU-15 producers instead.

¹⁵¹ Annex 54.

4.175 Third, the EC has at no point indicated or made clear why it relied on which industry level for each injury factor. If there was any logical or proper motive behind this choice, it has not been made known to the Indian exporters.

4.176 Fourth, the EC has never explained, made clear or indicated why it considered the sample that was drawn representative.

4.177 India therefore believes that the EC failed to explain “*the matters of fact and law and reasons which have led to the imposition of final measures*”. It further failed to properly explain the “*information described in subparagraph 2.1*”; and failed to provide “*the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters*”. In each case, it acted inconsistently with Article 12.2.2 of the ADA.

D. ARTICLES 3.4 AND 3.5: FOR THE INJURY AND CAUSALITY DETERMINATIONS THE EC TOOK INTO ACCOUNT OTHER THAN "DUMPED IMPORTS"

4.178 **Claims 19 and 20**: for the purpose of the determinations required under Articles 3.4 and 3.5 the EC considered all imports of bed linen from India in the years preceding the investigation period as ‘dumped’, even though no dumping was ever determined for these imports. This led to an incorrect finding that ‘dumped imports’ from India caused material injury to the domestic industry. The EC further failed to properly explain its reasoning, and consequently acted inconsistently with Article 12.2.1 (**claim 21**) and 12.2.2 (**claim 22**).

1. Facts

4.179 It is recalled that the complaint¹⁵² contained an Annex 2 entitled “*List of company closures*”:

“COMPANY CLOSURES AND JOB LOSSES IN SIMPLE MAKING-UP OF BED LINEN

GERMANY

1992

ERBA AG 681 jobs in total
8500 ERLANGEN

(1 part in bed linen)

1993

Spinnerei und Weberei Pfersee
Augsburgerstrasse 9
D - 86157 AUGSBURG

423 jobs

Carl HECKING GmbH & Co
Up de Hacke 15-17
D - 48691 VREDEN

169 jobs

1994

Arnold KOCK GmbH & Co
Arnold-Kock-Strasse 2
D - 47565 STEINFURT

39 jobs
has closed down its
department of bed linen production

¹⁵² Please refer to Annex 6.

Spinnerel und Weberelen ZELL-SCHÖNAU AG
Teichstrasse 4
7863 ZELL

Stopped bed linen production

TOTAL

1.312 jobs

GREECE

June 1992

PIRAIKI - PATRAIKI S.A

*234 losses estimated in the bed
linen production.*

*During the year 1992, 5 other companies had to reduce their operations with, as a result, the
loss of about 2,730 jobs.*

1995

FILIATES Textiles

n.a.

FRANCE

1990

HERITIERS DE GEORGES PERRIN

20 jobs

R.N.V.T.

33 jobs

SOLAXEN

45 jobs

(approx. 1.094 tons of production lost in bed linen)

1991

ETS. GERMAIN FRERES

17 jobs

TISSAGE ET FILATURE D'AUCHEL

43 jobs

HERITIERS GEORGES PERRIN

33 jobs

(approx. 1.348 tons of production lost in bed linen)

1992

WALTER SEITZ PRODUCTION

38 jobs

SONEP S.A. in Baisieux (makers-up)

BRUNER VILLENBACHER in Cernay (makers-up)

1993

CLAEYS et Fils in Houplines (makers-up)

DEFONGES OLIVIER in Marcq en Baroeul (makers-up)

CANONNE in Saint-Aubert (makers-up)

SOMACO in Riorges (weavers)

WALTER-SEITZ (weavers)

1994

CEDE SARL in Vitry-le-François (makers-up)
HARLE in Tergnier (makers-up)

1995

MDT DEVELLOTTE in La Baule (converters)

1996

SAVOIR FAIRE TEXTILE (converters)
CUSTOMAGIC in Halluin (converters)

TOTAL OF JOB LOSSES IN FRANCE: 448 (19 firmes)

ITALY

1991

TESSITURA GIORI 94 jobs

1992

CUSINI TOMMASO 53 jobs

SAPONARO }
ROSSI SIMEONE } 101 jobs lost
CARMINATI) in these 4 companies
MAURI }

Companies having given up bed linen production

CLERICI E PASTORELLI

PIAZZA

The following company has suffered 30 job losses over the last years: ELIOLONA

TOTAL 279 jobs

UNITED KINGDOM

1990

TAYLOR & HARTLEY FABRICS Ltd 60 jobs

EMBSEY (COURTAULDS) 89 jobs

1991

SMITH & NEPHEW TEXTILES Ltd -
CHATBURN 87 jobs

TOTAL 184 jobs

1988/1991

8 finishing and simple making-up mills of the COATS VIYELLA HOME FURMSHING Group (among which 5 in HEMMING) - about 600 job losses.

PORTUGAL

1991

About 702 job losses in different activity reductions. }

1992

COELIMA : restructuring with 663 job losses }

}
}
} TOTAL: 1.365 jobs
}

BELGIUM

N.V. SOLINTEX

Kortrijksestraat 387 - PB 134

B - 8500 KORTRIJK

This company first closed down the weaving mill, becoming a converter and later had to stop also this unprofitable activity.

Production tonnage lost : 1.300 tons

179 job losses" (Emphasis in original)

4.180 The Indian exporters argued from the beginning of the proceeding that their exports of bed linen to the EC had not caused injury. Such arguments were made in the submission on injury¹⁵³, during their first injury hearing on 13 January 1997, and in the post-hearing brief submitted on 6 February 1997.¹⁵⁴

4.181 In its provisional Regulation the EC made a determination on injury and causality which in relevant part reads as follows:

"F. INJURY

...

6. Situation of the Community industry

(a) Production

(81) Total output of bed linen by producers in the Community fell by 9.6 per cent from 138,400 tonnes in 1992 to 125,100 tonnes in the investigation period. This fall in production arose essentially through the closure of enterprises or their cessation of bed linen production within the Community (see recital (91) below) . . .

Indeed, in the course of its investigation the Commission acquired evidence of 29 companies other than the Community industry which ceased or reduced bedlinen production in the

¹⁵³ Annex 50.

¹⁵⁴ Annex 54.

Community between 1992 and the investigation period. It is estimated that total loss of production amounted to at least 10,000 tonnes per annum.

The sales, employment and profits of companies which have since disappeared are not included in the aggregated data for the Community industry, thus artificially improving the apparent trends for the survivors.

(b) Sales by volume

(82) At the level of the total Community producers, sales by volume in the Community, as measured by production minus exports, fell by 17 per cent from 124,400 tonnes in 1992 to 103,350 tonnes in the investigation period.

Sales by the sampled producers of the Community industry also declined, from 23,706 to 23,347 tonnes, a decrease of 1.5 per cent.

(c) Sales by value

(83) Sales by the Community industry rose by 4.2 per cent from ECU 428.6 million in 1992 to ECU 446.6 million in the investigation period. Sales by the sampled producers also rose, from ECU 280.6 million in 1992 to ECU 285.3 million (a rise of 1.7 per cent). It should be noted that these rises in nominal terms do not take account of inflation and represent a fall in real terms, since consumer prices in ecus rose by 5.5 per cent over the same period for the EU-15 countries. It should also be noted that these rises were overtaken by rises in the price of raw cotton (see recital (88) below).

It should be noted that among the sampled producers it was observed that sales have been maintained by seeking higher value market niches as the lower value, mass market items are undercut by imports. This pattern is indicated by developments on prices (see recital (87) below).

(d) Market share

(84) The market share by volume of producers at the level of the entire Community fell from 62.2 per cent in 1992 to 55.6 per cent in the investigation period. In that period the sampled producers from the Community industry increased their market share slightly, from 10.7 per cent to 11.3 per cent. The reason why the market share of survivors has slightly increased is that they have taken over some of the sales of those which had not survived the competition from dumped imports, particularly the sales of higher value niche products.

(85) An estimated analysis was done of market share by value. The patterns observed were the same as for market share by volume: producers at the level of the entire Community lost market share (from 77.8 per cent in 1992 to 72.0 per cent in the investigation period), while the Community industry as a whole and sampled producers gained market share, from 22.4 per cent to 25.1 per cent and from 14.7 per cent to 16.0 per cent respectively.

...

(h) Conclusion on injury

(92) *The Commission took into account all the economic indicators mentioned above in determining whether or not the Community industry was suffering material injury. Account was taken of the fact that the number of companies making up the Community industry was reduced in comparison with the start of the injury investigation period. The production, sales, employment and profits of companies which have since disappeared are not included in the aggregated data for the Community industry, thus improving the apparent trends for the survivors.*

...

G. CAUSATION

...

2. Effects of the dumped imports from the countries concerned

(96) *The investigation of the Community industry showed as the main injury indicator the unsatisfactory development of sales prices and the consequent declining profitability. It was also established that the dumped imports were sold at prices which significantly undercut those of the Community producers and in substantial and increasing quantities, reaching 25 per cent market share in the investigation period.*

...

(98) *It was observed among sampled producers that they had been obliged increasingly to shift production and sales to high value niche markets in order to maintain production and sales levels. The undercutting calculation provided evidence that this shift was caused by the imports concerned. Undercutting margins were lower in the lower value qualities, indicating that the imports significantly influence price levels in this market segment and have forced down Community producers' prices. Where higher value items were imported the undercutting margins were higher, indicating that imports of these qualities were not yet at sufficient volume to bring down Community prices to the same extent.*

It is worth noting that the Commission has received indications from importers, from Community producers and from suppliers of textile machinery to the exporting countries to the effect that exporters in the countries concerned are increasingly moving to higher value items.

(99) *Since price suppression and consequent decreasing profitability to inadequate levels were the main indicators on which the Commission's finding of injury was based, and in view of the coincidence in time between the deterioration of the situation of the Community industry and the significant increase of the dumped imports, it can be concluded that there was a direct causal link between these imports and the material injury found.*

...

4. Conclusion on causation

(109) *As has been shown above, there is a direct causal link between the increased volume and the price effect of the dumped imports and the material injury suffered by the Community*

industry. The direct link in this case is demonstrated by the existence of heavy undercutting which can reasonably explain the significant increase in market share of the dumped imports from 16.9 per cent in 1992 to 25.1 per cent in the investigation period and the corresponding negative consequences on volumes and prices of sales of Community producers. In terms of volumes, Community producers' market share decreased from 62.2 per cent in 1992 to 55.6 per cent in the investigation period. This fall was not reflected at the level of individual producers of the Community industry because they obtained sufficient benefit from the demise of other Community producers to keep their sales volume relatively stable. However, as far as the prices of the dumped imports are concerned, they have had an evident impact on the sampled producers, many of them being SMEs, whose profitability has fallen from 3.6 per cent to 1.6 per cent. In this respect, the Commission noted that such a situation can cause particular difficulty for SMEs given their lack of resources and the reluctance of banks to finance any losses.

(110) The consequent impact of the low-priced dumped imports has to be considered at two levels. Firstly, they have resulted in the exit of a significant number of firms with a considerable number of jobs lost. This is an on-going process which is likely to continue if dumping persists. Secondly, as to the surviving producers, they face continuing injury on two fronts. For low-value products the injury is very heavy since they are gradually pushed out of the corresponding market segment. For higher-value products, these producers have done considerably better but dumped imports are now progressively targeting this segment with the result that profitability is also falling in this respect . . .” (Emphasis added)

4.182 The Indian exporters made substantial arguments following this determination.¹⁵⁵

4.183 In the definitive Regulation the EC provided the following explanations on the state of the domestic industry:

“(40) Exporters from all the exporting countries claimed that the Commission's analysis of injury was defective in that it referred to the significant decline in total Community production of bed linen in assessing the situation of the Community industry. They claimed in particular that information concerning companies not included in the definition of the Community industry or which no longer produce bed linen cannot be used to construe a finding of material injury.

These claims were examined carefully. It should however be remarked that the principal basis for the finding of material injury was the reduced profitability and price suppression of the Community industry as observed among the sampled companies.

(41) In the assessment of injury pursuant to Article 3 of the basic Regulation, the Community institutions have to assess the economic situation of the Community industry. This assessment usually covers the analysis of a time period of four to five years as in the present case ('assessment period'). Such an assessment is commonly based on an analysis of the complaining industry and not necessarily on companies accounting for the totality of Community production on the ground that the situation of a major proportion of the Community production is representative for its totality. Such an assessment, however, also has to take into account the structure and the nature of the industry under consideration. In the present case this industry is characterized by a high number of operators, in many cases small- and medium-sized companies, and by the fact that it is a sector with relatively low

¹⁵⁵ Annexes 51 and 55.

barriers to exit. The latter is mainly due to the fact that machinery can be sold or used for other products relatively simply. This has the effect that material injury is likely to manifest itself through the exit of economic operators within the assessment period.

Consequently, to limit the assessment of injury only to companies which are still operational at the end of the assessment period (i.e. at the time of the lodging of the complaint) and thus able actively to support a complaint would mean that any injury caused to companies which have closed down before this point in time would go unconsidered in the analysis. Furthermore, it should be noted that this distortion could even be aggravated as the surviving complaining companies of the Community industry may have benefited, possibly only temporarily, from the disappearance of other companies, causing their positive development to be overestimated.

In the present case, it should be noted that 29 companies of the bed linen industry have closed down or ceased production: that is to say, that a substantial number of companies have ceased operation. Furthermore, given the substantial price undercutting established, the strong increase in the volumes of the imports concerned and their consequent rise in market share, any relatively positive development of the complaining producers must be seen as threatened in the absence of anti-dumping measures.” (Emphasis added)

4.184 During the consultations, India raised its concern that imports other than dumped imports had been taken into account for the assessment of injury:¹⁵⁶

“Mr Seth: Several provisions in Article 3 of the Agreement require that injury caused by dumped imports be determined. Article 3.1 requires that

‘[a] determination of injury . . . shall . . . involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.’

Similarly, Articles 3.2, 3.4, 3.5, 3.6 and 3.7 refer to ‘dumped imports’ as opposed to ‘all imports of the product concerned’. The European Community has . . . included non-dumped imports in its determination and this affects each and all of these provisions.

. . .”

4.185 During the second round of consultations the matter was raised again [see Annex 13].

2. EC practice

4.186 In EC practice, the injury determination consists of two elements. An injury (underselling (or undercutting)) margin is calculated per investigated exporter. In Bed linen II the investigation period [“IP”] covered the period from 1 July 1995 to 30 June 1996.¹⁵⁷ This underselling margin is calculated over the investigation period.

4.187 Second, for the determination of the impact of the “*dumped imports*” on the domestic industry, normally a reference is made to a 4-5 year period, ending with and including the

¹⁵⁶ The verbatim report of the first round of consultations is attached as Annex 11.

¹⁵⁷ Provisional Regulation at recital (9).

investigation period. In the Bed linen II proceeding this period lasted from 1992 up to the end of the investigation period.¹⁵⁸

4.188 The EC implicitly considers all Indian exports to the EC during the investigation to have been dumped. This is standard practice: “*The injury analysis concerning the examination of the volume and price effects of the dumped imports will also take into consideration imports with no or de minimis dumping margins . . .*”¹⁵⁹

4.189 The EC further assumes that all imports of the like product in the years immediately preceding the investigation period were dumped. This also appears to be standard practice:

“[The Indian delegation] clarifies that India takes no issue with the EC practice to look at a longer period. India’s problem is that the EC seems to automatically assume when assessing the impact of ‘dumped imports’ on the domestic industry that all imports in the preceding years are considered as dumped. Our second problem is that there were a number of product types exported from India during the investigation period which were clearly not dumped. The EC could not automatically without explanation consider these as dumped.

[EC]: You recognise that this is normal practice. I cannot deny there is an assumption element. We make the dumping over the like product. On this basis we found that the dumping determination covered all imports during the IP. We compensated for this by using WA-to-WA comparison in the dumping margins.”

4.190 During the second round of consultations, the EC explained the ‘logic’ behind this practice:

“[EC]: The investigation showed that there was dumping and injury for exactly the same twelve-month period. Of course, a longer period was used to compare data. This is a safeguard for the parties involved, because you then have a proper picture.”

4.191 In effect, however, the EC considers the whole period starting in 1992 and ending with the investigation period, and essentially looked at the differences between the situation in 1992 and the IP. Rather than putting the data on the situation of the domestic industry in the IP relief, the determination on the state of the EC industry is made for the whole period 1992-IP.

4.192 In this context it is illustrative that in recital (92) of the provisional Regulation the EC refers to this period as the “*injury investigation period*”, implying that the determination on the Community industry was made over the period 1992-IP rather than over the IP.

3. Claims

4.193 Several claims follow from the facts as described above.¹⁶⁰

4.194 First, India believes that the EC practice to automatically consider as “*dumped*” all imports of bed linen from India in the years preceding the investigation period, is inconsistent with Article 3.4.

4.195 Second, India believes that the same set of facts also leads to a causality finding inconsistent with Article 3.5.

¹⁵⁸ Ibid.

¹⁵⁹ Müller, Khan, Neumann, *EC Anti-Dumping Law—A Commentary on Regulation 384/96* at 189.

¹⁶⁰ Claims pertaining to other issues involving Article 3.4 are discussed in sections IV.B and IV.C, respectively.

4.196 Third, in the provisional Regulation the EC has insufficiently explained the basis for its finding that imports of bed linen from India ‘caused’ material injury to the domestic industry. This is inconsistent with Article 12.2.1.

4.197 Fourth, in the definitive Regulation the EC has insufficiently explained the basis for its finding that imports of bed linen from India “*caused*” material injury to the domestic industry. This is inconsistent with Article 12.2.2.

4. Claim 19: inconsistency with Article 3.4

4.1 The text of Article 3.4

4.198 Articles 3.1 to 3.5 of the ADA require that injury caused by dumped imports be determined. Article 3.4 provides in relevant part that:

“The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including . . .” (Emphasis added)

4.199 Throughout Article 3 the language is consistent: the injury to the domestic industry must have been caused by “*dumped imports*”. India already took issue with the EC’s practice to consider all imports of bed linen from India during the investigation period as dumped (please refer to the claims on Article 3.1, above). The question now is whether “*dumped imports*” include imports in the period 1992 up to, but not including the investigation period.

4.200 In the view of India, the plain meaning of the words “*dumped imports*” is unequivocal: imports determined to have been dumped. In this context, Article 2.1 of the ADA is of relevance:

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

4.201 Article 2.1 is not limited to “*for the purpose of this Article*”; rather, the definition of “*dumped*” contained in it is also applicable to other Articles of the ADA. In other words, imports in Article 3 are only considered to be “*dumped*” if they have been introduced into the commerce of the EC at less than their normal value, if their export price is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in India.

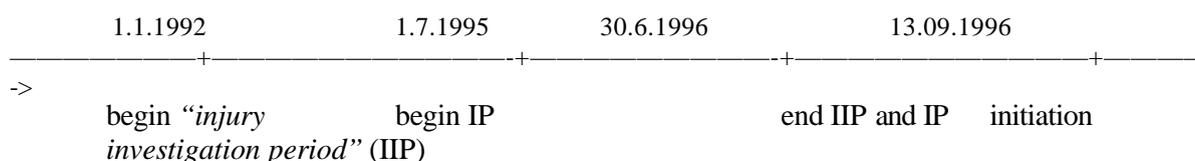
4.202 Under Article 17.6(ii) of the ADA the Panel will interpret:

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

4.203 However, in the clear language of the Agreement as interpreted in accordance with the customary rules of interpretation of public international law “*dumped imports*” would seem to mean “*dumped imports*”, and not “*dumped and non-dumped imports of the like product*”. The issue of the second sentence of Article 17.6(ii) therefore does not arise in this context.

4.2 Legal arguments relating to the claims relating to Article 3.4

4.204 For the convenience of the Panel, the time flow of the events relevant for this claim is set out as follows:



4.205 From the outset it must be made clear that no issue is taken with the practice of the EC to consider the years immediately preceding the investigating period. Indeed, in order to make a meaningful injury and causality determination, it will be necessary for the EC to do so.

4.206 This is not the same thing as making one assessment for the whole “*injury investigation period*”. For example, the allegations contained in Annex 2 of the complaint (quoted above) virtually all concerned companies which (as far as India can discern) terminated business or laid off staff in the period 1988 up to the investigation period. It is not excluded that such allegations may have a certain role in the context of prima facie evidence and the standard of Article 5.2.¹⁶¹ However, even if proven true, they would not be evidence of injury caused by “*dumped imports*” (*i.e.*, by imports taking place during the investigation period of 1 July 1995 to 30 June 1996).

4.207 In the injury determination the EC at several instances puts great emphasis on companies allegedly disappeared from the EC market in the period 1992-IP. Recital (81) of the provisional Regulation mentions:

“evidence of 29 companies other than the Community industry which ceased or reduced bedlinen production in the Community between 1992 and the investigation period. It is estimated that total loss of production amounted to at least 10,000 tonnes per annum.”

4.208 The closest thing to ‘evidence’ (if such a distinguished word may be used) in the non-confidential file indicative of this statement were precisely the allegations contained in Annex 2 of the complaint, and one letter from Eurocoton with further unproven allegations.¹⁶² The Commission subsequently noted that:

¹⁶¹ This statement is not intended as recognising in any way that these allegations were correct, factually true, or in any way relevant.

¹⁶² If the companies allegedly affected before 1992 as well as the pure weavers are discounted, this leaves the following list of companies in the complaint that allegedly went (partially or totally) out of business:

1. Erba AG; 2. Spinnerei und Weberei Pfersee; 3. Carl HECKING GmbH & Co; 4. Arnold KOCK GmbH & Co; 5. Spinnerei und Webereien Zell-Schönau AG; 6. Piraiki-Patraiki S.A.; 7. Filiales Textiles; 8. Walter Seitz Production; 9. Sonep S.A. in Baisieux (makers-up); 10. Bruner Villenbacher in Cernay (makers-up); 11. Claeys et Fils in Houplines (makers-up); 12. Desfonges Olivier in Marcq en Baroeul (makers-up); 13. Canonne in Saint-Aubert (makers-up); 14. Cede SARL in Vitry-le-François (makers-up); 15. Harle in Tergnier (makers-up); 16. MDT Develotte in La Baule (converters); 17. Savoir Faire Textile (converters); 18. Customagic in Halluin (converters); 19. Cusini Tommaso; 20. Saponaro; 21. Rossi Simeone; 22. Carminati; 23.

“[t]he sales, employment and profits of companies which have since disappeared are not included in the aggregated data for the Community industry, thus artificially improving the apparent trends for the survivors.”

4.209 This particular statement, if it is at all intelligible, would appear to imply that the Commission has taken account of these 29 companies when making the evaluation of the state of the domestic industry. This is very clear in recital (91) of the provisional Regulation:

“. . . In analysing data on the Community industry, account should be taken of the 29 companies other than the Community industry which ceased or reduced bed linen production in the Community between 1992 and the investigation period (see recital (81)). The associated job losses numbered over 2 400.” (Emphasis added)

4.210 And in recital (92) (“*Conclusion on injury*”):

“The Commission took into account all the economic indicators mentioned above in determining whether or not the Community industry was suffering material injury. Account was taken of the fact that the number of companies making up the Community industry was reduced in comparison with the start of the injury investigation period. The production, sales, employment and profits of companies which have since disappeared are not included in the aggregated data for the Community industry, thus improving the apparent trends for the survivors.” (Emphasis added)

4.211 This conclusion leaves no doubt that the alleged disappearance of the 29 companies was a factor taken on board for the evaluation required under Article 3.4.

4.212 This line of reasoning was maintained in the definitive Regulation:

“(40) Exporters from all the exporting countries claimed that the Commission's analysis of injury was defective in that it referred to the significant decline in total Community production of bed linen in assessing the situation of the Community industry. They claimed in particular that information concerning companies not included in the definition of the

Mauri; 24. Clerici e Pastorelli; 25. Piazza; 26. Eliolona; 27. Coelima; 28. N.V. Solintex, as well as the further unexplained mention of “5 other companies had to reduce their operations with, as a result, the loss of about 2.730 jobs”. However, it must be noted that this summary is partially speculative, since the EC did not make further evidence available on the matter and India thus does not know exactly which companies belonged to the 29.

In this context India notes the dictum in Korea—Anti-dumping duties on imports of polyacetal resins from the United States, Report of the Panel, ADP/92 and Corr.1 of 2 April 1993 at § 254:

“For the reasons set forth in the preceding paragraphs, the Panel was of the view that it was unable to ascertain from the text of the determination on what factual basis the KTC had found that the level of net profit in 1989 was insufficient to enable the industry ‘to maintain normal operations and development.’ While there might have been relevant information before the KTC in this regard, the determination did not enable the Panel to determine how this information had been evaluated by the KTC in making this finding. The Panel recalled its statement in paragraphs 227 and 228 regarding the considerations by which it was guided in reviewing whether the KTC's determination was based on positive evidence. The Panel concluded that the KTC's finding that the level of net profit in 1989 was not sufficient to permit the industry ‘to maintain normal operations and development’ was not adequately substantiated by positive evidence and was thereby inconsistent with Korea's obligations under Article 3:1 of the Agreement.

The letter from Eurocoton is attached as Annex 80.

Community industry or which no longer produce bed linen cannot be used to construe a finding of material injury.

These claims were examined carefully. It should however be remarked that the principal basis for the finding of material injury was the reduced profitability and price suppression of the Community industry as observed among the sampled companies.

(41) In the assessment of injury pursuant to Article 3 of the basic Regulation, the Community institutions have to assess the economic situation of the Community industry. This assessment usually covers the analysis of a time period of four to five years as in the present case ('assessment period'). Such an assessment is commonly based on an analysis of the complaining industry and not necessarily on companies accounting for the totality of Community production on the ground that the situation of a major proportion of the Community production is representative for its totality. Such an assessment, however, also has to take into account the structure and the nature of the industry under consideration. In the present case this industry is characterized by a high number of operators, in many cases small- and medium-sized companies, and by the fact that it is a sector with relatively low barriers to exit. The latter is mainly due to the fact that machinery can be sold or used for other products relatively simply. This has the effect that material injury is likely to manifest itself through the exit of economic operators within the assessment period.

Consequently, to limit the assessment of injury only to companies which are still operational at the end of the assessment period (i.e. at the time of the lodging of the complaint) and thus able actively to support a complaint would mean that any injury caused to companies which have closed down before this point in time would go unconsidered in the analysis. Furthermore, it should be noted that this distortion could even be aggravated as the surviving complaining companies of the Community industry may have benefited, possibly only temporarily, from the disappearance of other companies, causing their positive development to be overestimated.

In the present case, it should be noted that 29 companies of the bed linen industry have closed down or ceased production: that is to say, that a substantial number of companies have ceased operation. Furthermore, given the substantial price undercutting established, the strong increase in the volumes of the imports concerned and their consequent rise in market share, any relatively positive development of the complaining producers must be seen as threatened in the absence of anti-dumping measures." (Emphasis added)

4.213 As a preliminary remark, it would follow from previous GATT jurisprudence that India may rely on the published notice to ascertain what factors led the EC to impose anti-dumping duties.¹⁶³

¹⁶³ In Korea—Anti-dumping duties on imports of polyacetal resins from the United States, Report of the Panel, ADP/92 and Corr.1 of 2 April 1993 at § 209 the Panel noted (in the context of the 1979 Anti-Dumping Code) that:

"... Article 3 of the Agreement required investigating authorities to consider certain factors and to make a determination based on positive evidence with regard to these factors. In the view of the Panel, effective review under Article 15 of an injury determination against the standards set forth in Article 3 required an adequate explanation by the investigating authorities of how they had considered and evaluated the evidence with regard to the factors provided for in that Article. Interpreted in conjunction with Article 8:5, such an explanation had to be provided in a public notice. An explanation of how in a given case investigating authorities had evaluated the factual evidence before them pertaining to the factors to be considered under Article 3 clearly fell within the scope of the requirement in Article 8:5 that authorities articulate in a public notice "the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities, and the reasons and basis

4.214 The EC seems to assume without further comment that less companies implies less production.¹⁶⁴ No further evidence has been provided that the alleged demise of these 29 companies did in fact imply in each case a reduction of production.

4.215 The injury determination should not have taken account of injury allegedly caused by Indian imports before the investigation period. No dumping finding was ever made pertaining to imports of Indian bed linen in the period from 1992 up to the investigation period; indeed, the first anti-dumping proceeding concerning Bed linen was terminated and never led to such dumping (or injury) finding. There was therefore no basis in the ADA to consider such imports as having been “dumped”. The EC could not attribute the alleged closures and dismissals of the 29 companies in the period from 1992 up to the IP to the “dumped imports” during the IP, since these imports only occurred after the alleged company closures. The authorities’ establishment of the facts for the Article 3.4 determination was thus not proper and the evaluation of those facts was not unbiased and objective.

4.216 For these reasons India believes that the EC acted inconsistently with Article 3.4.

5. Claim 20: inconsistency with Article 3.5

4.217 Article 3.5 provides that the material injury determined on the basis of Article 3 must be caused by the “dumped imports”:

“3.5 It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include inter alia the volume and prices of imports not sold at dumping prices . . .”

(Emphasis added)

4.218 The reasoning developed in section 4, above, on the meaning of “dumped imports” is equally applicable for Article 3.5: India believes that the term “dumped imports” in 3.5 has no meaning differently from its equivalent in Article 3.4. For the analysis of that term reference is thus made to section 4, above.

4.219 There is, however, an additional element which must be noted: the words “*through the effects of dumping*” in Article 3.5 leave no doubt as to the emphasis on the dumped character of the imports. Under EC practice as applied in the Bed linen II proceeding, this provision is robbed of its meaning.

therefor.” This provision served the important purpose of transparency by requiring duly motivated public decisions as the basis for the imposition of anti-dumping duties. In the view of the Panel, the purpose of this provision would be frustrated if in a dispute settlement proceeding under Article 15 of the Agreement a Party were allowed to defend a challenged injury determination by reference to alleged reasons for such determination which were not part of a public statement of reasons accompanying that determination . . .”

¹⁶⁴ It would seem under the Commission’s logic that two companies merging but retaining their total production quality would imply the loss of one company and thus a sign of injury. Although Indian exporters protested against the automatic and unproven assumptions underlying the EC’s logic, this issue was merely met with the quote from the definitive Regulation discussed above.

4.220 India believes on this basis that the EC acted inconsistently with Article 3.5 by automatically considering all imports of bed linen from India in the period 1992-30 June 1995 as “dumped”.

6. Claim 21: inconsistency with Article 12.2.1

6.1 The text of Article 12.2.1

4.221 Article 12.2.1 was already discussed in the context of India’s claim concerning Article 3.1.

6.2 Legal arguments relating to the claims relating to Article 12.2.1

4.222 It is recalled that in anti-dumping proceedings the investigating authorities have a very dominant position as far as knowledge of the facts is concerned. This is even more so in the EC, where the European Commission is the only entity having access to all facts relating to the initiation. Only the EC authorities know what 29 companies were intended in the Regulation.

4.223 Article 12 fulfils in this context a crucial rôle to ensure a certain degree of transparency. In this context the *dictum* of the Panel in Korea—Anti-dumping duties on imports of polyacetal resins from the United States is recalled:¹⁶⁵

“In the view of the Panel, the purpose of this provision would be frustrated if in a dispute settlement proceeding . . . a Party were allowed to defend a challenged . . . determination by reference to alleged reasons for such determination which were not part of a public statement of reasons accompanying that determination . . .”

4.224 India may rely on the published Regulations and the disclosure documents to reflect the EC’s determinations accurately.

4.225 There are two arguments why the EC failed to properly explain its determination.

4.226 First, if the EC for the purposes of Articles 3.4 and 3.5 made its determination of material injury only concerning the “dumped” imports, there is nothing in the published Regulations or the non-confidential file to show for it. On the contrary, the Regulations seem to be clearly (partially) based on injury caused before the investigation period (e.g., by imports not determined to have been dumped). If the EC did not rely on imports during the period 1992-30 June 1995 for its injury and causality finding, this has not been explained in any comprehensible manner in the provisional Regulation.

4.227 It follows that the EC, assuming *arguendo* that it did not rely on imports not determined to have been dumped, has failed to explain this properly in the provisional Regulation or the provisional disclosure, and therewith acted inconsistently with Article 12.2.1.

4.228 Second, in recital (89) of the provisional Regulation the EC observes that:

“The profitability of the sampled companies declined by more than 50 per cent between 1992 and the investigation period, from a figure of 3.6 per cent to 1.6 per cent of sales. This is well below the figure of 5 per cent which can be regarded as a minimum level which was achieved

¹⁶⁵ Korea—Anti-dumping duties on imports of polyacetal resins from the United States, Report of the Panel, ADP/92 and Corr.1 of 2 April 1993 at § 209.

by these companies in 1991 when the dumped imports concerned were 30 per cent lower than in the investigation period. It is also below profit levels achieved by importers, which explains why certain producers have ceased production and switched to importing.”

4.229 There has never been any determination or even allegation that imports of bed linen from India in 1991 were “dumped” as defined in Article 2.1 of the ADA. Consequently, this statement is suggestive but totally unproven, and does not meet the standards laid down in Article 12.2.1.

7. Claim 22: inconsistency with Article 12.2.2

7.1 The text of Article 12.2.2

4.230 India recalls the text of Article 12.2.2:

“A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty . . . shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers . . .” (Emphasis added)

7.2 Legal arguments relating to the claims relating to Article 12.2.2

4.231 In their definitive disclosure comments the Indian exporters commented on the provisional Regulation and disclosure document that:

“there is another falsifying factor. As the Commission will undoubtedly know, the EC textile industry has gone through a major restructuring process in the past years. This involved, among others, the merger of many smaller companies in more viable units.

If, four years ago, company A was purchased by company B, the Commission’s logic seems to be as follows: company A has disappeared, which is a sign of injury, notwithstanding the fact that company B has expanded its production. Such ‘logic’, however, does not withstand scrutiny.”

4.232 The reply in the definitive Regulation to this argument stressed that:

“(41) In the assessment of injury pursuant to Article 3 of the basic Regulation, the Community institutions have to assess the economic situation of the Community industry. This assessment usually covers the analysis of a time period of four to five years as in the present case (‘assessment period’). Such an assessment is commonly based on an analysis of the complaining industry and not necessarily on companies accounting for the totality of Community production on the ground that the situation of a major proportion of the Community production is representative for its totality. Such an assessment, however, also has to take into account the structure and the nature of the industry under consideration. In the present case this industry is characterized by a high number of operators, in many cases small- and medium-sized companies, and by the fact that it is a sector with relatively low barriers to exit. The latter is mainly due to the fact that machinery can be sold or used for

other products relatively simply. This has the effect that material injury is likely to manifest itself through the exit of economic operators within the assessment period.

Consequently, to limit the assessment of injury only to companies which are still operational at the end of the assessment period (i.e. at the time of the lodging of the complaint) and thus able actively to support a complaint would mean that any injury caused to companies which have closed down before this point in time would go unconsidered in the analysis. Furthermore, it should be noted that this distortion could even be aggravated as the surviving complaining companies of the Community industry may have benefited, possibly only temporarily, from the disappearance of other companies, causing their positive development to be overestimated.

In the present case, it should be noted that 29 companies of the bed linen industry have closed down or ceased production: that is to say, that a substantial number of companies have ceased operation. Furthermore, given the substantial price undercutting established, the strong increase in the volumes of the imports concerned and their consequent rise in market share, any relatively positive development of the complaining producers must be seen as threatened in the absence of anti-dumping measures.”

4.233 The EC at no point addressed Texprocil’s point made in the comments¹⁶⁶ to the definitive disclosure that the restructuring of the EC textile industry¹⁶⁷ influenced the injury situation.

4.234 Moreover, the EC appeared to continue to consider imports of bed linen from India in the period 1992-30 June 1995 as “dumped” without elaborating on what basis it did so. This is inconsistent with Article 12.2.2 of the ADA since the EC did not explain how injury caused in the period 1992-30 June 1995 could have been caused by imports (allegedly) “dumped” during the investigation period.

¹⁶⁶ Please refer to Annex 60 at section 4.2.1.

¹⁶⁷ It is further recalled that in its first submission on injury (Annex 50) Texprocil argued that:

“ . . . the EC industry is in a state of change. Many companies have had to restructure themselves in the last years as a result of increasing globalisation of production. A central factor in this process is the problem of the relatively high wages in Europe.

The restructuring had serious consequences for Europe. Commissioners Bangemann and Brittan argued in their 1995 Communication on the impact of international developments on the Community’s Textile and Clothing Sector that ‘in textiles the rise in productivity . . . has been the main factor for the loss in employment.’ That study strongly argued that labour costs are of fundamental importance for the competitiveness of the EC industry. For instance, in 1993 the average hourly wages in EC Member States varied from 3.03 to 17.29 US\$, while in India it was merely 0.27 US\$. . .”

The EC authorities never reacted to these comments.

V. CLAIMS RELATING TO PROCEDURAL ISSUES

A. ARTICLE 5.3: THE EC DID NOT EXAMINE THE ALLEGATIONS IN THE COMPLAINT BEFORE INITIATING THE ANTI-DUMPING PROCEEDING. SUCH EXAMINATION WAS EVEN MORE IMPORTANT IN THE LIGHT OF EXISTING COUNTER-EVIDENCE

5.1 Summary: Article 5.3 requires the EC to examine the accuracy and adequacy of the allegations in the complaint before initiating the anti-dumping investigation. There is nothing on record to show that such examination was indeed performed (**claim 23**). Moreover, the available evidence from the Bed linen I anti-dumping proceeding made such examination even more important. Even though detailed arguments were presented by the Indian exporters on these issues, the EC failed to properly explain its actions and reasoning, and consequently acted inconsistently with Article 12.2.1 (**claim 24**) and 12.2.2 (**claim 25**).

1. Facts

5.2 In part I of this submission it was recalled that the Bed linen II proceeding had been preceded by an earlier one, concerning the same product and also targeting (*inter alia*) India. It is further recalled that in the Bed linen I proceeding the EC industry virtually refused to co-operate with the investigating authorities (at least, virtually no non-confidential summaries of their questionnaire responses have been made available in the non-confidential file of that proceeding).

5.3 The time flow of events may be summarised as follows:

25 January 1994	Initiation Bed linen I
March 1994	Submission of 41 questionnaire responses by Indian exporters
10 July 1996	Termination of the Bed linen I proceeding because “[t]he complainant Community producers formally withdrew the complaint concerning imports of certain types of bedlinen originating in India, Pakistan, Thailand and Turkey” ¹⁶⁸
30 July 1996	(a) Complaint by the original complainant, Eurocoton, leading to the Bed linen II proceeding
13 September 1996	Initiation of Bed linen II

5.4 The notice of initiation of the Bed linen II proceeding contained a rather terse statement on the alleged dumping and injury:

“4. Allegation of injury

The complainant alleges and has provided evidence that imports from Egypt, India and Pakistan have increased significantly in absolute terms and in terms of market share, during a period where the apparent consumption in the Community has decreased.

¹⁶⁸ Commission Decision of 9 July 1996 terminating the anti-dumping proceeding concerning imports of certain types of bedlinen originating in India, Pakistan, Thailand and Turkey, OJ (1996) L 171/27 (Annex 5) at recital (4).

It is further alleged that the volume and prices of the imported products have, among other consequences, had a negative impact on the quantities sold and the prices charged by the Community producers, resulting in substantial adverse effects on employment and the financial situation of the Community industry.”

5.5 It may be noted that at no point in the notice of initiation (or indeed, in the published Regulations or elsewhere) did the EC as much as mention that there had been a Bed linen I proceeding. Similarly, the complaint leading to the Bed linen II proceeding¹⁶⁹ conveniently ‘forgot’ that an anti-dumping proceeding covering the same product and largely the same countries on the basis of a complaint by the same entity had been terminated only twenty days before.

5.6 In their first submission on injury (Annex 50) the Indian exporters expressed their concerns on the issue of prima facie evidence and the compatibility of the initiation with Article 5:

“1.2 The Commission should have taken into account all available evidence when deciding on the initiation of the proceeding

Eurocoton appears to consider that the obligations under Articles 5.2, 5.3 and 5.8 of the Agreement are fulfilled if the Commission allegations on dumping and injury in the complaint [sic]. Such a view, if shared by the Commission, seems formalistic and contrary to letter and spirit of the Agreement.

A logical and literal reading of [Articles 5.2, 5.3 and 5.8 of the ADA] leads to the following conclusions:

- 1. The complainant must adduce evidence of (inter alia) injury in its complaint. This evidence should relate to the matters summed up in points (i) through (iv) of Article 5.2. However, it is not necessary that the evidence in the complaint be ‘court-proof’; it must be, so to speak, prima facie evidence.*
- 2. The purpose of Articles 5.2, 5.3 and 5.8 is to avoid frivolous complaints. The Commission is under an obligation, before the initiation of the proceeding, to investigate whether the facts alleged are more than [s]imple assertion, unsubstantiated by relevant evidence.’*

In order to avoid unnecessary harassment of exporters, it is mandatory that such investigation takes place by the Commission, before the initiation.

- 3. If the Commission is informed by some other source than the complaint of facts related to the injury question, it must take these into account: Article 5.3 provides that ‘[t]he authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation.’*

Article 5.8 adds in relevant part that ‘[a]n application . . . shall be rejected . . . as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case.’ If, in other words, the

¹⁶⁹ The non-confidential summary thereof was made available in the non-confidential file at the time of initiation. No other relevant evidence on the alleged injury was made available in the non-confidential file during the time of initiation.

Commission is satisfied, either before or during the proceeding, that there is no factual basis to pursue the matter, it may not continue the initiation or pursuit of the proceeding. Article 5.8 does not specify that the Commission should only take into account such evidence as has been presented in the complaint; on the contrary, if the Commission has obtained information from other sources, it is under an obligation to take this into account.

4. *This means that, in such cases, the evidence requirement for the complaint logically is a relative one: if strong counter evidence exists, the evidence in the complaint becomes 'simple assertion, unsubstantiated by relevant evidence', if the Commission does not further check it before the initiation.*

The question now arises, whether in the present case counter evidence or indications existed, which obliged the Commission to check the allegations in the complaint. Texprocil is convinced that such counter evidence was indeed available.

On 25 January 1994 the Commission initiated an anti-dumping proceeding concerning bed linen from India, Pakistan, Thailand and Turkey. The complaint had been submitted by Eurocoton.

The cooperation of Indian exporters was overwhelming; in contrast, the Community industry refused to submit questionnaire responses, as a result of which Eurocoton had to withdraw the complaint. The first bed linen proceeding was terminated on 10 July 1996.

As the Commission will be aware, even though the formal reason for the termination was the withdrawal of the complaint, the actual cause of the termination was the non-cooperation of the Community industry.

It follows that, at least during the period starting from 25 January 1994 (initiation of the first proceeding) up to the date of termination (10 July 1996) the Community industry did not consider itself injured; at least, the absolute non-cooperation of the EC producers is a very strong indication to that effect.

*The fact that the second complaint was formally submitted after the termination, on 30 July 1996 cannot change this. The 'data' or allegations in the complaint do not refer to events after the termination of the first proceeding; since there is a very strong indication that, up to 10 July 1996 the Community industry did not suffer material injury from imports of bed linen from India, all allegations in the complaint already appear disproved from the outset. Under these circumstances, the Commission was under an obligation to carefully check, **before** initiating the second proceeding, whether there was any serious evidence of injury (as opposed to mere assertions in the second complaint).*

There is no evidence in either the notice of initiation or the non-confidential [file] showing that the Commission did in fact make this a priori check. It follows that the Commission violated Articles 5.2, 5.3 and 5.8 of the Agreement as well as Articles 5(2) jo 5(3) and 5(7) of the basic anti-dumping Regulation. Texprocil therefore respectfully requests the Commission to terminate this proceeding since it is tainted with a procedural error which cannot be repaired retroactively."

2. **The complaint does not contain prima facie evidence of dumping and injury caused thereby**

...

The complaint has been based on little more than unsubstantiated allegations. First, the complainant notes that '[i]t is worth noting that these countries have access to domestically grown raw cotton . . .' This, however, ignores that Indian producers have suffered from an acute shortage of raw cotton through much of 1995, as is well-known.

Second, the non-confidential version of the complaint merely alleged price details in the 'dumping calculation', without giving any evidence. Since the complainant alleges that it has obtained its information from publicly available sources, there is no reason why no non-confidential version thereof (photocopies of the pages, etc., concerned) has been provided. Failure to do so makes the statements concerning the alleged dumping little more than 'simple assertion, unsubstantiated by relevant evidence.'

Alternatively, in the event Eurocoton did submit such information in the confidential version of the complaint, Texprocil considers that this should have been ignored by the Commission in accordance with Article 19 of the basic anti-dumping Regulation.

It follows that, apart from the violation of Article 5.2 of the Agreement in the context of the previous proceeding (see above), that provision is also violated since no prima facie evidence has been submitted in the complaint."

5.7 The issue of prima facie evidence and the EC's obligations under Articles 5.1, 5.2, 5.3 and 5.8 was subsequently raised during the injury hearing of 13 January 1997 but no answer was provided by the EC authorities. The post-hearing brief¹⁷⁰ which was subsequently filed therefore again put the Indian exporters' concerns on the record:

*"The Commission should have taken into account **all** available evidence when deciding on the initiation of the proceeding*

Eurocoton appears to consider that the obligations under Articles 5.2, 5.3 and 5.8 of the Agreement are fulfilled if the Commission checks the allegations on dumping and injury in the complaint. Such a view, if shared by the Commission, seems formalistic and contrary to letter and spirit of the Agreement . . .

1. *The complainant must adduce evidence of (inter alia) injury in its complaint. This evidence should relate to the matters summed up in points (i) through (iv) of Article 5.2. However, it is not necessary that the evidence in the complaint be 'court-proof'; it must be, so to speak, prima facie evidence.*
2. *The purpose of Articles 5.2, 5.3 and 5.8 is to avoid frivolous complaints. The Commission is under an obligation, before the initiation of the proceeding, to investigate whether the facts alleged are more than '[s]imple assertion, unsubstantiated by relevant evidence.'*

¹⁷⁰ Annex 54.

In order to avoid unnecessary harassment of exporters, it is mandatory that such investigation takes place by the Commission, before the initiation.

3. *If the Commission is informed by some other source than the complaint of facts related to the injury question, it must take these into account: Article 5.3 provides that '[t]he authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation.'*

Article 5.8 adds in relevant part that '[a]n application . . . shall be rejected . . . as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case.' If, in other words, the Commission is satisfied, either before or during the proceeding, that there is no factual basis to pursue the matter, it may not continue the initiation or pursuit of the proceeding. Article 5.8 does not specify that the Commission should only take into account of such evidence as has been presented in the complaint; on the contrary, if the Commission has obtained information from other sources, it is under an obligation to take this into account.

4. *This means that, in such cases, the evidence requirement for the complaint logically is a relative one: if strong counter evidence exists, the evidence in the complaint becomes 'simple assertion, unsubstantiated by relevant evidence', if the Commission does not further check it before the initiation.*

The question now arises, whether in the present case counter evidence or indications existed, which obliged the Commission to check the allegations in the complaint with more care than usual. Texprocil is convinced that such counter evidence was indeed available.

On 25 January 1994 the Commission initiated an anti-dumping proceeding concerning bed linen from India, Pakistan, Thailand and Turkey. The complaint had been submitted by Eurocoton. The product scope was identical to that of the current proceeding.

The co-operation of Indian exporters was overwhelming; in contrast, the Community industry refused to submit questionnaire responses, as a result of which Eurocoton had to withdraw the complaint. The first bed linen proceeding was terminated on 10 July 1996.

As the Commission will be aware, even though the formal reason for the termination was the withdrawal of the complaint, the actual cause of the termination was the non-cooperation of the Community industry.

It follows that, at least during the period starting on 25 January 1994 (initiation of the first proceeding) up to the date of termination (10 July 1996) the Community industry did not consider itself injured; at least, the absolute non-cooperation of the EC producers is a very strong indication to that effect.

The fact that the second complaint was formally submitted after the termination, on 30 July 1996 cannot change this. The 'data' or allegations in the complaint do not refer to events after the termination of the first proceeding; since there is a very strong indication that, up to 10 July 1996 the Community industry did not suffer material injury from imports of bed linen from India, all allegations in the complaint already appear disproved from the outset. Under

*these circumstances, the Commission was under an obligation to carefully check, **before** initiating the second proceeding, whether there was any serious evidence of injury (as opposed to mere assertions in the second complaint).*

There is no evidence in either the notice of initiation or the non-confidential file showing that the Commission did in fact make this a priori check. It follows that the Commission violated Articles 5.2, 5.3 and 5.8 of the Agreement as well as Articles 5(2) j° 5(3) and 5(7) of the basic anti-dumping Regulation. Texprocil therefore respectfully requests the Commission to terminate this proceeding since it is tainted with a procedural error which cannot be repaired retroactively.

1.3 *The complaint does not contain prima facie evidence of dumping and injury caused thereby*

Article 5.2 of the Agreement provides in relevant part that a complaint must contain prima facie evidence on, inter alia, dumping and injury.

The complaint has been based on little more than unsubstantiated allegations. First, the complainant notes that '[i]t is worth noting that these countries have access to domestically grown raw cotton . . .' This, however, ignores that Indian producers have suffered from an acute shortage of raw cotton through much of 1995, as is well-known.

Second, the non-confidential version of the complaint merely alleged price details in the 'dumping calculation', without giving any evidence. Since the complainant alleges that it has obtained its information from publicly available sources, there is no reason why no non-confidential version thereof (photocopies of the pages, etc., concerned) has been provided. Failure to do so makes the statements concerning the alleged dumping little more than 'simple assertion, unsubstantiated by relevant evidence.'

Alternatively, in the event Eurocoton did submit such information in the confidential version of the complaint, Texprocil considers that this should have been ignored by the Commission in accordance with Article 19 of the basic anti-dumping Regulation.

It follows that, apart from the violation of Article 5.2 of the Agreement in the context of the previous proceeding, that provision is also violated since no prima facie evidence has been submitted in the complaint."

(Emphasis in original, footnotes omitted)

5.8 Again, the Indian exporters received no reply to any of these arguments from the European Commission. The provisional Regulation contained merely a curt standard formula¹⁷¹ stating that:

"The proceeding was initiated as a result of a complaint lodged on 30 July 1996 by the Committee of the Cotton and allied Textile Industries of the European Communities (Eurocoton), on behalf of Community producers representing a major proportion of Community production of cotton-type bed linen. The complaint contained evidence of dumping of the said product and of material injury resulting therefrom, which was considered sufficient to justify the initiation of a proceeding."¹⁷²

¹⁷¹ That this formula is included as a matter of standard reply can be seen if the examples of EC determinations from the period 1996-1998 are compared. Fifteen such examples are attached as Annex 73.

¹⁷² Provisional Regulation at recital (2); emphasis added.

5.9 Since in the view of the Indian exporters this standard formula did not reply to the specific arguments and claims they had made, they repeated these at the next opportunity, in Texprocil's comments to the provisional disclosure.¹⁷³ Texprocil further noted that:

"The Indian exporters have consistently argued that the anti-dumping proceeding suffered from irreparable procedural deficiencies. The European Commission has not reacted to these motivated concerns in either the disclosure document or the provisional duties Regulation.

In view of these facts, the failure of the Commission to even mention, motivate or discuss in either the disclosure document or in the Regulation imposing provisional anti-dumping measures their decision not to terminate the Bed linen proceeding for the reasons set out above, is inconsistent with Article 12.2 of the Agreement."

5.10 Neither in the definitive Regulation nor in the definitive disclosure document did the EC institutions react or comment on these observations.

5.11 During the first round of consultations India again raised the matter:¹⁷⁴

"1.3 Prima facie evidence

India believes that the initiation has taken place inconsistently with Article 5. Notably, India believes Articles 5.2, 5.3 and 5.8 to be relevant . . .

In other words, before initiating the complaint, the investigating authorities must make a proper determination as to the information before them, in order to determine whether sufficient grounds exist for the initiation of an anti-dumping proceeding.

The requirements in Article 5.2, 5.3 and 5.8 are intended to avoid the initiation of anti-dumping proceedings on the basis of frivolous complaints . . .

Let us consider the facts available to the EC at the time of initiation of Bed Linen II. The Bed linen II proceeding was preceded by the Bed linen I proceeding, which covered exactly the same product and largely the same countries. This first proceeding had been terminated after the Community industry generally refused to co-operate with the European Commission. Under these circumstances the complainant was forced to withdraw the complaint, after which Bed linen I was duly terminated.

Very shortly after the termination of Bed linen I the complainant brought a new complaint. This was filed 20 days after the termination of the Bed linen I proceeding. As argued before, in the Bed linen I proceeding the domestic industry had failed and continuously failed to co-operate with the administrative authorities. This fact was well-known to the European Commission investigators, and is evidenced by the paucity of EC questionnaire responses in the non-confidential file of the Bed linen I proceeding.

*On 30 July 1996 the European Commission therefore had at least the following information:
— the complaint;*

¹⁷³ Annex 51 at sections 1.2 and 2.

¹⁷⁴ Annex 11.

- *the knowledge that in the period starting on 25 January 1994 (the date of initiation of the Bed linen I proceeding) up to 20 days before the submission of the second complaint, the Community industry en masse had refused to co-operate with the complainant.*

The Commission chose to simply ignore that there ever had been a Bed linen I proceeding and initiated the second proceeding on that basis.

The fact that the second complaint was formally submitted after the termination, on 30 July 1996 cannot change this. The 'data' or allegations in the complaint do not refer to events after the termination of the first proceeding; indeed, the complaint alleges that injury was suffered exactly in the period when the EC industry refused to co-operate in an anti-dumping proceeding concerning the same product from India. Since there is a very strong indication that, up to 10 July 1996, the industry did not suffer material injury from imports of bed linen from India, these allegations in the complaint already appear disproved from the outset.

Under these circumstances, the hard fact of the non-cooperation of the Community industry in the first proceeding did at least throw doubts upon the complainant's allegations. The European Commission should at least have considered whether the known facts from the previous proceeding affected the quality of the prima facie 'evidence' in the complaint; however, there is no evidence whatsoever in either the notice of initiation, the non-confidential file, the Regulations imposing provisional and definitive anti-dumping duties, or elsewhere that this issue has even been considered.

India would like to stress that it is not taking issue today with the EC's determination in the first Bed linen proceeding. The point we are making is, that at the time of the initiation of the second case, the investigating authorities could not simply ignore there had been a first proceeding covering exactly the period for which now injury was alleged. There is no evidence in either the notice of initiation or elsewhere suggesting that the EC even considered the previous proceeding, and why they—in spite of all evidence available—nevertheless wished to continue with the initiation.

It follows that the European Community acted inconsistently with Articles 5.2, 5.3 and 5.8 of the Agreement by initiating the anti-dumping proceeding on the basis of mere assertion, unsubstantiated by relevant evidence.

This leads to our following questions:

- 14. Would the EC agree that Article 5.3 (and, possible, Article 5.8) of the Agreement requires the EC to take account of all information available to, or in possession of, the investigating authorities in order to determine whether a prima facie case for an initiation exists?*
- 15. Would the EC agree that the non-confidential file of the first Bed linen proceeding, which was terminated only shortly before the Bed linen II proceeding was initiated, was still available to the investigating authorities?*
- 16. Would the EC agree that the one and a half year period immediately preceding the submission of the second complaint was roughly the period during which the first Bed linen investigation was on-going?*

17. *Would the EC agree that in Bed linen I the EC industry in large majority refused to co-operate with the investigating authorities? Would the EC agree that this was a factor which gave an importation indication whether the bed linen industry in the EC considered itself injured? Could the EC indicate which role the previous proceeding has played when deciding to initiate the second Bed linen proceeding?*

[EC]: the EC will make detailed comments. In general, [the EC] cannot admit that the EC industry did not co-operate in Bed linen I, rather there was a withdrawal of the complaint. In any event [the EC] would admit that no co-operation would not necessarily mean no injury; there may be many reasons why producers do not co-operate, even if there is injury. In the first Bed linen case no injury determination was made. The EC meticulously checked the prima facie evidence.

[The EC] further notes that India received a copy of the non-confidential version of the complaint.

1.4 Motivation of this issue

Mr Seth: Texprocil raised the procedural concerns discussed in 2.3, above, at every occasion and stage of the proceeding.

India believes that this is not consistent with Article 12.2.1 (as far as the provisional duties Regulation is concerned) and with Article 12.2.2 of the Agreement (as far as the definitive duties Regulation is concerned).

18. *Can the EC indicate where in the Regulations imposing provisional and definitive anti-dumping duties it has responded to the concerns of the Indian exporters in this regard, which were expressed at several occasions throughout the administrative proceeding?*

[EC]: Logically, once the case had been initiated, the issue of prima facie evidence no longer was relevant."

5.12 No further explanation on this issue has been given by the EC.

2. Claims

5.13 Three claims result from the events and facts described above.

5.14 First, the EC acted inconsistently with Article 5.3 of the ADA by not examining the allegations in the complaint before the anti-dumping proceeding was initiated. Especially in the light of the events taking place before this proceeding was initiated this inconsistency becomes even more pronounced.

5.15 Second, the EC acted inconsistently with Article 12.2.1 of the ADA by failing to explain its determination in the provisional Regulation even though Texprocil had made very elaborate arguments on this matter.

5.16 Third, the EC acted inconsistently with Article 12.2.2 by failing to provide in either the definitive Regulation or elsewhere the matters of fact and reasons which have led the EC to reject Texprocil's arguments and claims.

3. Claim 23: inconsistency with Article 5.3

3.1 The text of Article 5.3

5.17 Article 5.3 of the ADA provides as follows:

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

5.18 The word “shall” is obligatory and not qualified in any manner. In the context of another covered agreement the Appellate Body provided a clear interpretation of such mandatory language:¹⁷⁵

“In our view, the ordinary meaning of the text of Article 5.5 is clear. The chapeau of Article 5.5 clearly states that the schedule in the body of that provision is mandatory. The word used in the chapeau is ‘shall’, not ‘may’. There is no qualifying language, and there is no language that permits any method other than that set out in the schedule in Article 5.5 as a basis for the calculation of additional duties.”¹⁷⁶

5.19 The same logic applies to Article 5.3 of the ADA. Moreover, any other interpretation would make the provision largely redundant.

5.20 The next word is “examine”. This would imply *action* on behalf of the investigating authorities. Since it is the “*evidence provided in the application*” which must be examined, it would seem that such evidence can in itself never be the only element “*to justify the initiation of an investigation*”¹⁷⁷

¹⁷⁵ Compare further EC—Measures Concerning Meat and Meat Products (Hormones)(complaint by Canada), Report of the Panel, WT/DS48/R/CAN of 18 August 1997 at § 8.169:

¹⁷⁶ EC-Measures affecting the importation of certain poultry products, Appellate Body report 1998/3, WT/DS69/AB/R of 13 July 1998, at § 165.

¹⁷⁷ See in this respect also Guatemala—Anti-dumping investigation regarding portland cement from Mexico, Report of the Panel of 19 June 1998:

“7.47 Guatemala’s position on this issue is clear: if the information supplied in the application is all that is reasonably available to the applicant as required by Article 5.2, the investigating authority is justified in initiating the investigation . . .

7.49 We cannot accept Guatemala’s arguments in this regard. In our view, the fact that the applicant has provided, in the application, all the information that is ‘reasonably available’ to it on the factors set forth in Article 5.2(i) - (iv) is not determinative of whether there is sufficient evidence to justify initiation. Rather, Article 5.3 establishes an obligation that extends beyond a determination that the requirements of Article 5.2 are satisfied.

7.50 . . . Article 5.3 . . . sets forth what the investigating authority is to do when confronted with an application; it must examine the accuracy and adequacy of the evidence in the application ‘to determine whether there is sufficient evidence to justify the initiation of an investigation’. Thus, Article 5.3 is a requirement imposed on the **investigating authority** . . . If the investigating authority were to determine that the evidence and information in the application was not accurate, or that it was not adequate to support a conclusion that there was sufficient evidence to justify initiation of an investigation, the investigating authority would be precluded from initiating an investigation.” (Footnotes omitted).

The Appellate Body did not overturn the Panel report on this issue.

5.21 Last, it follows from the words “*to justify the initiation of an investigation*” that the examination and determination required by Article 5.3 should occur before the initiation of the proceeding. This follows logically from the text; it follows equally from the logic of the anti-dumping proceeding. To hold otherwise would deprive Article 5.3 of any meaning. This does not mean that the examination of the *prima facie* evidence will be as thorough as the investigation after initiation. For the purposes of Article 5.3 it is not necessary that the evidence in the complaint be found ‘court proof’; but at least an examination, within the limits of what is reasonably possible, would seem necessary.

3.2 Legal arguments relating to the claims relating to Article 5.3

5.22 There are two major relevant arguments here.

5.23 First, the investigating authorities, according to their own published statements, did not ‘examine’ the allegations in the complaint on the state of the domestic industry before initiating the anti-dumping investigation. It is recalled that the notice of initiation stated that:

“The complainant alleges and has provided evidence that imports from Egypt, India and Pakistan have increased significantly in absolute terms and in terms of market share, during a period where the apparent consumption in the Community has decreased.

It is further alleged that the volume and prices of the imported products have, among other consequences, had a negative impact on the quantities sold and the prices charged by the Community producers, resulting in substantial adverse effects on employment and the financial situation of the Community industry.

5. Procedure for determination of dumping and injury

Having determined, after consulting the Advisory Committee, that the complaint has been lodged by or on behalf of the Community industry and that there is sufficient evidence to justify the initiation of proceedings, the Commission has commenced an investigation pursuant to Article 5 of Regulation (EC) No 384/96.” (Emphasis added)

5.24 The complaint “*alleged*” that “*the volume and prices of the imported products have, among other consequences, had a negative impact on the quantities sold and the prices charged by the Community producers, resulting in substantial adverse effects on employment and the financial situation of the Community industry*”. Contrary to the statements in the complaint on imported volumes, where the complainant according to the notice of initiation “*provided evidence*”, there is nothing on record suggesting that the European Commission has received, or indeed sought, evidence on the state of the Community industry prior to initiation.

5.25 It transpires from the notice of initiation that the European Commission considered the information (allegations) in the complaint “*sufficient evidence to justify the initiation of proceedings*”. In any case, there is no indication that the investigating authorities “*examine[d]*” “*the accuracy and adequacy of the evidence provided in the application*”.

5.26 It is submitted that, even if the EC *did* examine the evidence contained in the complaint (as opposed to accepting Eurocoton’s allegations at face value as sufficient for initiation), then there is no record published or in the file which suggests so. In this respect, the panel report in Korea—Anti-

dumping duties on imports of polyacetal resins from the United States provides useful guidance on the necessity of transparency.¹⁷⁸

"[t]he legal question raised by the references made by Korea to statements in the transcript of the KTC's meeting was . . . whether the Panel could properly review the injury determination of the KTC by reference to considerations in the transcript which were not included or referred to in the public statement of reasons given by the Korean authorities at the time of imposition of the anti-dumping duties . . .

In the view of the Panel, effective review . . . of an injury determination . . . required an adequate explanation by the investigating authorities of how they had considered and evaluated the evidence with regard to the factors provided for in that article. Interpreted in conjunction with Article 8:5, such an explanation had to be provided in a public notice . . . This provision served the important purpose of transparency by requiring duly motivated public decisions as the basis for the imposition of anti-dumping duties. In the view of the Panel, the purpose of this provision would be frustrated if in a dispute settlement proceeding . . . a Party were allowed to defend a challenged . . . determination by reference to alleged reasons for such determination which were not part of a public statement of reasons accompanying that determination . . . Furthermore, for a Panel to review a determination by reference to considerations not actually reflected in a public statement of reasons accompanying such determination would also be inconsistent with the requirements of an orderly and efficient conduct of the dispute settlement process . . .

Korea had also argued that, since the transcript was part of the administrative record of this investigation, the Panel was under an obligation to consider it. However, the question of whether the transcript was part of the administrative record of the investigation was not decisive of whether the Panel was bound to take account of the transcript for purposes of reviewing the reasons upon which the KTC had based its determination. The task of the Panel was to review the consistency with the Agreement of the KTC's injury determination in Decision 91-6, not the administrative record upon which that determination was based. While an examination of elements of the administrative record might be appropriate in order for a Panel to determine whether certain findings of fact made by investigating authorities were based on positive evidence of record, it was only the public notice issued pursuant to Article 8:5, not the administrative record per se, which was relevant as a statement of reasons. In the case before the Panel, Korea had relied on the transcript not to provide evidence in support of specific statements of a factual nature in the KTC's injury determination but to further explain the reasons for that determination." (Emphasis added)

5.27 These principles are of no less value in the Bed linen II proceeding. If the EC would have made a prima facie examination of the allegations on the state of the domestic industry contained in the complaint, it would be up to the EC to notify this, either in a published notice or through a report made available to the Indian exporters separately. The EC did neither, and India may thus rely on this failure to conclude that, inconsistent with that provision, in fact no examination required by Article 5.3 was carried out.

5.28 Second, immediately before the initiation, the investigating authorities did have more information at their disposal than merely the complaint. Notably but not exclusively, the European Commission could not have been unaware of the fact that an anti-dumping proceeding concerning the

¹⁷⁸ Korea—Anti-dumping duties on imports of polyacetal resins from the United States, ADP/92 of 2 April 1993 at §§ 199-213.

same product scope and, to a large extent, the same targeted countries, on the basis of a complaint by the same complainant had been terminated only twenty days before the submission of the complaint. The investigating authorities could not have been unaware that in that proceeding, which ran during most of the investigation period of the Bed linen II proceeding, co-operation by EC producers was absolutely minimal.¹⁷⁹

5.29 That the first proceeding was formally terminated because the complaint was withdrawn, is besides the point—as the investigating authorities know or could know, that the complaint was only withdrawn after it transpired that it would be impossible to make an injury finding since the EC industry largely refused to co-operate.

5.30 It follows that, at least during the period starting on 25 January 1994 (initiation of the first proceeding) up to the date of termination (10 July 1996), there was a strong indication that the EC industry might not be considered injured since it even refused to support an initiated anti-dumping proceeding.¹⁸⁰ The allegations of the EC industry in the second complaint largely covered the period during which that same industry refused to co-operate. While it is granted that this is not in itself a fool-proof indication that no injury could exist, it is at least a strong indication which would have warranted a further examination before the initiation of the Bed linen II proceeding.

5.31 India believes that, under these circumstances, the EC could not initiate the Bed linen II anti-dumping proceeding without examining the prima facie evidence. By failing to do so, the EC acted inconsistently with Article 5.3 of the ADA.

4. Claim 24: inconsistency with Article 12.2.1

4.1 The text of Article 12.2.1

5.32 It is recalled that Articles 12.2 and 12.2.1 of the ADA provide in relevant part as follows:

“12.2 Public notice shall be given of any preliminary or final determination, whether affirmative or negative . . . Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities . . .

12.2.1 A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular:

- (i) the names of the suppliers, or when this is impracticable, the supplying countries involved;*
- (ii) a description of the product which is sufficient for customs purposes;*

¹⁷⁹ This is evident from the non-confidential file (or rather, the lack of non-confidential questionnaire responses submitted by the EC industry).

¹⁸⁰ It may be noted that the notice of initiation of the Bed linen I proceeding provided that:
“If the required information and argumentation is not received in adequate form within the time limit specified above, the Community authorities may make preliminary or final findings on the basis of the facts available in accordance with Article 7 (7) (b) of Regulation (EEC) No 2423/88.”
(OJ (1994) C 21/9, attached as Annex 2).

- (iii) *the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2;*
- (iv) *considerations relevant to the injury determination as set out in Article 3;*
- (v) *the main reasons leading to the determination.*”
(Emphasis added)

5.33 First, it is noted that “*determination*” in sub-paragraph (v) is in singular, in contrast to the “*preliminary determinations*” in the chapeau of the provision. That would suggest that “*determination*” in sub-paragraph (v) should not be read as “*preliminary determinations on dumping and injury*”; had that been the intention of the drafters, then they would have used the plural form in sub-paragraph (v) as well.

5.34 It would seem that “*determination*” in sub-paragraph (v) refers to “*preliminary or final determination*” in Article 12.2. In other words, under Article 12.2.1 the investigating authorities must set out in the provisional and definitive Regulations “*the main reasons leading*” to “*the preliminary or final determination*”.

5.35 Logically, sub-paragraph (v) does not (only) aim at the dumping determination and the injury determination. If this were different, then the sub-paragraph would add nothing to sub-paragraphs (iii) and (iv) of the same provision. That would imply that sub-paragraph, in such an interpretation, would be without meaning. In this context the *ut res magis valeat quam pereat* principle is recalled, which the Appellate Body defined as follows: “[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.”¹⁸¹

5.36 It would follow that sub-paragraph (v) aims (at least) at those determinations which are essential for the investigating authorities in order to impose anti-dumping measures. That includes the determination required under Article 5.3.

5.37 In this context it is further noted that—following the notice of initiation—the provisional Regulation (and the disclosure document issued around the same time) is the first document in which the EC authorities could have explained their position on Article 5.3, and where the exporters had expected to receive a reply to the arguments raised by them in this respect. If the investigating authorities would not be under any obligation to explain their Article 5.3 determination at the time of the imposition of provisional anti-dumping measures, it would impair the effective possibilities for exporting countries to raise such issues under Article 17.4, second sentence.¹⁸²

5.38 Second, the word “*and*” in the chapeau of 12.2.1 must be noted between “*sufficiently detailed explanations for the preliminary determinations on dumping and injury*” and “*shall refer to the matters of fact and law which have led to arguments being accepted or rejected*”. In other words, the limitation to preliminary determinations on dumping and injury would not appear to be applicable to the second part “*shall refer to the matters of fact and law which have led to arguments being*

¹⁸¹ United States—Standards for Reformulated and Conventional Gasoline, AB-1996/1 of 29 April 1996, section IV. See further *Yearbook of the International Law Commission* (1966), Vol. II at 219:

“When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted.”

¹⁸² “When a provisional measure has a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7, that Member may also refer such matter to the DSB.”

accepted or rejected". As argued above, Article 12.2.1 as a whole, and especially in view of its subparagraph (v), does apply to the Article 5.3 determination as well. A correct reading of Article 12.2.1 would thus seem to be that the provisional Regulation (or some other disclosed provisional document) must refer to "*the matters of fact and law which have led to arguments being accepted or rejected*" in the context of Article 5.3 as well.

4.2 Legal arguments relating to the claims relating to Article 12.2.1

5.39 In anti-dumping proceedings the investigating authorities have a very dominant position as far as knowledge of the facts is concerned. This is even more so in the EC, where the European Commission is the only entity having access to all facts relating to the initiation. Article 12 fulfils in this context a crucial rôle to ensure a certain degree of transparency.¹⁸³

5.40 As noted above, virtually no information has been provided by the EC on the Article 5.3 determination, if there was one.

5.41 Even though the Indian exporters brought Article 5.3 objections to the EC's attention throughout the proceeding repeatedly and in detail, the provisional Regulation merely contained the standard formula stating that:

*"The proceeding was initiated as a result of a complaint lodged on 30 July 1996 by the Committee of the Cotton and allied Textile Industries of the European Communities (Eurocoton), on behalf of Community producers representing a major proportion of Community production of cotton-type bed linen. The complaint contained evidence of dumping of the said product and of material injury resulting therefrom, which was considered sufficient to justify the initiation of a proceeding."*¹⁸⁴

5.42 As is clear from the evidence in Annex 73, this formula is not a reply to specific concerns and arguments raised by Indian exporters, but rather a standard formula inserted as a matter of course in virtually all EC determinations.

5.43 There was no way for the Indian exporters to further check the veracity of the conclusions of the investigating authorities. Under such circumstances, the EC can hardly claim that it referred "*to the matters of fact and law which have led to arguments being accepted or rejected*" or that the provisional Regulation or the provisional disclosure contained "*the main reasons leading to the determination*".

5.44 In summary, India believes that neither in the provisional Regulation nor in any other document made available to the Indian exporters around the time of the provisional anti-dumping measures the EC met the standards laid down in Article 12.2.1.

¹⁸³ In this context the dictum of the Panel in Korea—Anti-dumping duties on imports of polyacetal resins from the United States, Report of the Panel, ADP/92 and Corr.1 of 2 April 1993 at § 209 is recalled:

"In the view of the Panel, the purpose of this provision would be frustrated if in a dispute settlement proceeding . . . a Party were allowed to defend a challenged . . . determination by reference to alleged reasons for such determination which were not part of a public statement of reasons accompanying that determination . . ."

¹⁸⁴ Provisional Regulation at recital (2); emphasis added.

5. Claim 25: inconsistency with Article 12.2.2

5.1 The text of Article 12.2.2

5.45 The text of Article 12.2.2 differs somewhat from that of Article 12.2.1:

“A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6.”
(Emphasis added)

5.2 Legal arguments relating to the claims relating to Article 12.2.2

5.46 Even if the EC did not agree with the Indian exporters, it was still obliged to provide in the definitive Regulation *“the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers”*.

5.47 As noted in the facts’ description above, the EC did not react to the comments made by the Indian exporters in connection with Article 5.3. The EC thus failed to explain its definitive finding consistently with Article 12.2.2.

B. ARTICLE 5.4: THE INVESTIGATING AUTHORITIES FAILED TO MAKE A STANDING DETERMINATION IN CONFORMITY WITH ARTICLE 5.4

5.48 Summary: the EC acted inconsistently with Article 5.4 of the ADA by not making a proper standing determination before the anti-dumping proceeding was initiated (**claim 26**). Even though detailed arguments were presented by the Indian exporters on these issues, the EC failed to properly explain its reasoning, and consequently acted inconsistently with Article 12.2.1 (**claim 27**) and 12.2.2 (**claim 28**).

1. Facts

5.49 As discussed in section I, the complainant Eurocoton brought the complaint leading to the Bed linen II proceeding on 30 July 1996.¹⁸⁵ Eurocoton is an association of producers’ associations. In its complaint, Eurocoton noted that:

“[t]his complaint is submitted by EUROCOTON . . . on behalf of E.U. manufacturers which accounted for 38 per cent on [sic] the 1995 total EUR 15 production of cotton-type woven bed linen.

It should nevertheless be underlined that EUROCOTON represents producers weavers-makers-up of woven cotton-type bed linen, accounting for 53 per cent of the total EUR 15 cotton-type woven bed linen production. Producers representing 38 per cent of the total E.U.

¹⁸⁵ Please refer to Annex 6.

production declared to be active complainants while 15 per cent are supporting the complaint, but are not ready to cooperate actively to [sic] the inquiry. This means that member companies of EUROCOTON accounting for 53 per cent of the total E.U. production concerned are standing by the complaint. It is consequently quite impossible that producers accounting for more than 50 per cent of the total E.U. production declare themselves against the complaint. Indeed, EUROCOTON made an inquiry among its member Associations (see enclosure 1 a) in order to evaluate the rate of effective support for this complaint. At the date of completion of the inquiry, Member Associations which answered, supported all [sic] this complaint and no one objected to the lodging of this complaint.

EUROCOTON attests that for this complaint, it represents 38 per cent of the above referred EUR 15 production (see enclosure 1 b).

EUROCOTON' statutes (see enclosure 1 c) entitle it to represent the complainant producers.

Consequently, EUROCOTON complies with representativity conditions provided for in Article 5.4. of Council Regulation EC. 384/96 of 22/12/95 on protection against imports countries not members of the European Community.”

5.50 The non-confidential version of the complaint made available to the Indian exporters contained enclosures 1a and 1b, but not 1c.

5.51 Enclosure 1a (“*National associations members of Eurocoton*”) contained a list of the member associations of Eurocoton. Enclosure 1b (“*Producers of the product in question represented by Eurocoton (complainants)*”) contained a list of the following companies and associations:

Portugal (9 companies):

1. Coelima-Industrias Texteis, SA
2. Lameirinho-Industria Textil, SA
3. Foncar-Org. Ind. Comercial Textil, SA
4. Antonio de Almeida & Filhos, LDA
5. Incotex-Ind. E com. De Texteis, LDA
6. Jocaritex-Industrias Texteis, LDA
7. Maria Helena Dantas
8. Ribeiro, Fernandes & Rocha, LDA
9. Texteis Atma, SA;

Germany (11 companies):

10. Bierbaum Textilwerke GmbH & Co. KG
11. Luxorette Haustextilien GmbH
12. Günter Meckenholt Weberei und Ausrüstung GmbH
13. Wilh. Wülfig GmbH & Co. KG
14. Irisette GmbH
15. Erbelle GmbH
16. Hch. Kettelhack GmbH & Co.
17. Curt Bauer GmbH
18. Damino GmbH
19. RZ Dyckhoff GmbH

20. Fränkische Bettwarenfabrik GmbH;

Belgium (1 company):

21. Uco NV-Huishoudlinnen;

France (10 companies):

- 22. Ets Fremaux
- 23. Ets Hacot et Colombier
- 24. Hacot (Joseph et Cie)
- 25. Jalla SA-Nieppe
- 26. Mulliez Freres SA au Longeron
- 27. Vanderschooten
- 28. Valrupt
- 29. Ets Claude
- 30. Ets Bera
- 31. Ets Gisele le Chayoux;

Italy (5 companies):

- 32. Bassetti SpA
- 33. Bossi SpA
- 34. Gabel Industria Tessile SpA
- 35. Valman Srl
- 36. Zucchi SpA;

Spain (3 companies):

- 37. Estebanell y Pahisa SA
- 38. Hilados y Tejidos Puignero SA
- 39. Textil Cano Segura (Texca Sesa);

Finland (4 companies):

- 40. Finlayson Sisustustekstiili Oy
- 41. Finnpile Oy
- 42. Marimekko Oy
- 43. Reikälevy Oy;

Austria (no companies):

44. Vereinigung Textilindustrie (Austrian Textile Industry Association)

5.52 The last entity, Vereinigung Textilindustrie, is not a producer itself but merely the association of Austrian producers.

5.53 The notice of initiation with which the anti-dumping proceeding was initiated¹⁸⁶ noted on the issue of standing only that:

¹⁸⁶ Please refer to Annex 7.

“The Commission has received a complaint pursuant to Article 5 of Council Regulation (EC) No 384/96 [footnote omitted], alleging that imports of cotton-type bed linen originating in Egypt, India and Pakistan are being dumped and are thereby causing injury to the Community industry.

1. Complaint

The complaint was lodged on 30 July 1996 by the Committee of the Cotton and Allied Textile Industries of the European Union (Eurocoton).

...

5. Procedure for determination of dumping and injury

Having determined, after consulting the Advisory Committee, that the complaint has been lodged by or on behalf of the Community industry and that there is sufficient evidence to justify the initiation of proceedings, the Commission has commenced an investigation pursuant to Article 5 of Regulation (EC) No 384/96 . . . ”¹⁸⁷

5.54 In its first submission on injury and procedural matters¹⁸⁸, Texprocil noted among others that:

“Eurocoton alleges that 38 per cent of EC producers support its complaint. However, among this 38 per cent features the Vereinigung Textilindustrie, based in Vienna.¹⁸⁹ This organisation is an association of producers and does not itself produce bed linen. It follows that it should not be included in the tests of Article 5(4) of the basic anti-dumping Regulation, which clearly refers to producers and not to producers' associations.

. . . the opinion of producers' associations is irrelevant for the Article 5(4) test since this provision explicitly refers to ‘Community producers’. It is not certain whether Eurocoton has checked its standing with individual producers or with associations.

Second, even when Eurocoton alleges to have checked its standing with producers, it is up to the Commission to verify this. It follows from Article 5(4) that the Commission is under an obligation to check, before initiation of this proceeding, whether indeed Eurocoton's allegation that it represents at least 25 per cent of the EC industry, is founded . . . ”

5.55 Texprocil requested the Commission to make evidence available in the non-confidential file attesting that the Commission did indeed check, prior to initiation of this proceeding, that the 25 per cent test of Article 5(4) was reached, and in particular:

- how many companies in the Community produce bed linen other than Eurocoton members;
- whether companies alleged to support the complaint have indeed given a written statement to this effect.

¹⁸⁷ Notice of initiation of anti-dumping proceedings concerning imports of cotton-type bed linen originating in Egypt, India and Pakistan, OJ (1996) C 266/2.

¹⁸⁸ Annex 50.

¹⁸⁹ Complaint, non-confidential version, Annex 1b at 10.

5.56 Well over two months after the submission of this brief (or nearly four months after the initiation), Texprocil's legal representatives were granted access to the non-confidential file at the Commission's unit dealing with complaints (letter from the European Commission attached as Annex 58). One day later the standing file was inspected (contents of that file attached as Annex 59). The time flow of the events can thus be summarized as follows:



5.57 That file consisted of declarations of support for the complaint emanating from the following entities:¹⁹⁰

Portugal:

1. Lameirinho-Industria Textil, SA;
2. Incotex-Ind. E com. De Texteis, LDA;
3. Foncar-Org. Ind. Comercial Textil, SA;
4. Coelima-Industrias Texteis, SA;
5. Antonio de Almeida & Filhos, LDA;

Germany:

6. Bierbaum Textilwerke GmbH & Co. KG;
7. Günter Meckenholt Weberei und Ausrüstung GmbH;
8. Hch. Kettelhack GmbH & Co.;
9. Erbell GmbH;
10. Luxorette Haustextilien GmbH;
11. Wilh. Wülfing GmbH & Co. KG;
12. Curt Bauer GmbH;
13. Estella Ateliers (Fränkische Bettwarenfabrik GmbH);
14. Irisette GmbH;
15. Damino GmbH;
16. RZ Dyckhoff GmbH;

France:

17. Syndicat Général de l'Industrie Cotonnière Française (*General syndicate of the French Cotton Industry*), allegedly on behalf of:
 - a company indicated as "K.F.";
18. Fédération française de l'Industry Cotonnière (*French Federation of the Cotton Industry*), allegedly on behalf of:
 - Ets Claude,
 - Jalla SA-Nieppe,

¹⁹⁰ The European Commission later made a letter available from the Spanish Asociacion de impresarios textiles de la Comunidad Valenciana (ATEVAL) to Eurocoton, alleging that five more Spanish companies "do not explicitly oppose" the proceeding (Annex 79). This letter to Eurocoton is dated 18 September 1996 (*i.e.*, five days after the initiation). There is no indication when it was submitted to the EC.

- Hacot (Joseph et Cie),
- Ets Hacot et Colombier,
- Ets Fremaux,
- Vanderschooten,
- Mulliez Freres SA au Longeron,
- Ets Bera;

Italy:

- 19. Bossi SpA;
- 20. Zucchi SpA;
- 21. Gabel Industria Tessile SpA;
- 22. Valman Srl;
- 23. Bassetti SpA;

Spain:

- 24. Asociacion Industrial Textil de Proceso Algodonero (*Industrial Association of Cotton Process Textile*), allegedly on behalf of:
 - Estebanell y Pahisa SA,
 - Hilados y Tejidos Puigero SA,
 - Textil Cano Segura (Texca Sesa);

Austria:

- 25. Vereinigung Textilindustrie (*Austrian Textile Industry Association*), apparently on behalf of itself. It did, however, provide information on the total production of two of its members;

Finland:

- 26. Reikälevy Oy;
- 27. Marimekko Oy;
- 28. Finlayson Sisustustekstiili Oy.

5.58 Although the above declarations had clearly been faxed the fax headers had unfortunately been removed from all of them.

5.59 The non-confidential standing file further contained the statutes of Eurocoton, but not the statutes of its national member associations.

5.60 The Commission did not argue and has never argued that Texprocil had ‘missed’ declarations of support in the non-confidential file.

5.61 On 13 January 1997 Texprocil had a hearing on procedural, injury and miscellaneous issues. During this hearing, Texprocil explained its concerns in great detail. Notably, Texprocil argued that the mere allegation by a producers’ association could not, in its view, replace the standing determination of Article 5.4. Subsequent to the hearing, the post-hearing brief of 6 February 1997¹⁹² set out in writing the arguments made by Texprocil during the hearing. Notably, Texprocil argued in

¹⁹² Annex 54.

that submission several points of relevance to the standing determination, which are briefly summarised as follows:

- First, the declaration of Reikalevy Oy of Finland, made available over two months after the date of initiation, is undated and consequently ought to be left aside as evidence that it had come forth as supporting the complaint before the proceeding was initiated;
- Moreover, the Commission had provided no evidence whatsoever that it had made before initiating the proceeding a determination of total EC production of bed linen (which determination is logically necessary in order to perform the 25% test in Article 5.4);
- Texprocil further repeated its argument that Article 5.4 “*clearly refers to producers and not to producers' associations*”. Texprocil believed that producers associations did not have the right to bring complaints in their own right. Moreover, declarations from such associations would—in Texprocil’s view—not be an acceptable surrogate of producers’ support declarations, as had been shown so clearly in the Bed linen I proceeding;
- Texprocil noted further that a large number of companies listed by Eurocoton as complainants had not submitted a declaration of support before the initiation of the case.¹⁹³ In fact a number of companies listed in the complaint as supporting the complaint had not provided any evidence of their support nor had been included in the declaration of any producers association. It was therefore not clear whether the 25 per cent threshold laid down in Article 5.4 had been met;
- ? Furthermore, Texprocil took issue with the statements in the complaint that Eurocoton had apparently relied on the opinion of its member associations rather than assessing the support among producers;
- ? Then, Texprocil argued that a large number of complainants were not producers at all but rather converters using outward processing arrangements in Asia or Central Europe. Texprocil explicitly requested the Commission to check this point.

5.62 In the provisional Regulation the European Commission made the following comments:¹⁹⁴

“E. COMMUNITY INDUSTRY

1. Definition of the Community industry

(52) After elimination from the list of companies included in the complaint of seven of them found not to be complainants, the Commission found that the remaining companies represented a major proportion of Community production of bed linen and satisfied the requirements of Article 5 (4) of the basic Regulation.

¹⁹³ Nor was any other evidence made available indicating such support.

¹⁹⁴ It is recalled that Article 4(1) of the basic Regulation is worded almost identically to Article 4.1 of the ADA. However, one big difference exists: in the basic Regulation, the domestic industry (“Community industry”) is linked with Article 5(4) (which largely corresponds to Article 5.4 of the ADA):

“For the purposes of this Regulation, the term ‘Community industry’ shall be interpreted as referring to the Community producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion, as defined in Article 5(4), of the total Community production of those products . . .” (Emphasis added)

After initiation of the proceeding, a number of organizations representing exporters and importers of bed linen from the countries concerned alleged that several of the producers which made up the Community industry were also importing the dumped product from the countries subject to the proceeding. In these circumstances, the Commission re-examined whether, in the light of the provisions of Article 4(1)(a) of the basic Regulation, these companies should be excluded from 'the Community industry.

(53) For the purposes of carrying out this reexamination, and in accordance with consistent practice of the Community institutions, it appeared appropriate to determine whether those companies were primarily producers in the Community with an additional activity based on imports and merely supplementing their Community production, in order to be able to offer a complete range of products, or whether they were importers with relatively limited additional production in the Community.

(54) In all but one case, companies alleged to be importing bed linen from the countries concerned were among those selected in the sample of Community producers (see recitals (58) to (61)). The Commission was therefore able to examine the extent of these imports during the course of its on-the-spot verification visits. For all but one of these sampled companies, the investigation showed that the imports of dumped products from the countries concerned had accounted for less than 10 per cent of the turnover of the companies in question in the period examined. It is therefore the opinion of the Commission that these companies were not shielded from the effects of dumped imports and that for the purposes of Article 4 of the basic Regulation these companies may be considered along with the other cooperating producers, as belonging to the Community industry.

In the case of the one other sampled company, it was found that a higher proportion of its bed linen sales in the investigation period were of Pakistani origin and also that only a minor part of its sales were of its own production. It appeared in addition that the company's future activity was likely to be further focused on imports. This company, whose core interests were deemed clearly not to be in the production of bed linen within the Community, was therefore eliminated from the Community industry.

(55) Since all but one of the sampled companies alleged to be importing bed linen from the countries concerned were found, on examination, not to be doing so in quantities sufficient to warrant exclusion, it has been considered that the allegations made by the exporters in this regard were excessive and unreliable. Consequently, on the basis of the findings concerning the sample, no exclusion of the one non-sampled company is warranted. This company should, therefore, be retained in the definition of the Community industry. In any event, this issue has no substantial influence on the question of the representativity of the Community industry.

(56) Three other companies were eliminated. In one case the company was found no longer to produce bed linen. In two other cases the companies did not respond to the requests for information which were addressed, via Eurocoton and the national associations, to those complainants which were not selected in the sample of Community producers, in order to obtain information on the Community industry as a whole.

(57) The remaining 35 companies, which cooperated with the enquiry and are located in France, Germany, Italy, Spain, Portugal, Austria and Finland, represented a major

proportion of total Community production in the investigation period. These companies were therefore deemed to make up the Community industry under the terms of Article 4(1) of the basic Regulation.” (footnotes omitted)

5.63 The Commission did not further address Texprocil’s concerns beyond these remarks. Specifically, the Commission did not address the questions:

- whether undated declarations made available nearly four months after the initiation could serve as evidence that the company concerned had indicated its support for the complaint *before* initiation;
- whether producers’ associations had the right to support a complaint in their own name;
- whether producers’ associations have the right to support a complaint on behalf of producers, but without providing evidence that they have checked with such producers;
- whether the complainants mentioned by Texprocil were producers or rather converters using outward processing arrangements in Asia or Central Europe.

5.64 Texprocil filed comments on the provisional disclosure and the provisional Regulation.¹⁹⁵ It also had a second hearing at the Commission.¹⁹⁶ At every occasion Texprocil argued that the evidence in the file did not suggest that a proper standing determination had been made before the proceeding was initiated, and largely repeated the arguments on the unanswered issues mentioned above.

5.65 In the ensuing definitive disclosure document¹⁹⁷, the European Commission provided the following comments on the standing issue:

“Exporters from all three exporting countries observed that the complainant Community producers taken to be the Community industry made up just 34 per cent of total Community production. They claimed that this showed that a majority of bed linen producers in the Community did not support the complaint and should therefore be assumed not to be injured, and that the Community industry was not therefore representative of total Community production.

However, in response to the provisional measures only two Community producers expressed opposition to the duties. The combined production of these two producers was less than one third of the total production of the complainants. The Commission services therefore confirm the finding that the 35 complainant companies represented a major proportion of total Community production within the meaning of Article 5(4) of the Basic Regulation.

Pakistani exporters also claimed that the Commission had not used the correct test in determining whether Community producers which also import bed linen from the countries concerned should be excluded from the Community industry (recitals (52) to (55) of the provisional Regulation). By way of clarification, the Commission services confirm that the test used in recital (54) was whether bed linen imported from the countries concerned

¹⁹⁵ Annex 51.

¹⁹⁶ Post-hearing brief attached as Annex 55.

¹⁹⁷ Attached as Annex 56.

accounted for 10 per cent of the turnover in bed linen of the companies in question, rather than 10 per cent of total company turnover.

...

In conclusion, the Commission services confirm both the finding that the 35 complainant companies constitute the Community industry within the meaning of Article 4(1) of the Basic Regulation and the sampling methodology applied.”

5.66 Texprocil filed comments on the definitive disclosure.¹⁹⁸ At this occasion it again brought forward its concerns as to the standing determination, concerns which had not been allayed by the text of the definitive disclosure document.

5.67 The definitive Regulation repeated the wording of the definitive disclosure document in largely similar terms, with the exception of the second paragraph quoted above:

“(32) . . .

However, in response to the provisional measures only two non-complainant Community producers, which originally expressed no opinion to the Commission on the complaint, expressed opposition to the duties. The combined production of these two producers was less than one-third of the total production of the complainants. Throughout the proceeding, therefore, the complainants represented considerably more than 50 per cent of the collective output of those producers expressing either support for or opposition to the complaint.”

5.68 For the remainder Texprocil’s comments did not evoke any further response or reply from the EC side.

5.69 The matter of standing was taken up and discussed at great length during both rounds of consultations between India and the EC. During the first round of consultations the Indian delegation made a major effort in trying to understand how exactly the EC had proceeded in its standing determination. For this purpose, India submitted a list of detailed questions to the EC delegation.¹⁹⁹ The questions with relevance to the standing determination are numbers 1-13. The spokesman for the EC made the following observations:²⁰⁰

“[EC]: the EC will of course try to provide a detailed answer, but will have to get back to the file. In this case the complaint was lodged by Eurocoton, representing national associations. The EC was reasonably satisfied by the voting within Eurocoton. We will go through your points and will give you a precise answer . . .

[T]he EC will answer question 4 later. As far as question 5 is concerned, it is his personal view that it depends on the voting rules of the association. [The EC] is confident the Commission checked these rules at the time . . .

[The EC] refers to the footnote to Article 5.4. He adds that, by the time of the injury assessment, the EC should be certain of standing. Excluding a company can only happen after the opening of the investigation.

¹⁹⁸ Attached as Annex 60.

¹⁹⁹ Attached as Annex 10.

²⁰⁰ Verbatim report attached as Annex 11.

...

Mr Seth: Third, one company –the Finnish company Reikälevy Oy-- submitted a declaration of support which was undated. This means that, by the time the Indian exporters got access to the non-confidential standing file, which was months after the initiation, they could not ascertain when the declaration was filed. This leads to our following question:

6. Does the EC agree that undated declaration of support made available in the public file some four months after the initiation cannot be considered as valid evidence in accordance with Article 5.4 that the company expressed its support before the proceeding was initiated?

[EC]: I do not agree. I do not exclude that company. The internal rules of the association to which this company belongs may make this matter irrelevant. . . . We used the data of output on basis of the data obtained from the associations. The role played by the associations is on behalf of the producers by virtue of their internal rules. . . [The EC] replies re question 11 that India is entitled to information enabling her to satisfy that the standing determination has been duly made before initiation. On question 12 he says he thinks that such information was provided, but he will check this. On question 13, he would not deny this.

The EC adds that it would appear from the wording of the Regulation that the standing determination was made before initiation. This follows from the word ‘re-examination’. The concerns of India, which are matters of fact and law, have been fully addressed.’²⁰¹

5.70 The European Commission promised to provide a written definitive reply to India’s questions within reasonable time. Such reply was received on 1 October 1998. The combined reply to questions 1-18 was: “*For discussion in a new round of oral consultations.*”

5.71 During the second round of consultations the Indian delegation requested the EC to provide a definitive answer to its queries. The EC’s spokesman replied as follows:²⁰²

“[EC]: I will set out our answer in one response. Standing rules must be met prior to the initiation. We established that there was standing. We asked associations and companies, who provided us with evidence that approximately 35 or 34 percent of the Community producers supported the proceeding. We did not consider it necessary to obtain further support since we already met the criteria.

As to our standing practice: either the associations or companies can come forth. The associations can do it since they are acting on behalf of their members. Clearly, in case of large numbers of companies it is not practical to obtain the support from each single company. I note further that the Agreement itself allows sampling . . . All I can say about the timing is that it was before the initiation. The names of the companies are named in the complaint. There was obviously a process of contacts, but this went on before the initiation.

[T]he support from these companies was deduced from a combination of association and individual declarations. We think this is a reasonable process to establish support.

²⁰¹ As an explanatory note on the voting within Eurocoton, as is evident from the statutes of this organisation, its members are producers associations. In other words, it would seem that the EC argued here that they relied on the support from producers’ associations.

²⁰² Please refer to the verbatim report of the second round of consultations, attached as Annex 13.

Mr Seth: You think that an association declaration can represent its members?

[EC]: Yes. A representative can act on behalf of companies. ”

5.72 India received during the second round of consultations finally a sheet confirming which were the seven companies listed in recital (52), and which were the 35 companies constituting the Community industry (domestic industry). This sheet is attached as Annex 61.

2. Commission practice

5.73 Contrary to some other jurisdictions such as Australia, Canada and the United States, the EC does not describe in its published determinations or elsewhere how it goes about determining standing in cases with a large number of producers in the EC. The notice of initiation contains at most a standard phrase.²⁰³ This is regrettable, but perhaps not necessarily in violation of the ADA. Some indication about the process may be obtained from a European Commission draft document entitled *Guide on how to draft an anti-dumping complaint* with instructions to prospective complainants on how to draft a complaint.²⁰⁴ This document explains that:

“21. Standard forms for expressing support can be delivered to the complainant, upon request.

22. You may also comment on known producers, which do not support the complaint, describing, where possible, how many there are, their names, their contact data and their importance in Community production, and the reasons why they do not support the complaint.

23. It should be noted that the Commission verifies the representativeness of the Complainant prior to the initiation of the proceeding.”

5.74 Before discussing the fact pattern in Bed linen II in detail, it may be noted by way of background information that the support of EC producers for complaints filed by Eurocoton (the EC industry association representing the complainants) was a problem in Bed linen I, in the Cotton fabrics-I and the Synthetic fabrics proceedings. All these proceedings were initiated in 1994 pursuant to complaints by Eurocoton; all of which targeted—among others—India; in all of them co-operation of EC producers with the Commission was minimal.

5.75 It appears from the complaint (quoted above) that Eurocoton:

“made an inquiry among its member Associations . . . in order to evaluate the rate of effective support for this complaint. At the date of completion of the inquiry, Member Associations which answered, supported all this complaint and no one objected to the lodging of this complaint.”

5.76 The non-confidential standing file contained a number of declarations of support from companies and from producers' associations, which in total mentioned 35 companies.

²⁰³ By way of example, copies of the relevant part of notices of initiation from other proceedings opened around the same time as the Bed linen II proceeding are attached as Annex 74.

²⁰⁴ Annex 62. Although this document has existed formally as a 'draft', it appears to be used by the Commission Services, or to India's best knowledge at least reflect EC practice.

5.77 During the consultations, two different replies were given by the EC. During the first round, the EC stressed that Eurocoton had determined the support for the complaint among its member associations. The only ‘evidence’ made available in the non-confidential file was the statement in the complaint itself.

5.78 During the second round of consultations, the EC appeared to indicate that it had checked standing by relying on the declarations in the non-confidential file. Although this point was raised at every occasion, the EC has never denied or contradicted that some of these declarations were made by producers’ associations. Indeed, as noted above, the EC clarified during the second round of consultations that “*either the associations or companies can come forth. The associations can do it since they are acting on behalf of their members.*” The EC delegation likened the submission of support by a producers’ association to the representation of companies by lawyers.

3. Claims

5.79 Three claims flow from the events and facts described above.

5.80 First, the EC acted inconsistently with Article 5.4 of the ADA by not making a proper standing determination before the anti-dumping proceeding was initiated.

5.81 Second, the EC acted inconsistently with Article 12.2.1 of the ADA by failing to explain its provisional determination on standing, even though Texprocil had made very elaborate arguments on this matter.

5.82 Third, the EC acted inconsistently with Article 12.2.2 by failing to provide in either the definitive Regulation or elsewhere the matters of fact and reasons which have led the EC to reject Texprocil’s arguments and claims.

4. Claim 26: inconsistency with Article 5.4

4.1 The text of Article 5.4

5.83 Before proceeding with the analysis of the arguments, an analysis of the obligations contained in Article 5.4 of the ADA would seem in order. Article 5.4 of the ADA provides as follows:

“An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed¹³ by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry.¹⁴ The application shall be considered to have been made ‘by or on behalf of the domestic industry’ if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.

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

*14. Members are aware that in the territory of certain Members employees of domestic producers of the like product or representatives of those employees may make or support an application for an investigation under paragraph 1.*²⁰⁵

5.84 Article 5.4 lays down a number of clear rules on how the investigating authorities must determine whether standing exists.

5.85 As a first note, Article 5.4 essentially lays down two tests which may be paraphrased as follows:

- a test whether at least 25 per cent of domestic producers expressly support the complaint [hereinafter: “25 per cent test”]; and
- a test whether at least 50 per cent of all producers who made themselves known to the investigating authorities support the complaint [hereinafter: “50 per cent test”].

No issue is taken in this proceeding with the 50 per cent test.

5.86 Article 5.4 lays down very clear procedural requirements. First, it notes that “[a]n investigation shall not be initiated” unless the authorities have “determined” representativeness (also referred to as standing determination). India believes that the word “shall” has an imperative element.²⁰⁶ It does not permit an interpretation as ‘should’, ‘could’ or ‘may’. Second, the word “determined” would seem to require an explicit determination.

²⁰⁵ For easy reference, we recall also the text of Article 5(4) of the basic Regulation:

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

²⁰⁶ In this context India recalls the Appellate Body’s dictum in EC-Measures affecting the importation of certain poultry products, Appellate Body report 1998/3, WT/DS69/AB/R of 13 July 1998, at § 165:

“In our view, the ordinary meaning of the text of Article 5.5 is clear. The chapeau of Article 5.5 clearly states that the schedule in the body of that provision is mandatory. The word used in the chapeau is ‘shall’, not ‘may’. There is no qualifying language, and there is no language that permits any method other than that set out in the schedule in Article 5.5 as a basis for the calculation of additional duties. Likewise, Article 5.5 clearly identifies the c.i.f. import price of the shipment as the sole element to be compared with the trigger price in the calculation of the additional duties. Article 5.5 stipulates that the amount of additional duties ‘shall be set’ on the basis of the comparison of the c.i.f. import price of the shipment concerned with the trigger price. Thus, the ordinary meaning of the c.i.f. import price of the shipment is precisely that: the c.i.f. import price of the shipment . . . There is no authority in the text of Article 5.5 for a Member to use any alternative to the c.i.f. import price, shipment-by-shipment, in the calculation of the additional duties imposed under this special safeguard mechanism.”

Compare further EC Measures Concerning Meat and Meat Products (Hormones)(complaint by Canada), Report of the Panel, WT/DS48/R/CAN of 18 August 1997 at § 8.169:

“Guided by the wording of Article 5.4, in particular the words ‘should’ (not ‘shall’) and ‘objective’, we consider that this provision of the SPS Agreement does not impose an obligation.”

Similar Hormones (complaint by USA), WT/DS26/R/USA of 18 August 1997 at 8.167.

5.87 Second, it is evident that the determination must be made by the investigating authorities (“*unless the authorities have determined*”).

5.88 Third, Article 5.4 indicates how a determination of representativeness is to be made: “. . . *on the basis of an examination of the degree of support for, or opposition to, the application expressed by domestic producers of the like product*”. This requires foremost an examination. The determination is to be made *following* this examination. This follows from the words “*on the basis of*” in “*have determined, on the basis of an examination*”.

5.89 Fourth, the examination must be made of “*the degree of support for, or opposition to, the application expressed*”. The support or opposition must have been “*expressed*”. This implies, in other words, a deliberate act on behalf of the entity whose support is examined (the footnote to Article 5.4 is discussed below).

5.90 Fifth, Article 5.4 contains clear language *whose* support is to be taken into account: “*the degree of support for, or opposition to, the application expressed by domestic producers of the like product . . .*” The only entities whose support counts are domestic producers.²⁰⁷ In this context the difference in language may be noted within the first sentence of Article 5.4: in order to determine whether the application has been filed “*by or on behalf of*” the domestic industry, an examination of the support or opposition expressed by domestic producers is required.²⁰⁸ In other words, Article 5.4 foresees two actions from the side of the industry:

- 1) the filing of the complaint, which may be done by any entity; and
- 2) the expression of the support for the complaint, which must come from “*the domestic producers of the like product*”.

²⁰⁷ It is true that the footnote to Article 5.4 provides that: “*Members are aware that in the territory of certain Members employees of domestic producers of the like product or representatives of those employees may make or support an application for an investigation under paragraph 1.*”

This, however, deals with a situation not found in the EC but rather with the specific domestic legislation of another WTO Member. This would consequently not seem to be relevant for the *Bed linen II* case.

²⁰⁸ In this context India would follow the analysis of the words “*on behalf of*” in *United States—Imposition of anti-dumping duties on imports of seamless stainless steel hollow products from Sweden*, Report of the Panel (unadopted) of 20 August 1990, ADP/47 at § 5.9 (even though that analysis was made in the context of the 1979 Anti-Dumping Code):

“5.9 The Panel noted the views expressed by Sweden and the United States regarding the meaning of the term ‘*on behalf of*’ in the first sentence of Article 5:1 of the Agreement . . . The Panel considered that in its ordinary meaning this term was used to refer to a situation where a person or entity acted on the part of another involving the notion of agency or representation. Nothing in the text of Article 5:1 suggested that the drafters of the Agreement had wished to attach a different meaning to this term; on the contrary, the fact that the term ‘*on behalf of*’ appears in Article 5:1 as an alternative to ‘*by*’ underlines that this term must be interpreted in accordance with its ordinary meaning. In the view of the Panel, the alternative for the requirement that a petition be filed ‘*by*’ the domestic industry affected cannot be a requirement so loose as to allow a request to be filed by some members of an industry simply claiming to be acting ‘*on behalf of*’ the rest of the industry. The Panel concluded that ‘*a written request . . . on behalf of the industry affected*’ implies that such a request must have the authorization or approval of the industry affected before the initiation of an investigation.”

This line of reasoning in the interpretation of “*on behalf of*” was followed by the Panel in *United States—Anti-dumping duties on gray portland cement and cement clinker from Mexico*, Report of the Panel (unadopted) of 7 September 1992, ADP/82 at § 5.18-5.19.

These two actions may take place at the same point in time. For example, if a complaint is issued “by” companies clearly accounting for more than one-quarter of the total of EC producers, the EC authorities could reasonably conclude that the 25 per cent test is met.²⁰⁹ That factual situation, however, did not occur in the Bed linen II proceeding.

5.91 The provision does not preclude that an entity other than a producer files a complaint “on behalf of” the domestic industry—but in such a situation an examination of the support or opposition expressed by domestic *producers* nevertheless remains called for. Indeed, although it is possible that the complete domestic industry supports an anti-dumping proceeding (a situation which will normally mostly occur in cases where the number of domestic producers is very limited), in most anti-dumping proceedings the entity filing the complaint will not itself constitute the complete domestic industry. At least in EC practice, most anti-dumping complaints tend to be filed by trade organisations, (allegedly) on behalf of the domestic industry. The second and third sentences of Article 5.4 deal with the concept “by or on behalf of the domestic industry” by providing for the 50% test and the 25%, respectively. In both cases, the support for the complaint must come from domestic producers rather than from trade organisations or other entities not producing the like product.

5.92 Also, it is not argued in this context that a written declaration is the only method allowed by the ADA in which a producer could express its support for the anti-dumping complaint. It follows from the file, however, that the EC in the Bed linen II proceeding has relied on such written declarations. Moreover, the EC authorities have not argued that they sought or obtained the support from producers in any other manner.

²⁰⁹ In this respect the Panel report must be noted in United States—Imposition of anti-dumping duties on imports of fresh and chilled Atlantic salmon from Norway, Report of the Panel adopted on 27 April 1994, ADP/87:

“358. *The Panel then turned to the question of the duty incumbent on investigating authorities to ensure that their actions with regard to the treatment of written requests for the initiation of anti-dumping investigations were consistent with their obligations under Article 5:1. The Panel considered that, in light of the requirement in Article 5:1 that a written request be by or on behalf of the industry affected and contain certain evidence, the investigating authorities could not, consistently with Article 5:1, initiate investigations automatically in response to any written request received. The requirements of Article 5:1 clearly implied a duty for the authorities to evaluate each such written request to ascertain whether it contained the required information, and to screen out those requests that failed to provide it. The investigating authorities therefore had to evaluate whether a written request for the initiation of an investigation was made “on behalf of” the industry affected . . .*

360. *The Panel noted that the Agreement did not provide precise guidance as to the procedural steps to be taken for such an evaluation, and considered that the question of how this requirement is to be met depends on the circumstances of each particular case. In the Panel’s view, this question, or in this case the steps the United States was required to take as a prerequisite to initiating an investigation, had to be evaluated on the basis of the information before the investigating authorities at the time of the initiation decision. The Panel examined whether in the case before it the United States had taken such steps as could reasonably be considered sufficient to ensure that the written request for initiation of an investigation had been made with the authorization or approval of the industry affected.*

361. . . . The written request for the initiation of an anti-dumping investigation had been made with a legal certification, as to its accuracy and completeness. It had been submitted by twenty-one firms representing well over the majority of all domestic production of Atlantic salmon . . .”

In this case, the complainant did provide a legal certification guaranteeing that the information on standing was correct.” (Emphasis added, footnotes omitted)

In this respect it is further relevant that the language of Article 5.4 of the ADA is considerably more stringent than the language of Article 5.1 of the 1979 (“An investigation to determine the existence, degree and effect of any alleged dumping shall normally be initiated upon a written request by or on behalf of the industry (as defined in Article 4) affected”), which was at issue in Salmon.

4.2 Legal arguments relating to the claims relating to Article 5.4

5.93 India has a number of arguments why the determination of representativeness made by the EC does not meet the requirements laid down in Article 5.4, as analysed above.

5.94 First, it appears from the file that the EC has accepted a statement from at least one producers' association (the Austrian association Vereinigung Textilindustrie) that it supported the complaint in its own name, and has added the production volume of the members of this association to that of the complainants. Indeed, it is not certain whether the 25% test would still be met if the output of the members of the Austrian association were deducted.

5.95 If there has been any further check of the veracity of this statement, no record of it has been made available. The only response by the EC on the concerns raised by Texprocil in this regard was the curt statement in the provisional Regulation that "*the remaining companies represented a major proportion of Community production of bed linen and satisfied the requirements of Article 5(4) of the basic Regulation.*"²¹⁰ At the definitive stage the EC institutions simply ignored Texprocil's arguments. During the consultations the EC indicated orally that a declaration by a producers' association was valid in its opinion for the purposes of expressing support for the application.

5.96 India believes that, while it is possible for an association of producers to file a complaint, it would not be possible for a producers' association to substitute its support for that of its member companies. While acknowledging that Article 17.6(ii) of the ADA provides a certain space for different interpretations, this space only exists if "*a relevant provision of the Agreement admits of more than one permissible interpretation*". In the case of Article 5.4, however, the interpretation according to customary rules of interpretation is perfectly clear. In an interpretation "*in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*"²¹¹ "*domestic producers*" are to be interpreted as 'domestic producers'.

5.97 The argument used by the EC during the consultations that the rôle of the association in expressing support is comparable to that of a lawyer representing a company is instructive in this regard, in that it is false. At least in EC anti-dumping practice (and probably in most jurisdictions) for each new anti-dumping proceeding lawyers have to show a power of attorney from the company (on the company's letterhead, dated and signed) they purport to represent—no matter how longstanding the relation between the company and the lawyer. Indeed, the Commission will often insist on receiving the original (as opposed to a faxed copy) document for its files.

5.98 India believes that the procedural error of accepting and relying on a declaration of support "*on behalf of*" a producers' association without further checking whether the member companies of the association did indeed support the complaint²¹², cannot be repaired retroactively.²¹³

5.99 Second, it appears from the file that the EC accepted producers' associations' declarations "*on behalf of*" producers, without these producers having ever confirmed their support to the

²¹⁰ Recital (52).

²¹¹ Article 31(1) of the 1969 Vienna Convention on the Law of Treaties.

²¹² It has never been alleged by the EC during either the administrative proceeding or during the consultations that such a check was ever made. Even if it was, no record has been made available from which such a check would transpire.

²¹³ In this context guidance may be found in the GATT panel report on United States—Imposition of anti-dumping duties on imports of seamless stainless steel hollow products from Sweden, Report of the Panel (unadopted) of 20 August 1990, ADP/47 at § 5.20.

investigating authorities before the initiation of the proceeding.^{214,215} This concerns the French and Spanish producers' association declarations, and the (alleged) expressed support of the following companies:

France:

- Ets Claude,
- Jalla SA-Nieppe,
- Hacot (Joseph et Cie),
- Ets Hacot et Colombier,
- Ets Fremaux,
- Vanderschooten,
- Mulliez Freres SA au Longeron,
- Ets Bera;

Spain:

- Estebanell y Pahisa SA,
- Hilados y Tejidos Puigero SA,
- Textil Cano Segura (Texca Sesa).

5.100 As far as the EC has argued that the statutes of the producers' associations allow them to represent their members, it is believed that this misses the point. As argued above, a producers' association may surely file a complaint. The issue here, however, is not whether such an association has the right to file a complaint, but rather whether it can replace individual producers in expressing support for it. It follows from the analysis above that it cannot. In the terms of the analogy noted before by the Commission during the consultations: a lawyer cannot represent his client in issuing on behalf of that client a power of attorney to himself.

5.101 Moreover, as far as the EC would mean with its argumentation that it could trust that the producers' associations or Eurocoton have checked standing, this would in effect imply the 'catering out' of the standing determination to the complainant. It would seem that this would be hard to reconcile with the wording of Article 5.4, which clearly requires "*the authorities*" to determine representativeness. Eurocoton, its member associations or any other private party do not constitute "*the authorities*".

5.102 The EC's acceptance of declarations from associations without further verifying these is not excused by the large number of exporters. The ADA foresees for a clear procedure in cases where the number of exporters is large. If the EC considered that the number of alleged EC complainants was too large to make it practical to examine the expressed support of each individual producer, it could have resorted to the option contained in the footnote to Article 5.4:

²¹⁴ Even if they would have, no record has ever been made available nor has it been alleged in any way by the EC in the administrative proceeding or during the consultations. Furthermore, India believes that it is entitled to rely on the non-confidential file made available by the investigating authorities.

²¹⁵ The notice of initiation is not even clear whether the complaint was submitted "*by*" the domestic industry or "*on behalf of*" the domestic industry:

"Having determined, after consulting the Advisory Committee, that the complaint has been lodged by or on behalf of the Community industry and that there is sufficient evidence to justify the initiation of proceedings, the Commission has commenced an investigation pursuant to Article 5 of Regulation (EC) No 384/96." (Emphasis added) (OJ (1996) C 266/2 at 5).

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

5.103 As a factual matter, it is noted that during the administrative proceeding the EC authorities have never argued that this footnote was applied in the Bed linen II proceeding. Only during the second round of consultations the EC delegation referred to it briefly, apparently as an indication that the EC’s practice in the Bed linen II proceeding might be covered by it.

5.104 In this respect it must be noted that the footnote refers to *“statistically valid sampling techniques”*. Quite apart from no evidence being on file of any sampling technique ever having been used by the EC for the determination of representativeness, it would seem that a sample taken from the membership of the member associations of Eurocoton would not give a statistically valid picture of the domestic producers of bed linen in the EC. This is all the more so now that the standing for this proceeding according to the EC was at best little over 34 per cent (rather less than the 53 per cent alleged by Eurocoton in its complaint) of Community producers. Consequently, a large number of producers would thus seem to have never been asked their opinion on the complaint.

5.105 As a last issue, the question arises whether the procedural error committed before the initiation has been repaired retroactively by French and Spanish companies co-operating with the EC. We believe it has not. The wording of Article 5.4, as analysed above, would seem to be quite clear. We further note the text of Article 1 of the ADA:

“An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated¹ and conducted in accordance with the provisions of this Agreement. The following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations.

Footnote 1. The term ‘initiated’ as used in this Agreement means the procedural action by which a Member formally commences an investigation as provided in Article 5.”
(Emphasis added)

5.106 An anti-dumping duty may only be imposed if the investigation has been initiated and conducted in accordance with the ADA. The footnote to Article 1 even specifically clarifies that Article 5 (and thus 5.4) is very much relevant in this context. Since the standing determinations in the *Bed linen II* proceeding were made inconsistently with Article 5.4 of the ADA, the anti-dumping duty has been imposed inconsistently with Article 1 (and, for that matter, Article VI of GATT 1994). The language of Article 1 is imperative: *“shall be applied only”*.²¹⁶ There is no qualifying language in Article 5.4 of the ADA. Procedural defects at the time of initiation cannot be repaired retroactively.²¹⁷

²¹⁶ In this context the Panel’s conclusions in Korea—Anti-dumping duties on imports of polyacetal resins from the United States may be noted (Report of the Panel, ADP/92 and Corr.1 of 2 April 1993 at § 210):

“. . . for a panel to review a determination by reference to considerations not actually reflected in a public statement of reasons accompanying such determination would also be inconsistent with the requirements of an orderly and efficient conduct of the dispute settlement process . . . A full and public statement of reasons underlying an affirmative determination at the time of that determination enabled Parties to the Agreement to assess whether recourse to the dispute settlement mechanism . . . was appropriate and provided a basis for a delimitation of the object of such dispute settlement proceedings. In this connection the Panel noted that, in light of the wording of the public notice given by the Korean authorities at the time of the imposition of the anti-dumping

5.107 Additionally, the purpose of Article 5.4 is to avoid undue harassment of exporters by frivolous initiations (such as, for example, occurred by the initiation of the first Bed linen proceeding). This purpose would be defeated if the investigating authorities would be allowed to initiate an anti-dumping proceeding without making a proper determination of representativeness in order to subsequently attempt to obtain the necessary support for the proceeding. In this context, India can only concur with the EC's assessment in Brazil—Imposition of provisional and definitive countervailing duties on milk powder and certain types of milk from the EEC.²¹⁸

“The EEC disagreed with Brazil's position that this dispute involved only procedural issues and that any procedural errors committed by Brazil were harmless. The EEC considered that substantive rights under the Agreement could not be effectively guaranteed if minimum procedural requirements were not respected. Moreover, the EEC pointed out that its complaint also related to Brazil's non-compliance with substantive requirements in Article 6 of the Agreement regarding the determination of the existence of material injury.” (Emphasis added)

5.108 Last, it may be noted that Article 3(8) of the Dispute Settlement Understanding provides a strong presumption that an infringement of a covered agreement implies a case of nullification or impairment. India believes that the standing determination in the Bed linen II proceeding does not meet the criteria of Article 5.4 and as such, impaired or nullified India's rights under the WTO Agreement.

5. Claim 27: inconsistency with Article 12.2.1

5.1 The text of Article 12.2.1

5.109 *Mutatis mutandis* the same logic applies as noted in section V.A.4.1, above: “*determination*” in sub-paragraph 12.2.1(v) is in singular, in contrast to the “*preliminary determinations*” in the chapeau of the provision. That would suggest that “*determination*” in sub-paragraph (v) refers to “*preliminary or final determination*” in Article 12.2. In other words, under Article 12.2.1 the investigating authorities must set out in the provisional and definitive Regulations “*the main reasons leading*” to “*the preliminary or final determination*”. Logically, sub-paragraph (v) aims also at those determinations essential for the investigating authorities in order to impose anti-dumping measures, including the determinations on representativeness required under Article 5.4.

5.110 Since the provisional Regulation (and the provisional disclosure document) is the first document in which the EC authorities explain their position on standing, the exporters may expect to receive a reply there to any arguments raised by them in this respect. If the investigating authorities would not be under any obligation to explain their standing determination at the time of the

duties, Parties to the Agreement and exporters affected by these measures had no reason to believe that the injury determination of the KTC was based on considerations not reflected in that notice.” (footnote omitted)

Again reference is made to the Appellate Body's dictum in EC—Measures affecting the importation of certain poultry products, AB-1998-3, WT/DS69/AB/R of 13 July 1998 at § 165:

“The chapeau of Article 5.5 clearly states that the schedule in the body of that provision is mandatory. The word used in the chapeau is ‘shall’, not ‘may’. There is no qualifying language, and there is no language that permits any method other than that set out in the schedule in Article 5.5 as a basis for the calculation of additional duties.”

²¹⁷ Similar logic (in the context of the 1979 Anti-Dumping Code) in United States—Imposition of anti-dumping duties on imports of seamless stainless steel hollow products from Sweden, Report of the Panel (unadopted) of 20 August 1990, ADP/47 at § 5.20.

²¹⁸ Report of the Panel adopted on 28 April 1994, SCM/179 and Corr.1 at § 205.

imposition of provisional anti-dumping measures, it would impair the effective possibilities for exporting countries to raise such issues under Article 17.4, second sentence.²¹⁹

5.111 Second, the word “and” in the chapeau of 12.2.1 must be noted between “*sufficiently detailed explanations for the preliminary determinations on dumping and injury*” and “*shall refer to the matters of fact and law which have led to arguments being accepted or rejected*”. In other words, the limitation to preliminary determinations on dumping and injury would not appear to be applicable to the second part “*shall refer to the matters of fact and law which have led to arguments being accepted or rejected*”. As argued above, Article 12.2.1 as a whole, and especially in view of its subparagraph (v), does apply to the standing determination as well. A correct reading of Article 12.2.1 would thus seem to be that the provisional Regulation (or some other disclosed provisional document) must refer to *the matters of fact and law which have led to arguments being accepted or rejected*” in the context of standing as well.

5.2 Legal arguments relating to the claims relating to Article 12.2.1

5.112 In anti-dumping proceedings the investigating authorities have a very dominant position as far as knowledge of the facts is concerned. This is even more so in the EC, where the European Commission is the only entity having access to all facts relating to standing. Article 12 fulfils in this context a crucial rôle to ensure a certain degree of transparency. In this context the *dictum* of the Panel in Korea—Anti-dumping duties on imports of polyacetal resins from the United States is of relevance:²²⁰

“In the view of the Panel, the purpose of this provision would be frustrated if in a dispute settlement proceeding . . . a Party were allowed to defend a challenged . . . determination by reference to alleged reasons for such determination which were not part of a public statement of reasons accompanying that determination . . .”

5.113 In the provisional Regulation imposing anti-dumping duties on Indian bed linen the explanation on the determination of representativeness was, to put it charitably, brief:

“(52) After elimination from the list of companies included in the complaint of seven of them found not to be complainants, the Commission found that the remaining companies represented a major proportion of Community production of bed linen and satisfied the requirements of Article 5(4) of the basic Regulation.”

5.114 No word was spent in the provisional Regulation or the provisional disclosure document on the issues raised above—even though the Indian exporters had brought them to the EC’s attention throughout the proceeding repeatedly and in detail.

5.115 Apart from the information made available in the non-confidential file, there was no way for the Indian exporters to further check the veracity of the conclusions of the investigating authorities. Under such circumstances, the EC can hardly claim that it referred “*to the matters of fact and law*

²¹⁹ “When a provisional measure has a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7, that Member may also refer such matter to the DSB.”

Article 7.1 explicitly refers to Article 5, which includes Article 5.4.

²²⁰ Korea—Anti-dumping duties on imports of polyacetal resins from the United States, Report of the Panel, ADP/92 and Corr.1 of 2 April 1993 at § 209.

which have led to arguments being accepted or rejected” or that the provisional Regulation or the provisional disclosure contained “the main reasons leading to the determination”.

5.116 In summary, India believes that neither in the provisional Regulation nor in any other document made available to the Indian exporters around the time of the provisional anti-dumping measures the EC met the standards laid down in Article 12.2.1.

6. Claim 28: inconsistency with Article 12.2.2

6.1 The text of Article 12.2.2

5.117 The text of Article 12.2.2 differs somewhat from that of Article 12.2.1:

“A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6.”

6.2 Legal arguments relating to the claims relating to Article 12.2.2

5.118 Even if the EC did not agree with the Indian exporters, it was still obliged to provide in the definitive Regulation “the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers”.

5.119 As noted in the facts’ description above, the EC did react on issues raised in the connection with the scope of the domestic industry.

5.120 However, even though the Indian exporters again filed arguments in response to the provisional disclosure and the provisional Regulation, there was absolutely no reaction to or even a denial of the arguments and claims made by Indian exporters in connection with Article 5.4. The EC thus failed to explain its definitive finding consistently with Article 12.2.2.

VI. CLAIMS RELATING TO INDIA'S STATUS AS A DEVELOPING COUNTRY

A. ARTICLE 15: THE INVESTIGATING AUTHORITIES FAILED TO CONSIDER POSSIBILITIES OF A CONSTRUCTIVE REMEDY EVEN THOUGH INDIAN EXPORTERS HAD STRESSED THE IMPORTANCE OF THE BED LINEN INDUSTRY TO INDIA

6.1 Summary: the EC acted inconsistently with Article 15 of the ADA by not exploring possibilities of a constructive remedy and by not even reacting to arguments from Indian exporters pertaining to Article 15 (**claim 29**).

Even though detailed arguments were presented by the Indian exporters on these issues, the EC failed to properly explain its reasoning, and consequently acted inconsistently with Article 12.2.1 (**claim 30**) and 12.2.2 (**claim 31**).

1. Facts

6.2 In its injury submission²²¹ Texprocil drew attention to India's status as a developing country:

“Among all the countries targeted by this proceeding, India has by far the lowest per-capita income. GDP per capita is one of the three criteria used by the United Nations in determining the Least Developed Country (LDC) status. In 1971 the UN General Assembly established the list of LDCs. Lower and upper cut-off points of per-capita GDP were established at US\$356 and US\$427 respectively, and then manufacturing share of GDP and literacy rate for the country were factored into the formula.

While Texprocil realises that India is not listed as an LDC, India's 1993 per capita GDP of US\$270 was not only below the lower cut-off point for LDCs, but was also much lower than the per capita GDP of all countries in this proceeding, as shown by table 7:

Table 7: GNP per capita (US\$, estimates)

<i>India</i>	<i>Egypt</i>	<i>Pakistan</i>
270 (1993)	730 (1992)	410 (1992)

Source: CIA World Factbook

Article 15 of the Agreement provides that:

‘[i]t is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.’

The textile industry is one of the most important economic engines of the Indian economy. The country is highly dependent on the textile industry as a source of employment and development.

Texprocil respectfully requests that the Commission takes into account the spirit behind these special considerations while determining any injury caused by the allegedly dumped imports, and in any subsequent action it may take or suggest.”

6.3 During the first injury hearing the importance of the bed linen industry to the Indian economy was stressed and in the subsequent post-hearing brief²²² the point was repeated.

6.4 Notwithstanding India's request on the basis of Article 15, the EC did not once in the provisional Regulation, the provisional disclosure or anywhere else in the file even mention India's status as a developing country, let alone consider or comment on possibilities of constructive remedies. Even though Indian exporters had repeatedly stressed the great importance of the bed linen and textile industry to India's economy, the EC did not once contact the Indian exporters or the Indian government to explore the possibilities of constructive remedies before applying the provisional anti-dumping duties.

²²¹ Attached as Annex 50.

²²² Attached as Annex 54.

6.5 In its comments to the provisional disclosure, Texprocil therefore reminded the EC:²²³

“Texprocil recalls for the record its arguments concerning India’s status as a developing country as presented to the Commission. Texprocil notes that both in the disclosure document and in the provisional duties Regulation the Commission has failed to address these issues.”

6.6 The EC was similarly reminded during the second injury hearing and in the second post-hearing brief.²²⁴

6.7 Nevertheless, the definitive disclosure document and the definitive Regulation also failed to even mention India’s status as a developing country, let alone make any determination or any consideration on the issue of Article 15. The EC again failed to contact the Indian exporters or the Indian government to explore the possibilities of constructive remedies.

6.8 During the first round of consultations India raised the issue and the following discussion took place:

“Mr Seth: The words ‘must be given’ in Article 15 would seem to be mandatory. While Article 15 does not per se require the EC to make special concessions to developing countries such as India in each case, it does lay down an obligation at least to consider (‘special regard’) the ‘special situation of developing country Members’. It is accepted that such special regard does not affect the calculation of dumping and injury per se. Nevertheless, the words ‘when considering’ would imply that the EC, after having determined that dumping and injury caused thereby are present, must make a separate determination on the effects of anti-dumping measures to India’s situation as a developing country.

...

[EC]: The EC is convinced that special regard has been given. . . .”

6.9 The EC did not elaborate on its answer in its letter of 1 October 1998.

6.10 During the second round of consultations India reverted to the issue:

“Mr Seth: I move now on to question 115. Let me recall our conviction that the words ‘special regard must be given . . . to the special situation of developing country Members’ in Article 15 of the Agreement would seem to be mandatory. While Article 15 does not per se require the EC to make special concessions to developing countries such as India in each case, it does lay down an obligation at least to consider (‘special regard’) the ‘special situation of developing country Members’.

...

[EC]: We maintain that the requirement was respected. . . . Article 15 is a difficult piece, particularly in the Anti-Dumping Agreement.”

6.11 In its letter of 29 June 1999²²⁵ the EC provided the following written answer to question 115:

²²³ Attached as Annex 51.

²²⁴ Attached as Annex 55.

“Question 115

Can the EC indicate where in the provisional or definitive Regulations it has considered giving special regard to the special situation of India as a developing country Member?

It was pointed out that while specific concessions made to Indian firms in view of their location in a developing country were not spelled out in the published Regulations, the firms concerned were granted special treatment in a number of ways. The preparation of simplified questionnaires for exporters, the acceptance of responses beyond the stated deadline and consequent granting of co-operator status, and the individual treatment of newcomers despite the case having been based on sampling, are all examples of special consideration.

Last but not least, discussions on undertaking [sic] took place and this has to be considered as complying with obligations even if these did not result in measures in the form of undertakings.”

2. Claims

6.12 Three claims flow from the events and facts described above.

6.13 First, the EC acted inconsistently with Article 15 by failing to explore possibilities of constructive remedies before imposing anti-dumping duties, even though India had clearly argued that the textile industry, and with it the bed linen industry, is of essential interest to the Indian economy.

6.14 Second, the EC acted inconsistently with Article 12.2.1 of the ADA by failing to indicate in the provisional Regulation or in any other report made available to the Indian exporters at the time of the imposition of provisional measures why it refused any constructive remedy based on Article 15, or how it responded to its obligations under the second sentence of Article 15.

6.15 Third, the EC acted inconsistently with Article 12.2.2 of the ADA by failing to indicate in the definitive Regulation or in any other report made available to the Indian exporters at the time of the imposition of definitive measures why it refused any constructive remedy based on Article 15, or how it responded to its obligations under the second sentence of Article 15.

3. Claim 29: inconsistency with Article 15

3.1 The text of Article 15

6.16 Article 15 provides that:

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

²²⁵ Attached as Annex 14.

6.17 Article 15 provides for two different issues:

1. The first sentence of this provision concerns the appropriateness of the “*application of anti-dumping measures*” in view of the fact that the targeted country is a developing country Member. The issue is here that, once dumping and injury have been determined, when deciding whether anti-dumping measures should be imposed, developed countries should take into account the developing country status of the targeted country.

2. The second sentence deals with the case where “*essential interests*” of developing countries are at issue. The language here is more direct.

6.18 As a first observation, the two sentences are not linked (e.g., “. . . *under this Agreement and possibilities of constructive . . .*”); this is logically so. In other words, the words “*It is recognized that*” of the first sentence do not refer to the second sentence. This is clear since otherwise the second sentence would read as follows:

“It is recognized that possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.”

6.19 This, however, would not make much sense, among others because of the word “*shall*” which would have read ‘should’ if the permissive meaning implied in “*It is recognised that*” was applicable to the second sentence.

6.20 Let us then look at the meaning of each of the two sentences.

6.21 First the first sentence. The key words here are “*special regard*” and “*when considering*”. It transpires from the text that the relevant moment when the first sentence comes into play is when there is a determination of dumping and injury caused thereby. The importing country authorities then have to determine whether these findings, as well as any other elements relative to the case²²⁶, would militate in favour of imposition of anti-dumping measures or not. The first sentence of Article 15 states a preference that the special situation of developing countries should be an element to be weighted when making that evaluation.

6.22 The first sentence does not seem to create a rock-solid legal obligation. This follows from the opening words “*It is recognized that . . .*” and the wording “*special regard must be given*”. The first sentence thus contains a statement of preferred policy. This conclusion would seem reinforced by Article 17.6(ii) second sentence, of the ADA.²²⁷

6.23 The text and spirit of the second sentence differs considerably from that of the first sentence. To start with, the object of the sentence (“*essential interests of developing country Members*”) would seem to be more direct than the—rather vague—“*special situation*” of developing country members mentioned in the first sentence.

6.24 The obligations in the second sentence are accordingly stricter: “*Possibilities . . . shall be explored . . .*”. There is no “*It is recognized that*” here—the second sentence contains very clear

²²⁶ For example, under EC anti-dumping law, the investigating authorities must make a separate determination whether the imposition of anti-dumping measures would be in the Community interest.

²²⁷ Similar the EC in Cotton yarn at § 576. Note that the EC—correctly—limited the qualification to the first sentence, not to the whole provision.

language. The logic of the Appellate Body, developed in the context of another covered agreement, similarly applies here:

“The word used . . . is ‘shall’, not ‘may’. There is no qualifying language, and there is no language that permits any method other than that set out in the schedule in Article 5.5 as a basis for the calculation of additional duties.”

6.25 It follows that the second sentence, when regarded in the context of the Agreement, lays down clear obligations. First, there must *ipso facto* be a determination (or assessment) whether the essential interests of the developing country concerned may be involved. This determination must have been made “*before applying anti-dumping duties*”, *i.e.*, after a determination of dumping and injury caused thereby have been made, but before the imposition of (provisional) anti-dumping duties.

6.26 Then the investigating authorities are required to explore possibilities of constructive remedies “*provided for by this Agreement*”. These last words would seem to indicate that the remedy may consist of, among others, the non-imposition of anti-dumping measures, or an undertaking.

6.27 As to the timing of the ‘exploration of possibilities of constructive remedies’, these “*shall*” be explored “*before applying anti-dumping duties*”. In the EC context this means before provisional anti-dumping duties are imposed.

3.2 Legal arguments relating to the claims relating to Article 15

6.28 The first issue is whether the EC did in fact give special regard to India, and whether this alleged special treatment—even if factually correct—is relevant under Article 15 (section 3.2.1). The next issue is what the EC should have done under Article 15 (3.2.2).

3.2.1 The alleged special treatment granted by the EC

6.29 During the two rounds of consultations between India and the EC, the latter pointed to the following issues it believed to be applications of Article 15:

- (a) the questionnaires used were allegedly more simple than those used in other proceedings;
- (b) the EC was supposedly more flexible with India when accepting submissions outside the deadline;
- (c) a special newcomers’ provision was adopted in the definitive Regulation allowing newcomers to obtain the sample duty even though such a newcomers’ provision is not foreseen in the EC basic anti-dumping Regulation;
- (d) handloom products were excluded from the scope of anti-dumping duties.

6.30 (a) the questionnaires used: the questionnaire for exporters used in the Bed linen II proceeding is attached as Annex 63. It can be seen that it is *mutatis mutandis* similar to a recent questionnaire used for anti-dumping proceedings against OECD Members (Hungary, Poland, Mexico; see Annex 64). It can also be seen that it is very similar to a questionnaire as used against Taiwan (see Annex 65), clearly a very developed country. Although there are some minor differences between the questionnaires (in some cases caused by the different product and trade channels involved), it requires imagination to consider the Bed linen II questionnaire as less exacting than the questionnaires used for developed

countries. This is easily demonstrated by comparing the Bed linen II questionnaire with the other questionnaires mentioned. Indeed, if one compares the questionnaire for *Bed Linen* with one used in a recent proceeding against Taiwan (Annex 66), it would appear that in fact the latter one is more straightforward, and not *vice versa*. In summary, the EC's argument is factually incorrect.

6.31 Even if the EC's reply during the consultations were factually true, it would be an interpretation that is, to put it mildly, surprising in view of the EC's argumentation before the Cotton yarn panel.²²⁸

"The EC argued that any obligation contained in the first sentence of Article 13 only arose at the time of consideration of imposition of measures. The word 'measures' clearly limited the obligation to the stage following conclusion of an investigation. Article 10 of the Agreement referred to 'Provisional measures'. The first sentence of Article 10:1 confirmed that the obligation under Article 13 only arose after an investigation. Article 10:2 defined what provisional measures could consist of."

6.32 Moreover, the Panel in EC—Cotton yarn essentially followed the interpretation propagated by India in this case:

"585. The Panel was of the view that Article 1 of the Agreement provided the context for Article 13. Article 1 provided that anti-dumping duties could not be applied prior to determination of dumping, material injury and a causal link between the two. In addition, the words 'where they would affect the essential interests of developing countries' establish the condition under which this obligation becomes operative. Clearly this condition could only be ascertained subsequent to the determination of the amount of the anti-dumping duty to be applied in order to know whether the imposition of the anti-dumping duty would affect the essential interests of developing countries. This made clear that the second sentence of Article 13 gave rise to an obligation to consider the possibility of adopting constructive remedies after determination of dumping, material injury and a causal link between the two."

6.33 India believes the reasoning of the Cotton yarn Panel on the timing aspect to be convincing. In other words, Article 15 does not have regard to treatment during the determination of dumping and injury, but rather comes into play once the investigating authorities have determined that dumping and injury exist. Logically, the issue of allegedly 'simplified' questionnaires could not even arise under Article 15, since the questionnaires are issued and replied to before dumping can be determined.

6.34 (b) alleged flexibility with deadlines: To begin with, India is not aware of any (special) flexibility with deadlines in the Bed linen proceeding, and the Commission's statements during the consultations thus appear to be factually incorrect.

6.35 The two cases where companies (Giraffe International and Nidhi Exports) made themselves known to the Commission somewhat after the deadline clearly disprove the allegation. The Commission informed both companies that the Commission's services were unable to consider both companies as co-operating exporters,

²²⁸ EC—imposition of anti-dumping duties on imports of cotton yarn from Brazil, ADP/137 of 4 July 1995 at § 579. It is noted that the text of Article 13 of the 1979 Anti-Dumping Code is almost identical to that of Article 15 of the ADA:

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

“[a]s the deadline relating to sampling provided for in the notice of initiation has already passed and the companies to be included in the sample have been both selected and informed”²²⁹

6.36 Although India acknowledges the right of the investigating authorities to ignore information submitted after reasonable deadlines, by the same token it is noted that the EC, by availing of this right, cannot claim it has shown special consideration for the Indian companies concerned.

6.37 The sampled companies requested an extension of the deadline on the basis of Article 6.1.1 because the companies had shown good cause and such an extension was practicable for the investigation authorities. The extension was not granted because the companies concerned are located in a developing country (relevant correspondence attached as Annex 68) but on the condition that the companies would make an effort to submit the questionnaire responses as soon as possible. As far as India is aware, all sampled companies submitted their questionnaire responses within the—revised—deadline. It is thus hard to see how the investigating authorities in the Bed linen II proceeding would have been more flexible, and clear that the EC’s claims that it was exceptionally flexible with deadlines is not borne out by the factual situation.

6.38 Moreover, similarly to the point argued under (a), even if the EC’s argument would be factually correct (*quod non*), it would be irrelevant since the issue of deadlines arises only before dumping is determined, not at the stage of the application of anti-dumping measures.

6.39 (c) special newcomers’ provision: Under EC anti-dumping law, the possibility of a newcomer review is not foreseen in cases where the exporters have been sampled.²³⁰ This leads to patently unfair situations for companies commencing exporting after the investigation period, since they are subjected beyond their will to the (high) residual anti-dumping duty. In recent years, in Regulations in proceedings involving sampling the EC therefore includes as a matter of standard practice a clause on the following lines:

“Where any new exporting producer from the countries concerned provides sufficient evidence to the Commission that

- it did not export to the Community the products described in Article 1(1) during the investigation period . . . ,*
- it is not related to any of the exporters or producers in the exporting country which are subject to the anti-dumping measures imposed by this Regulation,*
- it has actually exported to the Community the products concerned after the investigation period on which the measures are based, or it has entered into an irrevocable contractual obligation to export a significant quantity to the Community,*

then the Council, acting by simple majority on a proposal submitted by the Commission after consulting the Advisory Committee, may amend Article 1(3) by adding that new exporting producer to the list in Annex I.” (Article 3 of the definitive Bed linen Regulation)

6.40 Three well-informed authors further confirm the logic behind the clause:²³¹

²²⁹ Letters to both companies attached as Annex 67.

²³⁰ Article 11(4), last sentence, of the EC basic anti-dumping Regulation.

²³¹ Müller, Khan, Neumann, *EC Anti-Dumping Law—A Commentary on Regulation 384-96*, Wiley 1998, page 354 at § 11.74.

“... the unavailability of both Article 11(3) and (4) could lead to injustices. In order to deal with such situation, the Council adopted an amendment to a regulation imposing definitive anti-dumping duties in a case where sampling had been used, the effect of which is to allow the regulation to be amended after the Commission has verified the applicant’s newcomer status, so as to add the newcomer to the list of parties subject to the average duty.”²³²

6.41 Moreover, the special newcomer clause is not only used in cases of developing countries. For example, a similar provision was used in *Flat wooden pallets from Poland* (where the provisional Regulation was even especially amended for it after its adoption)²³³ and—in a slightly different form—in *Farmed Atlantic salmon from Norway*.²³⁴ The Commission’s reply would thus seem to be factually incorrect—unless Norway qualifies as a developing country.

6.42 (d) handloom products: the argument that the exclusion of handloom was based on developing country considerations is factually incorrect and not supported by the published definitive determination:

“B. PRODUCT UNDER CONSIDERATION AND LIKE PRODUCT

1. Requests for exclusion from the proceeding

...

(7) As regards the request to exclude handloom products, while the use of different production methods is not in itself a reason relevant to the definition of the like product, it was found that handloom items had physical characteristics different from those of other bed linen, notably through a less regular and looser weave. This difference led to a different consumer perception of handloom products which was reinforced by the fact that handloom products are often sold through particular sales channels such as charity shops which are not available to Community producers.

Consequently it was concluded that handloom products should be excluded from the scope of the proceeding and, therefore, these products should be exempted from the payment of the duties if accompanied by a certificate of handloom origin (see Annex II to this Regulation) issued by the appropriate authorities of the exporting country.”

6.43 The issue of handloom exclusion was discussed under the heading ‘like product’—as indeed, the European Commission did during the investigation.

6.44 The reason given by the Commission for the exclusion is that handloom items “*had physical characteristics different from those of other bed linen*”. The Regulation does not even once mention India’s status of a developing country, let alone discuss it in the context of handloom products.

6.45 In summary, neither the provisional nor the definitive Regulation, nor the disclosure documents or any other report made available to the Indian exporters contains any determination, examination or consideration on India’s special status as a developing country, on the importance of

²³² Footnote in original: “*OJ No L 48, 19.2.97, p. 1—cotton yarn from Brazil and Turkey/ newcomer (Council) and OJ No L 50, 20.2.97, p. 1—cotton yarn from Brazil and Turkey/ newcomer (Commission).*”

²³³ See OJ (1997) L 225/11-12 and OJ (1997) L 324/6, respectively (attached as Annex 75).

²³⁴ OJ (1997) L 267/15 (relevant excerpt attached as Annex 76).

the bed linen and textile industry to the Indian economy and India's special interests in the matter (even though arguments pertaining to this had been made), or on any possible special remedies to take account of such situation.

3.2.2 The EC's obligations under Article 15 in the Bed linen II proceeding

6.46 The applicability of Article 15 arises once the investigating authorities have determined that dumping and injury caused thereby exist, and before they apply provisional anti-dumping measures (“*before applying anti-dumping duties*”).

6.47 Indian exporters had clearly argued that the textile industry, and the bed linen industry, is of vital importance to its economy. In its injury submission Texprocil noted that “[t]he textile industry is one of the most important economic engines of the Indian economy. The country is highly dependent on the textile industry as a source of employment and development.” This point was further stressed during Texprocil's first injury hearing.

6.48 In this context the conclusions of the Cotton yarn Panel may be recalled:

“583. The Panel noted that a precondition for the obligation in the second sentence was that the application of anti-dumping measures ‘would affect the essential interests of developing countries’. Brazil had argued that cotton yarn was a strategic industry for Brazil, and that, therefore, application of anti-dumping duties would be of immense importance to its economy. The Panel was of the view that ‘essential interests’ was defined by its context, like the phrase ‘special situation of developing countries’ in the first sentence of Article 13. The Panel considered that the essential interests of a developing country which could be affected by the imposition of anti-dumping duties could include a strategic industry dependent on export trade. If cotton yarn was such an industry in Brazil, the essential precondition to the activation of the particular obligation contained in the second sentence of Article 13 was satisfied.”

6.49 Similarly, the bed linen industry was thus an essential interest for India. Nevertheless, there is no record that the EC even tried to determine whether this was so.

6.50 Once they had determined that dumping and injury caused thereby existed, the EC authorities were then under an obligation (“*shall be*”) to ‘explore’ the possibilities of constructive remedies. To ‘explore’ means “*to search through or into*”²³⁵, “*to investigate in a systematic way; to examine*”²³⁶, to “*inquire into; investigate thoroughly*”.²³⁷ This would require positive action by the EC authorities, and presume a genuine and demonstrated willingness to consider the possibilities of constructive remedies.

6.51 The constructive remedies must be “*provided for by this Agreement*”. That would seem to imply a possible constructive remedy—apart from a decision not to impose any anti-dumping duties—would be an undertaking as provided by Article 8 of the ADA. The Indian exporters were only informed that dumped imports causing injury had been found after the imposition of provisional anti-dumping measures. Since the Indian exporters could only be aware of the dumping and injury findings after the imposition of anti-dumping measures, it is not reasonable to interpret the second sentence of Article 15 as requiring Indian exporters to take the initiative for an undertaking, to the

²³⁵ Webster's New Collegiate Dictionary, 1975, attached as Annex 69.

²³⁶ Webster's II New Riverside Dictionary, 1984, attached as Annex 70.

²³⁷ The Concise Oxford Dictionary of Current English, ninth edition, 1995, attached as Annex 71.

extent that an undertaking would have been a possibility of a constructive remedy. Logically, it follows that in accordance with Article 8.5, an undertaking (or any other constructive remedy provided by the ADA) should have been suggested by the EC authorities before the imposition of provisional anti-dumping duties, or at least, that the EC should have investigated the possibilities for such constructive remedy. However, there is nothing on file suggesting that the EC authorities even remotely considered, investigated or explored an undertaking or any other constructive remedy at the time.

6.52 It is noted here that the Indian exporters, after the provisional anti-dumping measures were imposed, did in fact sound out the Commission Services on their willingness to negotiate an undertaking.²³⁸ The Commission's immediate reaction was negative, in view of the large number of product types.²³⁹ No serious discussion ever took place on the subject of the organisation or feasibility of an undertaking, nor was such discussion ever initiated, promoted, or stimulated by the EC authorities. In view of this reaction, the Indian exporters abandoned their efforts to work out an undertaking proposal.

6.53 It follows that the EC, by patently failing to explore the possibilities for a constructive remedy provided by the ADA before imposing provisional anti-dumping measures, and/or by even failing to make any determination whether the Indian bed linen industry was an essential interest to India, acted inconsistently with Article 15 of the ADA.

4. Claim 30: inconsistency with Article 12.2.1

4.1 The text of Article 12.2.1

6.54 It is recalled that Articles 12.2 and 12.2.1 of the ADA provide in relevant part as follows:

"12.2 Public notice shall be given of any preliminary or final determination, whether affirmative or negative . . . Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities . . .

12.2.1 A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular: . . .

(v) the main reasons leading to the determination."

6.55 As noted in section 1, the Indian exporters made arguments on the issue of Article 15. These arguments were completely ignored by the EC in the provisional Regulation as well as in the provisional disclosure.

²³⁸ Relevant correspondence attached as Annex 72.

²³⁹ That concern compares oddly with the EC's eagerness one year later in the second Unbleached cotton fabrics proceeding, in which the EC made great efforts to try to conclude a minimum price undertaking with Texprocil on unbleached cotton fabrics—even though the number of product types and exporters was far greater in that proceeding than in Bed linen II. The relevant pages from the amendment to the definitive disclosure document as well as a fax from the European Commission regretting Texprocil's inability to conclude undertakings in the Unbleached cotton fabrics II proceeding are attached as Annex 77.

4.2 Legal arguments relating to the claims relating to Article 12.2.1

6.56 The EC has nowhere in the provisional Regulation or elsewhere in the file referred to or commented on its obligations under Article 15. The EC either did not consider its obligations under Article 15 material, or failed to explain in any detail its findings and conclusions thereon.

6.57 Although the Indian exporters made arguments on the issue of Article 15, the EC nowhere referred to “*the matters of fact and law which have led to arguments being accepted or rejected*”.

6.58 It follows that the EC acted inconsistently with Article 12.2.1 of the ADA.

5. Claim 31: inconsistency with Article 12.2.2

5.1 The text of Article 12.2.2

6.59 Article 12.2.2 provides in relevant part that:

“A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty . . . shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1 . . .”

5.2 Legal arguments relating to the claims relating to Article 12.2.2

6.60 The EC continued to fail to react to the Indian exporters’ arguments concerning Article 15, even though Texprocil had raised the matter again in its comments to the provisional disclosure. For the same reasons as indicated in section VI.A.4.2 the EC acted inconsistently with Article 12.2.2 of the ADA.

VII. CONCLUSIONS AND REQUESTS

A. CONCLUSIONS

7.1 The claims set forth in Parts III, IV, V and VI, above, affect the anti-dumping measure from different angles. India believes that the anti-dumping proceeding leading up to the definitive anti-dumping duties on bed linen from India should never have been initiated to begin with (initiation claims). After the initiation, the EC authorities acted inconsistently with the rules on procedure, on the dumping determination, and on the injury determination. Finally, when the EC imposed provisional anti-dumping measures, it further tainted the proceeding by acting inconsistently with Article 15 of the ADA. The Regulations imposing provisional and definitive anti-dumping duties on bed linen from India are thus irretrievably tainted with violations of the ADA and should never have been imposed.

7.2 As a second note the seriousness of these anti-dumping duties may be considered. Notably, the EC’s interpretation and application of Articles 2.2 and 2.2.2²⁴⁰ led to dumping margins where

²⁴⁰ This is without prejudice to the other claims made by India in this submission.

there either should have been none, or only very moderate ones. All dumping margins for India except one²⁴¹ can be fully attributed to the excessive and for Bed Linen completely unreasonable profit margin of over 18 per cent that was used in the constructed normal values.²⁴² The high dumping margins led to anti-dumping duties up to 24.7 per cent for the sampled companies and 24.7 per cent for non-co-operating companies.

B. REQUESTS

7.3 For the above reasons India respectfully requests the Panel to:

- 1) find that the EC has acted inconsistently with the ADA as per the claims above and which can be summarised as follows:
 - The initiation of the proceeding against Bed Linen from India by the EC is inconsistent with Articles 5.3 and 5.4 of the ADA;
 - The initiation of the proceeding against Bed Linen from India by the EC is inconsistent with Article 12.1 of the ADA;
 - The EC neither initiated nor conducted its anti-dumping proceeding against Bed Linen from India in accordance with the provisions of the ADA and therefore the initiation and the consequent application of a definitive anti-dumping measure violates Article 1 of the ADA;
 - The imposition of provisional and definitive anti-dumping measures by the EC on Bed Linen from India is inconsistent with Articles 2, 2.2, 2.2.2, 2.2.2(ii), and 2.4.2 of the ADA;
 - The imposition of provisional and definitive anti-dumping measures by the EC on Bed Linen from India was inconsistent with Articles 3, 3.1, 3.4, 3.5, 3.6, and 6 of the ADA;
 - The imposition of provisional and definitive anti-dumping measures on Bed Linen from India by the EC was inconsistent with Articles 12.2, 12.2.1, and 12.2.2 of the ADA.
 - The imposition of provisional and definitive anti-dumping measures on Bed Linen from India by the EC was inconsistent with Article 15 of the ADA.

7.4 Accordingly, India respectfully requests that the Panel

²⁴¹ The dumping margin for Anglo-French.

²⁴² All six other dumping margins for India did not exceed 17 per cent. Clearly, any use of a 'reasonable' profit margin (*i.e.* any profit margin lower than the excessive 18.65 per cent), such as had been suggested countless times during the proceeding, would have led to lower dumping margins.

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

ANNEX 1-2

REQUEST FOR A PRELIMINARY RULING BY INDIA

(11 April 2000)

India herewith respectfully requests a preliminary ruling of the Panel with respect to certain purported documentary evidence provided by the European Communities (EC) in its First Written Submission. India refers to Exhibit EC-4 of the submission of EC: the document titled "***Summary of declarations of support (per country) to industry complaint in EC anti-dumping proceeding.***"

India wishes to note, for the record, that this document has never been made available to India, or otherwise referred to, at any stage prior to this point in time. In particular, the EC has never mentioned or referred to this document during the course of the anti-dumping investigation, nor during the consultation phase preceding the request for establishment of the present Panel.

India recalls that the standing has been a central issue throughout the anti-dumping investigation leading to the imposition of anti-dumping duties on cotton-type bed linen from India, and later, during this dispute settlement proceeding. At each stage the Indian exporters, and later the Indian Government, have requested clarifications from the EC as to how the standing requirements of the Anti-Dumping Agreement (ADA) had been met. Despite this, the EC has never before produced Exhibit EC-4, nor made any reference to its existence, nor produced the "*number of exchanges in the process of verification of standing*" to which footnote 1 of Exhibit EC-4 refers. In addition, Exhibit EC-4 appears to contradict some of the (written) information provided by the EC in the course of the administrative proceeding and in the context of this dispute settlement proceeding.

For these reasons, India respectfully requests that the exact status of Exhibit EC-4 be established, namely: when it was finalized, for what purpose. In the light of the above, India considers that it has good cause, in accordance with paragraph 13, to request this preliminary ruling at this stage.

ANNEX 1-3

RESPONSE OF INDIA TO PRELIMINARY RULINGS REQUESTED BY THE EUROPEAN COMMUNITIES

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India understands that the EC is seeking five preliminary rulings in paragraph 46 of its first submission. In accordance with point 13 of the working procedures India would like to respond as follows to the EC's request for preliminary rulings:

1. "That India's claims regarding Article 1, Article 3.6 and Article 6 are dismissed"

1.1 As regards Article 1 of the Anti-Dumping Agreement (ADA), India accepts that it has not made any separate claims. Article 1 is a general provision requiring Members to abide by the provisions of the ADA while applying GATT Article VI and in conducting anti-dumping investigations. Therefore, India considers that a finding of violation of Article 1 of the ADA automatically follows from the inconsistencies with the other Articles of the ADA and Article VI of the GATT 1994. In India's view Article 1 of ADA does not therefore need to be mentioned separately in the request for consultations since the rights of defense of the EC have in no way been prejudiced;

1.2 As regards Article 3.6, India has included the entire Article 3 in its request for establishment of the Panel. Therefore, Article 3.6 is within the terms of reference of the Panel. However, in a spirit of co-operation India does not seek a ruling from the Panel on Article 3.6;

1.3 As regards Article 6, India assumes that the EC is referring to claim 14 and claim 16.

1.3.1 As far as claim 16 is concerned, India does not agree that this claim be dismissed. According to India it has been absolutely clear ever since the administrative procedure, the request for consultations, the discussions during the consultations, and the written procedure during the consultations, that India has been concerned with the EC's actions as regards Articles 6.10 and 6.11. Indeed, from the discussions during the consultations the claims under this Article were not unknown to the EC at all. Claim 16 is linked to India's claims regarding the selection of the sample in connection with Article 3. Accordingly claim 16 in the First Submission could not

have been a surprise for the EC and directly follows from claim 15. Claim 16 forms part of the context of the provisions that have been violated.¹ Moreover, India does not consider that the EC's rights of defense to have been infringed at all. In this regard India also refers to the ruling of the Appellate Body in the proceeding concerning Korean Safeguard measures on Dairy products² at 131: The EC has in the present case not demonstrated that its ability to defend itself in the course of the Panel proceedings has been prejudiced. On the contrary, the EC has had ample time and opportunity to respond to this claim, especially since the alleged inconsistencies were pointed out in detail during the consultation process;

- 1.3.2 As far as claim 14 is concerned, it is clarified that this claim forms part of an argument in support of claim 13 and addresses a further aspect of the matter.³ It is recalled that claim 13 was explicitly mentioned in paragraph 15 of the request for the establishment of the Panel;

2. "That India's claim regarding Article 3.4 is dismissed because India has failed to clearly identify this issue in the request for the establishment of the Panel in violation of Article 6.2 DSU"

2.1 India rejects the suggestion of the EC that India has failed to clearly identify a "claim" under Article 3.4 in its request for the establishment of the Panel. India assumes that in light of paragraph 11 of the EC's submission, the EC is in paragraph 46 only referring to claim 19. *I.e.*, India assumes that the EC is not referring to India's claims 11 and 15. If that were the case, India would strongly object to such contentions since these claims were clearly identified in paragraphs 15 and 14, respectively, of the request for the establishment of the Panel.

2.2 As far as India's claim 19 itself is concerned, this claim was clearly identified in paragraph 13 of the request for the establishment of the Panel. Paragraph 13 of the request for the establishment of the Panel clearly mentions "*Contrary to the wording of Article 3 [and especially Article 3.5] of the ADA . . .*". Clearly, the reference to Article 3 includes Article 3.4. The word 'especially' does not exclude other sub-paragraphs of the Article, which are also at issue for the claim in question. India also refers to the Appellate Body Report in *Bananas*,⁴ which held that it is sufficient to mention Articles [for example, Article 3]. It is therefore not necessary to cite each paragraph or sub-paragraph, or each claim thereunder, of an Article.

2.3 Moreover, India also refers to the ruling of the Appellate Body in the proceeding concerning Korean Safeguard measures on Dairy products⁵ at 131. In this ruling the criterion was espoused whether it had been demonstrated that the ability to defend itself in the course of the Panel proceedings had been prejudiced. Since the EC itself has commented in substance and in detail on claim 19 in its section V.12, paragraphs 343 through 350, the EC has in fact explicitly demonstrated that its rights of defense have *not* been prejudiced.

¹ Panel Report in *United States – Anti-Dumping Act of 1916*, 31 March 2000, WT/DS136/R at 6.22 through 6.28. At the very least, claim 16 forms part of an argument in support of the specific claim mentioned in paragraph 14 of the request for the establishment of the Panel and addresses a different aspect of the matter.

² Appellate Body Report in *Korea – Definitive Safeguard Measure On Imports Of Certain Dairy Products*, 14 December 1999, WT/DS98/AB/R.

³ See also Panel Report in *United States – Anti-Dumping Act of 1916*, 31 March 2000, WT/DS136/R at 6.22 through 6.28.

⁴ Appellate Body Report in *EC – Regime for the Importation, Sale, and Distribution of Bananas*, 9 September 1997, WT/DS27/AB/R.

⁵ Appellate Body Report in *Korea – Definitive Safeguard Measure On Imports Of Certain Dairy Products*, 14 December 1999, WT/DS98/AB/R.

3. "That India's Claims 2, 5, 8 (in part), 9, 11 (in part), 12, 15 (in part), 17, 19 (in part), 21, 24, 27, 29 (in part), and 30 are excluded from the scope of the proceedings."

3.1 As a preliminary remark India notes that while it has made certain arguments regarding the provisional Regulation it has always been clear that the definitive Regulation is the specific 'measure' at issue [see paragraph 2 of First Submission of India]. The fact that the definitive Regulation is the measure at issue does not limit the nature of arguments and claims that can be made. India notes that the EC posits in footnote 9 that *"in accordance with EC law and practice, aspects of the text of the provisional regulation are adopted by references in the definitive regulation. In so far as there is any difference between the texts of the two regulations, that of the definitive regulation prevails."* India shares this view and as there is agreement between the parties, this view automatically entails that aspects of the provisional regulation can be challenged in the context of the definitive regulation:

- Therefore, India does not seek a ruling from the Panel on claims 2, 5, 9, 12, 17, 21, 24, 27, and 30, it being understood that the EC's view expressed in footnote 9 entails that aspects of provisional Regulation endorsed at the definitive stage, can be challenged in the context of the definitive Regulation;
- India strongly disagrees to exclude claim 11 [even in part]. The claim itself clearly only relates to the Definitive Regulation [although the text of India's first submission may include discussion of aspects of the Provisional Regulation where there is no difference between the Definitive and Provisional Regulation]. As pointed out by the EC in its footnote 9, the text of the Provisional Regulation is endorsed in the Definitive Regulation and is therefore not different at the definitive stage. The *arguments* may still relate to the Provisional Regulation since the claim itself is clearly directed at the definitive measures. Finally, and in any event, as the AB noted in *Guatemala-Cement* *"This requirement to identify a specific anti-dumping measure at issue in a panel request in no way limits the nature of the claims that may be brought concerning alleged nullification or impairment of benefits or the impeding of the achievement of any objective in a dispute under the Anti-Dumping Agreement."*⁶
- India strongly disagrees to drop claim 15 [even in part] for the same reasons mentioned directly above [India's response to EC's request for preliminary ruling on claim 11];
- India agrees not to seek a ruling on claim 8 as regards the infringement of Article 3.6;
- India does not agree to exclude claim 19: As mentioned under point 2 above, paragraph 13 of the request for the establishment of the Panel clearly identifies Article 3 and this also includes Article 3.4.
- India does certainly not agree to exclude claim 29. Claim 29 relates to the EC's obligations towards developing country Members and was clearly identified in the request for the establishment of the Panel. India deplores that even at this stage the EC is trying to evade its obligations towards developing country members, as unfortunately also happened throughout the entire administrative proceeding. Article 15 is important to India and to all developing countries. The fact that arguments in the context of claim 29 may relate to the provisional measures as far as the timing element is concerned does not mean that aspects of the provisional measure cannot be challenged in the context of the definitive measure. Claim 29 is therefore maintained;

⁶ Appellate Body Report in *Guatemala – Anti-Dumping Investigation Regarding Portland Cement From Mexico*, 2 November 1998, WT/DS60/AB/R.

4. "That the verbatim reports of the consultations submitted as evidence by India are inadmissible and will be disregarded"

4.1 As a preliminary observation India stresses the absolute accuracy of the verbatim reports which were drafted by two authors taking notes and were subsequently proof-read by members of the Indian delegation present during the consultation process. These reports are therefore neither unreliable nor pointless at all. Indeed, most aspects of the consultation process as recorded in the reports can also be found back in the written answers of the EC. While it is perhaps unusual to present verbatim reports as an Exhibit in a First Submission, India was left with no other choice: the reports bear witness to the lack of respect on the part of the EC for the basic objective of the consultation process, which is to seek an amicable solution. India therefore disagrees with the EC's requested ruling number 4.

5. "That the document submitted by India as Annex 49 is not part of these proceedings"

5.1 India disagrees. The EC's position would imply that documents that were not published could not serve as evidence, even though they were communicated to interested parties and formed the basis for EC determinations;

5.2 Secondly, India notes that ex point 3 of the working procedures, all information submitted to the panel shall be kept confidential. Point 3 also provides that nothing shall preclude a party to a dispute from disclosing statements of its own position to the public, which in fact has not happened in this case;

5.3 Last, the allegation of breach of confidentiality is not at issue because the document submitted by India as Exhibit 49 is submitted with the explicit written approval of the producer concerned [see India Exhibit-81];

5.4 In light of the above, the question of breach of confidentiality does not arise and India respectfully submits to the Panel to dismiss the ruling requested by the EC;

5.5 Respectfully, India would also take this opportunity to briefly comment on a view espoused by the US in its third party submission on this issue. In footnote 2 the US states that it ". . . is of the view that it is not clear that this document demonstrates any inconsistency on the part of the EC." In the opinion of India however, the inconsistency is clear. When comparing the calculations of Annex 49 and paragraph 3.158 of its first submission, the respective columns "dump total" and "dumping result" are the equivalent of each other. In the calculations of Annex 49 however the "dump total" serves as the numerator for the determination of the dumping margin and thereby effectuates the genuine weighted average comparison. In paragraph 3.158, however, one "extra step" is performed before effectuating the comparison and calculating the dumping margin. This "extra step" is the zeroing of the amounts of negatively dumped models. This extra step, not foreseen in the ADA, therefore distorts the genuine weighted average comparison. When compared with the Bed Linen-II proceeding, Annex 49 therefore demonstrates different applications of the weighted average calculation methods between various proceedings; in the view of India this shows an inconsistency on the part of the EC.

Note: India does not comment on possible other rulings requested but not explicitly specified in paragraph 46. India reserves its rights to comment on any other rulings requested but not specified in paragraph 46 and its silence on such possible other requests should not be taken as acceptance.

ANNEX 1-4

ORAL STATEMENT AND CONCLUDING REMARKS OF INDIA

FIRST MEETING OF THE PANEL

(10-11 May 2000)

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Preliminary Rulings Requested by EC

India refers to its written answers as provided last Friday, 5 May 2000 which set out its position in detail.

Nevertheless, India welcomes this opportunity to briefly comment on the EC preliminary rulings requested by EC. India has noticed that at most points in time, rather than replying to the substance of arguments raised, the EC side-tracks into generalizations and deviates attention from the core of India's arguments.

As an example of this side-tracking, India would like to highlight the example of Article 1. EC has requested a dismissal of India's claim under Article 1. However, it is India's view that this Article lays down a general principle as indicated by its title. It obligates Members to conduct anti-dumping investigations in accordance with the provisions of the ADA and to apply AD measures in accordance with GATT Article VI. Even if this Article were not specifically mentioned in an anti-dumping panel request, violation of any ADA provision automatically constitutes a breach of this Article as well. In this light, the EC's argument is moot.

Other examples concern Articles 2, 3.4, 6, and 15, each alone and in conjunction with Article 12. The EC is not entering into a specific debate, as it had ample opportunity to do, but rather trying to avoid the issues.

Detailed arguments on these Articles and their respective claims will be set forth in India's first Oral Statement as regards substantive matters.

Preliminary Ruling Requested by India

India first of all objects to the assertion that its claim is inadmissible. India is not merely expressing its lack of understanding. Instead, India has posed two specific queries as regards the status of the document Exhibit EC-4: *when was it established* and for what purpose. India requests the Panel to use its investigative powers to establish a conclusive reply to these questions.

The date of establishment of the document is important since the EC communicated in writing on 29 June 1999 [Exhibit India-14] in its answers to the written questions by India that "only those companies which showed express support for the complaint . . . were considered as complainants . . . and included in the non-confidential standing file." Other declarations that were not considered in the standing determination were not placed on the file.

By contrast, the EC now suggests in recital (99) of its First written submission, that it has relied on data *of the eight French producers which were not on file* to reach the 34 per cent which it says to have relied on for initiation [EC recital (100)].

The information now contained in Exhibit-EC-4 is therefore contradictory if it was relied upon at the time of determination of standing. And this document cannot have been relied upon for the standing determination if it was established after 29 June 1999.

For similar reasons India also objects to the suggestion of the EC that the document does not contain new evidence: at no point in time prior to the EC submitting Exhibit-EC-4 to the Panel did India know of the inclusion of the declarations of support of eight French producers in the standing

determination, which were never included in the non-confidential file in the first place. In view of the above, the EC must clarify the following:

What is the status of the document? In case the document only summarizes ["recapitulative table"] the level of support for the complaint amongst the producers then why are there no details concerning the production output of each producer, which presumably formed the basis for the country-wise sub-totals?

When was Exhibit EC-4 finalized [date] and for what purpose.

Substantive Issues

I. INTRODUCTION

1. India wishes to extend its sincere appreciation to you all for the difficult task ahead. Some of the claims in the case before you are complicated and may require much of your time and efforts in the coming months. Others are relatively straightforward. We offer you our full co-operation.
2. In the course of this oral statement, we will summarize and explain our claims. We will also orally present a first rebuttal of the arguments made by the EC in its first submission to the Panel.
3. Our oral statement is divided into six parts:
 - Background of the case (II);
 - Initiation claims (III);
 - Dumping claims (IV);
 - Injury and causation claims (V);
 - Developing country status claims (VI); and
 - Explanation claims (VII).
4. As we have already submitted our comments on the EC's request for preliminary rulings in writing, we will not at this stage reiterate these comments.
5. As a last observation in this introductory part, we wish to bring to your attention that India is aware that two previous GATT panels (Swedish steel and Mexican cement) which held against the importing country authorities on initiation claims, did not address the other claims made by the exporting countries in these disputes, on the ground that the defective initiation constituted a fatal error which could not possibly be repaired and was therefore outcome-decisive. These holdings were correct under the GATT system and equally apply under the WTO system. However, the dispute settlement framework of the WTO involves an additional dimension: the appeals procedure before the Appellate Body. With this in mind, if the Panel agrees with India, as we hope it would, on any of the initiation claims or other outcome-decisive decisions¹, India requests that the Panel nevertheless also rule on the other claims pursued by India in this proceeding, in case the EC were to appeal the outcome-decisive findings of the Panel.

¹ But decisions which could be overturned by the Appellate Body on appeal.

II. BACKGROUND OF THE CASE

6. Allow us to recall, Mr Chairman, that the matter under dispute was in fact the second anti-dumping proceeding targeting *Bed Linen* from India. The first *Bed Linen* proceeding had to be terminated due to lack of co-operation on the part of the EC producers. In fact, this second *Bed Linen* proceeding may also be viewed from the larger perspective of four other cases brought by the European trade association *Eurocoton*, all of which were terminated due to defects of some sort which surfaced during these respective proceedings. These cases are commonly referred to as: *Synthetic Fabrics*, *Cotton Fabrics*, *Unbleached Cotton Fabrics I*, and *Unbleached Cotton Fabrics II*. India firmly believes that even this *Bed Linen II* should have been terminated if the EC had acted consistently with the rules of the ADA. India has been involved in a large number of anti-dumping investigations initiated by the EC. However, at no point has India been so firmly convinced that the rules of the Agreement have been so repeatedly and systematically violated and the results so unfair as in this *Bed Linen II* proceeding.

7. Paramount standing problems were ignored and/or not addressed. It appears that the EC was determined to "find" dumping and did so by using an extravagant profit margin of over 18 per cent and by using questionable calculation techniques in the "weighing process." Most of the obligatory injury factors to be examined were systematically ignored. Those injury factors that were relied upon were chosen from various sources, depending on the preferred outcome. On this basis it was then assumed that imports during the preceding years were also dumped and had also caused injury. Finally, in applying measures, the EC chose to ignore the repeated pleadings from India that, notwithstanding the serious deficiencies of this proceeding, it was prepared to explore constructive remedies.

III. INITIATION

1. Article 5.3: No 5.3 examination (Claim 23)

8. India recalls that the *Bed Linen II* complaint was a so-called back-to-back complaint, which was filed 20 days after the previous case had been terminated because of withdrawal by *Eurocoton* of its first *Bed Linen* complaint. Although not stated in the notice of termination, the immediate reason for the withdrawal of the *Bed Linen I* complaint was an overwhelming lack of cooperation from the EC industry (up until the termination of the case on 10 July 1996), as was clear from the non-confidential file. This was known by all, a fact which is also evident from the third party submission filed by Egypt. India considers that, against this specific background, the obligation upon the EC to examine the accuracy and adequacy of the evidence in the application was all the more acute.

9. India strongly rejects the argumentative statements by the EC that India is arguing for an 'eccentric' interpretation of the word 'examine' [point 54] or that its interpretation of the word 'examine' is 'so vague as to be useless' [point 49].

10. The situation is much more straightforward than that. It is clear from the very text of the EC's notice of initiation, that there was no examination whatsoever. This simply is a fact. It is recalled that the relevant part of the EC notice of initiation states that:

"It is further alleged that the volume and prices of the imported products have, among other consequences, had a negative impact on the quantities sold and the prices charged by the Community producers, resulting in substantial adverse effects

on employment and the financial situation of the Community industry." [Emphasis added].

11. From the plain meaning of this statement, and juxtaposed with the preceding paragraph in the notice of initiation which stated that "*the complainant alleges and has provided evidence*" [emphasis added] on other matters, it is crystal clear from the record that the EC did not examine this aspect at all.

12. In this connection India also rejects the statement contained in paragraph 55 of the first submission of the EC where the EC claims that "*The Community authorities . . . have no interest in initiating investigations that are likely to fail for lack of evidence reached a positive conclusion.*" It is ironic to read such bold statements when India had recently been subjected to *Synthetic Fabrics, Cotton Fabrics, Bed Linen I, all of which* failed exactly for lack of evidence.

13. The EC did not examine whether the volume and prices of the imported products had, among other consequences, had a negative impact on the quantities sold and the prices charged by the Community producers, resulting in substantial adverse effects on employment and the financial situation of the Community industry. Rather, the EC accepted these allegations at face value and chose to initiate on that basis.

14. The Article 5.3 examination must be clear from the (published) record of the proceeding, *i.e.* the notice of initiation. The EC cannot hide behind the fact that, in addition to the fact that examination is required, the notice of initiation should also contain information on six specifically enumerated factors. These factors under Article 12.1.1 are clearly different and should *follow* the examination [Article 12.1: '*When the authorities are satisfied*'].

15. Indeed, to the extent that the EC claims that it did in fact examine the evidence [paragraphs 68-70] -- although the EC implicitly acknowledges to have failed to publish the result of these findings -- India observes that the EC's statements are confusing if not contradictory:

- Paragraph 68 mentions that the previous investigation might have indicated that injury did not occur, in which case this information would not be material;
- However, in paragraph 69 the EC states that the previous investigation did contain indications that there was injury, and therefore did help to take the decision to initiate [paragraph 70].

16. It therefore appears that evidence has only been examined to the extent that it may have pointed towards injury, an establishment of the facts which can hardly be said to be 'unbiased and objective'.

17. For these reasons, India requests the panel to rule that there was no examination by the EC of the allegations in the application that the volume and prices of the imported imports had, among other consequences, a negative impact on the quantities sold and the prices charged by the Community producers resulting in substantial adverse effects on employment and the financial situation of the Community industry.

2. Article 5.4: Defective standing determination (Claim 26)

18. As a factual matter, India objects to the EC's insinuation² that India had suggested that EC officials falsified records and deceived the exporters in a fraudulent attempt to demonstrate that they complied with WTO rules. However, two facts stand out:

- The non-confidential file, supposedly containing the producers' declarations of support, was only made available nearly four months after the initiation of the proceeding.
- The file contained copies of faxed declarations of support from which the fax headers had been removed, preventing interested parties in the proceeding from objectively judging and acknowledging the proper chronology of events.

19. India notes that, to this day, the EC has not contested these facts and has at no stage attempted to give any explanation.

20. To the contrary, and making matters even worse, India now notes a new fact emanating from the EC's first submission. In that submission, the EC has now provided a new document Exhibit EC-4 suggesting that, in addition to the declarations that *were* contained in the non-confidential file, there had been *other* declarations from eight French producers which were taken into account to determine standing. These eight declarations were never made available in the non-confidential file. This newly offered evidence appears to be in direct contradiction with the second written reply of the EC during the consultation process: "*Only those companies which showed express support for the complaint . . . were considered as complainants at the stage of initiation, and included in the non-confidential standing file. Certain declarations of "passive support", also received before the initiation, were not considered in the standing determination, and therefore not placed on the file.*" [Emphasis added; Exhibit India-14, page 263].

21. It should be noted moreover that, as a factual matter, it remains extremely doubtful whether the 25 per cent threshold was ever met: 34 per cent³ minus the eight French producers which were never on record leaves a mere 26.7 per cent. From this 26.7 per cent one must remove three producers, whom the EC did not accept as belonging to the 'Community Industry'.⁴ If these three producers merely represented 0.6 per cent each⁵ even then the 25 per cent test has not been met.

22. Turning now from the factual to the legal aspects of India's claim, India recalls that there were three types of entities involved:

² EC first submission, at paragraph 83.

³ Assuming, for the sake of argument, that the total production of all producers in the EC is not higher than the figure used by the EC in its calculations.

⁴ The 35 which, according to the EC's own words, are also the same companies as those that brought the complaint); *See* rec 52 j° rec 57 PR, j° point 308 EC first submission j° list of 35 producers handed over during process of consultations. The three produces not belonging to these 35, according to EC, are Foncar (Portugal), Luxorette (Germany), and Erbelle (Germany).

⁵ In view of absence of producer-specific output in EC Exhibit-4, India is prevented from checking the actual impact that the exclusion of these three producers has had on the standing determination. However, the five Portuguese producers allegedly represented 12.7 per cent which at a simple average would imply 2.54 per cent for Foncar. The 11 German producers allegedly represented 8.7 per cent, which at a simple average would imply 1.58 per cent for Luxorette and Erbelle. Together these three producers would represent 4.12 per cent, which, if subtracted from the 26.7 per cent brings the alleged support to merely 22.58 per cent.

- *Eurocoton*, the European trade association, initially allegedly representing 38 or 53 per cent of bed linen production [page 3 of the complaint is ambiguous (India Exhibit-6, page 80)];
- *National associations*, members of *Eurocoton*;
- *Producers* allegedly represented by Eurocoton and, now, allegedly accounting for some 34 per cent [See EC Exhibit-4].

23. India recalls that Article 5.4 requires a *determination*, before initiation, that domestic *producers* expressly supporting the application account for at least 25 per cent of total domestic production. GATT panels (Swedish steel; Mexican cement) have consistently held that the failure to properly determine standing before initiation is a fatal error which cannot be cured retro-actively later on in the proceeding.

24. The declarations of support in the non-confidential file came partially from the producers identified in the complaint and partially from national textile industry associations, in the case of France, Spain and Austria, acting on behalf of producers in their countries.

25. Firstly India contends that it is unacceptable under Article 5.4 that European or national trade associations issue declarations of support to themselves: the declarations of support must emanate from individual producers, according to the plain meaning of Article 5.4 and according to the obvious purpose behind Article 5.4: the prevention of the filing of frivolous complaints. India recalls that Article 5.4 contains clear language as to whose support is to be taken into account: "*the degree of support for, or opposition to, the application expressed by domestic producers of the like product.*" Alternatively, if the group of producers is very large, the footnote to Article 5.4 offers the alternative of sampling. India notes that the EC chose not to invoke this available possibility of sampling in this case.

26. To be sure, India does not contest, and has never contested, that a trade association can file an application on behalf of its members. However, India recalls that the support for the application must be *expressed* by *domestic producers*. The EC interpretation that a trade association can issue support declarations to itself defeats the very purpose of Article 5.4, and this all the more so because, according to the EC's interpretation of Article 5.3, the authority does not even have to examine the accuracy and the adequacy of the evidence in the complaint.

27. Secondly, India therefore respectfully requests the panel to use its investigative powers to determine whether the declarations of support from the producers [and, for completeness' sake, the national textile industry associations] were received by the EC *prior to the initiation* of the proceeding, as is required by Article 5.4. India stresses that this is an outcome-decisive issue and that in the EC system of confidentiality of information [and the *ad hoc* removal of the fax headings in this case], India as of today is not in a position to establish the exact chronology of events.

28. The above two points raised by India are very straightforward; the EC, however, obfuscates their simplicity by side-tracking into discussions about degree of proof⁶, and interpretation of the term 'on behalf of'.⁷ In the view of India, these discussions are beside the point.

⁶ EC first submission, at paragraphs 84-89.

⁷ EC first submission, paragraphs 90-97.

29. To the extent that it is suggested that Article 6 should be considered in the determination of standing, India rejects these suggestions. Article 6 explicitly deals with issues 'throughout' the investigation, *i.e.* explicitly after the standing determination has been made and after the proceeding has been initiated. At issue here however is what the authorities must do *prior to the initiation of the proceeding*.

IV. DUMPING

30. Let us now turn to dumping issues: As regards the dumping calculation India recalls that there are three Articles that are at the core of the dumping claims: Article 2.2, Article 2.2.2 (ii), and Article 2.4.2.

1. Article 2.2: The profit must be 'reasonable' (Claim 4)

31. At the heart of the claim as regards Article 2.2 is the question whether the principle of 'reasonable' is an over-arching requirement, instructing the whole of Article 2.2, or whether any profit determined in accordance with the further specifics of Article 2.2.2 is *in se* reasonable?

32. India is strongly convinced that a profit arrived at under the methods foreseen under Article 2.2.2 is not automatically reasonable. The word 'reasonable' in the chapeau of 2.2 instructs the whole Article as an independent requirement, both as regards the method and its result. India categorically and strongly denies the EC's suggestion that the methods in 2.2.2 (i) and 2.2.2 (ii) are 'evidently formulae that produce reasonable solutions' [paragraphs 181]. Indeed, what if the EC had calculated a profit of 1000 per cent for one producer--would this also automatically be reasonable?

33. Let us also have a look to the facts at hand. The Indian producers have always maintained--and this fact has never been challenged by the EC--that Bombay Dyeing is a peculiar company in India possessing an established position in the market for over one-hundred years. The facts of the case bear this out. By way of illustration, however, India herewith wishes to show some photographs as well as sample evidence which bear out this statement.

34. India rejects the contention that no evidence was ever presented witnessing that the profit of Bombay Dyeing was anomalous. Countless times during the proceeding has this patent fact been brought to the attention of the attention of the EC.

35. In this connection India also rejects the EC's brushing off of India's argument that a profit is unreasonable simply because it is higher than that obtained in other countries [point 188]. The point is not and has not been that the profit so determined for India was a bit higher than in other countries [implied by EC paragraph 188]. The point was that the profit determined for and used in the calculations for India was three times higher than that of any other profit found to exist in the proceeding.

36. As regards EC's paragraph 190 India first of all rejects the statement that "India does not attack the methodology adopted by the EC authorities." It is clear that the second argument of the first claim of India, pertaining to Article 2.2.2(ii), challenges the EC's very methodology [III.A.4.2 of India's first submission] of determining profit based on profitable sales only.

37. The EC then obfuscates the issue between a normal profit "incurred and realized" and the profit "calculated and determined" for dumping purposes. In this connection India recalls that the three respective profit margins of Bombay Dyeing were *overall* 4.66 per cent, 12.09 per cent

"*incurred and realized* on Bed Linen", and 18.65 per cent "*determined* on profitable sales only of Bed Linen". Now that the EC argues that this 18.65 per cent profit of Bombay Dyeing was perfectly representative [paragraph 190], it may be recalled that the quantity of its profitable sales was *only half* of its total domestic sales [page 374 India Exhibit-24].

38. Indeed, the EC even states that there is "nothing to suggest that other companies selling in India could not have obtained profits similar to those of Bombay Dyeing" [Point 190]. India points out that it was the EC itself which refused to include Standard Industries, which along with Bombay Dyeing was the largest seller on the domestic market, in the main sample [paragraphs 3.9, 3.10, 3.11, 3.12, and 3.13 of India's first submission]. From the very beginning India's suggestions in this regard were not taken into account.

39. Moreover, to suggest that the inclusion of data of another producer would have had little effect [again paragraph 190] is not borne out by the facts. As the EC knows, Bombay Dyeing and Standard Industries were the largest sellers on the domestic market [see India's first submission paragraph 3.3]. Since the EC failed to investigate Standard Industries, its potential impact is unknown.

40. India recalls one important precedent from the Panel Report on Audio Tapes in Cassettes. In that report the Panel held at paragraph 393 that it "did not consider that an amount for profit was by definition reasonable simply because [it met the relevant criteria]".⁸ Although that Panel Report was not adopted at the time, India nevertheless considers its logic instructive and convincing.

41. Finally, India recalls the EC's own observations in paragraphs 135 through 152, most explicitly 152. In these paragraphs the EC suggests and stresses that the basic principle stems from the *chapeau* of Article 2.2 [paragraph 152] and that Article 2.2 seeks to avoid outcomes that would be distorted [paragraph 145]. Clearly, when the EC considers that the *chapeau* should override the subparagraphs for the 'ordinary course of trade' principle, it cannot suddenly take a different view when it comes to the notion of 'reasonable' which is at least as basic as the former.

2. Article 2.2.2: Incorrect application (Claim 1)

42. In relation to Article 2.2.2 there are three arguments that have been put forward:

- The text of Article 2.2.2 (ii) itself is evidently in the triple plural: weighted average, amounts, and exporters or producers;
- The text of Article 2.2.2 (ii) itself mandates the use of amounts "*incurred and realized*" and not amounts "*determined*";
- Option (ii) follows option (i).

43. As regards the first argument of this claim India does not deny that, in general terms, words in the plural could sometimes contain references to the singular as well. In this connection India has never meant to defy common sense. However, India believes that the text of Article 2.2.2(ii) is very explicit in referring to a *triple plural*. Moreover, in the current case the interpretation of Article 2.2.2(ii) allowing the use of one peculiar producer has led to a result which clearly is

⁸ Copy of relevant part attached as India Exhibit-81.

"unreasonable" both in terms of Article 32 of the Vienna Convention, as well as in terms of the hierarchically superior Article 2.2.

44. India also wonders how it is possible that a result arrived at under a method categorized under option (ii) could be reasonable when, if the same calculation method would have been used but categorized under option (iii), the result would have been considered illegal [because it exceeds normally realized profits of all other producers].

45. As far as the second argument concerning amounts "incurred and realized" are concerned, India first of all objects to the suggestion that it has not considered the context, object and purpose of the provision [EC paragraph 135]. However, it is clear from the Vienna Convention that the terms of a treaty in its ordinary meaning are the first source of interpretation. India has therefore rightfully considered the text of the provision.

46. Indeed, to improperly graft the concept of "ordinary course of trade" onto Article 2.2.2 (ii) has several flaws as a matter of treaty interpretation:

- First the initial sentence of Article 2.2.2 *chapeau* explicitly includes the concept "ordinary course of trade." This first sentence of this *chapeau* however is grammatically distinct from the second sentence that serves as the *chapeau* for the remainder of this provision. The concept "ordinary course of trade" is therefore not properly considered to be part of the remaining text of this provision. This is different from the concept of 'reasonable' which does not form part of the *chapeau* of 2.2.2, but is an overarching concept engraved in Article 2.2 and thereby instructing the whole of Article 2.2;
- Second, the drafters of Article 2 were quite careful to insert the concept "ordinary course of trade" in precisely those places where they intended the concept to apply. The decision not to include the concept in Article 2.2.2(ii) must therefore be given meaning when interpreting this language;
- Third, the EC's interpretation gives no significance to the important distinction between the language and the option set forth in Article 2.2.2 *chapeau* based on "actual data" and the language of the option set forth in Article 2.2.2(ii) based on "actual amounts incurred and realized".

47. The EC tries to bolster its own flawed interpretation by providing two hypothetical scenarios in paragraphs 145 and 146. In paragraph 145 no amounts for profits are realized so it is hard to see how in the absence of profits these amounts [nil?] could be used.

48. In paragraph 146, the EC provides a hypothetical example which firstly suggests that if for other producers an amount for profits is used that is lower than that of 'company A', it would automatically imply that this is unreasonable. This implied reference to the 'perverse' end-result [because it would be lower than the amount for producer A in question] contrasts unfavourably with the EC's stubborn unwillingness to re-consider the extreme profit of over 18 per cent for Bombay Dyeing, which resulted from the EC's actual interpretation and application of Article 2.2.2(ii).

49. Secondly, if indeed the actual text of 2.2.2(ii) would be applied to the facts at hand, the result is not as bizarre as paragraph 146 of the EC submission seeks to suggest. Suppose that, for other producers the EC would indeed have properly applied 12.09 per cent profit [the amount "*incurred and*

realized"] instead of 18.65 per cent, the dumping margins could in similar vein be expected to have been approximately 6.56 per cent lower, as follows:

Anglo-French:	18.1 per cent;
Bombay Dyeing:	7.7 per cent [not affected];
Madhu:	10.4 per cent;
Omkar:	7.6 per cent;
Prakash:	Nil.

50. Clearly the above result would have been more 'reasonable' than the current "*bizarre*" [see EC recital 144] dumping margins which resulted from the imputed 18.65 per cent profit.

51. In sum, it would appear that the EC has acted contrary to Article 2.2.2 on the above counts.

3. Article 2.4.2: Incorrect interpretation of all weighted average export transactions; main rule and exceptions cannot be mixed (Claim 7)

52. India reiterates its concern that allowing the offset within models but not between models contradicts the plain meaning of Article 2.4.2. The EC's interpretation disregards the word 'all' in the context of 'all comparable export transactions.' 'All' is apparently taken to mean by EC practice only the transactions that are dumped, not those transactions involving models that are not dumped.

53. Moreover, India respectfully submits that the alternative option contained in Article 2.4.2 allows the authorities to compare a weighted average normal value with individual export prices, in case of a 'pattern of export prices.' Such pattern could exist, for example, in a case where three models would appear very much dumped while two would appear very much non-dumped. However, in the view of India, the ADA does not allow the mixing of the main rule and the invocation of the exceptions. Either the main rule is applied or the exceptions are invoked on the basis of an explicit finding of existence of a pattern of export prices.

54. As far as Article 2.4.2 is concerned, India considers the arguments of the EC unconvincing. The fact remains that no genuine 'weighted average' on the export side is being effectuated: while normal value is always considered at the 'weighted average' level, the 'export prices' are sometimes 'zeroed' and therefore not considered at their 'weighted average' level.

55. The 'eccentric' interpretation of the EC which for certain models imputes 'zero' instead of 'weighted average' is tantamount to skewing the proper weighted average by essentially adjusting some prices, but not others.

56. The offsetting of dumped with non-dumped transactions within models [*intra*-model offsetting], but not between models [*inter*-model zeroing], is also illogical as shown in the Annex to this Statement.

57. The spirit of the provision should also be kept in mind. Article 2.4.2 was introduced in the Uruguay Round of negotiations to address specific concerns, including the fact that exporters should not be put in an unfair situation due to skewed calculation techniques, and to effectuate a genuinely fair comparison as per Article 2.4.

58. Finally, India further rejects the introduction by the EC of Article 9.4, which deals with the duty for the non-sampled co-operating exporters. It is clear that it is not the sampling duty

calculation, but the operation of Article 2.4.2 which is the Article towards India's claim is directed. The fact that a sampling duty could under certain specific circumstances be higher by the exclusion of zero or *de minimis* dumping margins is not at issue. No claims have been raised with respect to Article 9.4. Indeed, as the EC points out in the first sentence of paragraph 209: "The process of determining a (single) dumping duty from these margins is a separate one, which does not fall within the express terms of Article 2.4.2."

V. INJURY

1. Article 3.1: Failure to examine only dumped transactions (Claim 8)

59. India considers that the failure of the EC to examine dumped transactions only for the purpose of the injury determination in the Bed Linen II proceeding is inconsistent with Articles 3.1, 3.2, 3.4, 3.5 of the ADA.

60. India first of all objects to the suggestion by the EC that India's interpretation has "*moved beyond complexity into confusion*" [paragraph 221]. In this connection it is unfortunate that the EC is quoting selectively from the Vienna Convention: There is a real question here stemming from the discernible plain meaning of the language of the Article: the words "dumped imports" have been referred fifteen times in Article 3 alone.

61. If the EC authorities find that some imports are dumped and others are not, then they must distinguish between the two while making the injury determination. In this connection India disagrees with the statement that "*it is not possible to isolate the effects of individual transactions in a single product market. The market situation is determined by the overall impact imports*" [*sic*, recital 227]. Based on the detailed dumping calculations it must have been clear to the EC how much of the Indian exports had been dumped.

62. India further disagrees with the suggestion that the ASCM contains a parallel provision in this context [paragraph 231]. Dumping is by its nature company-specific and can therefore clearly differ between companies within a country while subsidies stem across the board from the Government. [This is not to say that for other purposes there could not be parallels between the ASCM and the ADA].

63. In short, allowing some "*dumped*" imports to taint all imports from a company and, indeed, a country skews, the fundamental injury analysis of Article 3. The core analysis of Article 3.1 and 3.2 requires the assessment of the volume and price impact of "*dumped*" imports only.

2. Article 3.4: Failure to evaluate all factors (Claim 11)

64. The EC failed to evaluate all injury factors mentioned in Article 3.4 of the ADA for its determination on the state of the domestic industry. Particularly, the EC did not evaluate the following twelve [of eighteen] factors:

- Productivity;
- Return on investments;
- Utilization of capacity;
- Factors affecting domestic prices;

- The magnitude of the margin of dumping;
- Actual effects on cash flow;
- Potential negative effects on cash flow;
- Inventories;
- Wages;
- Growth;
- Ability to raise capital;
- Ability to raise investments;

Thus the EC acted inconsistently with Article 3.4.

65. Firstly, India would like to recall the intrinsically contradictory nature of the defences put forward [paragraph 249] by the EC against this claim from India. At the outset the EC suggests that it has evaluated all the factors. Simultaneously however the EC also claims [EC's third line of defense] that such evaluation of all factors is not necessary. A defense which is irrelevant in case the EC had evaluated all factors.

66. Secondly, India is perplexed by the statement contained in EC submission at paragraph 262 that it is apparently up to the exporters to suggest factors to the EC which it otherwise might forget to evaluate and examine. Apparently the EC believes that the Indian exporters should have *guessed*, before imposition of measures, that the EC was only going to rely on *two* injury factors in its examination. For that reason the exporters should, on the basis of such speculative *guesswork*, have pointed out to the EC that there are at least 16 other factors which are relevant under the ADA and should be examined.

67. In this connection India recalls that the purposes of Article 3.4 is to ensure an unbiased and objective injury analysis, which is mandatory as per the Article. Evaluation of the factors is required in every case, although such consideration may lead the investigating authority to conclude that a particular factor is not probative in the circumstances of a particular industry and therefore is not relevant to the particular determination.⁹

68. Similarly, the Panel in *Korea Resins* concluded that the investigating authority could not focus solely on factors supporting a conclusion that the domestic industry is encountering difficulties, while disregarding other factors.¹⁰

69. Contrary to what the EC seems to suggest in its paragraph 289, the Panel in *HFCS* did not make its decision based on simplistic reliance on an inappropriate precedent. As the third party submission of the United States emphasizes, the parties to that dispute fully argued the issue to the panel, citing GATT anti-dumping determinations such as *Korea Resins*.

70. Article 3.4 specifies the 18 relevant factors and indices which shall at least be evaluated to examine the impact of the dumped imports on the domestic industry. Moreover, this list is not

⁹ *Mexico--HFCS*, WT/DS132/R, 28 January 2000.

¹⁰ *Korea-Resins*, ADP/92 and of 2 April 1993.

exhaustive. The EC observes in paragraph 265 that *"to insist that the listed factors must be evaluated in all circumstances, would be to require the evaluation of a factor that has already been found to be irrelevant, which is nonsense"*. However, this reasoning is illogical: how can investigating authorities determine that a factor is not relevant if it is not examined/evaluated? How can interested parties know that the authority has evaluated such factors, if nothing is published. In EC's logic, investigating authorities should first determine on which relevant factors/indices they will rely upon, and then examine only their importance. Such an approach makes a mockery of Article 3.4.

71. Regarding the EC's observation in paragraph 274 that *"the domestic producers are the best, and sometimes the only source of information on the factors relevant to injury"*, India questions the accuracy of this statement. The statement is hard to reconcile with the EC's practice in the Bed linen proceeding where three 'levels' were examined depending on the factor in question as described in paragraph 62 of the provisional Regulation, confirmed by the definitive Regulation.

72. As far as the EC's argument regarding 'or' is concerned [EC paragraph 282], India recalls that Article 6.3 of the Tokyo Round ASCM was virtually identical in wording, and contained exactly the same 'or' issue.¹¹ In fact the EEC argued in Brazil--CVD on Milk:

"125. . . . that in carrying out an objective examination required under Article 6:1 of the Agreement, the investigating authorities were obliged to consider the criteria and indicators laid down in Articles 6:2 and 6:3. Therefore, an essential element of a review of whether a determination of material injury was in conformity with the standard of Article 6 was an examination of whether the factors set forth in Articles 6:2 and 6:3 had been properly considered, though Article 6 did not prejudice the weight to be assigned to each factor."¹² However, in this case, the data on the elements contained in Article 6:3, such as on consumption, market shares, production or prices, had not been provided by Brazil at the time of its definitive determination. Moreover, despite the EEC having had earlier requested data on these aspects from Brazil, the first time the EEC received such data was when Brazil submitted the information on these aspects to the Panel." (Emphasis added).

The EC thus advocated exactly the same interpretation as is being argued by India in the present case. The EC's present defense therefore is simply not credible.

3. Article 3.4: Picking and choosing of the domestic industry for injury determination (Claim 15)

73. The first submission of India contains three arguments showing the inconsistency in the injury determination:

¹¹ "The examination of the impact on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry such as actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investment and, in the case of agriculture, whether there has been an increased burden on Government support programmes. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance."

¹² [Footnote in original]: To support its point that the question of whether the determination of injury was based on positive evidence was distinct from the question of the weight to be accorded to the facts before the investigating authorities, the EEC cited the report of the panel on "United States - Salmon", paragraph 260.

- The EC explicitly determined that the domestic industry consisted of 35 companies [the complainants according to the EC], but relied in its injury determination on companies outside this group of 35;
- The EC chose a sample from the domestic industry, but it did not consistently rely on it;
- The EC chose to rely on different 'levels' of industry for different injury indices without any apparent reason other than goal-oriented 'picking and choosing of injury'.

74. India maintains that the arguments put forward by the EC do not refute the claims made by India in its First Submission *at all*. Moreover, India objects to the newly introduced concept by the EC [as far as we understand it] that within one and the same single investigation a Member may use either of the alternative definitions of the domestic industry contained in Article 4.1 of the ADA, suited to its needs. Such innovative 'right' of picking and choosing the most desirable definition whenever a choice is available runs contrary to the concepts of consistency fairness and predictability. One may also wonder how such innovative approach fits with Article 17 (6) (i) which provides that establishment of the facts must be proper and the evaluation must be unbiased and objective.

75. In paragraph (57) of the provisional Regulation, subsequently endorsed, the EC noted that:

"The remaining 35 companies, which cooperated with the enquiry and are located in France, Germany, Italy, Spain, Portugal, Austria and Finland, represented a major proportion of total Community production in the investigation period. These companies were therefore deemed to make up the Community industry under the terms of Article 4 (1) of the basic Regulation." (Emphasis added).¹³

76. In paragraph 317 of its first submission the EC reiterates that its finding of injury is not based on the EC producers as a whole but on the Community industry. For this purpose the EC quotes recital (40) of the Definitive Regulation. The Definitive Regulation refers back to the sample companies. The sample however contained at least one company [Luxorette] that does not belong to the Community industry. The EC is therefore contradicting itself: how can EC say that it is not looking outside the Community industry when, for the purpose of analyzing the situation of the Community industry, It has relied on a sample which consists of companies not part of the Community industry?¹⁴

77. In paragraph 318 of its first submission the EC suggests that "India's arguments appear to rest on the notion that all factors . . . must indicate injury." For the record, India denies having ever relied on such notion.

78. As regards the sampling, India maintains that once the EC selected a sample from the domestic industry, it was not entitled to subsequently deviate from that sample in order to find injury.

¹³ This finding was confirmed in paragraph 34 of the definitive Regulation. If--notwithstanding this explicit determination--other companies were also part of the domestic industry, the provisional and definitive Regulations suffer at least from an Article 12 problem.

¹⁴ The German company Luxorette formed, at least according to the Provisional Regulation, part of the 17 sampled producers. This company Luxorette however did not form part of the 35 producers comprising the Community industry, at least according to the list of 35 producers provided in writing during the consultations. [Furthermore, two more companies formed part of the original sample of 19 producers. Both companies did later no longer belong to the sample; one of these however did continue to form part of the Community Industry.]

India notes that the EC does not deny having looked at information outside the sample. India rejects the implications put forward by the EC [paragraphs 326-327] that once it had selected a sample it could still use information outside the sample if available. Such approach distorts the very purpose of a sample and cannot, contrary to what the EC suggests in its paragraph 327, be considered 'unbiased and objective' at all.

79. As regards the 'picking and choosing' of the preferred level in order to establish injury India notes that the EC does not deny the facts as summarized by India. Indeed, the EC even seems to acknowledge that it has used various injury factors from the preferred level so long as this would support an injury determination. India underlines that such an approach cannot be considered unbiased and objective by any stretch of imagination.

4. Articles 6.10 and 6.11: No statistically valid sampling (Claim 16)

80. As pointed out in its response to the preliminary rulings requested by the EC, India is of the opinion that its claim regarding sampling is duly before the Panel because the rights of defense of the EC have not been impeded, as these claims were discussed during entire course of the proceedings and the consultations.

81. India underlines that for a sample to be statistically valid it must fairly represent the entire underlying population from which the sample was taken. India contends that to take a sample only from the pool of the complaining domestic producers does not meet the requirements of a 'statistically valid' sample. Alternatively, however, in case the sample is supposedly taken to represent only the Community industry, *i.e.* the complaining producers as the EC seems to argue, then it should not have contained companies from outside that industry.¹⁵

5. Dumped imports before I.P. (Claim 19)

82. India considers the assertion of the EC contained in its paragraph 343 where it now denies having ever considered as "dumped" all imports of bed linen from India in the years preceding the investigation period as factually incorrect. In this connection India recalls, to give just one example, paragraph 67 of the provisional Regulation, endorsed by the definitive Regulation, which states:

"dumped imports from the three countries concerned increased from 33,825 tonnes in 1992 to 46,656 tonnes during the investigation period i.e. an increase of 12,831 tonnes or 38 per cent. During the same period their market share increased from 16.9 per cent to 25.1 per cent" [emphasis added].

In the light of this India is surprised to read paragraphs 344 and 345 of the EC's first submission, which contradict its statements in the Official Journal on this point. Clearly, India is not 'in confusion' at all [EC paragraph 345] but is merely relying on the text of the published Regulation.

83. Accordingly, India reiterates that the EC practice to automatically consider as 'dumped' all imports of bed linen from India in the years preceding the investigation period, is inconsistent with Article 3.4. In particular, EC could not attribute the alleged closures of the 29 companies in the period from 1992 up to the I.P. to the "dumped imports" during the I.P., since these imports occurred only after the alleged company closures.

¹⁵ The company Luxorette was part of the sample but did not belong to the Community industry.

84. Second, the statements contained in paragraphs 346 through 350 contradict and try to explain away the EC's very own injury analysis as published in the Official Journal. In this connection India refers for example to recitals (91) and (92) of the Provisional Regulation, maintained in recitals (40) and (41) of the Definitive Regulation. The statements now made by the EC in its first submission, alleging for example that India's arguments are "misplaced" [paragraph 348], are completely contradicted by the published statements in the Official Journal.

6. Article 3.5: No consideration of other factors (Claim 20)

85. India believes that the EC acted inconsistently with Article 3.5 by automatically considering all imports of bed linen from India in the period 1 January 1992 - 30 June 1995 as "*dumped*" and thereby causing injury "*through the effects of dumping*".

86. For the same reasons as explained by India above under claim 19, the statements of the EC contained in paragraph 352 are not borne out by the facts. The Regulations imposing provisional and definitive duties are clear and form the basis on which this dispute is to be adjudicated. The clear language of these Regulations cannot be waived away by suggestive statements that India's claim is based on a "*misunderstanding of the EC's practice*" [EC paragraph 354].

VI. ARTICLE 15: NO DEVELOPING COUNTRY STATUS (Claim 29)

87. India briefly recalls the objective of Article 15 ADA. This specific Article of the ADA tries to take care and addresses the different market mechanisms applicable between the various countries in the world. For this purpose "special regard" *must* be given by developed country Members to the "special situation" of developing country Members.

88. Unfortunately however the EC chose to ignore this Article altogether. The EC did not explore any possibility for any constructive remedy at all and did not even take the trouble to address requests made by Indian exporters throughout the proceeding. During the consultations, the EC replied that the EC had in fact accorded special treatment to Indian exporters in three manners:

- Simplified questionnaires;
- Acceptance of responses beyond stated deadlines;
- Individual treatment of newcomers.

In its first submission, India has proven this alleged "special treatment" to be factually incorrect. Moreover, as already pointed out by India in its first submission: even if the EC would have done so these would not have constituted constructive remedies. Accordingly the EC did not pursue its earlier arguments in its first submission.

89. Instead the EC now argues that the Indian exporters missed the deadline for offering an undertaking. Again, unfortunately, this statement is factually incorrect, as India Exhibit-72 shows.

90. Furthermore, Article 15 clearly puts the initiative for exploring constructive remedies with the importing country authority, as the third party submission of Egypt also argues.

91. India regrets that the EC has completely and blatantly ignored its obligations under Article 15. The issue does not only affect India, but all developing country members alike, all of whom are looking with anticipation to the Panel ruling on this important issue.

VII. ARTICLE 12.2.2: NO/INSUFFICIENT EXPLANATIONS (CLAIMS 3, 6, 10, 13, 18, 22, 25, 28, AND 31)

92. Those familiar with anti-dumping and injury determinations in other jurisdictions, notably the United States and Canada, are often surprised at the scarcity of information provided in public determinations issued by the EC authorities. Contrary to, for example, the practice of the Commerce Department in the United States of addressing specific comments raised by parties in a section following the findings of the authorities, determinations in the EC are full of standard phraseology (see notably notices of initiation) and summaries of selective EC findings.

93. The EC tries to brush aside the concerns raised by India on the ground that the importing country authorities have discretion to decide which matters of fact and law, arguments and claims are *relevant* within the meaning of Article 12.2.2 and that the arguments made by the Indian exporters in the course of the proceeding were not relevant. Obviously, such line of reasoning would give the administering authorities *carte blanche* to reproduce only supposedly ‘favorable’ findings and to simply ignore arguments adverse to its case. Such interpretation is illegal and unwarranted and constitutes a violation of Article 17.6 (i).

94. Furthermore, the structure of India’s first submission, which was designed on purpose to show the close linkage between key arguments and insufficient explanation by the EC, negates the EC’s apparent conclusions that India’s claims and arguments were irrelevant for purposes of application of Article 12.2.2. The following table shows once more that on each of India’s substantive claims, the EC provided either no or extremely cursory information on public record:

Substantive claims	Explanation claims	
1-Article 2.2.2	3	Recital 18 addresses only 1 of 3 arguments, and very summary
4-Article 2.2 reasonable	6	Recital 18 does not address claim
8-All imports dumped	10	Not addressed
11-3.4 factors	13	Not addressed
15-3.4 picking and choosing domestic industry	18	Four arguments raised not addressed
20-Pre-IP imports	22	Not addressed
23-5.3 examination	25	Not addressed
26-5.4 standing determination	28	Not addressed
28-15-developing country	31	Not addressed

95. To sum up, the explanation in the definitive Regulation, which incorporates parts of the provisional Regulation suffering from the same defects, was self-serving and the EC failed to address virtually all of the claims and arguments made by Indian exporters in the proceeding. In view of this systematic and repeated pattern of ignoring claims and arguments made by Indian exporters in the proceeding, India requests the Panel to send a strong message to the EC: that self-serving explanations which do not address the claims and arguments made by exporters in the course of the proceeding do not meet the standards of Article 12. The most recent example of non-transparency of

EC proceedings is the reluctance, even today, to give the exact date of exhibit EC-4 and producer specific data in that exhibit.

ANNEX ON EC INTERPRETATION OF ARTICLE 2.4.2

Situation 1: One Model A

Date	Normal value	Export price	Difference
1 May	50	50	0
10 May	100	100	0
20 May	150	150	0
30 May	200	200	0

Agreed between all Members:

Weighted average-to-weighted average:

$$125 (50+100+150+200/4) - 125 (50+100+150+200) = 0$$

Situation 2: Four different models A, B, C, D:

Date	Normal value	Export price	Difference
1 May-Model A	50	50	0
10 May-Model B	100	100	0
20 May-Model C	150	150	0
30 May-Model D	200	200	0

Inter-model zeroing:

[India's method: Weighted average-to-weighted average: $125-125=0$]

Transaction by transaction-to-transaction by transaction:

[Model A: $50-50=0$
Model B: $100-100=0$
Model C: $150-150=0$
Model D: $200-200=0$]

EC method, as applied in *Bed Linen*: Weighted average normal value to transaction by transaction export price

Model A: $125-50=75$
Model B: $125-100=25$
Model C: $125-150=-25=0$
Model D: $125-200=-75=0$
 $100/500 \times 100 = 20$ per cent

The EC has managed to find a dumping margin of 20 per cent

Concluding Remarks

Mr. Chairman, the complexity of the legal and factual issues involved in this case are by now no doubt clear. Yet, despite this complexity and the fact that the case was initiated nearly four years ago, all that the Indian exporters targeted in this proceeding have sought, has been the right to fairly and properly defend their interests as envisaged in the Anti-Dumping Agreement. Unfortunately, Mr. Chairman, from the time of initiation, through to the provisional and definitive findings and during the consultation process, it has been exactly this expectation of fairness, transparency and accountability which has been totally denied to the Indian exporters, by the EC authorities.

The ADA imposes an obligation on investigating authorities to observe a minimum degree of transparency with respect to the methodology and evidence relied upon by the investigating authority; to provide access to meaningful *and timely* information on issues such as standing and injury; and, in the case of a developing country such as India, it also obliges the investigating authority to explore constructive remedies before the application of anti-dumping measures.

This has been provided to ensure that anti-dumping investigations are carried out in a fair and transparent manner, and so as to allow the targeted exporters a genuine chance to evaluate and comment upon the quality, accuracy and probative value of the evidence on the basis of which the investigating authority intends to make its determination

Unfortunately, this was not done. On several key, outcome-decisive elements, EC's approach to the whole matter has been somewhat reminiscent of the phrase 'you'll just have to take our word for it.'

For instance, was there sufficient support among the EC producers to justify the initiation of this case? Yes, according to the EC, but the exporters had to wait for four months following the initiation before the non-confidential file was shown to them. Why? We don't know. Did the EC satisfy itself that this support met the prescribed threshold and that it was expressed *by* the domestic producers *prior* to the initiation of the proceeding? Yes replied the EC but in spite of repeated requests did not produce the full copy of the faxed declarations of support, a practice they presumably follow in all anti-dumping investigations; did not give company wise production data; and did not include copies of expression of support from eight French companies in the confidential file, while enclosing all other similar expressions of support. And yet they say that the prescribed threshold of support was met before the initiation of the investigation.

Did the EC examine the accuracy and adequacy of the allegations in the complaint prior to initiation? Yes, assures the EC and confirms that it read the complaint, and did apparently measure the allegations in the complaint against an internal, unknown standard of 'credibility.' Even though EC does not elaborate upon this standard of 'credibility' it argues that this so called examination apparently bridges the gap between mere conjecture or allegation on the one hand, and persuasive *prima facie* evidence on the other hand, which proves both the adequacy and accuracy of the complaint.

Did the EC examine *all* the injury factors mandated under Article 3.4 of the ADA? First the EC says that it is under no obligation whatsoever to examine all the listed injury factors, contrary to certain laid down jurisprudence. Later, it contends that it nonetheless undertook this exercise, first

determining, though we don't know, how what it considered 'relevant,' and then evaluating only those relevant factors- while at the same time continuing to affirm that it examined *all* listed injury factors.

Mr. Chairman, unfortunately, this is not an exhaustive list. EC appears to have carried this approach throughout the present proceeding.

Mr. Chairman, we sincerely believe that justice was neither done, nor seen to be done in this case. The ADA spells out the obligations which the investigating authority must adhere to, obligations which are designed to provide fairness, equity and transparency, obligations which are designed to protect the trade interests of developing countries. Unfortunately EC failed to meet its obligations. We ask the Panel to so find and to ensure that justice is finally done.