

ANNEX D

ORAL STATEMENTS

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ANNEX D-1

ORAL STATEMENT OF THE REPUBLIC OF KOREA

11 September 2002

1. Korea welcomes this opportunity to present its views with respect to the proceeding initiated by India to examine the consistency with the covered agreements of the measure taken by the European Communities to comply with the rulings of the DSB concerning the EC anti-dumping duties on imports of cotton-type bed linen from India. Korea will confine its statements to a couple of issues raised in the submissions of India and the EC.

A. THE EC FAILED TO CONDUCT THE RE-DETERMINATION WITHIN ITS OBLIGATIONS UNDER ARTICLE 2.2.2(II) OF THE AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF GATT 1994

2. Article 2.2.2 (ii) mandates selling and general costs (SGA) and profits to be determined on the basis of the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation. The crucial point in this provision is the method for calculating the weighted average of the actual amounts.

3. In the present case, the EC resorted to sales value as the averaging factor for SGA and profits, whereas India argued that actual amounts should be averaged according to the sales volume of the exporters. Korea is of the view that the approach by the EC, which used the sales value in lieu of sales quantity or volume as the weight-averaging factor, resulted in distorting the relative importance of the exporters concerned.

4. Article 2.2.2 (ii) does not prescribe the use of any specific averaging factor in the method for determining the weighted average. The EC claims that lack of reference to any specific averaging factor in Art. 2.2.2 (ii) provides the investigating authorities with discretion as to the choice of the averaging factor. To make its case further, the EC compared Art. 2.2.2 (ii) with Footnotes 2 and 5 and Article 6.10 in its first submission para 72 and argues that by being silent on the averaging factor in Art. 2.2.2 (ii), the drafters of the AD Agreement “accorded the investigating authorities discretion between sales volume and other pertinent criteria”.

5. Korea believes the EC’s comparison is misplaced. In the AD Agreement, there are four provisions in total which contain reference to the concept “weighted average” – Articles 2.2.1, 2.2.2 (ii), 2.4.2 (ii), and finally 9.4 (i). There is one thing in common to these 4 provisions, that is, they all do not prescribe any specific averaging factor. If any of these provisions prescribed a specific averaging factor, then one could safely presume that it is the intention of the drafters that under the other provisions, the investigating authorities enjoy full discretion in the choice of averaging factor. On the contrary, that is not the case and from the fact that the drafters of the AD Agreement remain silent on choice of the averaging factor in all these 4 provisions, it is inferred that the investigating authorities may choose an averaging factor of their choice, but the choice is not immune from scrutiny.

6. What is important is that, as the Appellate Body in the EC Bed Linen case pointed out in its report, weighted averaging should take into account in an appropriate manner the relative importance of different exporters. Korea is of the view that the EC's averaging factor based on the sales value of each producer does not meet this standard because the method is biased towards overemphasizing the

relative importance of a company with higher SGA and profits – in this case, Bombay Dyeing - as SGA and profits and sales value are price-related indexes.

7. To illustrate this point, let us assume there are two companies: one with higher SGA and profits and the other with lower SGA and profits. In the majority of cases, the sales price of the company with higher SGA and profits would be higher than that of the company with lower SGA and profits because sales value is positively correlated with SGA and profits. Hence, if the sales value is used as an averaging factor in calculating the weighted average of SGA and profits, then the weighted average will converge into the company with higher SGA and profits.

8. Therefore, the sales value method leads to a higher weighted average SGA and profits, and consequently a higher constructed normal value, artificially inflating the dumping margins. In the original investigation, the EC chose to zero negative price differences to inflate the dumping margins, which was found by the Panel to constitute a violation of Article 2.4. Korea believes that the EC, by employing the sales value method which entails artificially higher weighted average SGA and profits, once again tried to distort the calculation of constructed and normal value.

9. In its first submission, the EC states that it employs the sales value method when calculating all other dumping rates under Article 9.4(i) of the ADA. Korea does not see any problem in the EC's averaging method based on value for the calculation of the weighted average under Article 9.4(i) because the dumping margin in Article 9.4 is not related with the averaging factor of sales value, i.e. it is independent from the sales value. The selling price of the company with the higher dumping margin can be lower than that of the company with a lower dumping margin because these two variables are not correlated. Therefore, the value-based averaging method employed with regard to the Article 9.4(i) will not produce any distortion in the end. A contrario, the averaging method based on value with respect to the Article 2.2.2 (ii) would lead to distortion and thus inflate the dumping margin, as SGA and profits on the one hand and sales value on the other are positively correlated.

10. In its first submission, the EC states that averaging the SGA and profits according to volume based on weight instead of the unit would result in higher dumping margins and that the EC's averaging method is in fact more favourable to India. With this in mind, the EC requested the Panel to find that the EC's violation has not nullified or impaired the benefits accrued to India, even though the Panel concluded that the EC has violated Article 2.2.2(ii) of the ADA.

11. Korea is of the view that the averaging method suggested by the EC in which the volume would be measured in terms of weight is not relevant. The averaging method should reflect the actual method of transactions and practice. Bed linen end-products are in general sold in different units and they're rarely, if ever, sold by weight or in bulk, as suggested by the EC.

12. Summing up, for the reasons stated above, Korea believes that the EC misinterpreted and misapplied the averaging method with regard to Article 2.2.2 (ii) and artificially inflated the dumping margin. Therefore, Korea is of the view that the EC's measures are not consistent with the recommendations and rulings of DSB and impairs and nullifies the benefits accruing to India.

B. THE EC ACTED INCONSISTENTLY WITH ARTICLE 3.1 AND 3.4 BECAUSE IT FAILS TO COLLECT SUFFICIENT DATA PRIOR TO EVALUATION IN ITS RE-DETERMINATION.

13. In order to comply with the recommendations and rulings of the DSB, the EC reassessed and evaluated all of the relevant injury factors enumerated in Article 3.4 of the AD Agreement (Regulation 1644/2001 recital (4)). However, the EC stated that it did not collect additional information for re-determination, and findings are based on information collected during 1996 – 1997 (recital 73). In its re-determination, taking into account this problem, the EC suspended the imposition of its anti-dumping duty for exports from India (recitals 72-78).

14. As for data collection, the original Panel found that necessary data was not even collected for all the factors listed in Article 3.4 of the AD Agreement. The Panel thus concluded that the EC did not conduct an objective evaluation of all relevant economic factors and failed to act consistently with its obligations under Article 3.4 of the Agreement.

15. In this respect, Korea believes that the EC's re-determination without collecting additional information does not meet the recommendations or rulings of the DSB. Article 3.1 states that injury determination shall be based on positive evidence and objective examination of the injury factors mentioned on Article 3.4, and the EC's re-determination does not meet this requirement. In order to fully carry out implementation, the EC should have collected additional information for re-determination.

ANNEX D-2

ORAL STATEMENT OF THE UNITED STATES AT THE THIRD-PARTY SESSION

11 September 2002

1. Thank you, Mr. Chairman, and members of the Panel. It is a pleasure to appear before you today to present the views of the United States in this proceeding. The purpose of this oral statement is to highlight certain aspects of the issues addressed in our written submission, and to comment on some issues in India's submission.

I. THE PROVISIONS OF ANTI-DUMPING AGREEMENT ARTICLE 5.7 DO NOT APPLY TO IMPLEMENTATION MEASURES

2. As the United States explained in its third party submission, the text of Article 5.7 of the Anti-Dumping Agreement specifies that the obligation applies in two circumstances – in the decision whether or not to initiate an investigation of dumping and injury and during the course of that investigation. The absence of reference to other circumstances, such as a proceeding to bring a measure into compliance with adverse DSB recommendations and rulings, indicates that Article 5.7 does not apply in those other circumstances.

3. In support of its view to the contrary, India cites to the Panel Report in *Certain Corrosion Resistant Carbon Steel Flat Products from Germany*.¹ In that dispute, the panel, with one member dissenting, concluded that the *de minimis* requirements of Article 11.9 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), which explicitly reference only the investigation stage, also apply in a five-year review under Article 21.3 of the SCM Agreement.

4. The United States believes the conclusions of the *Corrosion Resistant* panel are based upon erroneous findings on issues of law and related legal interpretations, and has appealed the *Corrosion Resistant* panel's findings on the pertinent issue to the Appellate Body. In this respect, the United States notes that the report of the panel in the *Corrosion Resistant* dispute is at odds with the report of the panel in the *Korea DRAMs* dispute.² As the panel in *Korea DRAMs* concluded in reference to the fact that Article 5 of the Anti-Dumping Agreement is entitled *Initiation and Subsequent Investigation*, "the term 'investigation' means the investigative phase leading up to the final determination of the investigating authority".³

5. The United States' view of the correct law is and has been consistent in the current Article 21.5 proceeding, in the *Korea DRAMs* dispute and in the *Corrosion Resistant* dispute. In all three cases, the fact that the text of an article (here Article 5.7 of the Anti-Dumping Agreement) explicitly delineates the circumstances to which it applies, but contains no reference to certain other circumstances (here the circumstances occurring after the initiation and initial investigations) must mean something. The ordinary meaning of the absence of such a reference is simply that there is no

¹ WT/DS213/R (Circulated 3 July 2002).

² *United States - Anti-Dumping Duty On Dynamic Random Access Memory Semiconductors (DRAMs) Of One Megabit Or Above From Korea* ("Korea DRAMs"), WT/DS99/R, Report of the Panel adopted 19 March 1999, para. 6.40.

³ *Korea DRAMs*, para. 6.48, n. 494.

requirement to apply the Article 5.7 simultaneity requirements to measures taken to comply with DSB recommendations and rulings.

6. In any event, the policy reasons articulated by the two-panelist majority in the *Corrosion Resistant* case simply are not present in the current case. In the *Corrosion Resistant* dispute, the panel was interpreting two provisions addressing the minimum requirements that investigating authorities must follow when they initially conduct an original investigation and a sunset review. In contrast, the instant case involves the question of what types of actions may be taken to correct an anti-dumping determination that has already been the subject of a complete investigation, if a Member chooses to reconsider that determination in order to bring the measure into compliance with the DSB recommendations and rulings.

7. India appears to recognize that Article 5.7 does not impose a blanket requirement for simultaneous consideration of dumping and injury in all proceedings. It admits that Article 5.7 would permit a Member, upon implementing a DSB recommendation or ruling addressing only dumping or only injury, to reconsider only the dumping findings or only the injury findings.⁴ India fails to explain how Article 5.7 can be read *not* to require a simultaneous consideration of dumping and injury in response to *some* DSB recommendations and rulings, yet to require reconsideration in response to certain other DSB recommendations and rulings.

8. If a Member chooses to implement DSB recommendations and rulings by reconsidering a dumping determination, neither the Anti-Dumping Agreement nor the DSU requires investigating authorities to include in their reconsideration findings that were not found to be inconsistent with the covered agreements. Furthermore, requiring investigating authorities to go beyond the scope of the DSB recommendations and rulings in the context of implementation could also create inconsistencies with Article 6.9 of the Anti-Dumping Agreement, which requires authorities to inform all interested parties of the essential facts under consideration in sufficient time for the parties to defend their interests.

9. Finally, we note that India's argument would require an investigating authority to reconsider every aspect of a determination when it implements DSB recommendations and rulings that are applicable only to certain aspects of that determination. If that were the rule, it would greatly expand the time necessary to comply with recommendations and rulings regarding anti-dumping and countervailing measure determinations, contrary to one of the central objectives of the DSU, as described in Article 21.1, which is to secure prompt compliance with the recommendations and rulings of the DSB.

II. COMPARISON OF ANTI-DUMPING AGREEMENT AND SAFEGUARDS AGREEMENT

10. As India notes, the texts of Article 3.5 of the Anti-Dumping Agreement and Article 4.2(b) of the Safeguards Agreement are not identical.⁵ The United States agrees with India that the standard of causation applicable in disputes arising under the Safeguards Agreement should not be transposed to disputes arising under the Anti-Dumping Agreement.

11. Likewise, the Panel should reject India's efforts to transpose the *Line Pipe* Appellate Body finding concerning Article 5.1 of the Safeguards Agreement onto its interpretation of Article 11.1 of the Anti-Dumping Agreement.⁶ The texts of the two provisions are not, as India asserts, similar.

⁴ India's Second Written Submission at para. 118.

⁵ India's Second Written Submission at paras. 196-197.

⁶ India's Second Written Submission at para. 208.

Article 5.1 of the Safeguards Agreement addresses the nature of the measure that the Member takes in the first instance “to remedy serious injury and to facilitate adjustment”. Article 11.1 of the Anti-Dumping Agreement addresses the “duration and review” of anti-dumping duties that have already been issued. Furthermore, in an anti-dumping duty action, unlike the measure contemplated under Article 5.1 of the Safeguards Agreement, the Member does not have to choose among a quota, a tariff-rate quota, and a tariff in taking action.

III. WEIGHT AVERAGING

12. With respect to India’s claim that the EC improperly used sales value as the basis for weight averaging sales, general and administrative expenses (“SG&A”) as well as profit, the Anti-Dumping Agreement does not specify whether sales value or sales volume must or may be the weighing factor. Article 2.2.2(ii) of the Anti-Dumping Agreement is silent as to the type of weighting factor to be used. As both sales value and sales volume represent permissible bases for weight-averaging these figures, the Member conducting an investigation of dumping retains the discretion to choose between them. If the Panel were to require use of a particular method, it would add to the obligations to which the WTO Members have agreed, in direct contravention of Article 3.2 of the DSU.

13. India suggests that Article 17.6 of the Anti-Dumping Agreement may have been improperly applied by failing to first interpret Article 2.2.2(ii) of the Anti-Dumping Agreement in accordance with the customary rules of interpretation of public international law. India’s argument, however, is premised on its assertion that Article 2.2, footnote 2, Article 2.2.1 and Article 6 of the Anti-Dumping Agreement somehow provide relevant context for the interpretation of Article 2.2.2(ii). These Articles, however, are wholly unrelated to the averaging of SG&A and profit. To the extent that the Panel finds it relevant that these provisions specifically refer to volume as the basis for evaluating a requirement, the fact that Article 2.2.2(ii) of the Anti-Dumping Agreement does not refer to volume should be considered equally relevant.

IV. CONCLUSION

14. This concludes my presentation. Thank you again for this opportunity to express our views.

ANNEX D-3

ORAL STATEMENT OF THE EUROPEAN COMMUNITIES

10 September 2002

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I. INTRODUCTION

1. On behalf of our delegation, I would like to thank the Panel for this opportunity to submit orally the views of the European Communities (the “EC”) in this dispute.

2. In our Oral Statement of this morning we will provide a comprehensive response to India’s Second Submission. I will begin by addressing India’s reply to the EC’s preliminary objections. I will then turn to India’s arguments with respect to claims 1 to 4 and 6 to 8. My colleague, Ms. Meany, will address India’s arguments in connection with claim 5.

II. PRELIMINARY OBJECTIONS

A. FIRST REQUEST: MEASURES “TAKEN TO COMPLY”

3. The EC has requested the Panel to find that Regulations 160/2002 and 696/2002 are not “measures taken to comply” within the meaning of Article 21.5 of the *DSU*.

4. India objects to that request by arguing that those two regulations are “closely connected to the panel and Appellate Body reports concerned”.¹ Yet, India does not explain how the measures are “connected”, or why such “connection” should be relevant.

5. The EC submits that not all the measures that are somehow “connected” to the measure in dispute in the original panel proceedings qualify as measures “taken to comply”. By India’s standard, once a measure has been found to be WTO inconsistent, any subsequent measure that amends formally the legal instrument containing the original measure would have to be considered as a measure “taken to comply”, even if it bears no relationship whatsoever with the rulings and recommendations made in the original dispute. That interpretation of Article 21.5 cannot be correct.

6. India further argues that, upholding the EC’s request, would amount “to leaving it to the full discretion of the implementing member to decide whether or not a measure is one “taken to comply””.² This is a mischaracterization of the EC’s position. The EC has never argued that it is for the implementing Member to self-judge what constitutes a measure “taken to comply”. Clearly, it is for the Panel to decide whether or not a measure qualifies as a measure “taken to comply”.

7. In this regard, the precedents cited by India are inapposite. In *Australia – Salmon*, Australia argued that a measure had not been “taken to comply” because it aggravated the inconsistency.³ In *Australia – Leather*, Australia argued that the measure was not “taken to comply” because it had not been notified as such to the DSB.⁴ In the case at hand, the EC is arguing nothing of the sort.

8. The EC’s request is based on the fact that the anti-dumping duties on imports from Egypt and Pakistan were not a measure in dispute before the original Panel. India did not submit any claims with respect to those measures. Nor, consequently, did the DSB make any recommendations or rulings with respect to those measures.

9. The re-determination of the dumping findings for Egypt and Pakistan made in Regulation 160/2002 was conducted by the EC authorities on their own initiative, and not because they were required to do so in order to comply with the DSB’s recommendations and rulings. For that reason, such re-determination cannot be considered as a measure “taken to comply”. Had the EC authorities not adopted Regulation 160/2002, India could not have requested an Article 21.5 panel to complain about the absence of implementing measures with respect to Egypt and Pakistan.

10. In turn, the re-determination of injury contained in Regulation 696/2002 was rendered necessary by the adoption of Regulation 160/2002. For that reason, it cannot be considered as a measure “taken to comply” either.

¹ India’s Second Submission, para. 8.

² *Ibid.*

³ *Australia – Measures affecting the Importation of Salmon – Recourse to Article 21.5 by Canada*, WT/DS18/RW, para. 7.10, subpara. 23.

⁴ *Australia – Subsidies provided to Producers and Exporters of Automotive Leather - Recourse to Article 21.5 of the DSU by the United States*, WT/DS126/RW, para. 6.4.

11. The EC notes that India has nowhere addressed these arguments

B. SECOND REQUEST: DATE FOR ASSESSING THE CONSISTENCY OF THE MEASURES
“TAKEN TO COMPLY” WITH THE COVERED AGREEMENTS

12. The EC has requested the Panel to make a ruling to the effect that the relevant date for assessing the consistency of the measures “taken to comply” with the covered agreements is the date of establishment of the Panel.

13. India agrees with that request⁵. Nevertheless, it argues that, in addition, the Panel should assess the consistency of the measures “taken to comply” also as of the date of expiry of the “reasonable period of time”.⁶

14. India’s request is not within the Panel’s terms of reference. The obligation to comply within the “reasonable period of time” does not arise from Article 21.5, but from Article 21.3 of the *DSU*. Yet, India has not cited Article 21.3 in its panel request.

15. In any event, the ruling requested by India would serve no useful purpose and would complicate unnecessarily the Panel’s task. If the Panel found that the EC did not comply as of end of the “reasonable period of time”, but did so as of the date of establishment of the panel, there would be nothing else that the EC could do in order to remedy that temporary lack of compliance. Therefore, should the Panel consider that India’s request is within its terms of reference, the EC would invite the Panel to exercise judicial economy.

16. India has suggested that the obligation to comply within the reasonable period of time flows from Article 21.1 of the *DSU*.⁷ The EC disagrees. Article 21.1 states an objective, which informs the interpretation of the other provisions of Article 21. But it does not impose, as such, any legal obligations. In any event, India’s panel request does not cite Article 21.1 either.

17. India suggests that a Member cannot initiate proceedings under Article 21.5 until the end of the “reasonable period of time”.⁸ Although the issue is not relevant in this dispute, the EC must state its disagreement. If a Member takes a “measure to comply” before the end of the “reasonable period of time”, that measure can be challenged immediately under Article 21.5. It is only in the absence of any measures “taken to comply” that the complaining Member will be required to wait until the end of the “reasonable period of time” before requesting a panel under Article 21.5.

18. India further argues that “the inconsistency of a measure with the covered agreements under Article 21.5 proceedings automatically results in a violation of Article 21.1”.⁹ While this is correct, the opposite is not necessarily true. A measure may be consistent with the covered agreements, and yet violate Article 21.3 because it was taken after the “reasonable period of time”. Thus, it is incorrect to say that it is “unnecessary for a complaining Member to raise the violation of Article 21.1 as an independent claim”.¹⁰

⁵ India’s Second Submission, para. 12.

⁶ *Ibid.*

⁷ *Ibid.*, para. 16.

⁸ *Ibid.*, para. 17.

⁹ *Ibid.*, para. 22.

¹⁰ *Ibid.*, para. 22.

19. While it may be true that no Member has ever invoked a violation of Article 21.3 in Article 21.5 proceedings¹¹, this does not prove that it is unnecessary to state that claim separately. Rather, it seems more likely that no Member has ever bothered to invoke a violation of Article 21.3 because a ruling that the implementing Member has complied late would be declaratory and devoid of practical consequences.

20. India also argues that, in light of Article 21.2 of the *DSU*, when the complaining Member is a developing country, panels should make a “strict interpretation of the binding nature of the obligation to comply”.¹² This argument is misguided. The EC does not dispute the binding nature of the obligation to comply within the “reasonable period of time”. The EC has never suggested that such obligation is “meaningless”.¹³ To repeat, the point made by the EC is simply that a finding that a Member has violated Article 21.3 by complying late would be merely declaratory, because there is nothing else that such Member could do in order to remedy such violation.

C. THIRD REQUEST: CLAIMS THAT COULD HAVE BEEN RAISED IN THE ORIGINAL DISPUTE BUT WERE NOT

21. The EC has requested the Panel to rule that certain claims under Articles 3.4 and 3.5 which India could have raised, but did not raise, in the original dispute with respect to findings that have remained unmodified in the measure at issue are not properly before it. Those findings do not constitute, properly speaking, measures “taken to comply”. Furthermore, by withholding those claims, India has acted inconsistently with Article 3.10 of the *DSU*, which requires that the complaining party raises its claims in a timely manner. As a result, India has prejudiced the procedural rights of the EC.

22. India argues that the claims under Article 3.5 which it has raised in these proceedings were within the terms of reference of the original Panel.¹⁴ The EC would agree that the panel request was drafted in such broad terms that it could have encompassed any conceivable claim under Article 3.5. It remains, nevertheless, that India never argued in the original proceedings that the EC had acted inconsistently with Article 3.5 by failing to examine the inflation in the prices of consumer goods as a cause of injury, or by failing to separate the effects of the increase in the cost of raw cotton from those of the dumped imports. Thus, when adopting the implementing measures at issue, the EC authorities could assume legitimately that the WTO consistency of their analysis of those two factors was not being called into question and, therefore, that there was no need to revise that analysis.

23. As regards Article 3.4, the EC has noted that in Regulation 1644/2001 the authorities confirmed the findings made in the original measure with respect to some of the injury factors listed in that article (namely, sales, market share, price development, production, profitability and employment). Indeed, since those findings were not challenged by India in the original proceedings, there was no reason to revise them. For example, India did not contest in the original dispute the findings with respect to the level of profits made by the EC industry. Those findings have, therefore, been confirmed in Regulation 1644/2001. Yet, India claims now, for the first time, that such findings are inadequate.¹⁵ The EC submits that India should not be allowed to raise that claim at this late stage.

¹¹ Ibid., para. 50.

¹² Ibid., para. 19.

¹³ Ibid., para. 17.

¹⁴ India’s Second Submission, para. 25.

¹⁵ Ibid., paras. 172-179.

24. To say that the EC authorities have confirmed the findings which they made with respect to some injury factors, which were not contested in the original proceedings, does not amount to an admission that the EC authorities have not made an overall reconsideration and analysis of all the injury factors.¹⁶ The EC did make such an overall reconsideration and analysis by taking into account both the undisputed findings with respect to certain injury factors and the findings with respect to certain other factors which the original Panel found had not been properly evaluated in the original measure. India's persistent refusal to acknowledge the obvious difference between the factual findings made with respect to each individual injury factor and the overall consideration and analysis of all injury factors is becoming tiresome by now.

25. Predictably, India cites the report of the Appellate Body in *Canada – Aircraft (21.5)*.¹⁷ However, as explained, that report does not address the situation at issue in this case. Unlike Canada, the EC is not arguing that the complaining party is not entitled to make any claims which it did not make before the original panel. As correctly concluded by the Appellate Body in that case, the measures “taken to comply” will generally be new, different measures, which may therefore give rise to new claims. Instead, the EC's position is that India should not be allowed to raise at this stage those claims which it could have raised before the original Panel, but which it chose not to raise.

26. Finally, the EC notes that India fails to address the EC's argument that, by withholding the claims at issue, India has prejudiced the procedural rights of the EC.¹⁸ By way of response, India limits itself to argue that the claims at issue were properly stated in the request for the establishment of this Panel.¹⁹ This does not answer the points made by the EC. First, that deadlines are shorter in Article 21.5 proceedings. And second, and more importantly, that, if a violation is found, the EC will have “no reasonable period of time” to comply. As a result, the EC will be exposed to an immediate suspension of concessions under Article 22 of the *DSU* in response to a violation which India had never invoked before and which, therefore, the EC could legitimately assume did not exist at the time when the implementing measures were adopted.

D. FOURTH REQUEST: CLAIMS NOT STATED IN THE PANEL REQUEST

27. The EC has requested the Panel to make a ruling to the effect that India's claims under Article 4.1(i) of the *Anti-Dumping Agreement* and Article 21.3 of the *DSU* were not stated in the request for the establishment of the Panel and, therefore, are not properly before the Panel.

28. The EC notes India's explanation that it is not submitting a claim under Article 4.1(i).²⁰ However, such claim is implicit in India's claim under Articles 3.1 and 3.4 to the effect that the data for the company concerned should have been evaluated. Indeed, India's claim is logically dependent on a previous finding that the company in question, which was excluded by the EC authorities from the “domestic industry”, should nevertheless have been included therein.²¹ Yet, clearly, whether or not that company was properly excluded from the “domestic industry” is not something which can be decided by the Panel under Article 3. It involves necessarily a finding under Article 4.1(i).

¹⁶ *Ibid.*, paras. 29-32.

¹⁷ India's Second Submission, para. 33.

¹⁸ EC's First Submission, paras. 49-50.

¹⁹ India's Second Submission, para. 39.

²⁰ *Ibid.*, para. 42.

²¹ See India's First Submission, at para. 216:

... since India was not dumping, the re-investigation of dumping should have included the verified information of that sampled producer. *There was no legal justification to continue to exclude (or disregard) information on the record pertaining to that producer. Article 4.1(i) could not be invoked...* [emphasis added].

29. This claim is fundamentally different from the claim under Article 3 decided by the original Panel to which India refers in its Second Submission.²² Before the original Panel, India claimed that data for EC producers which had not been included in the “domestic industry” could not be used in assessing the state of the “domestic industry”. The EC never disputed that those producers were not part of the “domestic industry”. In contrast, the issue raised by India now is whether the fact of disregarding data for a company which was not included, but which, according to India, should have been included in the “domestic industry”, amounts to a violation of Article 3. The EC submits that the Panel cannot decide that issue without deciding first whether the decision of the EC authorities to exclude that company from the “domestic industry” was consistent with Article 4.1(i).

30. As regards Article 21.3 of the *DSU*, India’s position is that it was not required to make a separate claim under that provision.²³ We have already addressed this argument in connection with the second preliminary request.

III. CLAIMS

A. CLAIM 1: ARTICLE 2.2.2 (II)

31. India alleges that Article 2.2.2 (ii) requires the amounts for SGA and profits to be averaged according to the volume sold by the “other producers or exporters” and does not allow the sales value to be used for that purpose.

32. India’s interpretation finds no support in the text of Article 2.2.2 (ii). Well aware of this, India has advanced a series of contextual arguments. The EC has shown that they are all without merit.²⁴

33. The EC considers that Article 2.2.2 (ii) does not prescribe any specific averaging method. The EC is not suggesting that the investigating authorities enjoy unrestricted discretion to select an averaging factor. The method chosen by the investigating authorities must allow a “proper establishment of the facts”.²⁵ A method which precludes a “proper establishment of the facts” cannot be considered a “permissible” interpretation of Article 2.2.2 (ii) within the meaning of Article 17.6 (ii).

34. The EC has shown that the method applied in *Bed Linen* does allow a “proper establishment of the facts”. It is pertinent. And it is neutral. It does not result necessarily in higher amounts for SGA and profits than India’s proposed method. Under a different set of factual circumstances, the EC’s method might well have been more favourable to the exporters than India’s own method. India has acknowledged this expressly.²⁶

35. Unlike the EC’s method, India’s method does not allow a “proper establishment of the facts” and, hence, it is not a “permissible” interpretation of Article 2.2.2 (ii). As explained, India’s method gives the same weight to a pillow case as to a double set comprising one sheet, one duvet cover and two pillow cases.²⁷ Thus, in the words of the Appellate Body²⁸, India’s method fails to “reflect the relative importance” of each of the “other exporters or producers”.

²² India’s Second Submission, para. 45.

²³ India’s Second Submission, paras. 49-50.

²⁴ EC’s First Submission, paras. 71-74.

²⁵ Cf. Article 17.6 (i) of the Anti-Dumping Agreement.

²⁶ India’s Second Submission, para. 100.

²⁷ EC’s First Submission, paras. 86-88.

36. India asserts that its method is “reasonable” because it would have led to “one more company not being found dumping”.²⁹ However, the reasonableness of a legal interpretation is not a function of whether it is more favourable to the exporters. The EC is not aware of any provision of the *WTO Agreement*, or of any principle of treaty interpretation, which would require it to choose always that interpretation which, in the specific circumstances of each investigation, happens to be the most favourable for each exporter concerned.

37. India has suggested that, in view of the first sentence of Article 15, the EC authorities should have chosen the method which results in the lowest dumping margin.³⁰ This amounts in effect to a new claim under Article 15 which was not stated in India’s request for the establishment of this Panel and is, therefore, outside the Panel’s terms of reference.³¹ The EC is hereby requesting the Panel to make a ruling to that effect. In any event, as recalled by the panel in *India – Steel Plates*, the first sentence of Article 15 is not a mandatory provision.³² Moreover, as noted by the same panel, the first sentence of Article 15 only requires to give special regard “when considering the application of anti-dumping measures”. That phrase refers to the final decision to impose measures, and not to the choices of methodology during the investigation.³³

38. India makes much of the alleged lack of consistency in the EC authorities’ practice.³⁴ However, whether or not the EC authorities acted consistently is not a pertinent consideration for the interpretation of Article 2.2.2 (ii). The interpretation of that provision must be valid for all Members, and not just for the EC. In any event, the EC rejects categorically India’s accusations:

- ? first, the method applied in the *Bed Linen* investigation is the same generally applied by the EC authorities in all the anti-dumping investigations where it has become necessary to resort to Article 2.2.2 (ii).³⁵ India has not disputed this;
- ? second, the method applied by the EC authorities is consistent with the methodologies applied at previous steps of the dumping calculation in the *Bed Linen* investigation. It is also consistent with the methods applied to calculate other weighted averages, such as the “all others” rate or the profit margin of the domestic industry.³⁶ Again, India does not dispute this³⁷; and
- ? third, there is no inconsistency between the method applied in this case and the Judgement of the EC Court of First Instance in the case 118/96 cited by India, which addresses a different issue.³⁸

²⁸ Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, para. 74.

²⁹ India’s Second Submission, para. 77. See also para. 104.

³⁰ *Ibid.*, para. 102.

³¹ See India’s Request for the Establishment of a Panel of 7 May 2002, WT/DS141/13/Rev.1, at letter (h), where India stated its claim under Article 15 as follows:

The EC acted inconsistently with Article 15 of the ADA by failing to explore constructive remedies. The recently initiated partial interim review shows that the suspension of the measures was not a remedy of any type but a pretext to continue the proceeding and circumvent the Panel’s finding with respect to Article 15;

³² Panel Report, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India*, WT/DS206/R, para. 7.110.

³³ *Ibid.*, para. 7.111.

³⁴ See e.g. India’s Second Submission, at paras. 90, 101, 103 and 104.

³⁵ EC’s First Submission, para. 81.

³⁶ EC’s First Submission, para. 82.

³⁷ India’s Second Submission, paras. 97 and 98.

³⁸ EC’s First Submission, paras. 75-78.

39. In fact, India's allegations of inconsistency rest on little else than a series of incidental statements made by the EC to the original Panel to the effect that the sales of the company Bombay Dyeing were "representative" because they accounted for almost 80 per cent of the domestic market. That is indeed a very scant basis for alleging a violation of Article 2.2.2 (ii). The statements in question were made in response to India's argument that data for one exporter could not be sufficiently representative to calculate the reasonable amount for SGA and profits in accordance with Article 2.2.2 (ii). They have no direct bearing on the question of whether the amounts for SGA and profits should be averaged according to volume or value, an issue which did not arise in the original investigation. The statements made by the EC would have been equally pertinent, regardless of whether they referred to percentages of sales value or of sales volume, because both magnitudes may be relevant to measure the "representativeness" of an exporter. In any event, as explained, they referred to value, and not to volume.

40. The apparent discrepancy alleged by India in its Second Submission³⁹ results from the fact that the company Standard Industries reported in its Questionnaire response an amount for its domestic sales which was different from the amount that it had previously reported for the purposes of the selection of the sample in September 1996. The market shares cited by the EC in the statements to the original Panel were based on the sales value reported by the Indian producers for the purposes of the selection of the sample, except in the case of the two sampled companies with sales in India (Anglo French and Bombay Dyeing), for which the amounts reported in their Questionnaire responses and verified on-spot were used instead. On the other hand, the amounts used for the purposes of calculating the weighted average SGA and profits were the sales value established for Bombay Dyeing during the investigation and the sales value reported by Standard Industries in its Questionnaire response. (It is recalled that since Standard Industries served only as a reserve company, its response was neither examined nor verified during the original investigation). While Standard Industries reported for the purposes of the sampling that its domestic sales amounted to [***], its Questionnaire response showed that they amounted to only [***].⁴⁰ These data are well known to India (see Exhibit India – RW – 17 and Annexes 16, 17 and 18 of India's First Submission to the original Panel). Nevertheless, and in order to dispel any remaining misunderstanding, the EC is providing as an annex to this Oral Statement a table showing the amounts used to calculate the market shares cited by the EC in the statements to the original Panel and the amounts used in order to calculate the weighted average SGA and profit.⁴¹

41. Even assuming that Article 2.2.2 (ii) required to use the sales volume, India has advanced no reason in its First Submission to justify why the sales volume should be measured in "units/sets" rather than by weight or size. Significantly, India's Second Submission remains silent on this issue. As demonstrated in our First Submission⁴², had the EC authorities used the sales volume measured by weight, the dumping margins would be higher. Thus, in any event the violation alleged by India would be inconsequential and give rise to no nullification or impairment of the benefits accrued to India under Article 2.2.2 (ii). The EC recalls that it has made a conditional request to the Panel to make an express finding to that effect.⁴³ The EC hereby reiterates that request.

³⁹ India's Second Submission, paras. 57-60.

⁴⁰ The EC requests that the data in square brackets be treated as confidential pursuant to Article 17.7 of the *Anti-Dumping Agreement* and paragraph 3 of the Panel's Working Procedures.

⁴¹ Exhibit EC-1. The EC requests that the information set out in this Annex be treated as confidential pursuant to Article 17.7 of the *Anti-Dumping Agreement* and paragraph 3 of the Panel's Working Procedures.

⁴² EC's First Submission, paras. 90-94.

⁴³ *Ibid.*, para. 293.

42. India does not contest that the EC authorities would be entitled to average according to weight. Nor does India dispute that such method would lead to a higher dumping margin. Nonetheless, India contends that the EC has failed to rebut the presumption of nullification or impairment laid down in Article 3.8 of the *DSU* because it has not shown that “there was no change in the competitive relationship”.⁴⁴

43. Obviously, India has misunderstood the EC’s argument. Unlike the United States in the *Superfund* case, to which India refers⁴⁵, the EC is not arguing that the averaging method which it applied in *Bed Linen* has had no actual effects on the volume of imports. (Indeed, since the EC is applying no duties, this fact would be impossible to ascertain). Rather, the point made by the EC is that, by applying a method which results in a lower dumping margin, and consequently in a lower duty, than another method which, by India’s own admission, is consistent with Article 2.2.2 (ii), the EC is effectively improving the competitive opportunities of the Indian imports. Indeed, India would surely agree that the competitive opportunities of the Indian imports would be impaired if the EC were to increase the duty rates above the current level following a recalculation of the reasonable amounts for SGA and profits based on the use of weight as the averaging factor.

B. CLAIM 2: ARTICLES 3.1 AND 3.3

44. India has alleged that the EC authorities should not have cumulated imports from Pakistan and India because imports from Pakistan were not dumped.

45. The EC’s position is well known to the Panel. The anti-dumping duties applied to imports originating in Pakistan were not a measure in dispute before the original Panel. India made no claims against the dumping determination for Pakistan. And, consequently, the DSB made no rulings or recommendations with respect to that determination. This has two implications: first, that the EC authorities were not required to re-determine the dumping margin for Pakistan as part of the measures “taken to comply”; and, second, that the EC authorities were entitled to continue to treat imports from Pakistan as “dumped” for the purposes of the injury determination made in Regulation 1644/2001.

46. Regulation 1644/2001 is the only measure “taken to comply”. Accordingly, whether or not Regulations 160/2002 and 696/2002 are consistent with Articles 3.1 and 3.3 is not an issue before the Panel. In any event, assuming that those regulations were also measures “taken to comply”, their consistency would have to be assessed as of the date of establishment of this Panel. Yet, India does not dispute that, as of that date, the measures in dispute were based on the injurious effects of the imports from India alone.

47. India’s complaint is thus effectively circumscribed to the allegation that the measures were inconsistent with Articles 3.3 and 3.1 between the date of entry into force of Regulation 160/2002 and the date of entry into force of Regulation 696/2002, i.e. between 28 January 2002 and 25 April 2002.⁴⁶ The EC submits that this issue is not within the Panel’s mandate, which is to assess the consistency of the measures “taken to comply” as of the date of its establishment. Furthermore, even if it were, the ruling requested by India would serve no useful purpose, because the EC could not remedy a violation which had already ceased when the Panel was requested. Accordingly, the EC would invite the Panel to exercise judicial economy.

⁴⁴ India’s Second Submission, para. 80.

⁴⁵ *Ibid.*

⁴⁶ India’s Second Submission, para. 110.

48. India alleges that the issue is “material” because the ongoing review of the measures in dispute was initiated during that period.⁴⁷ However, the EC would recall that India has withdrawn its claims with respect to the initiation of that review.⁴⁸ Moreover, it is plain that the initiation of that review is not within the terms of reference of the Panel. First, because the initiation of a review is not one of the three types of measures mentioned in Article 17.4 of the *Anti-Dumping Agreement*.⁴⁹ And second, because, in any event, the initiation of the review was not a measure “taken to comply” within the meaning of Article 21.5 of the *DSU*.

49. In connection with this claim, India has accused the EC of acting in a “cynical and unprincipled”⁵⁰ manner because, according to India, the EC would have raised similar claims in another case against the United States (still at the consultations stage). The EC takes offence at the use of such language, which is even more unacceptable given that India’s accusations are false. In the case mentioned by India, the EC has expressed the concern that the United States should not have cumulated imports from the EC with imports from other sources because imports from the EC were negligible or competed in different ways. There is no contradiction between those claims and the position taken by the EC in this case.

C. CLAIM 3 : -ARTICLE 5.7

50. By its own terms Article 5.7 applies only to original investigations. It does not apply to subsequent reviews under Article 11. Nor does it apply to subsequent re-determinations made in order to comply with the DSB’s recommendations and rulings or, as in the case at hand, in order to adapt a measure which has not been the subject of dispute settlement to the legal interpretations developed in an adopted report.

51. India now appears to concede that the scope of a review or of a re-determination may be limited to injury or to dumping.⁵¹ Yet, it goes on to argue that, “once both dumping and injury are under review”⁵², they should be considered simultaneously.

52. Even if India’s argument were correct as a matter of law, it would still be wrong as a matter of fact. It is not true that in the case at hand “both dumping and injury were under review”. The scope of the redetermination made in Regulation 160/2002 was limited from the outset to the dumping determinations for Egypt and Pakistan. Therefore, the issue of whether both dumping and injury should have been examined simultaneously did not even arise.

53. India is effectively arguing that, under Article 5.7, the EC was not entitled to limit the scope of the re-determination contained in Regulation 160/2002 to dumping. Yet, Article 5.7 is a procedural provision concerned exclusively with the timing of the examination of dumping and injury. It does not provide for a substantive obligation to examine both dumping and injury. The source of that obligation, if any, must be found elsewhere in the *Anti-Dumping Agreement*.

⁴⁷ Ibid.,

⁴⁸ Ibid., para. 35.

⁴⁹ Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R (“*Guatemala – Cement I*”). Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R (“*US - 1916 Act*”), para. 73.

⁵⁰ India’s Second Submission, para. 111.

⁵¹ India’s Second Submission, paras. 117 and 118.

⁵² Ibid., para. 117.

D. CLAIM 4: ARTICLES 3.1 AND 3.2

54. India accuses the EC of confusing the notions of *margin* and *duty*.⁵³ The EC authorities made no such confusion. They determined first the margins of dumping for both the co-operative and the non-co-operative exporters that were not included in the sample.⁵⁴ Only as a subsequent step, and on the basis of those margin determinations, did the EC authorities impose duties on imports from those exporters.

55. India has at no point contested the methods followed by the EC authorities in order to calculate the margins of dumping for the non-sampled exporters (both co-operative and non-co-operative). In particular, India has not claimed that those methods are inconsistent with Articles 2, 6.10 or 6.8 or with any other relevant provision governing the determination of dumping.

56. The findings of dumping reached by the EC authorities concerned all the imports from the non-sampled exporters, and not just a certain proportion of them. Therefore, the EC authorities were entitled to treat all such imports as “dumped”. The term “dumped imports” has the same meaning throughout the *Anti-Dumping Agreement*. Since India has not disputed the finding that all the imports from the non-sampled exporters were “dumped”, it is precluded from claiming that only some of them should be treated as “dumped” for the purposes of the injury analysis.

57. While India insists that Article 9.4 is concerned exclusively with the imposition of duties, it does not explain how the dumping margin of the non-sampled exporters should have been calculated. Surely, India’s position cannot be that the investigating authorities enjoy complete discretion to establish the dumping margin of those exporters. Or that no dumping margin needs to be calculated for them.

58. The EC submits that it is more logical to consider that, although the *Anti-Dumping Agreement* does not prescribe any specific method for calculating the dumping margin of the non-sampled exporters, and therefore leaves some discretion to the investigating authorities, the ceiling set out in Article 9.4 operates also, indirectly, as a limit on the method used for calculating the dumping margin of those exporters.

59. Indeed, while the provisions of Article 9 are concerned with the imposition of duties, it is obvious that there is a logical link between the level of the dumping margin and that of the dumping duty. In fact, that link is stated expressly in Article 9.3. That article and the other provisions of the *Anti-Dumping Agreement* discussed in the EC’s First Submission reflect the basic notion that duties can be applied only to “dumped” imports. Therefore, if Article 9.4 allows the application of duties to all the imports from the non sampled exporters, something which India does not dispute, it is because all such imports can be considered as “dumped”, including for the purposes of the injury analysis.

60. India attributes to the EC the position that “there can be only one weighted average dumping margin for the country”.⁵⁵ The EC has never taken that position. Thus, India’s arguments in paragraphs 130 to 132 of its Second Submission are pointless.

61. India also makes much of what it describes as the EC’s “misqualification of the ‘all others’ rate”.⁵⁶ The EC fails to see what point, if any, India is trying make. The EC attaches no particular relevance to the use of the term “all others” rate. The EC has referred to the duty rate established in

⁵³ India’s Second Submission, paras. 61-66

⁵⁴ Regulation 1644/2001, recitals 12 and 13.

⁵⁵ India’s Second Submission, para. 130.

⁵⁶ India’s Second Submission, paras. 67-73.

accordance with Article 9.4 as the “all others” rate simply because that was the terminology used by the Appellate Body in *United States – Hot Rolled Steel*.⁵⁷ The EC has clearly explained that the duty applied to non-cooperative exporters not included in the sample was calculated on the basis of “facts available”, and not of the formula set out in Article 9.4.⁵⁸ Thus, the confusion alleged by India does not arise.

E. CLAIM 5: ARTICLE 3.4

62. I shall address each of India’s arguments under Article 3.4, namely, (1) that data not collected cannot have been evaluated; (2) that even if the data were collected they were not adequately evaluated; and (3) that certain factual errors have allegedly invalidated the redetermination.

1. Data not collected cannot be evaluated

63. In its First Submission, India claimed that the Panel had “factually established the absence of data collection as a substantive violation” of Article 3.4.⁵⁹ Even though watered down, in its Second Submission, India still insists on arguing that the original Panel “found” that it appeared that data had not been collected.⁶⁰ The original Panel did not find, as a matter of fact or of law, that data had not been collected. It merely found that there was no indication in the determination that the EC authorities had evaluated the relevance or significance of all of the factors listed in Article 3.4. India conveniently ignores the fact that the original Panel acknowledged that some of the data collected for other factors may have included data for the factors mentioned; in the absence of any indication to that effect in the determination, however, it could not assume that that was the case. In other words, the information might well have been collected but this was not sufficiently clear from the determination. The original Panel’s remarks have thus been taken out of context and exaggerated, and India’s continued reliance on those remarks merely exposes the weakness of its assertion that certain information was never collected.

64. India then casts wild and unsubstantiated aspersions about the EC’s attitude to data collection, by suggesting that if the EC producers choose not to disclose certain data, then the EC would simply consider that factor not relevant.⁶¹ The EC strongly objects to this accusation, both in general and in regard to the present case. What is striking here is that India completely ignores the fact (or even the possibility) that it may sometimes be impossible to establish meaningful data and it fails to respond to the EC’s explanations regarding the difficulties encountered in collecting specific data e.g. on capacity utilisation, in an industry such as bed linen, where machinery is used for so many different qualities and types of product, including products outside the definition of the like product.

65. We shall consider again the two examples given by India, capacity utilisation and stocks. Since these are both factors which were not considered relevant to the state of the Community industry, and since India alleges that there is some connection between the decision not to consider

⁵⁷ Appellate Body Report, *United States – Anti-Dumping Measures on certain Hot Rolled Steel Products from Japan*, WT/DS184/AB/R, (“*US – Hot Rolled Steel*”), para. 115

We observe, first, that Article 9.4 applies only in cases where investigating authorities have used “sampling”, that is, where investigating authorities have in accordance with Article 6.10 of the Anti-Dumping Agreement, limited their investigation to a select group of exporters or producers. In such cases, the investigating authorities may determine an anti-dumping rate to be applied to those exporters and producers who were not included in the investigated sample. *The rate so established is referred to as the “all others” rate.* [emphasis added].

⁵⁸ EC’s First Submission, para. 115.

⁵⁹ India’s First Submission, para. 145.

⁶⁰ India’s Second Submission, para. 140.

⁶¹ India’s Second Submission, para. 145.

these relevant and the collection of information, it may be helpful here to explain not only how information was collected but also how relevance (or the lack of it) was assessed.

Stocks

66. Inventories increase or decrease depending on the volume produced and the volume sold/exported during a given period. Since data concerning production, sales volumes and exports were collected⁶², the EC authorities did have data on stocks, as was clearly confirmed to Texprocil in the EC Commission's letter of 27 July 2001.⁶³ Information concerning stocks was further verified on spot for sampled producers. India ignores the fact that information on stocks could be derived from other data, and stresses that the information requested on stocks in the exporter's questionnaire was much more detailed and that this level of detail would be necessary also for properly establishing the relevance or significance of stocks for the purposes of determining injury. But requesting information on stocks from exporters serves an entirely different purpose. Information on stocks may be relevant in calculating normal value for the IP for an individual exporter. It might not play a role, however, if that particular company only produces to order. In assessing the relevance or significance of stocks for the sampled Community industry, it is first necessary to have meaningful, reliable data across the entire sample of producers and over a number of years, not just for the investigation period. But this is difficult to establish where certain companies are found to produce to order, others may also subcontract to meet orders and others still may maintain stocks to better serve their clients.

67. India has also argued that the EC should not have had regard to the accounts since they only reflect data at the company level and not at the level of the product concerned. However, stock movements could be estimated on the basis of turnover and in this respect it should be noted that bed linen activity represented up to 70 per cent (and 46 per cent on average) of the sampled Community producers' activity.⁶⁴ However, what is important here is that it became plain upon the on spot verifications that an increase in stocks may not necessarily indicate unsold production but might be due to increased orders.

68. At recital 29 of Regulation 1644/2001 it was explained in detail that production often takes place in response to or in anticipation of orders placed by particular clients. Secondly, stock valuation often takes place at 31 December which is towards the end of a peak period for the bed linen sector; this can also lead to apparent large variations in stocks from one year to the next. While some increase in stocks was observed in some companies, there was no suggestion that this was evidence of injury. As explained, an increase in stocks or decrease in stocks in this sector can thus indicate actual or anticipated orders rather than unsold production.⁶⁵ Consequently, on the basis of information obtained and verified on spot, the EC was entitled to conclude that stocks did not have a bearing on the state of the domestic industry.

Capacity utilization

69. It had been stated in the complaint that statistics on production capacity did not exist for the bed linen industry as it is far too specific.⁶⁶ This alleged difficulty in establishing data on production capacity and capacity utilisation for bed linen, was confirmed during the on-the-spot verification visits made at the premises of the sampled Community producers. As capacity utilisation cannot be calculated without reference to production capacity, this necessarily means that reliable data on

⁶² Regulation 1069/97, recitals 63, 81 and 82.

⁶³ Exhibit – India – RW – 17, page 4.

⁶⁴ Exhibit India-RW –17, page 5.

⁶⁵ Regulation 1644/2001, recital 29.

⁶⁶ India-Exhibit 6, page 30.

capacity utilisation was equally unattainable. The EC would like to draw the Panel's attention to the fact that certain Indian producers made similar comments.⁶⁷ For instance, one company stated that "*there are no rated capacities for the machineries for producing the product concerned. [Nor is there] any other technical ways or means to compute the installed capacity.*" Another company likewise said that the stitching machine had no rated capacity. Other companies said that since they produced to order the question of determining capacity utilization did not arise.

70. The EC found that many Community businesses bought and/or sold machinery with relative ease, making capacity production/utilisation somewhat of a moving target. More importantly, even the same machinery can yield completely different production capacities depending on the product mix, especially since the product concerned consists of a large number and variety of products which differ in size, colour, construction and quality. This made it extremely difficult for the EC to draw meaningful, comparable data. Whilst the investigation did show that some producers had contracted out surplus production, which might indicate a higher rate of capacity utilisation towards the end of the period considered, the data available could not be considered as a basis for drawing any conclusions as to the state of the Community industry. For instance, a company working at full capacity and subcontracting a product mix comprising a majority of smaller products, such as pillowcases, may not necessarily find that work as profitable as if it had used less capacity to produce a higher value product. In other words, a decrease or increase in capacity utilisation is unlikely to have the same meaning in terms of injury for different companies or even for the same company in different years. The EC therefore rightly concluded that capacity utilisation was not a factor which could be considered relevant for determining the state of the Community bed linen industry.

2. Adequate evaluation of Article 3.4 factors

71. Before turning to look in more detail at the evaluation of certain factors performed by the EC authorities, a few preliminary observations should be made.

An overall reconsideration does not prevent any confirmation of previous findings

72. First, contrary to what India alleges in its Second Submission, the EC did not contradict itself by stating that there had been an overall reconsideration and analysis even though certain previous findings were confirmed. As has already been explained, India takes out of context⁶⁸ the EC's reference to the 'confirmation' of original findings. The fact that the EC did not, upon reconsideration of the matter, find it necessary to amend certain of its previous findings, whilst it did revise other findings, in no way supports the allegation that there has been no overall reconsideration.⁶⁹

Use of the sample

73. Second, we note that India does not contest the relevance of the sample for determining injury⁷⁰. Apart from the fact that India has not previously stated that it contested the representativity of the sample, we have already noted that the claim in relation to one producer excluded from the

⁶⁷ Exhibit EC-2. The EC requests that the information set out in this Annex be treated as confidential pursuant to Article 17.7 of the *Anti-Dumping Agreement* and paragraph 3 of the Panel's Working Procedures.

⁶⁸ India's Second Submission, para. 150.

⁶⁹ See also EC First Submission, para. 163.

⁷⁰ India's Second Submission, para. 156.

sample is not properly before the Panel since no claim has been brought under Article 4.1 regarding the proper definition of the Community industry.⁷¹

74. So, whilst India purports not to contest either the representativity or the relevance of the sample, it still contests reliance on sampled data alone for certain injury factors. However, one must ask what is the point of allowing the use of a sample at all if one cannot rely on the data collected for that sample? Now, some basic information may be available at the level of the entire Community industry; this is generally information which is collected globally and readily available or ascertainable. (This normally includes information on production, sales, market share, employment and growth.) Such data are often derived from statistics kept by National Federations based on an aggregation of figures supplied by their members. This information is then cross-checked with the data submitted directly from all the companies included in the definition of the Community industry in their questionnaire replies.

75. Information which is of a much more company specific nature on the other hand, such as information on prices, profitability, cash flow etc., is unlikely to be readily available and may be much more difficult to collect and verify at the level of the entire Community industry. This is especially so where the industry is fragmented and comprises a large number of individual companies. In cases where it has been deemed necessary to have recourse to a representative sample of producers, it is common in the EC's practice to collect and verify such detailed company specific information only at the level of the sample.

Assessment of relevance

76. The assessment of the relevance of certain factors (stocks and capacity utilisation) has already been addressed in oral and written argument; we refer the Panel to our previous comments.

Evaluation of injury factors

77. The EC notes that India acknowledges that injury can be suffered even if certain factors do not show injury⁷², but it contends that the EC failed to explain why certain positive trends were not probative for the state of the Community industry. Since the EC has explained in detail in its First Submission how each of the factors mentioned in Article 3.4 was evaluated, it will therefore concentrate in its oral submissions on addressing those factors which India has alleged should have been probative for the state of the industry.

Sales, Market share, prices

78. The figures on sales, market share and price developments are set out in recitals 82 to 88 of Regulation 1069/97 and recital 35 of Regulation 1644/2001. (Again, the fact that these earlier findings are confirmed cannot be taken to mean that there was no overall reconsideration and analysis as India has alleged.) In short, sales for the Community industry increased more in terms of value (4.2 per cent)⁷³ than in terms of volume (only 1 per cent).⁷⁴ Similarly, sales by sampled producers actually decreased by 1.5 per cent in terms of volume⁷⁵, whereas they rose in terms of value by 1.7 per

⁷¹ As the EC pointed out at para. 200 of its First Submission, the inclusion of that one sampled producer would have been of negligible effect in any event.

⁷² India's Second Submission, para. 154.

⁷³ Regulation 1069/97, recital 83.

⁷⁴ Regulation 1644/2001, recital 35.

⁷⁵ Regulation 1069/97, recital 82.

cent⁷⁶. Average prices per kilogram therefore increased over the period. The investigation established that for the sampled producers, the increase in prices was due to a shift towards higher value niche products. This was confirmed in the redetermination.⁷⁷

79. India rejects out of hand the EC's explanations regarding the shift towards niche products as far as prices are concerned. It seems to argue that since the like product includes the niche products, there can be no distinction between the two, implying that only average prices should be relevant. It submits that otherwise there would always be injury since there would be injury if prices decrease and if they increase this would just be put down to a supposed shift in the product mix. This suggestion is absurd- there is no conspiracy theory! Interestingly, India does not seem to dispute the actual existence of the shift in sales and production by the sampled producers towards higher value niche products. Nor is it disputed that average prices actually decreased for the defined reference products in the sample. Therefore, the EC found that average prices had increased, but on closer inspection it found that this was due to the shift in product mix. Had average prices decreased overall, it may have been equally necessary to consider whether changes in the product mix could have been responsible. The EC does not conclude that whenever average prices increase this will not be treated as a positive development; it merely argues that it was perfectly entitled to look beyond the development in average prices and take account of the fact that the increases were largely the result of a shift in production and sales to higher value niche products.

80. As far as market share, sales (and output) are concerned, India again argues that the shift towards niche products should not be taken into account. The EC maintains that rather than simply taking into account the bottom line in developments in market share, sales and output, it can and should look to the context in which those developments take place. Here again, it may take into account the fact that sales, production and market share have increased for higher value niche products.

81. On the one hand, India seems to suggest then that the EC should have merely calculated average prices, set out the figures for sales and market shares and looked no further if this showed a positive trend. On the other hand, India states that an analysis of pertinent information is required and not merely a reference to it.⁷⁸ We could not agree more.

Output

82. With regard to output, India argues that the EC failed to mention why the 8.7 per cent increase in output was not probative for the state of the Community industry. Apart from the fact that no one factor can be taken to be decisive, India fails to respond to any of the EC's explanations in its First Submission as to how information on output was analysed. For instance, whilst there was an overall increase of 8.7 per cent (between 1992 and the IP), this was not an "increasing trend" as India says but output actually decreased between 1994 and the IP. The EC recalls that in *Argentina – Footwear Safeguard*, the Appellate Body found that investigating authorities are required to consider the trends over the period of the investigation and not just the end to end points.⁷⁹

83. It was further noted by the EC that the increase in exports had also led to the overall increase in output and that the Community industry had to a certain extent benefited from the demise of other

⁷⁶ Regulation 1069/97, recital 83.

⁷⁷ Regulation 1644/2001, recital 35.

⁷⁸ India's Second Submission, para. 157.

⁷⁹ Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS/121/AB/R ("Argentina – Footwear Safeguard") para.129.

producers which had not survived the competition from dumped imports.⁸⁰ It cannot be argued therefore that the EC merely recited the fact that output had increased without actually analysing this factor. Nor is India correct in stating that the EC only argued that the increase in production was due to the concentration on higher value niche products – that was merely one aspect of the EC's analysis, in addition to the elements already mentioned.

84. The EC does not simply assert that “the declining profits override the increase in output”. Rather, the EC analysed the increase in output in context, noting *inter alia*, the recent decrease in output, and further noted that despite the overall increase in production, the Community producers had still suffered declining and inadequate profitability, which one would not normally expect to be the case.

Productivity and Employment

85. The overall increase in production and the overall decrease in employment clearly resulted in increased productivity. India regards this a positive development caused by the increase in production (which it alleges was due to improved machinery which in turn led to a decrease in jobs), whereas the EC argues that there is no direct link between the increase in investments and the decrease in employment – the positive trend in productivity cannot be seen as significant since it was partly caused by the reduction in employment. The patterns of production and employment can be seen in Exhibit India–RW- 5. There was no increase but rather a decrease in production during the period for which employment decreased. It was also explained that the overall increase in production was partly due to the Community industry's increased sales of niche products; this coupled with the restructuring which took place made improvements in productivity possible. In the absence of this improvement in productivity, financial losses would have been higher.

Wages

86. Average wages per employee increased during the period considered. The EC explained that this increase was partly in line with the increase in consumer prices in the EC during the same period. Whilst the EC accepts that this is not necessarily an indication of injury, it does not agree that this factor alone can be seen as decisive, as India suggests.

Growth

87. The EC notes that India does not actually dispute the fact that growth of the domestic industry was limited compared with the growth of low priced dumped imports from India alone or from all countries concerned. In that regard, it is clear that growth in the domestic industry was far less significant in both absolute and relative terms: sales increased by 1 per cent (or 348 tonnes) between 1992 and the IP and market share increased by 1.6 percentage points in that period.

88. India then claims that the EC was selective in looking at trends over the years. Where, however, there is a clear negative trend for a significant period of the analysis period, (in this case a decline in sales volume of 3 per cent (or 1173 tonnes) between 1994 and the IP) it should not be ignored. It was also noted that this decline in sales volume occurred even though domestic producers should have been able to benefit from the gap left by factory closures.⁸¹ India also objected to the EC's statement that growth in market share was very limited between 1994 and the IP, arguing that market share cannot be expected to grow each year. The EC does not necessarily expect market share to grow each year but it observes that at the same time as the negative trends for sales, growth in

⁸⁰ EC First Submission, paras. 183–186.

⁸¹ Regulation 1644/2001, recital 44.

market share was more limited, i.e. that growth was negative (sales volume) or limited (market share) during the latter period of the injury analysis period. Again, the EC recalls that in *Argentina – Footwear Safeguard*, the Appellate Body found that investigating authorities are required to consider the trends over the period of the investigation and not just the end to end points.⁸²

Profits

89. It is not disputed by India that profits of the sampled domestic producers fell from 3.6 per cent to 1.6 per cent during the period considered. This is a decline of 54 per cent (even though India would have us believe that a decline of 2 percentage points is somehow equivalent to 2 per cent, that is of course nonsense).

90. The EC found that a reasonable level of profitability for this industry was 5 per cent. This figure was not plucked from the air. It was based on actual profit levels achieved by the Community producers in a year in which there was no evidence of dumping and when the imports concerned were 30 per cent lower than in the IP. This figure cannot be said to be subjective or arbitrarily chosen since it was based on actual profit data. It was also found that the low level of profitability achieved during the investigation period was below levels achieved by importers of the like product.

91. India still questions why data was only available for profits at the level of the sample and not the entire Community industry. It has, however, already been explained that where it is necessary to have recourse to a sample, complex company specific data such as profitability data can only be examined at the level of the sample. However, as noted, there has been no question as to the representativity of the sample.

Cash flow

92. As stated in recital 19 of Regulation 1644/2001, data for trends concerning cash flow was collected at the level of the sample. The EC found that as with profitability, cash flow had decreased, by 28 per cent from 1992 to the IP. This is not disputed. Whilst India has submitted that the evaluation regarding cash flow is inadequate, this allegation is wholly unsupported.

Return on investments

93. India implies that since the EC did not expressly state in the table in its letter of 19 June 2001⁸³ that the figures for investments represented accumulated accounts, that the express mention of this in the letter of 27 July 2001⁸⁴ is somehow not to be trusted. However, since the figures in those tables are identical there can be no doubt that the figures represent accumulated and not yearly amounts for investments. Whilst the return on investments remained positive throughout the injury analysis period, it decreased by over 50 per cent.⁸⁵

Margin of dumping

94. The EC has submitted under claim 4 that it is entitled to treat all imports from India as dumped for injury purposes. However, if the determination of injury should be based on the effects of dumped imports as India argues, the EC maintains that non-dumped imports are not relevant in

⁸² Appellate Body Report, *Argentina – Footwear Safeguard*, para 129.

⁸³ Exhibit India-RW-4, table in Annex.

⁸⁴ Exhibit India-RW-17, table on page 8.

⁸⁵ Regulation 1644/2001, recital 39.

assessing significance of the margin of dumping established for injury purposes. In any event, the EC would still submit that the margin of dumping is substantial and above *de minimis*.

Factors affecting prices

95. The EC found that in fair market conditions, domestic producers should have been able to pass on the increase in prices of raw cotton material to their customers. In so far as India argues that the injurious effects of the increase in raw material prices should have been separately established, this is dealt with in the context of its claim under Article 3.5.

96. It should be noted that the EC also observed that prices had not kept pace with inflation in prices of consumer goods.⁸⁶

3. Alleged factual errors

97. For the most part, the factual errors alleged by India have either already been addressed, or it has been accepted that there was no 'error' as such.

Dumping margin

98. The argument in relation to dumping margins has been dealt with under claim 4.⁸⁷

Sample

99. The allegation concerning the exclusion of a producer from the Community industry is not properly before the Panel for the reasons already given.⁸⁸ We would merely add that, in any event, the exclusion of that producer does not affect the representativity of the sample. As regards the factors for which data for the whole Community industry have been used, the exclusion of that producer was of negligible consequence since it represented less than 1 per cent of the Community industry.

100. As far as the alleged misrepresentation is concerned regarding references to the sample, the EC notes that India does not contest that it was in any way misled by which figures related to the sample and which related to the Community industry. We therefore fail to see the relevance of this allegation.

Market share

101. The alleged discrepancy regarding the figures for market share has been clarified and accepted.⁸⁹

Profits

102. India states that it fails to understand how data sheets with different turnover figures could show the same profit margin.⁹⁰ However, the EC has already clarified that there was a minor clerical error in the sales turnover figures for sampled producers in disclosure document of 19 June 2001.

⁸⁶ Regulation 1644/2001, recital 50; Regulation 1069/97, recital 86.

⁸⁷ See paras. 54-61 above.

⁸⁸ See paras. 27-30 above.

⁸⁹ India's Second Submission, para. 187.

⁹⁰ India's Second Submission, para. 186.

This did not affect the profitability figures. If anything, the fact this error crept into the EC's disclosure upon re-determination, though regrettable, only goes to demonstrate that a thorough overall reconsideration and analysis was performed. Had the EC merely blindly confirmed its previous findings, as India claims, such a clerical error would not have arisen.

103. Let us not forget the substance here. India tried various arguments in its First Submission, to demonstrate the inadequacy or inaccuracy of the EC's findings on profits. However by the stage of its second Submission, India simply tries to hide behind a smokescreen alleging inconsequential factual errors. The fact is that India cannot really dispute that profitability levels decreased by over 50 per cent between 1992 and the IP. This decrease and the reference to adequate levels of profitability are based on hard evidence, since these were actually achieved by the sampled companies.

4. Conclusion

104. In conclusion, the EC did not blindly confirm previous findings; it did conduct an overall reconsideration and analysis and it did not err in finding that some information and findings set out in the original investigation were confirmed. It did not act blindly in pursuit of some form of "self-fulfilling prophecy", as India suggests.⁹¹ Instead it looked closely and carefully at the situation of the Community industry and found *inter alia* that:

- ? Profitability decreased by 54 per cent over the period considered;
- ? Profits for the sampled producers were below those for importers of the product concerned;
- ? Undercutting by dumped imports from India ranged between 13.8 and 40.7 per cent;
- ? Cash flow declined by 28 per cent; returns on investment also showed declining trends;
- ? Employment decreased by 5.3 per cent;
- ? Production decreased between 1994 and the IP;
- ? Average prices of the defined reference product for sampled producers decreased;
- ? Although sales value of the Community industry as a whole increased, sales volume increased by less (and even decreased for the sampled producers); average prices therefore increased -this was due to a shift towards higher value niche products;
- ? Average price increases were not sufficient to pass on fully to customers the substantial increase in the cost of raw cotton due to the downward pressure exerted by low priced dumped imports, which declined by up to 18 per cent;
- ? Market share increased by 1.6 percentage points, however sales volumes fell by 3 per cent between 1994 and the IP; this is despite the fact that there were several factory closures in the Community and the surviving producers of the Community industry ought to have benefited from this gap in the market;
- ? Growth of the Community industry was limited compared to the growth in imports from India – imports increased by 56 per cent in volume and gained 4 percentage points in market share⁹²;

105. Although certain factors appeared positive at first sight, these had to be analysed in context. Thus, as the EC found at recital 50 of Regulation 1644/2001, while the Community industry managed to increase production and to slightly increase its sales volume and market share by concentrating on more sales of higher value niche products, it nevertheless suffered declining and inadequate profitability, which is basically the result of prices which had not been able to reflect the increases in

⁹¹ India's Second Submission, para.

⁹² Even if imports from exporters found not to have dumped are excluded, the increase in dumped imports from India remains significant at 55 per cent and market share increased by 3.4 percentage points (from 5.1 to 8.5 per cent). See Regulation 696/2002, recital 23.

the costs of raw cotton or to keep pace with inflation in prices of consumer goods. Declining trends were also found for cash flow, return on investments and employment.

106. On this basis, and in particular because of the declining and inadequate profitability (which is not disputed) and the price suppression suffered as a result of the marked increase in low priced dumped imports, the EC was able to find, in all objectivity, that the Community industry had suffered material injury within the meaning in Article 3.4 of the *Anti-Dumping Agreement*.

F. CLAIM 6: ARTICLE 3.5

107. The EC notes that India concedes, after some quibbling, that the EC authorities were not required to establish that dumped imports were *the cause* of the injury suffered by the domestic industry, but rather that there was a genuine and substantial relationship of cause to effect.⁹³ That relationship does not exclude the existence of other causes of injury.

108. India also recognises that injury may be found to exist even where the increase in the market share held by dumped imports is relatively small.⁹⁴ Once that premise is accepted, however, it becomes obvious that the five-line argument made by India at paragraph 248 of its First Submission, even if it were factually correct (*quod non*), would not be sufficient to establish a *prima facie* violation of Article 3.5.

109. India argued in its First Submission that the EC authorities identified the inflation in the prices of consumer goods as a cause of injury which, therefore, should have been examined under Article 3.5. The EC has explained that the inflation in the prices of consumer goods was not considered a cause of injury, but rather a further indication of price suppression and inadequate profitability. Yet, in its Second Submission, India persists by arguing that “since price suppression and inadequate profits were singled out as the main indication of injury, the inflation could well have been a cause of that alleged injury”.⁹⁵

110. The EC fails to see the logic of this proposition. Unlike raw cotton, consumer goods are not inputs for the manufacture of bed linen. Consequently, an increase in the prices of consumer goods does not affect the profitability of the bed linen industry and, therefore, cannot be a cause of injury. To repeat, the fact that the prices of bed linen (a consumer good) do not increase in line with the prices of other consumer goods is a “symptom” of injury because it suggests that, unlike the producers of other consumer goods, the manufacturers of bed linen are not able to pass on their cost increases. But it is not, of itself, a cause of injury.

111. India’s last argument under this heading is that the EC authorities attributed to the dumped imports from India the injury caused by other factors, and in particular by the increase in the prices of raw cotton.

112. At the outset, the EC would recall that the burden of proof is borne by India. Accordingly, it is for India to prove that there were other known causes of injury and that the EC authorities failed to separate their effects, and not for the EC to prove the opposite. In order to meet its burden of proof, it is not enough for India to continue to quote once again the same well-known passages from the relevant Appellate Body reports and to assert, like a mantra, that the EC authorities failed to “separate/distinguish”, etc.

⁹³ India’s Second Submission, paras. 193-209.

⁹⁴ Ibid., para. 210.

⁹⁵ Ibid., para. 213.

113. The EC notes that India does not dispute that the prices of raw cotton increased substantially. Nor does India contest that the EC producers of bed linen were unable to reflect those increases in their prices. Further, India has not alleged, let alone proved, that the EC producers were prevented from rising their prices due to factors other than the dumped imports from India. In view of that, the EC submits that India has failed to establish even a *prima facie* violation of Article 3.5.

114. As explained in our First Submission, the EC authorities found that the increase in the cost of raw cotton was a cause of injury only because the EC producers were unable to reflect that increase in its prices. In turn, the reason why the EC industry could not pass on the cost increases was the downward pressure on prices exerted by the dumped imports. Thus, ultimately, the cause of injury were the dumped imports, and not the increase in the cost of raw cotton. In a passage of *US – Hot Rolled Steel* repeatedly cited by India⁹⁶ the Appellate Body noted that it is necessary “to separate and distinguish the injurious effects of *different* causal factors”.⁹⁷ The increase in the cost of raw cotton is not a *different* causal factor, because it cannot have any injurious effects on its own. Therefore, its effects need not, and indeed cannot possibly be separated from those of the dumped imports.

G. CLAIM 7: ARTICLE 15

115. The obligation to explore “constructive remedies” provided for in Article 15 must be fulfilled before “applying” anti-dumping duties. The EC has suspended the “application” of anti-dumping duties on imports of bed linen from India. If and when the EC authorities decide to “apply” anti-dumping duties as a result of the ongoing review, they will explore first the possibilities of constructive remedies, and more specifically the possibility of a price undertaking. In the meantime, India’s claim is premature and should be rejected by the Panel.

116. India contends that “the suspension of an imposition of duties can in itself also qualify as a form of application”.⁹⁸ India argues that Article 7 refers to the “application” of provisional measures and includes among those measures the “withholding of appraisement”, even though that measure does not involve the “imposition” of duties.⁹⁹ That is, of course, correct. But it lends no support to India’s interpretation of Article 15. To begin with, Article 15 refers to the “application” of anti-dumping duties, and not of other anti-dumping measures. And, in any event, the EC is not “applying” any anti-dumping measures of any kind, including those envisaged in Article 7.

117. India’s reliance¹⁰⁰ upon the report of the Appellate Body in *US – Line Pipe*¹⁰¹ is likewise misguided. In that case, the United States argued that the safeguard measure at issue did not “apply” to developing countries accounting for less than three per cent of imports because imports below 9,000 tons were exempted and the US authorities “expected” that any country exceeding that limit would, in practice, account for more than three per cent of total imports. In other words, the US contention that the safeguard measure did not “apply” to certain countries was based on the mere “expectation” that, *de facto*, imports from those countries would not reach the level that triggered the application of the safeguard measure. The Appellate Body correctly rejected the US argument.

118. Unlike the United States in *US - Line Pipe*, the EC is not arguing that it “expects” that, in practice, no duties will be “applied” to imports from India. The “application” of anti-dumping duties

⁹⁶ India’s Second Submission, para. 221.

⁹⁷ Appellate Body Report, *US – Hot Rolled Steel*, para. 228. [Emphasis added].

⁹⁸ India’s Second Submission, para. 226.

⁹⁹ *Ibid.*

¹⁰⁰ India’s Second Submission, para. 227.

¹⁰¹ Appellate Body Report, *United States – Definitive Safeguard measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R (“*United States – Pipe Line*”), paras.130-132.

to imports of cotton bed linen originating in India is suspended as a matter of law, and not merely as a matter of fact. This legal situation will remain unchanged as long as the Council of the European Union does not adopt another regulation repealing formally the decision to suspend the application of the duties.

119. The EC has submitted in the alternative that, assuming *arguendo* that the EC authorities had been required to explore possibilities of constructive remedies, notwithstanding their decision to suspend the application of the duties, such suspension would qualify as a “constructive remedy” for the purposes of Article 15.

120. In response, India limits itself to argue that the suspension of duties would not be a “remedy”.¹⁰² India cannot have it both ways. It is manifestly contradictory to argue, on the one hand, that the EC is “applying” duties, because, although suspended, they continue to affect imports potentially¹⁰³ and, at the same time, that such suspension constitutes no “remedy” for the EC industry.

121. India also argues that the “imposition of duties was merely suspended with the sole goal of (soon) seeking to impose duties ...”.¹⁰⁴ India further asserts that the EC does not deny these facts.¹⁰⁵ That is false. The EC has thoroughly refuted this absurd accusation in its First Submission.¹⁰⁶ It has shown that India’s allegation is not only unfounded, but indeed plainly illogical. The EC authorities did not need to suspend the application of duties in order to open a review. They found that imports from India are dumped and cause injury. Therefore, they were entitled, and continue to be entitled, to apply anti-dumping duties on those imports pending the duration of the review.

H. CLAIM 8: ARTICLE 21.2 OF THE DSU

122. As explained in our First Submission, the EC considers that Article 21.2 of the *DSU* is a non-mandatory provision.¹⁰⁷ In any event, the EC authorities did pay “particular attention” to the interests of India.¹⁰⁸

123. Article 21.2 is worded in hortatory terms: it uses the term “should”, rather than “shall”. Generally, the word “should” implies no more than a moral obligation.¹⁰⁹ True, as noted by the Appellate Body, the term “should” may, in certain contexts, have the meaning of “shall”.¹¹⁰ In the case of Article 21.2, however, the context indicates otherwise. The terms of Article 21.2 are exceedingly broad. They lack the minimum degree of precision which is indispensable to any binding obligation. As rightly put by a recent panel report, “Members cannot be expected to comply with an obligation whose parameters are entirely undefined”.¹¹¹

124. To say that Article 21.2 is not mandatory is not the same as saying that it is “inoperative¹¹²”, “meaningless”¹¹³ or “redundant”.¹¹⁴ Public international law provides many examples of non-binding

¹⁰² India’s Second Submission, para. 231.

¹⁰³ *Ibid.*, para. 228.

¹⁰⁴ *Ibid.*, para 224. See also, para. 247.

¹⁰⁵ *Ibid.*, para. 224

¹⁰⁶ EC’s First Submission, paras. 270-274.

¹⁰⁷ *Ibid.*, paras. 279-284.

¹⁰⁸ *Ibid.*, paras. 289-292.

¹⁰⁹ Appellate Body Report, *Canada – Measures affecting the Export of Civil Aircraft*, WT/DS70/AB/R, footnote 120.

¹¹⁰ *Ibid.*, para. 187.

¹¹¹ Panel Report, *United States – Anti-dumping and Countervailing measures on Steel Plate from India*, WT/DS206/R, para. 7.110.

¹¹² India’s Second Submission, para. 235.

instruments of unquestionable relevance. The *WTO Agreement* itself contains numerous provisions drafted in hortatory terms, including some of the provisions on special and differential treatment for developing country Members. Indeed, as explained in our First Submission¹¹⁵, the *Decision on Implementation* adopted at the Doha Conference instructs the Committee on Trade and Development to identify those non-mandatory provisions and to consider whether they should be rendered mandatory. We note that India has not addressed this argument.

125. As recalled by India¹¹⁶, in some arbitrations under Article 21.3 (c) of the *DSU* the arbitrators have followed the exhortation contained in Article 21.2 to pay particular attention to the interests of developing country Members when exercising the margin of discretion which is inherent in the determination of a “reasonable” period of time. Contrary to what is suggested by India, this does not imply that Article 21.2 imposes a mandatory obligation upon developed country Members.

126. Even if Article 21.2 imposed a mandatory obligation, any such obligation would relate to the procedural requirements of the implementation process set out in the other provisions of Article 21, and not to the content of the implementing measures. India appears to endorse this view in the proposal which it has submitted to the Trade and Development Committee.¹¹⁷ Yet, in its Second Submission, it takes the opposite view. Thus, India argues now that, in view of Article 21.2, the EC was required to refrain from opening the ongoing review of the measures¹¹⁸ or, even further, to publish a decision “not to initiate Bed Linen – 3”.¹¹⁹

127. On India’s interpretation, a developed country Member which violates the *WTO Agreement* would be subject to stricter substantive obligations when adopting an implementing measure than those that would apply to a Member which has acted consistently with the *WTO Agreement*. In other words, a developed country Member which has infringed the *WTO Agreement* would be penalised for that reason. That interpretation is at odds with the objectives of the WTO dispute settlement mechanism. The *DSU* is not a punitive mechanism. It does not provide for the imposition of penalties to those Members who violate the *WTO Agreement*. Rather, the objective of the *DSU* is to secure the withdrawal of the measures that are found to be inconsistent with the *WTO Agreement*.¹²⁰

128. India also argues that the alleged violation of Article 15 would entail an automatic violation of Article 21.2.¹²¹ The EC disagrees. Even if Article 21.2 imposed an obligation, and even if the EC had infringed Article 15, it remains that the EC could have paid “particular attention” to the interests of India in other, different ways. Indeed, as explained in our First Submission, the facts of this case evidence that the EC did pay “particular attention” to the interests of India in at least two other ways.

129. In the first place, the EC paid particular attention to India’s interests by agreeing to an implementation period of only five months and two days. Contrary to India’s allegations¹²², the existence of an agreement between the parties does not detract from this. To be clear, the EC would not have agreed to such accelerated implementation, had India not been a developing country Member.

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ EC’s First Submission, paras. 281-282.

¹¹⁶ India’s Second Submission, paras. 237-239.

¹¹⁷ See EC’s First Submission, paras. 287-288.

¹¹⁸ India’s Second Submission, paras. 242 and 251.

¹¹⁹ Ibid., para. 249.

¹²⁰ Cf. Article 3.7 of the *DSU*

¹²¹ India’s Second Submission, para. 243.

¹²² Ibid., para. 246.

130. The EC also paid particular attention to the interests of India by accepting the establishment of this Panel at the first meeting of the DSB in which India's request was put in the agenda. India argues now that, *de facto*, the same request had been made once before.¹²³ That is incorrect. India's previous request was withdrawn because it was premature. (It had been submitted before the expiry of the 60 days period mentioned in Article 4.7 of the *DSU* without the agreement of the EC). Moreover, the measures and the claims mentioned in the two requests were not the same.

131. Finally, should the Panel take the view that Article 21.2 limits the discretion of the implementing Member to choose the content of the implementing measures, the EC has submitted in the further alternative that it paid "particular attention" to the interests of India by suspending the application of the anti-dumping duties, notwithstanding the findings that imports from India are dumped and cause injury to the EC industry.

132. In response, India contends that the suspension was not decided in good faith, because "in retrospect it appears no more than temporary lip service to enable the initiation of yet another Bed Linen proceeding".¹²⁴ We have already refuted this absurd accusation. To repeat, the suspension was not required in order to initiate the current review. The EC authorities were, and continue to be, entitled to apply duties pending the duration of the review. It is deeply ironical that the EC should be accused now of bad faith for suspending the application of the duties.

This concludes our oral statement. Thanks for your attention.

¹²³ Ibid., para. 246.

¹²⁴ Ibid., para. 247.

ANNEX D-4

CLOSING STATEMENT OF THE EUROPEAN COMMUNITIES

11 September 2002

Mr. Chairman, Members of the Panel,

1. First of all, allow me to express our appreciation for your efforts and those of the Secretariat. Like the original dispute, this is a complex one. It raises important and novel issues, both under the *Anti-Dumping Agreement* and under the *DSU*.

2. The discussions during this hearing have helped to clarify the positions of the parties. We are concerned, however, about India's change of position on some issues. India is not simply adding new arguments. In some cases, it is raising entirely new claims, which are not within the Panel's terms of reference. In fact, some of those claims even contradict the claims submitted previously by India in its Panel request.

3. In this statement I do not intend to address all the claims of issue in the request. We will limit ourselves to restate briefly our position with respect to two issues where we believe that this may be particularly useful in view of the positions expressed by India during this hearing.

4. First, we would like to come back to India's claim 4. As explained, the EC authorities calculated a dumping margin for the non-sampled exporters who co-operated in the investigation on the basis of the margins established for the sampled exporters. They calculated another dumping margin, on the basis of "facts available", for the non-cooperative non-sampled exporters.

5. India has not submitted any claims with respect to the methods followed by the EC authorities in order to calculate the dumping margin of the non-sampled exporters. Yet, India indicated yesterday that it contests those methods. India suggested that those methods would breach Articles 2, 3 and 6.10 of the *Anti-Dumping Agreement*.

6. India's reference to Article 3 is difficult to understand, because it is obvious that Article 3 contains no provision dealing with the calculation of the margin of dumping.

7. Articles 2 and 6.10 are relevant for the determination of dumping, but were not cited in the request for establishment of this Panel. They are, therefore, outside the terms of reference of the Panel.

8. In any event, India has not explained why the EC's method is contrary to Articles 2 and 6.10. The EC considers that neither Article 2 nor Article 6.10 nor indeed any other provision of the *Anti-Dumping Agreement* prescribes any specific method for calculating the dumping margin of the non-sampled exporters. Of course, this is not saying that the investigating authorities enjoy unrestricted discretion to establish that margin. Logically, the upper limit for the duty rates set out in Article 9.4 limits also the level of the dumping margin.

9. India has suggested that the dumping margin should be calculated by averaging the margins of the sampled exporters, without excluding zero or *de minimis* margin.

10. It should be noted, first of all, that this contradicts the claim raised by India in this Panel request. The result of applying India's method would be that either all imports from the non-sampled exporters are dumped or that all such imports are non-dumped. Yet India claims that the data of the sample should be used to establish what proportion of imports from the non-sampled exporters is dumped. In any event, the EC considers that there is no provision in the Agreement that requires investigating authorities to use India's method. And indeed India has pointed to no such provision.

11. Furthermore, India's method leads to an absurd result. In accordance with Article 9.4, the importing Member could apply duties at a higher rate than the dumping margin established by following India's formula. Further, in accordance with Article 9.4, the importing Member could apply duties to imports from the non-sampled exporters, even when the dumping margin of those exporters is zero or *de minimis*.

12. The EC submits that an interpretation which leads to these absurd results cannot be correct. The second issue we would like to address is the relevance of the increase in the cost of raw cotton under Article 3.5.

13. At the outset, we would recall that Article 3.2 of the *Anti-Dumping Agreement* recognises expressly that price suspension is a relevant form of injury.

14. India has not contested that the prices for raw cotton increased substantially, not just in the EC but worldwide. Nor does India dispute that the EC producers were not able to pass on fully such increase. In sum, it is undisputed that the EC industry suffered injury in the form of price suppression.

15. As the Chairman rightly pointed out yesterday, price suppression may be caused by a variety of factors. Indeed, it may be caused by any factor which has an impact on the prices of the domestic industry. However, under Article 3.5 the authorities are not required to examine all conceivable causes of injury, but just the "known" factors. The EC authorities did examine all known "other factors", including all the factors included by India during the investigation, such as the evolution of consumption, the impact of non-dumped imports and the competition from other EC producers. They concluded, nevertheless, that while some of those factors may have contributed to the injury, there was a substantial and genuine causal relationship between the dumped imports and the injury suffered by the domestic industry.

16. At any rate, it is important to note that India is not arguing that the price suppression was caused by factors other than the dumped imports. In other words, India is not arguing that the EC producers were prevented from rising their prices in order to respect the increased cost of raw cotton by factors other than the dumped imports. Instead, India is arguing that the EC should have distinguished the effects of the dumped imports from those of the increase in the cost of raw cotton. As explained, this argument is illogical. The increase in the cost of raw cotton is not a cause of injury *per se*. It caused injury only because the EC producers were prevented from passing on that increase. Therefore, the injury caused by the increase in the cost of raw cotton cannot be separated from that caused by the dumped imports.

17. Before concluding this statement, we would like inform the Panel and India that the EC wished to request confidential treatment also for Exhibit EC-1 and the turnover data derived from the exhibit which is mentioned in the Oral Statement. We will include this request in the final version of our Oral Statement.

Thanks for your attention.

ANNEX D-5

ORAL STATEMENT OF INDIA

10-11 September 2002

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Mr Chairman, Members of the Panel,

1. On behalf of my delegation, in the dispute EC-Bed Linen: recourse to Article 21.5 of the DSU by India I thank you for the opportunity to address you today. India has made two submissions to the Panel. I am sure you have carefully studied them. Therefore, we will be brief in our remarks.

2. We will endeavour to assist the Panel by highlighting what we consider to be the most important points.

3. Let me put the present dispute in its context. India would like to recall that the matter before this Panel is whether the EC has correctly implemented the recommendations and rulings of the DSB in the original dispute—*within* the reasonable period of time as mutually agreed between India and the EC.

4. The answer is a clear No.

5. The DSB recommendation gave EC the choice *either* to revoke the measure *or* to modify it correctly. The EC has done *neither*. There has simply not been even an actual *intention* to comply.

6. More specifically, whilst the application of the re-determination adopted pursuant to the DSB ruling is currently suspended, the *reason* for doing that was, as an EC official speaking to the Bureau of National Affairs, on conditions of anonymity, put it:

"We have made a strong statement by suspending the duty. The EU has *distanced* itself in *the greatest possible way* from the Appellate Body ruling."¹ (emphasis added)

¹ Unworkable WTO Ruling Spurs EU to suspend Bed-Linen Dumping Duties, BNA (Bureau of National Affairs) WTO Reporter, 15 August 2001.

7. In other words, while the EC *claims* to have changed the measure, it simultaneously and expressly *recognized* and publicly *declared* that it could *not* apply the measure in the modified form. As a result the EC chose to suspend the duties rather than to comply with an adverse DSB recommendation.

8. Accordingly, the so-called 're-determination' was nothing else than payment of lip-service to the DSB. At the same time it gave an opportunity to the EC to "distance" itself from rulings with which it disagreed.

9. So where is the compliance when there is not even an *intention* to comply? There is None.

10. Lack of an actual *intention* to comply is the first, basic, reason as to why India considers that there is no compliance.

11. This does not detract from the fundamental violations that were committed in the process of paying the lip-service. The so-called 'measures to comply' taken by the EC in the form of the re-determination and its subsequent amendments have introduced a *series* of inconsistencies with the ADA and the DSU. This re-determination and its amendments will soon, upon conclusion of the ongoing "partial interim review", result in further imposition of anti-dumping measures.

12. Indeed, if one steps back from the details and examines *what* the EC has done, the question of compliance needs to be put in perspective. Does the DSB ruling simply prohibit dumping margin calculations as well as findings of injury and causality that were **formulated** in the EC's *Official Journal* in a certain way? Can that illegal measure simply be **re-formulated**—or **restated**—so that its effects are the same but are no longer prohibited? Is the WTO about form over substance? The answers to these questions, India submits, are obvious. The rest of this statement will be devoted to explaining how one reaches the same answers when looking at the detail.

13. For this purpose, with your permission, I would now like to request my colleague, Mr K.K. Jalan, Joint Secretary, Ministry of Textiles, Government of India, to take the floor.

Mr Chairman, Members of the Panel,

On behalf of the Indian delegation, I want to thank you for the opportunity to appear before you today.

I. A "REASONABLE PERIOD OF TIME" IS A *FINITE* RATHER THAN *INFINITE* CONCEPT (INDIA'S CLAIMS 2 AND 3)

14. On 14 August 2001 the EC declared that it fully complied with the DSB ruling in the *Bed Linen* case.² The press release specifically emphasized that "implementation was achieved within the reasonable period of time granted by the WTO." The rationale for this emphasis was, in the EC's own words, the *obligation* to implement the DSB's rulings and recommendations within the "reasonable period of time".³

15. At the same time the EC has recently requested the Panel to consider the date of establishment of the panel as the relevant date for assessing the consistency of the measures "taken to

² European Union complies fully with WTO ruling in India Bed Linen case and suspends anti-dumping measures against India, IP/01/1207, 14 August 2001.

³ EC First Written Submission (FWS) para. 36.

comply".⁴ Thus in the present case the EC strives to prove that on 22 May 2002 it fulfilled its obligation to comply before 14 August 2001. Mr Chairman, surely 22 May 2002 does not come before 14 August 2001.

16. India agrees that it is the right of the Panel to assess the overall consistency of the measures "taken to comply" up to the date of, and specified in, the request for the establishment of the Panel.⁵ Indeed, this logic is fully consistent with India's claims that the EC violated its obligation to comply *within* the reasonable period of time. With this request as well as with its first request for a preliminary ruling, the EC implicitly admits that it has no substantial arguments against India's claims 2 and 3. In doing so, it actually concedes that it failed to respect the requirement of Articles 3.1 and 3.3 to cumulate dumped imports only with dumped imports (India's claim 2) as well as with the obligation of synchronicity, contained in Article 5.7 (India's claim 3), to consider the evidence of both dumping and injury *simultaneously*.

17. India notes that the EC by turning to formalistic arguments concerning terms of reference of the panel and the scope of application of Articles 3.1, 3.3, and 5.7 implicitly accepts that *substantially* it is wrong. As India pointed out this is witnessed, respectively, by the EC's recent request for consultations in a different dispute settlement proceeding⁶, and by a recent Panel Report where it was the EC which took the view that certain important procedural standards do apply in the context of review proceedings.⁷ India, while disagreeing with these formal objections of the EC, notes the substantial position of the EC in these other proceedings.

18. Therefore, in respect of its claims under Articles 3.1, 3.3 and 5.7 India notes that the EC and India are in fact in agreement as regards the substance of the violations pointed out in India's claims 2 and 3.

II. A MERE GLOSS ON THE ORIGINAL FINDING IS *NOT* WHAT IT TAKES (INDIA'S CLAIM 5)

19. The EC's re-determination is constructed around the word "appears" used by the Panel in the context of concluding that data collection for the injury factors listed in Article 3.4 had not even taken place, let alone evaluated by them.⁸

20. The Panel would have noted that the EC repeatedly has failed to quote the *conclusion* of the Panel that "based on the *foregoing*" it found that the EC had not engaged in an evaluation of all relevant economic factors.⁹ As India had pointed out in its First Written Submission: the word "foregoing" not only includes the reference in paragraph 6.167 that "it appears that data was not even collected" but also includes the Panel's dismissal in paragraph 6.168 of the EC's recurring argument "that data were evaluated but not discussed". As the Panel noted: that latter view was *simply not tenable*. Why should it be tenable now?

⁴ EC FWS, para.35.

⁵ E.g. US – Shrimp 21.5, paragraph 5.13.

⁶ United States – Sunset Reviews of Anti-Dumping and Countervailing Duties on Certain Steel Products from France and Germany. Request for consultations by the EC of 30 July 2002, WT/DS262/1, 3rd and 6th matter raised in that request.

⁷ Certain Corrosion Resistant Carbon Steel Flat Products from Germany, WT/DS213/R of 3 July 2002.

⁸ Original Panel Report, para. 6.167.

⁹ Original Panel Report, para. 6.169.

21. Accordingly, in particular, the measure taken by the EC "to comply" completely disregarded the essential requirement to *first collect* the previously missing data and *subsequently* engage in an overall reconsideration and analysis.

22. The EC never went out to collect the missing data. Indeed, as India pointed out, there is simply no evidence whatsoever that the EC *ever* collected data on stock or capacity utilization of the Community industry.¹⁰ As pointed out, the data obtained from the accounts reflect stock data at a company level. Exactly for such purposes the questionnaires for *exporters* invariably contain separate detailed questions and tables on stock data for the product concerned. The issue is material: data on stocks form an important means in EC anti-dumping practice through which sales and production data are double-checked.

23. The 'defence' of the EC that *because these data were absent they were irrelevant* is untenable. It violates basic obligations of an investigating authority. By allowing domestic producers to decide what data to provide and by accepting that only such data are relevant, the injury determination becomes a meaningless self-fulfilling prophecy.

24. Furthermore, the EC seems to believe that there is no need to have an *overall* analysis and reconsideration of the data collected. In its written submission the EC states that Regulation 1644/2001 limits itself to "nothing but confirm" the original findings. This statement reflects exactly India's concern pertaining to the EC's compliance in the present case, *i.e.*: the EC disregarded relevant case law such as the Panel and Appellate Body in *Mexico-HFCS 21.5* that mandated precisely such overall reconsideration and analysis.

25. India would not like to repeat its detailed arguments in this connection but simply would wish to stress that an overall reconsideration and analysis should have taken place, if data had indeed been collected. In this regard the EC's contention that India is making a "formalistic argument" by pointing out that a mere reference back is nothing more than a restatement of a previous finding, is incorrect.¹¹

26. Yet, it was up to the EC to explain what the difference is between its approach and a simple restatement. An overall reconsideration and analysis cannot simply be assumed by mere references back to earlier findings whilst, simultaneously, some of the other earlier findings are simply deleted. This is witnessed, to name but one example, in the context of market share: while the EC curtly states that the previous findings are confirmed, an overall reconsideration and analysis should, for example, have led to the inclusion of the verified sampled EC producer who was importing the product from Pakistan. This should at least have led to a change in the market share data.

27. India has in its written submission identified other pertinent factual errors such as the change in turnover of the sampled producers which nevertheless, and surprisingly, led to exactly the same profit margin. The significant overstatement of the dumped imports from India as well as the disregard of the level of the dumping margins are other examples of facts that were ignored.

28. India also wishes to point out that the First Written Submission of the EC has not directly addressed the arguments of India. Instead the EC has done no more than summarize its re-determination and contend in a *pro forma* manner that its re-determination satisfied the requirements of the ADA.

¹⁰ These two factors are only examples, since it appears that data were never collected for as many as eight or nine factors.

¹¹ EC FWS para. 163.

III. A "SAMPLE" MEANS WHAT IT NORMALLY MEANS RATHER THAN WHAT IT NEVER MEANS (INDIA'S CLAIM 4)

29. The EC's view "to comply" with the DSB ruling as regards the re-determination of injury meant, first, to take a sample of Indian imports. It then determines within the sample the relationship in *relative* terms between dumped and non-dumped imports. Finally, it deducts from the total volume of Indian imports the *absolute* amount of non-dumped imports *from the sample*.

30. The Panel will recall that India has already provided a hypothetical example in its First Written Submission to illustrate how untenable the EC's position is.

31. Answering India's legitimate concerns about the reasons not to deduct the amount of non-dumped imports corresponding to its *relative* share within the sample, the EC invariably relies upon Article 9.4. India has already pointed out the irrelevance of that Article for the question under consideration.

32. This irrelevance follows from the title of this article 9 ("imposition and collection of duties") as well as from the clear-cut findings of the Appellate Body in this regard.¹² As India has pointed out, the EC deliberately assimilates the different concepts of duty and margin when in truth those issues are distinct. That deliberate confusion ultimately led the EC to interject the 'exclusion concept' that applies for dumping *duties* into the concept of dumping *margins*.

33. On the other hand, India's view on the ordinary meaning of the term "sample" ("a relatively small part or quantity intended to show what the whole is like; a specimen") does not necessitate any additional comments.

34. Equally contradictory is the EC's argument that there can be only one weighted average dumping margin for the country. If that logic is taken to its consequence, it becomes clear that on a weighted average basis India was never dumping and that the termination of the proceeding is way overdue.

35. Indeed, since the EC apparently is of the opinion that there is only one weighted average dumping margin for a country India may now legitimately pose two interlocutory questions:

- (1) Why did the EC not terminate the proceeding on 14 August 2001, when it was apparent to the EC that there was no dumping from India on a weighted average basis?
- (2) Why did the EC engage once again in the "zeroing" of the negative dumping amounts of entire producers when the Appellate Body had already noted that Article 9 did not have bearing on the determination of dumping margins?

36. India looks forward to the answers of the EC as long as these answers do not involve another repetition of a reference back to Article 9, which is irrelevant in this context.

IV. VOLUME OR VALUE (INDIA'S CLAIM 1)

37. The EC submits that by choosing value-based averaging factor in order to determine the relative importance of Indian exporters under Article 2.2.2(ii) it has not acted inconsistently with that

¹² Appellate Body Report, European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India ("EC – Bed Linen"), WT/DS141/AB/R, adopted 12 March 2001, footnote 30.

provision. The EC believes that it could have chosen *any* method to average, provided it acted reasonably in its application. Such reasoning is constructed around the assumption that Article 2.2.2(ii) is silent on the issue discussed.

38. India cannot accept this argument. Article 2.2.2(ii), if properly interpreted on the basis of the *Vienna Convention* and in light of the statements of the Appellate Body, does not give rise to any doubts as for its preference for volume-based averaging as the only averaging factor possible. As India had occasion to note: volume is, *inter alia*, price-neutral and in harmony with the volume-based averaging on the export side of a sample. It flows naturally from the text and context of the Article, if applied properly. In doing so, India has given a meaning to all aspects of Article 2.2.2(ii), as required by the *Vienna Convention* and to the principle of effective treaty interpretation.

39. Even assuming, for the sake of argument, that Article 2.2.2(ii) provides for discretion in terms of the selection of an averaging factor, this discretion does not mean that an investigating Member can depart from its own previous definition of the relative size being 80-14, especially given the status of India as a developing country.

40. The EC states:

"By India's logic, the investigating authorities ... would have to test all possible calculation methods at each step of the dumping determination, and then choose that method which is the most favourable to the exporter in the particular circumstances of each investigation. This would impose an unreasonable burden on the investigating authorities and, at the same time, be a source of unacceptable legal uncertainty and unpredictability for all the interested parties."¹³

41. This statement misinterprets India's reasoning. The statement of the EC is abstract while the circumstances of this case are very concrete. India recalls that it was the EC who had originally defined an averaging factor by which it had come to the ratio of 80-14. Such a ratio can be reached only on the basis of volume. Hence India's objection is that the EC is not being consistent in its practice by shifting to the ratio 91-9. India does not request the EC to be favourable to the exporters nor to the importers but wish the EC to be unbiased and objective, more so given India's status as a Developing Country. An unbiased and objective authority acting in good faith cannot shift positions as regards important aspects of a proceeding, displaying various views as and when deemed fit.

42. As the Appellate Body stated in the *US – Shrimp*:

"One application of [the principle of good faith], the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right "impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably." An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting."¹⁴ (footnotes omitted)

43. The Appellate Body went on to clarify the meaning of the word "reasonable":

¹³ EC FWS, para. 85.

¹⁴ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* ("US – Shrimp"), WT/DS58/AB/R, adopted 6 November 1998, para. 158.

" ... Exercise of the right in such a manner as to prejudice the interests of the other contracting party arising out of the treaty is unreasonable and is considered as inconsistent with the bona fide execution of the treaty obligation, and a breach of the treaty. ... "¹⁵

44. India also recalls in this connection that it follows from the EC's own reasoning in paragraphs 13-14 of its First Written Submission that for the purpose of implementation of the DSB ruling it could not have done what it had not been asked to do.¹⁶ The question arises then, why did the EC change the averaging factor (from 80-14 to 91-9) in its calculations under the Article 2.2.2(ii)? India suspects that the obvious answer has to deal with the intention of the EC to circumvent the DSB ruling and thus to preserve the restrictions on Indian imports. Maintaining dumping margins as high as possible demonstrates a consistency in goal but not a consistency in method—as required by Article 2.2.2(ii) and its interpretation by the Appellate Body.

V. CAUSAL LINK AND NON-ATTRIBUTION (INDIA'S CLAIM 6)

45. We now come to the question of causal link and non-attribution.

46. Not only the injury finding, but also the determination of the alleged cause of the alleged injury is—as it has always been—of concern to India. The so-called measures taken by the EC to comply neither prove the existence of a causal link between dumped imports and serious injury, nor do they ensure that the injurious effects of factors other than dumping such as increase in costs of raw materials and inflation are not "attributed" to dumped imports.

47. The defence of the EC in this regard is missing the point: it distorts India's claim in respect of Article 3.5 and is based on a wrong presentation of facts.

48. Contrary to the EC's view, India has *nowhere* gone as far as arguing that the dumped imports must *on their own* be capable of causing material injury. In line with Article 3.5 of the ADA India believes that it must simply be demonstrated that the dumped imports are causing injury. And nothing else. Until now the EC has failed to comply with this requirement. In fact, and astonishing enough, currently less volume of imports are dumped while the alleged injury as a result of dumped imports is more.

49. As regards the non-attribution language India fails to understand why inflation while identified by the EC as a factor has not been analysed separately as a cause of the alleged injury nor has its injurious effect been segregated from the alleged injury caused by dumped imports. The same is true about the increase in prices of raw materials.

50. India recalls that the EC in recital (103) of the Provisional Regulation had stated that:

¹⁵ ID., footnote 156 (quoting B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Stevens and Sons, Ltd., 1953), Chapter 4, in particular, p.125).

¹⁶ EC FWS, paras. 13-14:

"In the original panel proceeding India submitted no claims against the findings of dumping with respect to imports originating in Pakistan and Egypt reached by the EC authorities in Regulation 2398/97.

Nor, consequently, did the DSB make any rulings or recommendations with respect to such findings. For that reason, when implementing the DSB's rulings and recommendations, the EC authorities did not re-examine the findings of dumping for Egypt and Pakistan."

"The Commission concluded that increases in raw material prices had caused injury."

51. Again, in the re-determination (Regulation 1644/2001) the EC states at recital (50) that:

"... the declining and inadequate profitability ... is basically the result of prices which had not been able to reflect the increases in the costs of raw cotton."

52. Yet, nowhere in the provisional Regulation, nor elsewhere for that matter, were the injurious effects caused by the price increase in the costs of cotton separated and distinguished from the effects of the dumped imports.

53. On the contrary, the EC in its rebuttal merely concludes that:

"Since the increase in the cost of the raw cotton was not a separate cause of injury, its injurious effects cannot possibly be "separated/distinguished" from those of the dumped imports."¹⁷

54. Yet this explanation directly contradicts the obligations as expressed by the Appellate Body as regards the non-attribution of injury and the mandatory separation of injurious effects.¹⁸ Once the EC determined that the increase in raw material prices caused injury¹⁹, such cause *had* to be separated from the alleged injury caused by dumped imports. As the Appellate Body noted:

" ... although this process may not be easy, this is *precisely* what is envisaged by the non-attribution language.²⁰ (Emphasis added)

VI. SHOULD A DRIVER ACCELERATE? (INDIA'S CLAIMS 7 AND 8)

55. It seems to India that there is not much to add on its claims under Article 15 ADA and 21.2 DSU. The EC has hardly reacted to India's claims in a meaningful fashion. To the extent that the EC has replied, it has not addressed the substance of India's claim, but has rather (1) resorted to formalistic arguments about the 'application' of duties and (2) the fact that Article 21.2 DSU is couched in 'should' rather than 'shall'. India has already shown those arguments to be irrelevant and wishes to step back from the *form* to the *substance* of the obligation, if one agrees that WTO is substance over form.

56. To illustrate: What should a driver in a big car do when he sees a pedestrian cross the street? Should he accelerate? What should that driver do when he notes that it is not just any pedestrian crossing that street but the *same* one that he hit before due to his previous reckless driving? Should he this time accelerate even faster in order to test whether his new car is capable of reaching 100 km per hour in 5 seconds so as to pass the crossover before the pedestrian? Should the driver take that risk? Or should he this time be a little more cautious so as not to cause any additional damage to the

¹⁷ EC FWS, paragraph 248.

¹⁸ US – Hot-Rolled Steel AB paragraph 228. Moreover, the Appellate Body in Line Pipe, in the context of the ASG, at paragraph 217, did not leave any doubt:

"... the competent authorities must establish explicitly, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports. This explanation must be clear and unambiguous. It must not merely imply or suggest an explanation. It must be a straight forward explanation in express terms."

¹⁹ Provisional Regulation recital (103).

²⁰ US – Hot Rolled Steel AB paragraph 228.

pedestrian? These questions, while appearing to be rhetorical, do reflect the realities in this present dispute.

57. What should a very developed country do when it is obliged by the WTO to bring its inconsistent anti-dumping measures against the imports from a developing country into conformity with the WTO Agreement? Should it just try to introduce a new anti-dumping measure as fast as possible and with the risk of causing even greater harm than before? Or should it try to pay *special attention* to the interests of the developing country in the process of due compliance before it decides to introduce a new, if any, anti-dumping measure? Due to the mandatory language of Article 15 of the ADA and Article 21.2 of the DSU the answers again are obvious.

58. India recalls in this regard that the EC is well aware of the enormous difficulties caused to the Indian textile industry by its previous measure. In March 2002 the *Bed Linen* case was cited by the NGO Oxfam as the *clearest example yet* of the devastating impact of anti-dumping duties on exports from the developing countries.²¹ The EC has read the report as it follows from the fact that it issued public comments in this respect. This stated awareness, however, had no effect.

59. In particular, the EC seems to believe that it complied with the ruling of the DSB to give due regard to the developing country status of India through suspension of anti-dumping duties. In this connection the EC conveniently forgets that the real, and expressly declared, reason was that the suspension was to:

"distance itself in the greatest possible way from the Appellate Body ruling."²²

60. India submits once again that suspension of duties with the sole aim of seeking to re-impose them cannot qualify as a "remedy" of any type, constructive or otherwise.

61. Indeed, as the Panel has already clearly stated in its original report suspension of measures is not a remedy of any type. Yet the EC did exactly that.

62. Moreover, India recalls that the suspension of imposition of duties equally qualifies as an application of measures. The measures are dormant, but they apply. If they would not apply then there would be no need to suspend their imposition. This suspension is conditional upon the conclusion of the partial review.²³ There is therefore a very clear timing condition on imports that take place—a condition which moreover will soon run out and after which no more imports can take place. A virtual time bomb is ticking and the mere threat of its likely explosion has already caused irreparable damage.

63. Besides that, the EC again has failed to study the possibility of constructive remedies. India recalls that the obligation to explore rests on the EC, not on India. As pointed out, the EC has done just the exact opposite of what the Panel found: it suspended the measures even though the Panel had explicitly held that such is not a remedy, constructive nor otherwise.

64. The EC's repetition of its inconsistency with Article 15 of the ADA—after the Panel already found fault with the EC's actions—brings with it also a violation with Article 21.2 of the DSU. India

²¹ As is known, companies which ever dumped (such as Omkar) went bankrupt due to the illegal measures. Companies such as Anglo-French which suffered WTO-inconsistent duties had to lay off thousands of workers due to the illegal duties.

²² Unworkable WTO Ruling Spurs EU to Suspend Bed-Linen Dumping Duties, BNA WTO Reporter, 15 August 2001.

²³ Re-determination Article 2 paragraph 2.

considers that the compelling logic of the Appellate Body enunciated in *Line Pipe*²⁴ also applies in the relation between Articles 21.2 of the DSU and Article 15 of the ADA: a Member cannot be considered to have paid particular attention unless, as a first step, it has heeded the essential interests of developing country Members under Article 15. From the repeated violation of Article 15 flows inherently the inconsistency with Article 21.2 DSU.

65. Besides that, in general the EC has done just *nothing* that could qualify as an action under Article 21.2. On the contrary, the initiation of yet another Bed Linen review suggests that the EC has done just the exact opposite of paying particular attention to the interests of India.

VII. GOOD FAITH IN THE CONTEXT OF ARTICLE 21.5 PROCEEDINGS

66. As the Appellate Body stated in the *Japan–Alcoholic Beverages II*:

"adopted panel reports ... create legitimate expectations among WTO Members".²⁵

67. India submits that the first and immediate legitimate expectation generated by an adopted panel report is that the party found to be in violation of the WTO Agreements would comply with an adverse decision in *good faith*.

68. India has already pointed out in its Second Written Submission that the third EC request for a preliminary ruling is nothing more than a litigation technique.

As has been pointed out by two respected authors in the field, the legal stance of the EC in its third preliminary request—and of which it accuses India—is the opposite of what it actually has done earlier in another case:

"The situation will probably not happen often but did seem to occur in the recent case 'United States–Tax Treatment for Foreign Sales Corporations'. In the original proceedings, the plaintiff European Communities did not lodge a complaint about GATT Article III (national treatment). Then in the Article 21.5 proceeding, the European Communities raised that point with regard to a limitation on foreign content in the new US tax measure, which was a similar limitation to what existed in the original tax measure. The panel found a violation with respect to GATT Article III and the Appellate Body affirmed."²⁶ (footnotes omitted)

70. As can be seen, these authors have shown that the EC's own *actions* in that different proceeding significantly contradict the EC's *reasoning* relating to its third preliminary request.

²⁴ US – Line Pipe AB, at paras. 118-119 where the AB upheld the Panel's findings on the inconsistency with Article 8, that had quoted the AB report on US – Wheat Gluten. In US – Wheat Gluten AB it was held at para. 146 that:

"In view of [the] explicit link between Articles 8.1 and 12.3 of the Agreement on Safeguards, a Member cannot, in our view, "endeavour to maintain" an adequate balance of concessions unless it has, as a first step, provide an adequate opportunity for prior consultations on a proposed measure."

²⁵ Appellate Body Report, Japan – Taxes on Alcoholic Beverages ("Japan – Alcoholic Beverages II"), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97, at 14.

²⁶ Kearns, J.E. and Charnowitz, S. "Adjudicating Compliance in the WTO: A Review of DSU Article 21.5", 5:2 JIEL (2002) 331-352 at 348 in Chapter III.B.2.b "New claims and arguments that could have been raised in the original dispute but were not".

71. The EC's unfortunate interpretation of straightforward facts is not unique. Similar examples abound, as witnessed by the EC's own arguments. *For example*, the EC:

- (1) confuses the concepts of an anti-dumping *duty* and a dumping *margin*;
- (2) attaches a bizarre meaning to the word "sample";
- (3) suddenly changes its mind as regards the choice of the averaging factor;
- (4) creates an evaluation of factors based on data which were not even collected, leave alone brought on record, before the original Panel; and, besides that,
- (5) directly, and repeatedly, disregards what the Panel stated in respect of the constructive remedies.

One may also recall that:

- (6) whilst the EC argues that Article 5 does not apply in the context of a review, it recently argued exactly the opposite in another dispute settlement proceeding. The same goes for Articles 3.1 and 3.3.

72. India recalls that today's proceedings are not original proceedings before an ordinary Panel. Today the parties are before a 21.5 Panel. Therefore, those parties are *ex definitione* unequal. India has prevailed in the original proceedings and it is now for the EC to demonstrate its adherence to the rule-oriented multilateral trading system.

Mr Chairman, Members of the Panel

73. We regret if we have used some harsh words during our oral presentation today. However, this only reflects the anguish of India, especially the Indian Bed Linen exporters and hundreds of thousands of workers connected with the industry, who have faced the unending consequences of a prolonged investigation since 1994.

74. As already mentioned, even the initiation of proceedings affects the exports. Thus the *Bed linen* exports have been affected from 1994 onwards. Moreover, this item is under quantitative restrictions. Since 1997, Indian exporters have had to face four sets of anti-dumping determinations and there is no relief in sight, despite measures being termed "inconsistent" by the DSB.

75. Mr Chairman, Members of the Panel, India looks forward to justice being done not only in form but also in substance, so as to strengthen the faith of Developing Country Members such as India, in the multilateral rule-based trading system.

Thank you for your attention.

ANNEX D-6

CLOSING STATEMENT OF INDIA

10-11 September 2002

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Mr. Chairman, Members of the Panel,

1. Thank you for listening to us so carefully these two days and for your stimulating questions. We would like to make a number of concluding remarks to highlight a number of key issues arising out of the debate.

I. FRUSTRATING YET ILLUMINATING QUESTIONS AND ANSWERS

3. One frustrating—yet illuminating—feature of our debate has been the extent to which the EC has responded to the questions of the Panel and the questions of India.

4. The Panel asked whether the EC, after the original Panel Report, went out and collected the information on factors for which it appeared that data was not collected. The EC simply answered that it did not.

5. India asked why the EC did not re-determine its dumping and injury findings simultaneously vis-à-vis Egypt and Pakistan. The EC argued that these were not related to the DSB ruling. Yet, when asked why then the EC did not re-determine other Regulations imposing anti-dumping measures vis-à-vis third countries (not related to the DSB ruling) the EC considered this not necessary. Despite

this divergence in approach, the EC continues to deny that the re-determination for Egypt and Pakistan are closely connected with the findings of the DSB on all counts that India mentioned. The EC seeks to deny the close connection of Regulation 696/2002 even though it specifically and only deals with the causality of dumped imports from India.

6. India asked why the reasoning of the EC in *Certain Corrosion Resistant Carbon Steel Flat Products from Germany* does not apply in the context of this proceeding. The EC's reply was that the *de minimis* rule contained in Article 11 of the ASCM contained an important substantive safeguard, but that Article 5.7 of the ADA is about procedure. When asked why a substantive provision does apply in a review and a procedural safeguard does not the EC does not know. On the basis of this logic of self-selection by the EC, important procedural safeguards are reduced to inutility.

7. In this connection of Article 5.7 India also observes that the US in its oral statement has not taken into account point that India made in paragraph 117 of its SWS. The point was that once both dumping and injury are under review the synchronicity requirement should be respected.

8. India asked the reason for the difference in approach relating to fact finding (questionnaires) with respect to exporters and domestic producers. The EC answers that since the goals are so different the means could be different. Yet, the EC still has to explain why the goals are so different, for example, as regards stocks and capacity utilization. India has already pointed to the importance of these factors for double-checking certain other information such as sales and production figures.

9. India asked why sample data were taken differently in the context of exporters as compared to sample data in the context of domestic producers. The EC explained that it did not consider the data of domestic producers in a different fashion. Yet, that is not borne out by the facts. The result of the sample was attributed to the "Community Industry" yet the result of the Indian exporters was not attributed to the Indian exports.

II. PROCEDURAL

First Request

10. In respect to the first request of the EC for a preliminary ruling India would like to recall that the first and foremost factor that the Panel should take into account is the fact that all three measures taken by the EC to comply—Regulation 1644/2001, Regulation 160/2002 and Regulation 696/2002—are mentioned in the request of India for the establishment of the Panel.

11. In its panel report in *Australia – Leather 21.5* the Panel has stated that

"in general it is the complaining Member in WTO dispute settlement which establishes the scope of the measures before the Panel ... For us to rule that we are precluded from considering [a certain measure] would allow [the defendant] to establish the scope of terms of reference... In the absence of any compelling reason to do so, we decline to conclude that a measure specifically identified in the request for establishment is not within our terms of reference".¹ (underlining added)

12. What is the "compelling reason" for the Panel in the present case to exclude Regulations 160/2002 and 696/2002 from the scope of terms of reference?

¹ WTO Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the Dispute Settlement Understanding by the United States*, WT/DS126/RW, adopted 11 February 2000, paras. 6.4-6.5.

13 The EC believes that it is the fact that

"the re-determination of the dumping findings for Egypt and Pakistan ... was conducted by the EC authorities on their initiative, and not because they were required to do so in order to comply with the DSB's recommendations and rulings... In turn the re-determination of injury contained in Regulation 696/2002 was rendered necessary by the adoption of Regulation 160/2002".²

14. Apart from that, the EC failed to explain why it was necessary to lump together imports from India, Pakistan and Egypt in the original proceeding, while it became unnecessary and impossible in August 2001 at the moment of issuing the re-determination.

15. India notes, however, that at the same time, the EC recognised during the oral hearings that there is a close connection between the three Regulations as is obvious from the fact that they amend the same original Regulation, are devoted to the same category of products, adopted by the same body within the relatively short period of time. In other words, there is a clear-cut connection between the original measure and three regulations under consideration today as well as obvious interdependence between the three regulations as such.

16. If one looks objectively now at these statements of the EC—even assuming for the purpose of argument that Regulations 160/2002 and 696/2002 are not directly related to the Dispute Settlement Body ruling (*quod non*)—it is easy to notice that they counterbalance each other. In these circumstances is there a compelling reason to deprive India of possibility to get a verdict on the measures specified by it in the request for the establishment of the Panel? The answer is No.

Second Request

17. As a preliminary matter India would like to notice that the first written submission of the EC creates confusion as for the date for assessing the consistency of the measures "taken to comply". While in the title of its request the EC states that the relevant date is the date of the establishment of the panel, later on³ it agrees with the Panel in *US – Shrimps 21.5* which stated that the relevant date is "the date on which the matter was referred to the Panel".⁴ Contrary to what the EC claims now, in the latter case the EC argued that the date on which the matter was referred to the Panel is the date of the request for the establishment of the panel.⁵ India concurs with this interpretation of the EC. In any case India submits that the issue is non-material since all the inconsistent measures in this case were taken by the EC prior to both—the date of the request for the establishment of the panel forming the basis of the terms of reference (7 May 2002) as well as the date of establishment of the panel (22 May 2002).

18. What is, however, material is the issue whether the EC has complied within the reasonable period of time. India notes that nowhere in its statements and written submissions does the EC question the fact that it has NOT complied within the reasonable period of time. Rather, it states that India's request is not within the Panel's terms of reference.⁶

² Oral Statement of the EC, para. 9.

³ EC FWS, paras. 34-35.

⁴ Panel Report, United States - Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 by Malaysia ("United States – Shrimp (21.5)"), WT/DS58/RW, para. 5.13.

⁵ *Ibid.*, para. 4.34, especially footnote 126.

⁶ Oral Statement of the EC, para. 14.

19. The panel has surely noted that the EC's request is contradictory. First, the EC itself recognises that India "is correct" in stating that "the inconsistency of a measure with the covered agreements under Article 21.5 proceedings automatically results in a violation of Article 21.1".⁷ Thus, the EC recognises that at least for the purpose of this case the panel can legitimately deal with India's claim that it has not complied within the reasonable period of time.

20. Second, the EC's argument *a contrario* in the same paragraph misses the point since India has never argued the opposite neither at the concrete level in the present proceedings, nor in abstract for the future. The EC suggests that there may be situations that the mentioning of Article 21.1 in the request for the establishment of the panel will indeed be necessary. India's immediate reaction to that is: So What? In the current dispute and in the situations India has had in mind in its SWS the violation of Article 21.1 follows directly from the violations of the covered agreements.

21. The EC well aware of the weakness of its argument invents the following theory. According to it, the fact that no Member has ever invoked a violation of Article 21.3 in Article 21.5 proceedings witnesses not the fact that it is unnecessary to state that claim separately, but the fact that "no Member has ever bothered to invoke a violation of the finding of such violation of Article 21.3 because a ruling that the implementing Member has complied late would be declaratory and devoid of practical consequences".⁸ India submits that apart from lack of the textual support in the DSU as for the criteria to distinguish between declaratory and devoid of practical consequences rulings of the DSB and other rulings of the DSB, the argument of the EC misrepresents the everyday practice of this Organisation.

22. Irrespective of the number of the article of the DSU from which the obligation to comply within the reasonable period of time flows, the failure to mention it is easily explained by the fact that the DSB finds violation of this obligation without its specific identification in the request for the establishment of the panel. To name but few examples, India recalls that in the *Australia – Salmon 21.5* the panel found that Australia failed to comply with the DSB recommendation within the reasonable period⁹ without the need for Canada to specifically indicate this claim in the request for the establishment of the panel.¹⁰ In the same way in the *Brazil – Aircraft 21.5* Canada's request for the establishment of the panel did not contain any specific basis for its claim that Brazil has not complied within the required 90 days.¹¹ This, however, has not precluded the panel and subsequently the Appellate Body from coming to a conclusion that "Brazil has failed to ... withdraw the prohibited export subsidies ... within 90 days".¹² Finally, in the *US – FSC 21.5* the EC in its request for establishment of a panel requested a panel to find that "that the US has failed to comply with the DSB recommendations ... by 1 November 2000".¹³ In view of the fact that this request for establishment of the panel failed to specify "the appropriate legal basis", how can the EC insist that this claim was outside the panel's terms of reference? Does the EC suggest that the *US – FSC* case should be re-litigated?

⁷ Ibid., para. 18.

⁸ Ibid., para. 18.

⁹ Panel Report, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5* by Canada, WT/DS18/RW, para. 8.1(i).

¹⁰ *Australia – Measures Affecting Importation of Salmon*, Request by Canada for Determination of Consistency of Implementation Measures, WTO Document WT/DS18/14, 3 August 1999.

¹¹ *Brazil – Export Financing Programme for Aircraft*, Recourse by Canada to Article 21.5 of the DSU, WTO Document WT/DS46/13, 26 November 1999.

¹² Appellate Body Report, *Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU*, WTO Document WT/DS46/AB/R, adopted 20 August 1999, para. 82.

¹³ *United States – Tax Treatment for 'Foreign Sales Corporations'*, Recourse to Article 21.5 of the DSU by the European Communities, Request for the Establishment of a Panel, WTO Document WT/DS108/16, 8 December 2000.

India recalls in this concern that in its request for establishment of the panel¹⁴ India requested the Panel to find that:

- (a) By failing to withdraw the measures found to be inconsistent with the Anti-Dumping Agreement and to bring its measures into conformity with its obligations under the Anti-Dumping Agreement, the EC has failed to comply with the DSB recommendations and rulings in this dispute; and
- (b) The re-determination, as amended, and the subsequent actions as identified above are inconsistent with the above provisions of the Anti-Dumping Agreement and the DSU.

India submits that this request together with detailed claims constitute sufficient basis for the panel to find a violation by the EC of its obligation to comply within the reasonable period of time irrespective of the fact that the specific provision of the DSU is not mentioned.

Third Request

24. There is not much that India could add to its arguments against the EC's third request for preliminary ruling. India recalls once again that contrary to its position today it was the EC in the *US – FSC 21.5* case which argued that claims that could have been raised in the original dispute but were not, may certainly be raised during the 21.5 proceedings. The panel and Appellate Body in *US – FSC 21.5* endorsed this approach. India fails to see how the situation of non-compliance of the US in that case is different from the EC's non-compliance in the present case.

25. The panel surely noted yesterday the oral comment of the EC that the precedent created by the *US – FSC 21.5* case is irrelevant for the purposes of the current discussion since in this case the measure under consideration was "new" while in the present proceedings the measure under consideration is an "old amended" one. The statement is remarkable since it demonstrates the absolute ignorance as for the following finding of the Appellate Body:

"... a measure which has been "taken to comply with the recommendations and rulings" of the DSB will *not* be the same measure as the measure which was the subject of the original dispute, so that, in principle, there would be two separate and distinct measures: the original measure which *gave rise* to the recommendations and rulings of the DSB, and the "measures taken to comply" which are – or should be – adopted to *implement* those recommendations and rulings. In these Article 21.5 proceedings, the measure at issue is a new measure ..."¹⁵

26. Thus, the EC argument of irrelevance of the *US – FSC 21.5* should be dismissed. Equally irrelevant is the EC's argument that "by withholding the claims at issue, India has prejudiced the procedural rights of the EC". India notes in this regard, first, that the fact that the procedural rights of the US will be affected by the new claims brought by the EC did not prevent the panel and Appellate Body in the *US – FSC 21.5* to put aside this argument of the EC. Secondly, India submits that it is the EC through non-compliance with the DSB ruling which imposed upon itself considerably tighter schedule of 21.5 proceedings.

¹⁴ European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India (WT/DS141) - Recourse to Article 21.5 of the DSU by India, Request for the Establishment of a Panel, WT/DS141/13/Rev.1, 8 May 2002.

¹⁵ Appellate Body Report, Brazil – Export Financing Programme for Aircraft - Recourse by Canada to Article 21.5 of the DSU, WTO Document WT/DS46/AB/R, adopted 20 August 1999, para. 36.

Fourth Request

27. India has already explained that it does not request the Panel to make findings in respect of EC's violations of Article 4.1(i) of the ADA and Article 21.3 of the DSU.

Due Process

28. India also wishes to recall one issue of due process. During the meeting with the Panel on 10 September 2002, the EC submitted excerpts of confidential questionnaire responses of Indian producers to underscore certain of arguments. India has already pointed out how the Exhibit shows the due compliance of Indian producers with its detailed questionnaire whilst EC producers were not even asked such questions.

29. Faced with this sudden submission of confidential information, and in order to re-establish the level playing field, India has already asked the EC to submit the same information for EC producers.

30. The EC did not want to do that.

31. In light of the unwillingness of the EC to submit such information at the simple request of India, the Panel could, on the basis of its powers under Article 13 DSU, request to hand this information in immediately (and not after so many weeks) so that a level playing field can be established. India emphasizes in this context that the EC has started the process of relying on confidential information submitted by interested parties in the administrative proceeding.

III. A "SAMPLE" MEANS WHAT IT ALWAYS MEANS RATHER THAN WHAT IT NEVER MEANS (INDIA'S CLAIM 4)

32. Ever since its First Written Submission India has made a clear-cut claim on what is a "sample". The answer, India submits, is simple: a sample is intended to show what the whole is like, a specimen. By not recognizing that a sample is what it always is the EC has come to a significant overstatement of the dumped imports from India. Accordingly it has neither based itself on positive evidence nor engaged in an objective examination.

33. In the present case, where the non-dumped imports in the sample drawn by the EC was 53 per cent the EC comes to the conclusion that non-dumped imports in case of the whole is 14.4 per cent.

34. Basically, the EC is asking the Panel to accept that a sample for injury purposes only serves as a basis to show what the whole is like as far as dumped imports are concerned. According to the EC's logic, the sample becomes irrelevant insofar as it shows no dumping. Yet, India has already shown that when there is only one company that dumps the EC will find that the entire country is dumping. Or, as illustrated by the example of India: The EC's approach leads to situations where even though 95 per cent of the sample is not dumped, then still 95 per cent of the total exports will be considered dumped.¹⁶

¹⁶ India's FWS paragraph 123: 'Suppose that this time the total export volume was 100,000. Suppose that the investigating authority would resort to sampling. Suppose that that sample consists of 5 producers. Suppose that these five producers have a total export volume of 5,000 tonnes. Suppose that there are four producers in that sample who are not dumping. Suppose that these four producers represent 95 per cent of the exports in that sample. Suppose therefore that these four producers represent 4,750 tons out of that sample and that therefore 4,750 tons out of 5,000 tons are not dumped. Then it is the EC's position that for the purpose of injury, it should consider 95,250

35. It is well-known that the EC, on its own accord, selected a sample of exporters, in order to investigate Indian exports.¹⁷ That sample was a specimen to see what the rest was like. It was intended to provide statistical estimates relating to the whole. If the EC had considered that a sample would not represent Indian exports it could have investigated all exporters.

36. As noted, the *evidence* that was available is that (slightly over) 53 per cent of the sample was not dumped, while (slightly over) 46 per cent was dumped. This was the positive evidence of the sample pool that should have formed the basis for the examination. There is no *evidence* with respect to the dumping or non-dumping of the remainder of the exports which was not sampled.

37. Hence, by deducting an absolute amount calculated from a sample *representing a total amount of exports*, the EC has neither based itself on positive evidence nor engaged in an objective examination. *Instead*, however, the EC 'concluded' that, *based on the evidence that 53 per cent of the sample was not dumped*, a mere 14 per cent of the total $[(2,612/18,428)*100]$ was not dumped!

38. India considers that such conclusion is not objective, since it involves an inappropriate mix of a relative amount with an absolute total. Following the EC's "logic" India could equally argue that if dumping was only found for 47 per cent of the sample, only 12 per cent $[(2,276/18,428)*100]$ of the total imports was dumped. Neither of such methods would draw "objective" conclusions based on "positive evidence".

39. The correct approach would have been that for the remainder (or *total*) of exports an *objective examination* should therefore take place: based on the positive *evidence* of the sample, the authorities should have *objectively* examined how the rest (total) of the exports looked like.

40. The EC's method runs therefore directly contrary to Article 3.1, as interpreted by the Appellate Body, which mandates such objective examination based on positive evidence. This inconsistency with Article 3.1 also results in a direct inconsistency with Article 3.2: the failure to correctly establish the "volume of the dumped imports" leads automatically to the impossibility to correctly "consider whether there has been a significant increase in dumped imports".

41. The EC continues to side-track this straightforward claim by entering into arguments concerning Articles 6 and 9. The EC argues that India did not make a claim with respect to the weighted average dumping margin. That is correct. India only requested that a sample should be taken to represent the imports from a country.

42. More specifically, the EC argues that imports cannot be simultaneously dumped and non-dumped. In essence, the EC is therefore making the point that there can be only one overall margin for the country as a whole, be it dumped or non-dumped. India has responded that if *that* line of reasoning is followed, the proceeding should have been terminated long ago since there was no dumping for the country as a whole. It was minus one point five. The EC argues that India cannot say that since according to the EC the duty for the country as a whole was five point seven. Yet, that duty was arrived at by zeroing the dumping margin of two large producers in the sample. As India had occasion to point out: the exclusion (zeroing) concept in Article 9 does not bear on the determination of a dumping margins. Yet the EC continues to refer to that Article. Thus, in reaction to this EC view: while zeroing had been clearly prohibited on a product level, by the Panel and the

tons as dumped! Or in other words: even though 95 per cent of the sample (representing the total exports) is not-dumped, then still 95 per cent of the total exports will be considered dumped."

¹⁷ Original Panel Report, paragraph 2.5.

Appellate Body, the EC continues to zero this time even more than ever: it zeroed on the producer level!

43. Finally, the EC continues to assert that the sample on the side of the domestic industry was applied in the same way as on the export side. For this purpose the EC gave the example of profits. Yet, surely, for profits the EC did not "zero" the losses that were made by some of its domestic producers. It made an average of profits and losses. Objectively, the same should have been done on the export side when determining the existence of dumping or not dumping.

IV. COLLECTION OF DATA AND OVERALL RECONSIDERATION (CLAIM 5)

44. As regards its fifth claim, India can today be short. It may be worthwhile to recall three basic points.

45. First, the EC has expressly admitted that no new collection of data took place. Obviously, collection of such absent information cannot even take place. Inconsistency of the measure with Article 3.4 was ruled by the Panel and the EC did not take this issue to the Appellate Body. Had the data been with the EC, it would have taken this finding of the Panel to the Appellate Body. India has also shown how the EC purportedly "collected" data on the 15 factors with respect to the domestic producers.

46. Second, the EC has already admitted that the market share of the domestic producers did not change although it should have changed if an overall reconsideration and analysis had indeed taken place. Other factual mistakes, resulting from the absence of such overall reconsideration and analysis, abound.

47. And third, India has already identified in its second written submission the enormous problem that this case has on account of "like product". The EC argues when it comes to sales prices that such price increase should not be considered for the "like product". Instead, the EC wishes that the average price increase should be put in perspective in light of the shift towards "niche products". This in itself signifies an enormous problem of 'like product'. As Article 2.6 of the ADA mandates:

"Throughout the Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration" (underlining added)

48. There is simply no discretion of suddenly identifying niche products at a certain stage of the proceeding (the re-determination stage) for the purpose of a very specific aspect of the re-determination (the question of sales value increase in the context of injury). For this purpose India has also recalled during today's discussions the pertinent observations of the Appellate Body.¹⁸

V. CAUSAL LINK AND NON-ATTRIBUTION (INDIA'S CLAIM 6)

49. The EC continues to argue that increase in raw material cost was not a separate cause in injury, to be distinguished from the effect of dumped imports from India.

50. India already had occasion to point out that these statements of the EC contradict their own recitals (103) of the original Provisional Regulation and (50) of the re-determination. In recital (103) the EC had concluded that increases in raw material prices had caused injury. Again, in recital (50) of

¹⁸ The findings in Recital (53) of the original Report. As it did before, the EC again acknowledged that it was itself who defined the "like product".

the re-determination, the EC stated that the declining profitability resulted from prices not being able to reflect the increases in the costs of raw cotton.

51. Basically the EC in its rebuttal stated that the injurious effects of the increase in the costs of raw cotton could not be separated from the effects of the dumped imports. The EC does not contest that in principle the injury caused by other factors should not be attributed to the dumped imports.

52. In its Oral Statement (112) the EC also declined that these were separated causes of injury. It even attributed further burdens on India which not even exist in Article 3.5.

53. Is "increase of raw material prices" a different issue from "dumped imports"? While this straightforward question appears rhetorical, it is a genuine issue in this dispute. The same goes for inflation. India trusts that the Panel agrees that factors such as inflation and increase in raw material prices are indeed different from dumped imports.

54. In its Oral Statement the EC reiterated that the inadequate profitability was "basically the result of prices which had not been able to reflect the increases in the costs of raw cotton or to keep pace with inflation in prices of consumer goods." What does this have to do with dumped imports?

55. This is not the only problem. There is a further contradiction.

56. While this alone signifies an elementary problem on account of "like product", the contradiction is that when it comes to discussing raw material price increases the EC does not engage in distinguishing between niche products and other products.

57. In short, the EC therefore wants to have it three ways: (1) for the average price increase the "like product" definition should be set aside; (2) for the increase in raw material prices there is only one "like product" and (3) the EC also wishes us to accept that increase in raw material prices is a same factor as the imports from India. The fact that in the original proceeding the EC also wanted a different "like product" when it came to zeroing of certain models has already been ruled to be incorrect by the Appellate Body.

VI. ARTICLE 2.2.2(II)

58. As Korea had occasion to point out today, the weighing on the basis of value has an intrinsic tilt-effect towards the finding of higher dumping margins. By contrast, a volume-based weighing is neutral and accords proportionate weight to the relative size of companies. India's detailed arguments have been set forth in its written submissions. The Appellate Body already rendered clear findings regarding Article 2.2.2(ii) but scrutiny of the so-called re-determination shows that the requirement of weighted average has not been properly respected. India has already shown that if the EC's original position had been taken to its consequence would lead to one more producer not being found dumping.

VII. SHOULD A DRIVER ACCELERATE? (INDIA'S CLAIMS 7 AND 8)

59. As regards the DSB finding pertaining to Article 15, the EC's view that suspension of a measure is a constructive remedy cannot be taken as correct. The Panel has clearly ruled that suspension of a measure is not a constructive remedy. In this regard India also recalls the *intentions* of the EC. As already pointed out in India's opening statement, the suspension was only conducted in order to distance itself from the DSB rulings in the greatest possible way. The further intention is also clear from the subsequent actions in relation with the suspension of Regulation 1644/2001.

60. The suspension was followed by a partial interim review which is being pursued at top speed to reach a predetermined conclusion. The EC is perhaps targeting India for taking the matter to DSB. That is why the measure is terminated against two countries previously forming part of the measure while it is put into partial review mode for India. Perhaps it is the EC's way to distance itself from the DSB ruling. India is of the view that there is no compliance at all. Obviously in such a situation there cannot be any compliance as there is no intention to comply from the beginning. In such a situation there cannot be any consideration for the developing country status of India.

61. The EC has not refuted the allegation that it is driving at top-speed and aiming for a new record. It merely repeats its earlier contradictory assertion that whilst the suspension should already be considered as a constructive remedy, it will explore a constructive remedy before its new car hits the target.

62. Mr Chairman, Members of the Panel,

63. As a concluding observation India submits that if this re-determination and its reparations of an important DSB ruling is allowed to pass, India's faith in the multilateral trading system will be severely shaken. For the time being India simply notes that the EC's action were no more than lip service. As India pointed out: the WTO should be substance over form. India trusts that the Panel agrees with this latter view.

Thank you for your attention.