

ANNEX A

First Submission by the Parties

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ANNEX A-1

FIRST WRITTEN SUBMISSION OF INDIA

(15 July 2002)

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INDIA-RW-13	Fax of EC to law firm dated 27 June 2001, EC reference 056099
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OLD EXHIBITS

(ATTACHED FOR EASY REFERENCE)

INDIA-8	PROVISIONAL REGULATION
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I. INTRODUCTION

1. On 12 March 2001, the Dispute Settlement Body (hereinafter: "DSB") adopted¹ the Appellate Body Report² and the Panel Report³ as modified by the Appellate Body, in the dispute "*European Communities – Anti-Dumping Duties On Imports Of Cotton-Type Bed Linen From India*" (WT/DS141). These Reports concluded that the EC's imposition of definitive anti-dumping duties on imports of Cotton-Type Bed Linen from India had been inconsistent with the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (hereinafter: "Anti-Dumping Agreement" or "ADA"). Pursuant to the recommendations of these Reports, the DSB requested the European Communities to bring its measure into conformity with its obligations under the Anti-Dumping Agreement.

2. On 26 April 2001, in accordance with Article 21.3(b) of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), the EC and India mutually agreed on a reasonable period of five months and two days to implement the recommendations and rulings of the DSB.⁴ This reasonable period of time (RPT) expired on 14 August 2001.

3. Regulation 1644/2001, *amending the original definitive anti-dumping duties on Bed Linen from India* (hereinafter: "re-determination" or "Regulation 1644/2001"), adopted by the Council of the European Union on 7 August 2001, and published on 14 August 2001⁵, is the measure taken by the EC, ostensibly to comply with the recommendations and rulings of the DSB, following the proceedings before the Panel and the Appellate Body.

4. In the view of India this re-determination does not, however, bring the EC into compliance with those recommendations and rulings and, moreover, introduces further inconsistencies with the ADA and the DSU, for the reasons that India will explain in detail below. Although the application of the re-determination is currently suspended, this suspension is tantamount to a virtual sword of *Damocles*: since the EC is presently conducting, with full speed, a "partial interim review" of the dumping margins, new results are imminent.⁶ Accordingly, once these new dumping margins are confirmed, they can, under EC law, enter into force based on the injury and causality "findings" of the re-determination. This imminent re-introduction of anti-dumping measures will then enable an expiry review to start before 28 November 2002, which, in turn, can extend the duration of the anti-dumping measures with, at least, another five years.

5. Section II will summarize, in chronological form, the factual events following 12 March 2001 and is limited to essential information. More details about the re-determination and the surrounding actions will be provided, as and when needed. Section III contains an executive summary of the claims. Section IV will elaborate these claims in detail. Section V will conclude this Submission.

¹ WT/DS141/9 of 22 March 2001, copy attached as Exhibit-India-RW-1.

² WT/DS141/AB/R of 1 March 2001.

³ WT/DS141/R of 30 October 2000.

⁴ WT/DS141/10 of 1 May 2001, copy attached as Exhibit-India-RW-2.

⁵ Council Regulation (EC) No 1644/2001 of 7 August 2001 amending Regulation (EC) No 2398/97, imposing a definitive anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan and suspending its application with regard to imports originating in India, published in Official Journal of the European Communities of 14 August 2001, L-series, No 219, pages 1-11. Due to the chronology of events, set forth below in Section II, a copy of this Regulation is attached as Exhibit-India-RW-18.

⁶ The speed with which this review is being conducted is unprecedented. In fact, the EC has already disclosed new dumping margins. Based on calculation techniques with which all Indian exporters take issue, and in direct contradiction with the text of Article 11.2 ADA, it transpires that the EC seeks to impose duties that are even higher than in the original provisional Regulation.

II. FACTUAL BACKGROUND AND SEQUENCE OF EVENTS

6. In this second section, India will summarize, in chronological order, the events that followed the adoption of the Reports on 12 March 2001. Where necessary, further factual details will be provided in the subsequent sections. In light of the fact that the Panel is well aware of the background of this dispute through its work on the original Panel Report, this factual summary omits events from before that date. However, for the sake of easy reference, India attaches additional copies of the original provisional and definitive Regulations.⁷

7. As noted above, on 26 April 2001, in accordance with Article 21.3(b) of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), the EC and India mutually agreed on a reasonable period of five months and two days to implement the recommendations and rulings of the DSB.⁸

8. On 19 June 2001, the Commission Services faxed the general disclosure document to the Indian trade association 'TEXPROCIL'⁹, with a copy to the Embassy of India in Brussels. Simultaneously, the EC faxed copies of company-specific disclosure documents to the five exporting producers that originally constituted the main sample.¹⁰ In these faxes the Commission Services granted ten days to comment on the disclosure and also inquired whether the law firm involved in the original proceeding was still representing TEXPROCIL and/or any of its members. On the same day, TEXPROCIL clarified that the law firm was still representing it,¹¹ and subsequently the EC faxed a copy of the general disclosure document to the law firm.¹²

9. The copies of the company-specific disclosures for Bombay Dyeing, Madhu, Omkar, Prakash, and Anglo-French were faxed to the law firm on, respectively, 20 June 2001¹³, 22 June 2001¹⁴, 22 June 2001¹⁵, 25 June 2001¹⁶, and 25 June 2001.¹⁷

10. On 25 June 2001 the law firm noted that the rights of defence of its clients were being impeded because of the delay in the transmission of the disclosure documents. In that fax the law firm also requested the detailed dumping calculations for the company Standard Industries of the reserve sample, as well as access to the non-confidential file.¹⁸

11. In response, the EC sent a fax on the same day in which it stated that the rights of defence were not impeded.¹⁹ The EC also clarified that no dumping calculations existed for Standard Industries, and that the non-confidential files had not been changed since the original investigation.

12. On 26 June 2001 the law firm sent another fax to the EC in which it, *inter alia*, again requested access to the calculation details pertaining to Standard Industries.²⁰ On 27 June 2001, the

⁷ To avoid confusion these copies are separately attached and carry the same number as the original Exhibits, *i.e.* Exhibit-India-8 and Exhibit-India-9, respectively.

⁸ WT/DS141/10 of 1 May 2001, copy attached as Exhibit-India-RW-2.

⁹ Copy attached as Exhibit-India-RW-3.

¹⁰ *I.e.*, Anglo-French, Bombay Dyeing, Madhu, Omkar, and Prakash.

¹¹ Copy attached as Exhibit-India-RW-4.

¹² Copy attached as Exhibit-India-RW-5.

¹³ Copy attached as Exhibit-India-RW-6.

¹⁴ Copy attached as Exhibit-India-RW-7.

¹⁵ Copy attached as Exhibit-India-RW-8.

¹⁶ Copy attached as Exhibit-India-RW-9.

¹⁷ Copy attached as Exhibit-India-RW-9.

¹⁸ Copy attached as Exhibit-India-RW-10.

¹⁹ Copy attached as Exhibit-India-RW-11.

²⁰ Copy attached as Exhibit-India-RW-12.

EC (finally) released calculation details insofar as they contained information pertaining to Standard Industries.²¹

13. On 3 July 2001 a hearing took place. The oral statement presented during that hearing is attached.²² On the same day, TEXPROCIL also filed its written disclosure comments.²³

14. On 26 July 2001, the Council of the European Union adopted Council Regulation 1515/2001 on the measures that may be taken by the EC following a report adopted by the Dispute Settlement Body concerning anti-dumping and anti-subsidy matters.²⁴

15. On 27 July 2001, the EC sent a fax to TEXPROCIL in which it reacted to the disclosure comments and the arguments presented during the hearing.²⁵ A copy of this fax was sent to Ministry of Textiles in New Delhi, the Embassy of India in Brussels, and the law firm in Brussels.

16. On 7 August 2001 the Council of the European Union adopted Regulation 1644/2001 amending the original definitive anti-dumping duties on Bed Linen from India, purporting to comply with the DSB's recommendations and rulings, whilst simultaneously suspending its application.²⁶ This latter measure is hereinafter referred to as the "re-determination". India strongly disagreed that this re-determination complied with the findings of the Panel and Appellate Body.²⁷

17. The re-determination, *inter alia*, provided for the expiry of the amended measures within six months after entry into force of the re-determination, unless a review had been initiated before that date. For this reason, and in an attempt to de-escalate the dispute, the matter was laid to rest by India in the belief that the illegal measure would, although clearly outside the 'reasonable period of time', finally, expire by 14 February 2002.

18. On 19 December 2001, the association EUROCOTON filed a request with the EC authorities to re-examine the dumping margins.²⁸

19. Council Regulation (EC) No 160/2002 of 28 January 2002 terminating the proceeding against Pakistan,²⁹ amended the re-determination.

²¹ Copy attached as Exhibit-India-RW-13.

²² Copy attached as Exhibit-India-RW-14.

²³ Copy attached as Exhibit-India-RW-15.

²⁴ Council Regulation (EC) No 1515/2001 of 23 July 2001 on the measures that may be taken by the Community following a report adopted by the WTO Dispute Settlement Body concerning anti-dumping and anti-subsidy measures, published in Official Journal of the European Communities of 26 July 2001, L-series, No 201, pages 10-11. Copy attached as Exhibit-India-RW-16.

²⁵ Copy attached as Exhibit-India-RW-17.

²⁶ Council Regulation (EC) No 1644/2001 of 7 August 2001 amending Regulation (EC) No 2398/97, imposing a definitive anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan and suspending its application with regard to imports originating in India, published in Official Journal of the European Communities of 14 August 2001, L-series, No 219, pages 1-11. Copy attached as Exhibit-India-RW-18.

²⁷ WT/DS141/11 of 21 September 2001, a copy of which is attached as Exhibit-India-RW-19. WT/DSB/M/108 at paragraph 85, a copy of which is attached as Exhibit-India-RW-20.

²⁸ Copy attached as Exhibit-India-RW-21.

²⁹ Council Regulation (EC) No 160/2002 of 28 January 2002 amending Regulation (EC) No 2398/97 imposing a definitive anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan and terminating the proceeding with regard to imports originating in Pakistan, published in Official Journal of the European Communities of 30 January 2002, L-series, No 26, pages 1-4. Copy attached as Exhibit-India-RW-22.

20. On 13 February 2002 the EC initiated a so-called "partial interim review" against India.³⁰
21. On 28 February 2002 the anti-dumping measures against Egypt expired.³¹
22. On 8 March 2002 India initiated procedures under Article 21.5 of the DSU by requesting the EC to enter into consultations. The request was circulated in document WT/DS141/12 of 14 March 2001.³²
23. On 14 March 2002 the EC faxed a disclosure of "re-assessed" injury findings to TEXPROCIL and to the law firm in Brussels.³³ On 25 March 2002 TEXPROCIL provided disclosure comments in writing and requested a hearing.³⁴
24. On 25 and 26 March 2002 consultations were held in Geneva. In the view of India these consultations failed to settle the dispute. Accordingly, India requested a Panel under the procedures of Article 21.5 DSU on 4 April 2002.³⁵
25. On 18 April 2002, the EC faxed a reply to the disclosure comments of TEXPROCIL.³⁶ On 19 April 2002 a hearing took place in connection with the disclosure provided on 25 March.
26. On 22 April 2002 the Council of the European Union adopted Regulation (EC) No 696/2002 confirming the definitive anti-dumping duty imposed on imports of cotton-type bed linen originating in India by Regulation (EC) No 2398/97, as amended and suspended by Council Regulation (EC) No. 1644/2001.³⁷
27. On 7 May 2002 India reiterated its request for the original Panel to be re-convened to examine this issue under Article 21.5 of the DSU.³⁸ India also requested that the Panel be established with standard terms of reference set out in Article 7 of the DSU.
28. The Panel was established on 22 May 2002.
29. The Panel was composed on 25 June 2002.

III. EXECUTIVE SUMMARY OF CLAIMS

30. There is disagreement between India and the EC as to the consistency with the WTO Covered Agreements, including GATT 1994, of measures taken to comply with the recommendations and rulings of the DSB within the meaning of Article 21.5 of the DSU.

³⁰ Notice of initiation of a partial interim review of the anti-dumping measures applicable to imports of cotton-type bed linen originating in India, published in Official Journal of the European Communities of 13 February 2002, C-series, No 39, pages 17-19. Copy attached as Exhibit-India-RW-23.

³¹ Notice of the expiry of certain anti-dumping measures, published in Official Journal of the European Communities of 14 March 2002, C-series, No 65, page 12. Copy attached as Exhibit-India-RW-24.

³² WT/DS141/12 of 14 March 2002, copy attached as Exhibit-India-RW-25.

³³ Fax of 14 March 2002, with EC reference 052697. Copy attached as Exhibit-India-RW-26.

³⁴ Copy attached as Exhibit-India-RW-27.

³⁵ WT/DS141/13. Copy attached as Exhibit-India-RW-28.

³⁶ Copy attached as Exhibit-India-RW-29.

³⁷ Council Regulation (EC) No 696/2002 of 22 April 2002 confirming the definitive anti-dumping duty imposed on imports of cotton-type bed linen originating in India by Regulation (EC) No 2398/97, as amended and suspended by Council Regulation (EC) No 1644/2001, published in Official Journal of the European Communities of 25 April 2002, L-series, No 109, pages 3-13. Copy attached as Exhibit-India-RW-30.

³⁸ WT/DS141/13/Rev.1. Copy attached as Exhibit-India-RW-31.

31. India is of the opinion that the re-determination, and the surrounding actions, as identified above, did not bring the EC into compliance with the recommendations and rulings of the DSB. The re-determination suffers from similar inconsistencies as regards Articles 2, 3, and 15 of the Anti-Dumping Agreement. Notably, parts of the re-determination took place outside the reasonable period of time, in the form of an amendment or confirmation. Moreover, India is of the view that the re-determination and the other actions have introduced further inconsistencies with the Covered Agreements and the DSU.

32. Accordingly, India has requested that the Panel be established with standard terms of reference set out in Article 7 of the DSU. Pursuant to Article 21.5 of the DSU India has also requested that, if possible, the DSB refer the matter to the original Panel.

33. The mandate of the Panel pursuant to Article 21.5 of the DSU, and in light of Article 17 of the Anti-Dumping Agreement, is

"to examine, in light of the relevant provisions of the covered agreements cited by India in document WT/DS141/13/Rev.1, the matter referred by India to the DSB in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."³⁹

34. India will summarize the reasons why it considers that the re-determination failed to comply with the DSB recommendations and rulings by the due date and why the EC's actions are inconsistent with ADA. In particular, India will claim and respectfully request the Panel to find that:

Claim 1: The EC acted inconsistently with its obligations under Article 2.2.2(ii) of the Agreement on Implementation of Article VI of GATT 1994

The EC did not properly calculate a "weighted average" of amounts for SG&A and profits. By taking an about-turn in the presentation of the relative size of Bombay Dyeing and Standard Industries the EC continued to miscalculate and overstate the dumping margins;

Claim 2: The EC acted inconsistently with its obligations under Articles 3.1 and 3.3 of the Agreement on Implementation of Article VI of GATT 1994

The EC cumulated Indian imports with those from a country for which no dumping was found;

Claim 3: The EC acted inconsistently with its obligations under Article 5.7 of the Agreement on Implementation of Article VI of GATT 1994

The EC did not simultaneously consider the evidence of dumping and injury. Instead, the EC resorted to *ex-post* 'reparations', which further undermine the re-determination. Even these reparations took place in various episodes and after the deadline;

Claim 4: The EC acted inconsistently with its obligations under Articles 3.1 and 3.2 of the Agreement on Implementation of Article VI of GATT 1994

³⁹ WT/DS141/14, as corrected by WT/DS141/14/Corr.1. Copy of both documents attached as Exhibit-India-RW-32.

The EC did not properly exclude the portion of non-dumped imports from the total volume of Indian imports. By misrepresenting that proportion from the sample that was non-dumped the EC significantly overstated the total volume of dumped imports;

Claim 5: The EC acted inconsistently with its obligations under Articles 3.1 and 3.4 of the Agreement on Implementation of Article VI of GATT 1994

The EC evaluated factors without even collecting data on them. The re-determination merely puts a gloss on the original finding. A proper implementation of the Panel's findings would have required not a mere recitation of injury factors but an overall reconsideration and analysis of the information in light of the requirements of the Anti-Dumping Agreement;

Claim 6: The EC acted inconsistently with its obligations under Article 3.5 of the Agreement on Implementation of Article VI of GATT 1994

The EC incorrectly established a causal relationship between dumped imports and injury. The EC disregarded the non-attribution language.

Claim 7: The EC acted consistently with its obligations under Article 15 of the Agreement on Implementation of Article VI of GATT 1994

The EC did not explore any remedy, constructive or otherwise. Quite on the contrary, a review was initiated and new results, higher than ever, are imminent; and

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

The EC did not pay any particular attention to this matter which affects India and which has been the subject of dispute settlement.

35. For the sake of brevity India will not pursue its claims under Articles 11 and 18 of the ADA, even though it considers that the EC did not respect its obligations under these Articles.⁴⁰

36. In presenting its claims, India is mindful of the standard of review as, for example, clarified in cases such as *US–Hot Rolled Steel*.⁴¹

" ... Article 17.6(i) requires panels to make an "assessment of the facts ". The language of this phrase reflects closely the obligation imposed on panels under Article 11 of the DSU to make an "objective assessment of the facts ". Thus the text of both provisions requires panels to "assess" the facts and this, in our view, clearly necessitates an active review or examination of the pertinent facts.

...

Panels must assess if the establishment of the facts by the investigating authorities was proper and if the evaluation of those facts by those authorities was unbiased and objective." (Emphasis added)

⁴⁰ There is therefore no need for the EC to request a preliminary ruling on Articles 11 and 18 ADA, since India's claims under these Articles are not pursued in the context of this Article 21.5 proceeding for the above-mentioned sake.

⁴¹ *US–Hot Rolled Steel*, AB, paras. 55-56.

37. India is of the view that the EC did not meet those (latter two) broad standards when establishing facts nor when evaluating facts (keeping in mind the interpretative guidance provided under 17.6(ii) ADA).⁴²

38. In view of its eight claims presented India is also mindful about the possibility for a Panel to apply judicial economy. In this latter regard however India recalls the case law of the Appellate Body in *Australia–Salmon*⁴³ where it was made clear that only a partial resolution of the matter would be *false judicial economy*. In this latter light India finds compelling, for example, the findings in other cases where Panels recognized but refused to apply judicial economy.⁴⁴ Therefore, India requests the Panel to rule on all eight claims so as to enable the DSB to make sufficiently precise recommendations and rulings. Only that would allow prompt compliance by the EC in order to ensure an effective resolution of this dispute.

39. Accordingly, India will, in its conclusions, request the Panel to find that:

1. 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 within the mutually agreed reasonable period of time, the EC has failed to comply with the DSB recommendations and rulings in this dispute; and
2. 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.

IV. CLAIMS AND ARGUMENTS

A. THE EC CONTINUED TO MISCALCULATE AND OVERSTATE THE DUMPING MARGINS

1. **Claim 1: The EC acted inconsistently with its obligations under Article 2.2.2(ii) of the Agreement on Implementation of Article VI of GATT 1994**

(a) Introduction

40. In its re-determination, the EC recalculated the dumping margins for India for the five companies of the main sample.⁴⁵ This re-calculation was performed, ostensibly, to comply with the findings of the Panel and the Appellate Body with respect to the correct interpretations of Articles 2.2.2(ii) and 2.4.2. If, however, the re-calculation is scrutinized in greater detail, it becomes clear that the requirement of "weighted average", as stipulated in Article 2.2.2(ii), and as interpreted by the Appellate Body, has not been properly respected.

41. The issue is material. Instead of two companies found not to have dumped in the re-determination, there were in fact *three* companies without dumping. *I.e.*, not only Omkar and

⁴² India is mindful of the number of cases addressing the question of standard of review. For the sake of brevity India does not here repeat this case law. For a concise overview India refers to, paras. 5.13 thru 5.16 of the recent Panel report in *United States–Countervailing Duties on Certain Corrosion Resistant Carbon Steel Flat Products from Germany*, WT/DS213/R of 3 July 2002. India considers that the additional considerations in those paragraphs apply *mutatis mutandis* to the current dispute.

⁴³ *Australia–Salmon AB*, para. 223.

⁴⁴ *E.g. Brazil–Aircraft 21.5 II*, paras. 5.56 and 5.208.

⁴⁵ Recitals (5) – (14) of the re-determination.

Prakash, but also *Madhu* should have been properly attributed its zero margin. Further, the dumping margin for Anglo-French would have been much lower, thereby also affecting the *residual* duty, which would then become based on the margin of Bombay Dyeing. This would also affect the *weighted average* duty, which would then become based on the average of Anglo-French and Bombay Dyeing.

42. More specifically, the differences between the current re-determination and a calculation that properly respects the requirements of Article 2.2.2(ii) can be summarized as follows:

	EC: dumping margins as per new weighted average of re-determination	India: dumping margins as per weighted average based on previous EC data
Anglo-French	9.8%	3.8%
Bombay Dyeing	5.5%	5.5%
Madhu	3.0%	0%
Omkar	0%	0%
Prakash	0%	0%
Weighted average margin for co-operating companies	5.7%	4.6%
Residual	9.8%	5.5%

43. How these overstatements occurred can, perhaps unfortunately, only be grasped by going into the details of the calculations; those details will reveal the about-turn, between the facts of the original panel proceeding and the facts of the re-calculation, as performed by the EC. Since these details, however, are a pre-requisite for the proper understanding of this claim, we respectfully request the Panel to bear with us, and to review these differences in calculation method. After having unveiled the differences in question, we will explain our claim in further detail and set forth the arguments on the basis of which it will become clear that the EC's method was not permissible.

(b) Facts

44. In the re-determination, the EC has, for producers without sufficient domestic sales, calculated the amounts for SGA and profits, as well as the amounts for allowances to be made to the constructed normal value so arrived at, on the basis of an amalgamation of data. *I.e.*, whilst no longer basing the SGA and profits, and allowances, solely on the data of Bombay Dyeing, the EC has combined the data of Bombay Dyeing and Standard Industries.

45. In so doing, the EC has taken as a basis the following sets of figures:

Base data as per disclosure⁴⁶	Bombay Dyeing	Standard Industries
SGA percentage	10.39%	19.15%
Profit percentage	12.09%	(35.49%)
Allowance percentage	(2.23%)	(0.37%)
Overall addition to COP	20.25%	(16.71)

46. Up to this stage, these figures appear undisputed.⁴⁷

⁴⁶ Negative amounts are put in brackets.

⁴⁷ The direct source is page 2 of Exhibit-India-RW-13.

47. The divergence of views as to the correct interpretation stems from the manner in which these percentages are to be combined or, more to the point, "weighted". The EC has applied the following proportion in its weighing technique:

New EC method	Bombay Dyeing	Standard Industries
Total net sales value	134,154,064	13,276,083
Relative weight in the mean	91%	9%

Thus, the EC has weighted on the basis of sales value.

48. In the view of India, the correct interpretation, the arguments for which will be provided below, would have necessitated a weighing on the basis of sales quantities, as follows:

Correct weighted average and previous EC position	Bombay Dyeing	Standard Industries
Total domestic sales quantity (in units/sets)	627,764	179,775
Relative weight in the mean	77.74%	22.26%

49. The overall impact of proper volume-based weighing becomes clear when comparing the resulting weighted averages:

	New EC Method ('value'-based)	Correct weighted average and previous EC position ('volume'-based)
Overall percentage for SGA, profits, and allowances to be added to cost	16.93% (18.99-2.06)	12.03% (13.84-1.82)

50. The resulting difference is clear. By employing the method as it did, the EC was able to minimize the impact of Standard Industries. By doing so the EC inflated the constructed normal values and the resulting dumping margins by 4.90 per cent. By contrast, India's understanding of the interpretation of the Appellate Body's finding would have led to constructed normal values (and dumping margins) that are approximately 4.9 per cent lower.⁴⁸

(c) Arguments

(i) *Argument 1: The text of the Article and its interpretation by the Appellate Body do not permit a value-based weighing in the circumstances under consideration*

⁴⁸ The difference for Anglo-French and Madhu is not exactly 4.9 per cent but could be more. This is due to the effects of negative dumping: where constructed normal values for certain "models" become lower, they may at some point drop below the weighted average export price, as a result of which the negative dumping amounts that so ensue, offset possible positive dumping amounts of other models. The resulting difference on the dumping margin by virtue of a 4.90 per cent drop in the constructed normal value is therefore mathematically equal to, or greater than, 4.90 per cent.

51. First of all, India recalls that the text of the relevant part of Article 2.2.2(ii) mandates 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 in respect of production and sales of the like product in the domestic market of the country of origin".

52. In interpreting this provision we recall the pertinent observation of the Appellate Body in paragraph 74 of its Report:

". . . the textual directive to "weight" the average further supports this view because the "average" which results from combining the data from different exporters or producers **must reflect the relative importance of these different exporters or producers** in the overall mean." (underlining and emphasis added)

53. It is submitted that by choosing the method as it did, the EC did *not* reflect the relative importance of these two exporters in the mean. Even if there were to be two permissible interpretations, which India will show below there are not, the very choice for the method that weighted the amounts based on value, significantly understated the relative importance of Standard Industries as the second company on the Indian domestic market. As the EC previously did, when it chose to zero amounts that were negatively dumped, it has again chosen that method which results in the highest possible dumping margins. By doing so, the relative importance of Standard Industries has become trivialized to reflect less than 1/10th of the mean. This has, in these circumstances, in the words of the Appellate Body:

"substantially emptied the phrase "weighted average" of meaning."⁴⁹

54. Since an interpreter is not free to adopt a reading that reduces terms to redundancy or inutility,⁵⁰ the EC has acted contrary to that principle by applying a method which *de facto* deprived the term "weighted average" of meaning.

(ii) *Argument 2: The context of the Article as well as case law of the European Court of Justice representing consistent EC administrative practice do not permit a value-based average in the circumstances under consideration*

55. Article 2.2.2(ii) does not operate in a vacuum nor does it lead its own life outside the framework of the Anti-Dumping Agreement. The Article should also be seen in its context. In the framework of this question this context can be sub-divided in 'direct context' such as Article 2 itself, as well as 'indirect context' such as Article 6.

56. Direct context is provided in Article 2 itself. In this Article 2 it is clear that the two normative cut-off points that pertain to the relative importance of domestic sales always hinge on a *quantity*-(volume)-parameter: first of all, the five-per cent rule, enshrined in Article 2.2 and footnote 2 of the Anti-Dumping Agreement bases itself on quantity of sales:

"... shall normally be considered a sufficient quantity for the determination of the normal value if such sales constitute 5 per cent or more ...". (underlining added)

⁴⁹ Appellate Body Report on *Bed Linen* at paragraph 75, last sentence.

⁵⁰ *Ut res magis valeat quam pereat*. This principle of *effectiveness* has become consistent case law since *United States—Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body, WT/DS2/AB/R of 29 April 1996, page 23.

57. Secondly, the test laid down in Article 2.2.1 chapeau, *juncto* footnote 5, which decides when sufficient quantities of sales are made at a loss, and may therefore be disregarded as not being in the ordinary course of trade, also bases itself on quantity:

"Sales below per unit costs are made in substantial quantities when ... the volume of sales below per unit costs represents not less than 20 per cent of the volume sold ... ".
(underlining added)

58. Article 6 also provides context. This Article attaches significance to the percentage of volume of exports from the country in question. Clearly, where the volume is the benchmark on the export-sales-side of the exporters, the same benchmark should apply on the domestic-sales-side of the exporters. Applying different standards to the two sides does not do justice to the requirement of a proper establishment of the facts and the requirement of an unbiased and objective evaluation.

59. Moreover, it is not only these provisions in the ADA themselves, but also the European Court of First Instance that has pronounced itself in its case-law on the application of volume as a benchmark. In an important judgment on the question whether the Community Institutions had correctly based themselves on volume, rather than value, for the determination of the "10 per cent rule" in the context of the ordinary course of trade test,⁵¹ the Court upheld the choice of the institutions for the use of *volume*.⁵²

60. In the context of these important Articles, and in the context of the relevant case law of the ECJ, all enshrining *quantity* as a basis for the determination of relative importance of domestic sales in a set, it is illegal to interpret Article 2.2.2(ii) in a different fashion. Indeed, the "value-method" does no justice to the important observations of the Appellate Body that the relative importance of producers **must** be reflected and that words "weighted average" should not become bereft of meaning.

(iii) *Argument 3: The current weighing on value-basis contradicts the previous position of the EC*

61. In connection with this claim it is also important to recall that the EC *itself*, during the original Panel proceedings, made no secret of the fact that Bombay Dyeing represented *eighty* per cent, rather than (now, and suddenly), ninety per cent, of the mean. We only need to refer to paragraph 190 of the EC's first written submission to the Panel where the EC noted that

⁵¹ Case T-118/96, Judgment of the Court of First Instance of 17 July 1998, notably recital 79. Copy of judgment attached as Exhibit-India-RW-33. Here it may be noted, for the sake of understanding the so-called '10 per cent rule', that the EC institutions have developed, in their own practice, a secondary rule in addition to the '20 per cent rule' as foreseen in footnote 5 of the ADA. *I.e.*, as per footnote 5, where sales at a loss exceed 20 per cent of the domestic sales volume, these may be disregarded in establishing the weighted average price. The EC would then base itself on the remaining sales at a profit, except where the profitable remaining quantity is less than 10 per cent of the total quantity. This practice of using an upper and lower cut-off point in terms of quantity is often referred to as the "80-10 rule". The lower cut-off point is this '10 per cent rule'. Since only the first part of that rule is written in the ADA and the EC Regulation, the *applicant* in this Court case argued, *inter alia*, that the 10 per cent rule (the second cut-off point) should be calculated on value, rather than volume. In view of the structure of the Regulation the Court rejected that plea, recitals 76-79, and underlined that volume should be the norm. For the record, India disassociates itself from this and other arguments put forward by the applicant in that case. India solely refers to this Court case as a means of illustration to show that, *within the EC jurisdiction, the authorities and the Court attach, in the context of the size of measuring domestic sales, the importance to volume, rather than value*. The Court has found that the 'volume'-context of the Regulation was sufficient to override any preference for a value-based determination. It is also in this light that the current sudden and impulsive choice of the EC for a value-based criterion should be dismissed as incongruous, and inconsistent with normal practice.

⁵² *I.e.* to act inconsistent with its own case law would be contrary to the principle of good faith, enshrined in Article 31.1 of the Vienna Convention.

" ... Bombay Dyeing has almost 80 per cent of the domestic market ... ".

62. This statement was not accidental, but repeated in various instances. For example, in the next sentence the EC stated:

"That one producer can have 80 per cent of its domestic market ... ".

63. In the oral statements the EC repeated these views. One may for example look at the first oral statement at paragraph 52 *in fine* or the second oral statement at paragraph 39:

" ... how a company with 80 per cent of the market can be more ?? anomalous and peculiar ?? than one with only 14 per cent."

64. Suddenly, and surprisingly, however, when it comes to the actual weighing of the relative importance of the companies and their amounts, the EC shifted its position in the re-determination and came up with a calculation technique that changed 80 per cent into 90 per cent and that, accordingly, marginalizes the influence of Standard Industries.

65. It is submitted that an unbiased and objective authority cannot be permitted to shift positions as regards important aspects of a proceeding, thereby rendering the outcome into a moving target, displaying various views as and when deemed fit. On the contrary, it would have been prudent and bearing witness of impartiality, if the EC's previous arguments, pronounced during earlier submissions had been followed up and if the consequences would have been taken to its logical conclusion. India deplores the EC's sudden shift in position and hopes that the Panel can underline India's view as to the correct interpretation of Article 2.2.2(ii) given the factual circumstances of this case.

2. Intermediate conclusions

66. In view of the above, India considers that it has presented a *prima facie* case as to the fact that the EC has engaged in an incorrect application of Article 2.2.2(ii) insofar as the weighing was based on value. India has cited the pertinent considerations of the Appellate Body concerning the interpretation of the *text* of the provision, the relevant *context* in which the provision operates, and the *factual history* of this panel proceeding (with the previous' EC position) in the context of which the EC re-calculated the dumping margins. The unexpected choice for weighing based on value was incongruous with these three important considerations. The weighing did no justice to the actual absence of dumping by the company Madhu and has led to an overstatement of the dumping margins for Anglo-French, the co-operating non-sampled producers, as well as the residual dumping margin.

67. India respectfully requests that the Panel conclude that the EC acted inconsistently with its obligations under Article 2.2.2(ii) of the Anti-Dumping Agreement. India is mindful of the technical nature of this first claim and would therefore be happy to present any additional and/or specific information that might assist the Panel in reaching its conclusion.

B. THE EC RESORTED TO UNWARRANTED CUMULATION AND *EX-POST* 'REPARATIONS'

1. Claim 2: The EC acted inconsistently with its obligations under Articles 3.1 and 3.3 of the Agreement on Implementation of Article VI of GATT 1994

2. Claim 3: The EC acted inconsistently with its obligations under Article 5.7 of the Agreement on Implementation of Article VI of GATT 1994

(a) Introduction

68. In this section, India will put forward its claim with respect to Articles 3.3 and 3.1. India considers that the EC acted manifestly inconsistently with its obligations under Articles 3.3 and 3.1, when it cumulated India's imports with the non-dumped imports of Pakistan. In case the EC were to argue that the dumping determination against imports from Pakistan was made at a later stage than the injury determination in Regulation 1644/2001, then that argument in itself would be clear proof that the EC did not respect the deadline of 15 August 2001. Moreover, in such latter case India submits that the EC acted contrary to Article 5.7. In any event, India also submits that the EC (again) acted contrary to Article 5.7 when it separately considered the dumping determination for Pakistan in Regulation 160/2002 of 28 January 2002 and the related injury determination in Regulation 696/2002 of 22 April 2002.

(b) Facts

69. Article 3.3 stipulates, in the relevant part that:

"Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that (a) the margin of dumping established in relation to the imports from each country is more than de minimis ... "
(underlining added)

(c) Arguments

(i) *Argument 1: In view of the fact that the imports from Pakistan were not dumped, the EC acted inconsistently with Article 3.3 when it cumulated these imports with those of India*

70. In Regulation 1644/2001 (the re-determination) the EC cumulated Indian exports with those of Pakistan. Pakistani imports were in fact not dumped, a fact which was revealed to India by publication of Regulation 160/2002. India cannot be blamed for the fact that the EC revealed this absence of dumping on part of Pakistan only by the end of January 2002, *i.e.* more than five months after the publication of Regulation 1644/2001.

71. Accordingly, by cumulating (partly dumped) imports from India with the non-dumped imports from Pakistan, the EC acted directly contrary to Article 3.3 of the basic Regulation. The word 'only' in Article 3.3 denotes a clear prohibition: cumulation is not permitted when a country does not dump. The fact that such cumulation nevertheless took place is therefore directly inconsistent with the text of Article 3.3.

72. Accordingly, by relying on evidence that was not 'positive' and thereby not 'credible', the EC also acted inconsistently with Article 3.1.

(ii) *Conditional argument 2: In case the EC were to argue that the dumping determination against imports from Pakistan was made at a later stage, then the EC acted contrary to Article 5.7*

73. The EC might, perhaps, argue that the revised dumping determination against Pakistan was made only after August 2001. Of course, that itself would be clear proof that the EC did not respect the deadline of 15 August 2001 since the EC was required to prepare a legally correct re-

determination within the deadline. Such reasoning on part of the EC would run directly counter to the text of Article 5.7 which requires that:

"The evidence of both dumping and injury shall be considered simultaneously ... during the course of the investigation ..." (underlining added)

74. It is clear from the text of this Article that all evidence must be considered at the same time. If the drafters had wished to be so lenient and allow for some evidence to be considered at some time, and some evidence at another date, the Article could have been drafted differently, for example,

"evidence of dumping and injury shall be considered during the course of the investigation."

75. Clearly, this latter discretion was not the intention, as a result of which the text of the actual provision is mandatory: the words "the", "both" and "shall" leave no room for doubt. In case the EC wishes to defy common sense by arguing that the investigation was only against India, then we have no choice but to refer to the published notices such as the Notice of initiation, which clearly clarifies that the proceeding was against Egypt, India, and Pakistan.

76. Hence, by not considering all *the* evidence on dumping within the mutually agreed reasonable period of time the EC clearly acted contrary to the text of Article 5.7.

(iii) *Argument 3: By not simultaneously considering the evidence on both dumping and injury the EC again acted contrary to Article 5.7 when it separated the dumping and injury findings in Regulations 160/2002 and 696/2002*

77. The violation of Article 5.7 did not stop after the set of facts addressed in the second argument. When the EC published Regulation 160/2002 it clearly had not re-considered the injury findings.

78. On 8 March 2002, when India requested consultations, India cited the above-mentioned pertinent and repeated violations of Articles 3.3 and 5.7 in its written request. In reaction, the EC quickly came up with a new injury disclosure on 14 March 2002.⁵³ This disclosure later led to the adoption of Regulation 696/2002, published on 25 April 2002.

79. Thus, the EC through Regulations 160/2002 and 696/2002 also violated Article 5.7 since it acted directly contrary to the explicit requirements of the text of that provision. It *first* "revised" dumping aspects and *later* injury aspects. Again, this means that, it was not "the" evidence of "both" dumping and injury that was considered—as stipulated in Article 5.7—but only *part* of the evidence in January and another part in April.

80. Indeed, Regulation 696/2002 of April 2002 tries to justify, in retrospect, how the EC could have known, in *August 2001*, that the measures of Regulation 1644/2001 could also be based on the imports of India alone. The puzzling question of how the EC could already have guessed in *August 2001* that the measures against Egypt—failing a complaint—were going to expire in *February 2002*⁵⁴ remains.

81. Moreover, India recalls, it is well-established case law that such afterthoughts, or *ex-post facto* justifications, are not permissible. As the EC argued in *Argentina—Floor Tiles*:

⁵³ See the EC disclosure of 14 March 2002, Exhibit-India-RW-26.

⁵⁴ Clearly, February 2002 was well before the regular (five year) expiry date of 28 November 2002.

"... It was no more than an *ex-post facto* justification and, as such, should be rejected by the Panel"⁵⁵

82. Accordingly, Regulation 696/2002 cannot provide a valid legal ground for justifying actions that were illegal in the past. In any event Regulation 696/2002 took place outside the reasonable period of time and is therefore also for that reason a non-permissible "justification".

3. Intermediate conclusions

83. India considers that it has provided convincing arguments showing that the EC acted manifestly contrary to Articles 3.3, 3.1, and 5.7. Cumulation took place that was not permitted. Determinations regarding dumping and injury took place at different times, but never simultaneously. The justification of actions in the form of afterthoughts is contrary to consistent case law as well as to the EC's own views. In any event, the reasonable period of time was a cut-off point to which the EC itself had agreed. Even that period of time was not respected.

84. India therefore considers that it has presented a *prima facie* case showing where and how Articles 3.1, 3.3 and 5.7 were violated. Accordingly, India respectfully requests the Panel to find that the EC acted inconsistently with its obligations under Articles 3.1, 3.3, and 5.7 of the Anti-Dumping Agreement. India would be pleased to answer any questions from the Panel in case there are any issues that require clarification.

C. THE EC OVERSTATED THE VOLUME OF DUMPED IMPORTS FROM INDIA

1. Claim 4: The EC acted inconsistently with its obligations under Articles 3.1 and 3.2 of the Agreement on Implementation of Article VI of GATT 1994

(a) Introduction

85. In order to facilitate the understanding of this claim of India, we briefly recall the facts as they unfolded during the various injury determinations of the EC authorities.

86. In the original measure imposing anti-dumping duties (Regulation 2398/97 imposing definitive duties), the injury determination was based on the total volume of imports from all three countries (Egypt, India, and Pakistan).

87. In the "re-determination" of August 2001, the injury findings were based on (a) the volume of dumped imports from Egypt; (b) the volume of non-dumped imports from Pakistan; and (c) the volume of dumped imports as well as most of the volume of non-dumped imports from India.

88. In another, more recent, determination (Regulation 696/2002), "confirming" the injury established in August 2001, the injury findings were based on (a) part of the volume of imports from India and, specifically, not on (b) the volume of dumped imports from Egypt nor on (c) the non-dumped imports from Pakistan.

⁵⁵ *Argentina-Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS189/R of 28 September 2001 at paragraph 4.262. The fact that afterthoughts are not permitted is also consistent case law, such as for example witnessed by *Brazil-Milk*, Report of the Panel adopted by the Committee on Subsidies and Countervailing Measures on 28 April 1994 (SCM/179, and Corr.1*), at para. 312: "For the Panel to take into account such considerations would be tantamount to allowing a Party to modify and rationalize its determination *ex post facto*". Clearly, Regulation 696/2002 is way beyond the RPT of 15 August 2001.

89. This claim concerns specifically the EC's calculation of the portion of dumped imports out of the total Indian imports. For this purpose India will first recall the pertinent facts in more detail after which it will present its arguments.

(b) Facts

90. It is first recalled that the *total* volume of imports from India developed as follows:

	1992	1993	1994	1995	IP
India's total import volume in tonnes ⁵⁶	11,845	12,424	13,113	17,998	18,428

91. Secondly, it is recalled that the total volume of imports of Indian sample developed as follows:

	1992	1993	1994	1995	IP
India's sample import volume in tonnes	3,016	3,016	4,405	4,753	4,888

Out of this sample, the non-dumped imports developed as follows:

	1992	1993	1994	1995	IP
Volume of non-dumped imports of the sample ⁵⁷	1,612	1,612	2,354	2,540	2,612
Percentage of non-dumped imports of the sample ⁵⁸	53%	53%	53%	53%	53%

92. In other words, the non-dumped imports in the sample represented more than half (53 per cent) of the volume of the sample. In case the error in the dumping margin for Madhu is corrected the amount of non-dumped imports in the sample represents more than two-thirds (70 per cent) of the imports of the sample.

93. Up to here, it would appear that the figures are undisputed.

94. The divergence of views between the EC and India results however from how the non-dumped imports of the sample should be treated. We assume that both the EC and India wish to respect the important finding of the Panel that:

"... It is possible that a calculation conducted consistently with the AD Agreement would lead to the conclusion that one or another Indian producer should be attributed a zero or *de minimis* margin of dumping. In such a case, it is our view that the

⁵⁶ E.g., Regulation 696/2002 at rec. (5).

⁵⁷ E.g., Regulation 696/2002 at rec. (45).

⁵⁸ Volume of non-dumped imports of the sample expressed as percentage of total volume of imports of the sample.

imports attributable to such a producer/exporter may not be considered as "dumped" for the purposes of injury analysis.⁵⁹

95. In reaching this view the Panel took into account, *inter alia*, the consideration that the interpretation of the term "dumped imports" should be "workable"⁶⁰ and that it was in line with the findings of the GATT Panels in the *Salmon* cases.⁶¹

96. While it is further clear that the Panel reached no explicit conclusions,⁶² it is equally clear that the EC has, in its re-determination, purported to pay heed to the Panel's finding.⁶³

97. It is therefore no longer a question **whether** dumped imports should be considered: on this issue both the EC and India seem to be in agreement (non-dumped imports should not be considered, as was the view of the Panel). The question has instead come down to the difference in approach as to **how** imports from companies *in a sample* that are not dumping should be approached.

98. Basically, in the view of the EC, the total volume of imports in absolute terms should in principle be considered dumped, but from this total should be deducted the absolute amount of non-dumped imports *from the sample*. This method was applied by the EC in its injury findings of Regulation 1644/2001 and its injury findings of Regulation 696/2002. Thus, in these two Regulations the EC considered the total absolute volume of 18,428 tonnes as dumped, but deducted the non-dumped *absolute* amount of the non-dumping companies from the sample (2,612 out of 4,887).

99. Basically, India considers that the *sample* (with a volume of 4,887 tonnes) was meant to *represent* the total volume of India's exports (18,428).⁶⁴ When, 53 per cent (or 70 per cent, if the mistake for Madhu is corrected) of that *sample* was found not dumped, the view of India is that this 53 per cent (70 per cent) should be applied to the total of 18,428 tonnes on a *pro rata* basis. Thus, in the view of India the same proportion of non-dumped imports of the sample (currently 53 per cent) should also be considered non-dumped when looking at the total, thereby resulting in a *non*-dumped amount of 9,767 tonnes.⁶⁵ Hence, in the view of India, the absolute amount of the total imports and the relative absolute amount of the sample should not be improperly mixed.

100. In the view of India, the issue is material. Basically, the entire import volume of dumped imports and non-dumped imports is dramatically different in absolute and relative terms, once the calculation is performed properly:

	1992	1993	1994	1995	IP
Consumption	199,838	194,524	193,674	189,233	185,825
A. Total imports from India	11,845	12,424	13,113	17,998	18,428
B. Market share of A.	5.9%	6.4%	6.8%	9.5%	9.9%
C. EC view of absolute amount of dumped import volume	10,233	10,812	10,758	15,458	15,816
D. Market share of C. (EC view)	5.1%	5.5%	5.5%	8.2%	8.5%

⁵⁹ Panel Report at paragraph 6.138.

⁶⁰ Panel Report at paragraph 6.139.

⁶¹ Panel Report at paragraph 6.141. The Panel stated at that para:

"... In that case, the "dumped imports" included all imports from all producers in the country without distinction by transactions. In our view, this conclusion is consistent with an interpretation of the phrase "dumped imports" as referring to all imports of the **product** from producers/exporters as to which an affirmative determination of dumping has been made." (underlining added, emphasis in original).

⁶² Panel Report at paragraph 6.138, last sentence.

⁶³ Re-determination, recital (22).

⁶⁴ On the exact meaning of a *sample* see paragraphs 102 *ff.*, *infra*.

⁶⁵ 18,428*53 per cent. Some small differences could result from rounding.

	1992	1993	1994	1995	IP
E. Absolute amount of dumped imports if sample truly serves as a <i>sample</i> (i.e. 53% non-dumped, 46% dumped)	5,449	5,715	6,032	8,279	8,477
F. Market share of E. as % of EC market	2.7%	2.9%	3.1%	4.4%	4.6%

101. This table illustrates,⁶⁶ the point that by interpreting the term dumped imports as it did, the EC's entire foundation for its injury determination was incorrect since it was not based on credible evidence.

(c) Arguments

(i) *Argument (1): A 'sample' is intended to show what the whole is like. By disregarding this fact, the EC neither based itself on positive evidence nor engaged in an objective examination*

102. According to the *New Shorter Oxford Dictionary*, the noun sample, in its third meaning is described as:

"A relatively small part or quantity intended to show what the whole is like; a specimen."

103. In the context of *statistics* this dictionary adds that a sample is:

"a portion selected from a population, the study of which is intended to provide statistical estimates relating to the whole."

104. Thus, in the view of India, the exports from the sample were intended to show what the whole of the imports were like; it should have served as a basis to provide an estimate relating to the whole of the imports.

105. By contrast, according to the EC, a sample only serves as a basis to show what the whole is like as far as dumped imports are concerned. To the extent that a sample does not show dumping then only the remaining portion of the sample is relevant for the analysis.

106. The EC, clearly, has tried to defy common sense as well as accepted definitions and understandings of what is a 'sample'.

107. Article 3.1 stipulates that the determination of injury shall be based on "positive evidence" and involve an "objective examination".

108. In *US—Hot Rolled Steel* the Appellate Body recalled its finding in *Thailand—H-Beams*. The Appellate Body stated at paragraph 192 with respect to "positive evidence":

"The thrust of the investigating authorities' obligation, in Article 3.1, lies in the requirement that they base their determination on "positive evidence" and conduct an "objective examination". The term "positive evidence" relates, in our view, to the quality of the evidence that authorities may rely upon in making a determination. The

⁶⁶ The table is restricted to the absence of dumping as established for Prakash and Omkar. The figures would be even more dramatic once Madhu is properly attributed its zero margin.

word "positive" means, to us, that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible."⁶⁷

109. In paragraph 193 of *US–Hot Rolled Steel* the Appellate Body clarified the meaning of an "objective examination":

"The term "objective examination" aims at a different aspect of the investigating authorities' determination. While the term "positive evidence" focuses on the facts underpinning and justifying the injury determination, the term "objective examination" is concerned with the investigative process itself. The word "examination" relates, in our view, to the way in which the evidence is gathered, inquired into and, subsequently, evaluated; that is, it relates to the conduct of the investigation generally. The word "objective", which qualifies the word "examination", indicates essentially that the "examination" process must conform to the dictates of the basic principles of good faith and fundamental fairness."⁶⁸

110. Turning back to the specifics of the re-determination.

111. It is well known and undisputed that the EC authorities selected a *sample* of exporters in order to investigate the total Indian exports.⁶⁹ The exports of the five companies that were investigated, were a specimen "to see what the rest was like"; the sample was intended to provide statistical estimates relating to the whole.

112. 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. It was the positive evidence of this 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.

113. 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!

114. 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".

115. 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.

116. 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 since 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".

⁶⁷ *United States–Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, Report of the Appellate Body, WT/DS184/AB/R of 24 July 2001.

⁶⁸ *Ibid.*

⁶⁹ *E.g.* see Panel Report, Section II Factual Aspects, paragraph 2.5.

(ii) *Argument 2: The EC's 'legal justification' is tantamount to a pretext*

117. The EC, probably fully aware of its fatal fallacy in the re-determination did not want to correct this enormous error, since it would take away the entire fundamentals of its 'finding' of injury. Instead of acknowledging its mistake the EC resorted to a pretext, possibly in order to be able to continue the investigation.

118. More specifically, in its reply of 27 July 2001, the EC mentions:

"their [the non-sampled exporter's] dumping margin was determined pursuant to Article 9(6) of the Basic Regulation and, on that basis, these imports were found to be dumped."

119. Article 9(6) of the Basic Regulation is (more or less) the equivalent of Article 9.4 of the ADA. It deals with the determination of an anti-dumping *duty* with respect to non-sampled cooperating producers. In that calculation of a dumping duty authorities disregard *zero, de minimis*, and margins based on *facts available*. This Article however has no bearing to the question under consideration, which is the volume of dumped imports for injury purposes. The EC conveniently forgets to mention that Article 9.4 ADA (and its domestic equivalent) specifically states that the rules in this paragraph, including the obligation to disregard, are restricted "for the purpose of this paragraph". Article 9.4 does therefore not operate elsewhere, and especially not in the context of an injury determination. Indeed, Article 9 refers to the *imposition and collection of anti-dumping duties*, and does not bear on the determination of injury—including the volume of dumped imports—under Article 3.

120. It is recalled that also in the context of Article 2.4.2 the EC previously tried to justify its actions with a resort to Article 9. In that instance the Appellate Body did not (wish to) spend more than one footnote dismissing such type of 'justification'.⁷⁰

121. The EC's 'justification' is therefore incorrect and irrelevant in the context of properly establishing the total volume of dumped imports. The EC's 'justification' has nothing to do with a proper injury determination.

(iii) *Argument 3: Taking the EC's reasoning to its ultimate consequence*

122. An illustrative example may clarify the ultimate and absurd consequence of the EC's position, if the EC's reasoning is pushed to its limits.

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 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.

124. In the view of India such absurd results can only be avoided when the requirements of Articles 3.1 and 3.2 are duly respected. There should be *positive evidence* involving an *objective*

⁷⁰ Footnote 30 of *Bed Linen* Appellate Body Report.

examination. An objective examination involves, *inter alia*, respect for elementary principles of mathematics and statistics. This means that if, in a certain case, 53 per cent of a sample is non-dumped, then 53 per cent of the total should also be considered as non-dumped. The EC's view results in the opposite conclusion.

125. Furthermore, for all practical purposes, if the EC's interpretation is correct, then no country can ever "win" any dumping case against the EC on no-injury grounds since all the EC has to do is find one producer with a dumping margin slightly over the *de minimis* threshold, and a subsequent finding of injury is guaranteed.

(iv) *Argument 4: The EC's view on a sample is inherently contradictory*

126. Finally, as is known, the EC did also engage in sampling on the side of the domestic industry. Clearly, on that side of the investigation the EC did consider that the result of the sample (on the state of the industry) should represent the *Community industry*.

127. Hence, by applying different standards, as to what a sample is supposed to mean, on the export and domestic side of an investigation, the EC has clearly not engaged in an objective examination as mandated by Article 3.1 of the ADA.

2. Intermediate conclusions

128. India considers that it has provided a *prima facie* case showing that the EC's actions run counter to the basic fundamentals of Articles 3.1 and 3.2, as interpreted by the Appellate Body. For these reasons India respectfully requests the Panel to conclude and find that the EC acted inconsistently with its obligations under Articles 3.1 and 3.2 of the Anti-Dumping Agreement. India would be pleased to answer any question from the Panel should the Panel require any further information.

D. THE EC 'EVALUATED' DATA WITHOUT EVEN COLLECTING THEM. THE RE-DETERMINATION MERELY PUTS A GLOSS ON THE ORIGINAL FINDING

1. Claim 5: The EC acted inconsistently with its obligations under Articles 3.1 and 3.4 of the Agreement on Implementation of Article VI of GATT 1994

(a) Introduction

129. The Panel, in its Report, found that:

"[i]t appears from this listing [in the Provisional Regulation] that data was not even collected for all the factors in Article 3.4, let alone evaluated by the EC investigating authorities."⁷¹

130. On this basis the Panel found that a violation of the *substantive* requirement under Article 3.4 had taken place. Notably, the Panel added, in a later part of its Report, when dismissing India's claim 13, that:

"if the determination was substantively inconsistent with the relevant legal obligations, the adequacy of the notice is meaningless."⁷²

⁷¹ Panel Report paragraph 6.167. Relevant details of the Panel's determination are well known and are set forth in paragraphs 6.153 through 6.169 of the Panel Report.

131. These findings, *inter alia*, implied that absence of data collection in the first place could impossibly be repaired by a mere re-statement of the notice.

132. Not disturbed by these clear-cut findings of the Panel, the EC in its re-determination simply stated: "the determinations ... [in the original measure] were not fully described."⁷³ This put paid to the entire DSB deliberations, by creating facts whose existence itself had neither been brought on record before, nor were accepted by, the Panel.

133. Even if the facts had originally been duly collected and evaluated—*quod non*—then also the other findings of the Panel and the Appellate Body, as well as the results of these other findings, should have necessitated an *overall reconsideration and analysis* of the determination of injury.⁷⁴ Such overall reconsideration and analysis was all the more necessary in view of the other findings of the Panel which had an impact on the dumping margin, an impact on the definition of the domestic industry, and an impact on which dumped imports to consider.

134. Moreover, such overall reconsideration and analysis should have taken place within the mutually agreed reasonable period of time ('RPT').

135. Furthermore, India wishes to point out that the EC's injury 'findings' contain certain factual errors. These errors are also witness to the fact that no objective examination has taken place on the basis of *positive evidence*.

(b) Facts

136. The Panel will appreciate that this claim is part of a 'rich' factual and legal record—a large part of which is known from the original proceedings. Accordingly, rather than trying to summarize all facts, India proposes to refer to the relevant facts, as when presenting its arguments hereinafter.

(c) Arguments

(i) *Argument 1: Data which were not collected cannot be evaluated*

137. As noted, the Panel originally found a violation of the **substantive** requirement of Article 3.4 and did not merely relate to the explanation of the EC's notice.⁷⁵ The Panel found that it appeared from the listing in the Provisional Regulation that for a number of injury factors listed in Article 3.4 data collection had not even taken place,⁷⁶ let alone evaluated.⁷⁷

138. The Panel added, in a later part of its Report, when dismissing India's claim 13 (regarding the inadequacy of the explanation), that:

"if the determination was substantively inconsistent with the relevant legal obligations, the adequacy of the notice is meaningless."⁷⁸

⁷² Panel Report paragraph 6.259.

⁷³ Re-determination, recital 17 (ii), second sentence.

⁷⁴ *Mexico–Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, Panel Report, WT/DS132/RW, at paragraph 6.37. This argument is further developed, *infra*, at para. 0 ff.

⁷⁵ The EC did not appeal this finding.

⁷⁶ The Panel refers in its conclusion in para. 6.169 to the "foregoing" which includes the reference in para. 6.167 that it appears that data was not even collected. The "foregoing" also includes the Panel's dismissal in para. 6.168 of the EC's argument that data were evaluated but not discussed.

⁷⁷ *Ibid.*

⁷⁸ Panel Report paragraph 6.259.

139. These two findings of the Panel implied, *inter alia*, that the original absence of data collection and evaluation could impossibly be repaired by a mere re-statement of the notice.

140. Despite these clear-cut findings of the Panel, the EC in its re-determination merely stated that: "the determinations ... [in the original measure] were not fully described."⁷⁹

141. The Commission Services continued this line of reasoning in recital (19) of the re-determination:

"The approach described in recital 62 of the provisional Regulation was revised by eliminating data relating to producers which were not part of the Community industry. In the present Regulation, the data were analysed as follows:

- (i) at the level of the Community industry, for trends concerning production, sales by volume, market share, employment and growth. The relevant data were obtained from the verified questionnaire responses of the 17 sampled producers, and from the information collected with regard to the further 18 producers forming part of the Community industry;
- (ii) at the level of the sampled Community producers, for the trends concerning prices and profitability, cash flow, ability to raise capital and investments, stocks, utilisation of capacity, wages and productivity, on the basis of the aforementioned questionnaire responses.

In addition, the magnitude of the margin of dumping was examined."

142. This line of reasoning permits two observations from India.

143. *Firstly*, in view of the findings of the Panel that a **substantive** violation of Article 3.4 had occurred, and specifically not Article 12, it is impossible that such data are subsequently evaluated without first being collected.⁸⁰

144. In case the Panel at the time would merely have taken issue with the problem of an *adequate explanation*, then the Panel would have acted in accordance with the case law of the Appellate Body in *Thailand-H-Beams*:

" ... Article 12, like Article 6, sets forth important procedural and due process obligations. However, as in the case of Article 6, there is no justification for reading these obligations into the substantive provisions of Article 3.1. We do *not*, however, imply that the injury determination of the Thai authorities in this case necessarily met the requirements of Article 12. This issue was not considered by the Panel, since Poland did not make a claim under this provision.

111. We consider, therefore, that the requirement in Article 3.1 that an injury determination be based on "positive" evidence and involve an "objective" examination of the required elements of injury does *not* imply that the determination must be based only on reasoning or facts that were disclosed to, or discernible by, the parties to an anti-dumping investigation. Article 3.1, on the contrary, permits an

⁷⁹ Re-determination, recital 17 (ii), second sentence.

⁸⁰ It appears from the record, and is undisputed by the EC, that after 12 March 2001, and during the reasonable period of time, no new collection of data took place whatsoever.

investigating authority making an injury determination to base its determination on *all* relevant reasoning and facts before it."⁸¹

145. In India's view it remains therefore impossible that data are now suddenly evaluated in the re-determination if they were not even collected. For this reason India will not (again) enter into (endless) discussions as to whether the EC collected information in the questionnaires since the Panel had already factually established this absence of data collection as part of the substantive violation of Article 3.4.

146. *Secondly*, India will highlight two economic factors that are illustrative as to the fact that no data had been collected.

Inventories

147. While the EC makes no secret of the fact that stock data were not even taken into account when establishing consumption,⁸² this absence of data collection for inventories is replicated at the level of the description of the sampled EC producers.

148. At the level of the sampled producers⁸³ the EC *first* explains why, in the abstract, it considered that the indicator stock did not have a bearing on the state of the Community industry:

"As to stocks, this is the case for two reasons. Firstly, ... Secondly ... "

149. Only *then* did the EC reveal part of the allegedly collected facts: "While some increase in stocks was observed in some companies ... ".⁸⁴

150. The EC then mentions that with respect to these partially revealed facts "neither the complainant [sic] nor any sampled Community producer adduced increase in stocks as evidence of injury."⁸⁵

151. Clearly, such 'evaluation' turns the world on its head. It can only be understood if no data collection had taken place. By contrast, the original Panel, also referring to the Panel in *Korea – Dairy Safeguards* made abundantly clear how a proper fact finding and subsequent evaluation should take place.⁸⁶

"... In our view, the text of Article 3.4 indicates that the listed factors are *a priori* "relevant" factors "having a bearing on the state of the industry", and therefore must be evaluated in all cases."⁵⁵

⁸¹ *Thailand–H-Beams*, WT/DS122/AB/R of 12 March 2001, section VII, notably paragraphs 110 and 111.

⁸² Recital (20) of the re-determination confirms recital (63) of the provisional Regulation. Recital (63) of the provisional Regulation measured consumption as production plus imports minus exports but without taking account for stocks. Clearly, while no auditor in her or his right mind would ever approve of measuring consumption whilst purposefully disregarding inventories, this non-consideration of stocks is in itself already a first indication that information on inventories was simply never collected.

⁸³ Re-determination, recital (29).

⁸⁴ Up to the present date, it is anyone's guess how stocks developed for all companies.

⁸⁵ One may only wonder what the complainant has to do with the investigation. Once an investigation has started a complainant should normally not form part of the investigative process. One may also wonder why an investigating authority considers this (*i.e.* whether a "complainant ... [or] producer adduced increase in stocks as evidence of injury") to be a 'criterion' to determine whether or not a factor is relevant.

⁸⁶ Panel Report, paragraph 6.155.

55 We note, in this regard, that the Panel in *Korea – Dairy Safeguard*, interpreting the language of Article 4.2 of the Agreement on Safeguards, which provides that, in making a determination of serious injury or threat thereof in a safeguard investigation, the investigating authority:

"shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, ..."

The Panel concluded that the text of this provision made it clear that:

"among "all relevant factors" that the investigating authorities "shall evaluate", the consideration of the factors listed is always relevant and therefore required, even though the authority may later dismiss some of them as not having a bearing on the situation of that industry". *Korea – Dairy Safeguard*, Panel Report, para. 8.123." (underlining and emphasis added)

152. Clearly, facts pertaining to a certain factor must *first* be collected and brought on record, *after* which they can be evaluated. The EC's current determination switches this around. Following such a sequence of 'reasoning', facts could equally not have been collected.

Utilization of Capacity

153. The same observation goes, for example, for the factor 'utilization of capacity'.⁸⁷ The EC *first* tries to explain as to why the factor did not have a bearing on the industry. It *then* explains that reliable figures were extremely difficult to establish. It *subsequently* explains however that there was a high rate of capacity utilization where production *even* had to be sub-contracted.

154. The subsequently—barely revealed—factual data follow the *a priori* dismissal of the relevance of the factor. Moreover, the factual data, if anything, do not point towards injury at all, on the contrary.⁸⁸

155. Clearly, and as pointed out by the original Panel which cited *Korea – Dairy Safeguards*, facts pertaining to a certain factor must *first* be collected and brought on record, *after* which they can be evaluated.

156. Finally, it may be noted that whilst for some of the other factors the EC in the re-determination suddenly and purportedly came up with some 'hard and fast' figures and indices,⁸⁹ the

⁸⁷ Re-determination, paragraph 30. In the re-determination this factor 'utilization of capacity' is described under the title 'production capacity' which, of course, something different. The discussion itself also confuses the two factors. While India can only speculate that this mistake stems from a basic misunderstanding of the difference between these two factors, India will at present make no argument on this puzzle since that would not seem to add to the substance of the issue of 'utilization of capacity'.

⁸⁸ High capacity utilization was maintained; this does not point towards injury. Production had to be sub-contracted; this means that own capacity was not even sufficient to keep up with the demand. High utilization even took place during depressed periods; this means that even in so-called 'depressed' periods the capacity utilization was high. None of these three observations points to injury at all, *on the contrary!*

⁸⁹ The data are less 'hard and fast' than the figures wish the reader to believe. While India will devote a separate section *infra* (*i.e.* paras. 214 ff.), to factual errors, it may be pointed out here that while most data pertain to the period 1992–I.P., the increase on consumer prices (recital (33)) starts only with the year 1993, and the factor *growth* is, without rhyme or reason, restricted to the period 1994–I.P.

"evaluation" of inventories and utilization of capacity remained stranded in vague generalizations about allegedly collected facts.

(ii) *Argument 2: Even if data had been collected—quod non—there should have been an overall reconsideration and analysis; the evaluation should be adequate*

157. In the view of India the EC has in fact done nothing else other than to issue a new determination that, while professing to comply with the Panel's conclusions and findings, is essentially a restatement of its original determination. Information is mis-characterized and there is no reasoned explanation why improvements in trends were not probative in ascertaining the condition of the industry. The new gloss that the EC has put on its original determination cannot hide the fact that the finding of injury continues to be contradicted by facts on the record.

158. In short: The new gloss does not remedy the errors found by the Panel.

159. Examples of important changes as a result of the original Panel Report that *should* have been taken into account by the EC for the determination of injury included, for example, the observations from the Panel that:

- information was never collected let alone evaluated;
- the EC may for its injury determination not rely on companies outside the Community industry;
- only countries found to be dumping should be considered; and
- only *dumped* imports from India should be considered.

160. Also the reduction in dumping margins should have been considered.

161. The Panel will be aware of a recent similar case where the Mexican authorities also re-stated their original determination in a manner found to be inconsistent with the ADA. In the 'compliance Panel' regarding *HFCS*, it was found that a proper implementation of the Panel's findings requires not only a recitation of those injury factors which should have been examined in the original investigation, but an overall positive injury determination in line with the requirements of the ADA:

" ... Part of the difficulty with SECOFI's redetermination in this case is that while SECOFI apparently undertook to respond to the specific criticisms set out in the original Panel's report, and has set out additional information relevant to the specific points made by the Panel in that report, there does not appear to have been an **overall reconsideration and analysis** of the information in light of the requirements of the AD Agreement, as clarified by the original Panel."⁹⁰ (emphasis added)

162. The *HFCS* compliance Panel Report was upheld by the Appellate Body.⁹¹

163. Hence, in order to comply with the original Panel Report, the re-assessment carried out by the Commission Services must show that there has been an overall reconsideration and analysis of the injury factors listed in Article 3.4 of the ADA. Not only should all factors be evaluated, but the evaluation of each factor should also be *adequate*.

⁹⁰ *Mexico–Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, Panel Report, WT/DS132/RW, at paragraph 6.37.

⁹¹ WT/DS132/AB/RW of 22 October 2001.

164. Despite these findings of the compliance Panel in *HFCS*, the 'analysis' of the state of the domestic industry was apparently carried out as follows. First the Commission Services professed to have examined data with regard to the relevant injury factors listed in Article 3.4. Yet, the 'examination' is curt and includes references to the original provisional Regulation, in itself a sign that no re-consideration took place. The original reliance on information regarding companies outside the Community industry is allegedly disregarded (by alleged 'elimination' of such data⁹²) although the EC continues to refer to them in at various parts of the re-determination.⁹³

165. We now turn to the EC's analysis of the injury factors and will show examples of the inadequate analysis or examples of the fact that analysis did not even take place.

Actual and potential decline in sales, Market share, Price development

166. The sales volume of the Community industry went *up* from 36,205 tonnes in 1992, to 36,553 tonnes in the IP.⁹⁴ The sales turnover of the Community industry also went *up* from ECU 428.6 million in 1992 to ECU 446.6 million in the I.P. While sales information on the sampled producers is also available, that information can be set aside in a situation where positive information on the *entire* domestic industry is available, since the issue to be resolved is exactly the state of the entire domestic industry.⁹⁵

⁹² Re-determination, recital (19).

⁹³ *E.g.*, re-determination recital (44) second paragraph. This also happened in the context of causation, *e.g.*, recital (61) second paragraph.

⁹⁴ Recital (35) re-determination.

⁹⁵ In line with the reasoning of the original Panel at 6.181:

" ... anti-dumping investigations should be fair and ... investigating authorities should base their conclusions on an objective evaluation of the evidence. It is not possible to have an objective evaluation of the evidence if some of the evidence is required to be ignored, even though it relates precisely to the issues to be resolved."

The Appellate Body in *Hot Rolled Steel* also expressed its views on a limited examination of the domestic industry. (*United States–Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, Report of the Appellate Body, WT/DS184/AB/R of 24 July 2001.) While the Appellate Body in that case did not object to a limited investigation *as such*, it offered important warnings with respect to such approach:

"195. ... Similarly, it seems to us perfectly compatible with Article 3.4 for investigating authorities to undertake, or for a Member to require its investigating authorities to undertake, an evaluation of particular parts, sectors or segments within a domestic industry. Such a sectoral analysis may be highly pertinent, from an economic perspective, in assessing the state of an industry as a whole.

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

...

204. ... where investigating authorities undertake an examination of one part of a domestic industry, they should, in principle, examine, in like manner, all of the other parts that make up the industry, as well as examine the industry as a whole. Or, in the alternative, the investigating authorities should provide a satisfactory explanation as to why it is not necessary to examine directly or specifically the other parts of the domestic industry. Different parts of an industry may exhibit quite different economic performance during any given period. Some parts may be performing well, while others are performing poorly. To examine only the poorly performing parts of an industry, even if coupled with an examination of the whole industry, may give a misleading impression of the data relating to the industry as a whole, and may overlook positive developments

167. According to the original EC's provisional regulation, the market share of the domestic industry went *up* from 22.4 per cent to 25.1 per cent.⁹⁶ According to current facts as disclosed, the market share of the domestic industry went *up* from 18.12 per cent to 19.67 per cent.⁹⁷ While India does not quite understand the difference in figures it appears that under both calculations the market share went up.

168. Since the increase of (domestic) sales in value terms⁹⁸ is greater than the increase in volume terms⁹⁹ it is also clear that average prices went up.¹⁰⁰

169. Information on export sales has not been collected let alone been evaluated. In the absence of information on inventories, it is in fact impossible to calculate how export sales have performed.

170. Clearly, the factors sales, market share, as well as price development do not point towards injury. The EC does not evaluate nor offer any comment on these three factors that all do not point towards injury. The only remark that is offered is that market share increase was due to sales of "higher value niche products".¹⁰¹ Clearly, such kind of observation from the EC does not meet any standard of a proper evaluation. Nor does the observation conform to the findings of the Appellate Body with respect to the existence of one like product:

"... Having defined the *product* as it did, the European Communities was bound to treat that *product* consistently thereafter in accordance with that definition."¹⁰²

171. In fact, the EC's remark that market share increase was due to sales of "higher value niche products" is also at odds with its determination in recital (97) of the provisional Regulation where it argued that "the market for bed linen is characterized by product substitutability and transparency."

in other parts of the industry. Such an examination may result in highlighting the negative data in the poorly performing part, without drawing attention to the positive data in other parts of the industry. We note that the reverse may also be true – to examine only the parts of an industry which are performing well may lead to overlooking the significance of deteriorating performance in other parts of the industry.

205. Moreover, by examining only one part of an industry, the investigating authorities may fail properly to appreciate the economic relationship between that part of the industry and the other parts of the industry, or between one or more of those parts and the whole industry. For instance, we can envisage that an industry, with two parts, may be overall in mild recession, where one part is performing very poorly and the other part is performing very well. It may be that the relationship between the two parts is such that the healthier part will lead the other part, and the industry as a whole, out of recession. Alternatively, the healthy part may follow the other part, and the industry as a whole, into recession.

206. Accordingly, an examination of only certain parts of a domestic industry does not ensure a proper evaluation of the state of the domestic industry as a whole, and does not, therefore, satisfy the requirements of "objectiv[ity]" in Article 3.1 of the *Anti-Dumping Agreement*." (footnotes omitted)

⁹⁶ Provisional Regulation, recital (85): "... market share by volume: ... Community industry ... gained market share, from 22.4 per cent to 25.1 per cent ...".

⁹⁷ Volume as disclosed in re-determination divided by consumption disclosed in fax of EC of 27 July 2001, page 12. $(36,205 \div 199,838) \times 100 = 18.12$ per cent and $(36,553 \div 185,825) \times 100 = 19.67$ per cent. These market share figures coincide with the market share figures in recital (35) of the re-determination.

⁹⁸ From 428.6 million Ecu to 446.6 million Ecu.

⁹⁹ From 36,205 tonnes to 36,553 tonnes.

¹⁰⁰ From 11.8 Ecu/kg to 12.2 Ecu/kg.

¹⁰¹ Re-determination, recital (35).

¹⁰² Appellate Body, *Bed Linen*, at paragraph 53.

Profits

172. As a preliminary remark it is noted that during all these years the EC has been suspiciously silent on the profits achieved by the *Community industry*. In view of the fact that profit reduction formed the main, if not only, factor on which alleged injury is based it would have been not more than prudent to reveal those profits.

173. The entire injury determination is therefore based on a doubtful and limited piece of information, *i.e.* the profits of the *sampled* producers. The EC allegedly did possess information on the total sales *values* and *volumes* of the domestic industry *and* the sampled producers but, surprisingly, profits only for the *sampled* producers. If this vital information was indeed not collected at the level of the domestic industry, then this fails to meet the standard pronounced by the Appellate Body on the requirements of objectiv[ity] of Article 3.1 of the Anti-Dumping Agreement. As the Appellate Body, quoted in more detail above,¹⁰³ noted:

" ... an examination of only certain parts of a domestic industry does not ensure a proper evaluation of the state of the domestic industry as a whole, and does not, therefore, satisfy the requirements of "objectiv[ity]" in Article 3.1 of the *Anti-Dumping Agreement*."

174. Moreover, India has reservations with the absolute figures of profits attributed to the "*domestic industry*" in recital (36) of the re-determination; according to India this was the profit amount for the *sampled* producers. To be sure, India takes no issue with having the sample *representing* the total;¹⁰⁴ however, India (again) takes issue with attributing *absolute* amounts of a sample to a total pool. Furthermore, India can only wonder how the change in turnover of the sampled producers between the provisional Regulation and the re-determination still managed to result in the same profit figures.¹⁰⁵

175. In any event, it is undisputed that the sampled companies *made a profit* throughout the investigation period. The EC does not further evaluate this profit figure. The EC in the re-determination merely confirms the provisional Regulation. The provisional Regulation in turn did nothing more than allege that the profit is below the minimum level of 5 per cent. The EC does not provide any proof for such minimum level of profit. It only states that this minimum was the level of profits made in 1991, *i.e.* a year outside the injury investigation period.

176. In this connection India also recalls the finding of the panel concerning India's previous arguments regarding the reasonability of profits in the context of normal value:

" ... Merely that these other profit rates are lower does not, in our opinion, make them more "reasonable" than the rate actually calculated and applied by the EC."¹⁰⁶

177. Now that the reverse situation occurs on the side of the domestic industry, in the context of injury, the Panel would not hesitate to draw the mirror-conclusion: that the actual profit rates of EC

¹⁰³ *United States–Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, Report of the Appellate Body, WT/DS184/AB/R of 24 July 2001, at para. 206.

¹⁰⁴ Indeed, this is what a sample is for, as argued earlier.

¹⁰⁵ In the provisional Regulation the value of Bed Linen sales by the sampled producers rose from ECU 280.6 million in 1992 to ECU 446.6 million in the investigation period. In the provisional Regulation the corresponding profits dropped from 3.6 per cent to 1.6 per cent. In the disclosure of 19 June 2001, the EC table at page 13 shows a turnover of ECU 276.9 million in 1992 and ECU 281.2 million in the I.P. The profit for these two years however remained the same at 3.6 and 1.6 per cent respectively.

¹⁰⁶ Panel Report, para 6.100, last sentence.

producers are lower than those achieved in another year (outside the IIP) does not *ipso facto* render those actual profits less adequate.

178. Finally, it may be added that these were profits *after* (very) significant investments. The sampled producers were profitable even after making all the investments that they made. One could only imagine the profit levels had no such heavy investments been made. Indeed, if one takes away the average yearly investments of 20 per cent, the profit margins would have consistently exceeded 20 per cent.

179. Accordingly, India submits that the EC has failed to adequately evaluate the factor profits. India has provided four straightforward reasons for this assertion. (1) This being the single most important factor for injury for the EC's determination it should have tried to obtain (or, perhaps, reveal) the information for the entire domestic industry. (2) There are factual contradictions between the original Regulation and the re-determination which remain unexplained. (3) No objective proof has been provided for the fact that profit levels obtained throughout the period were not adequate. (4) On the contrary, profit was achieved throughout the IIP, even after significant yearly investments of over 20 per cent.

Output

180. The domestic industry *increased* its output from 39,370 tonnes to 42,781 tonnes. Recital (31) of the re-determination refers to the (short) statement in recital (81) of the provisional Regulation. Other than recital (81) this factor remains unevaluated. In recital (81) the EC states:

"The Commission concluded that the Community industry represented those companies which were **strong enough** to survive competition from dumped imports and which to a certain extent had benefited from the demise of those which had not so survived."(Emphasis added)¹⁰⁷

181. If anything, this factor clearly does not point towards injury since output *increased*, and the Commission considers the producers of the Community industry were "strong enough". Other than that, India considers that this factor has not been adequately evaluated.

182. Indeed, if India understands the EC's logic pronounced in recital (19) of the re-determination the references to producers not forming part of the Community industry should have been considered eliminated. It is therefore unclear if and how recital (81) of the provisional Regulation should be read: if recital (81) is indeed eliminated the EC has not discussed output. If recital (81) is not eliminated it refers to producers outside the domestic industry. In such latter case India objects to the EC trying to introduce alleged injury by references to non-industry through the backdoor (a practice which the panel disallowed).

Productivity

183. Productivity increased with 11 per cent from the beginning to end the injury investigation period. The factor remains completely unevaluated and, if anything, does not point towards injury.

Return on investments

184. The investments made throughout the entire injury investigation period were substantial. The table attached to the fax of 19 June 2001¹⁰⁸ shows that investments by sample companies for Bed

¹⁰⁷ Provisional Regulation recital (81).

¹⁰⁸ Exhibit-India-RW-5.

Linen production were over 20 per cent (!) for *each year* (!) of the injury investigation period.¹⁰⁹ This is remarkable since the EC noted in recital (90) of the provisional Regulation that " ... the industry in question is not capital intensive".

185. Throughout the injury investigation period the companies obtained a positive return on investments. Again, India takes issue with the mistake that in the re-determination the EC refers to the *sampled companies* as *Community industry*. This error will be addressed below.

186. In any event, no evaluation takes place of the factor. The EC merely states that "the maintenance of production tools was the main purpose of the Community industry's [sic] investments during the period concerned" and "the overall trend followed by the return on investments is similar to that of profitability." India considers that this is not an adequate evaluation of a factor which in essence does not point towards injury. The high level of the investments moreover does not point towards a mere maintenance of tools at all, but points towards significant upgrading of machinery.¹¹⁰

Factors affecting domestic prices

187. The EC refers to the contraction in demand and raw cotton prices.

188. As regards contraction in demand (*i.e.* decrease in consumption), no evaluation takes place. The EC merely concludes that "given that the prices of the dumped imports were the lowest", "the contraction in demand in itself did not have an overriding impact on prices".¹¹¹ No reasoning or logic is provided which adequately explains this statement. The conclusion that "contraction of demand in itself did not have an overriding impact on prices" because India's imports were allegedly among the lowest of all operators is equally incomprehensible.

189. As regards the price of raw cotton there again seems to be a problem with the evaluation of the evidence. The EC merely states that price of raw cotton "can represent up to 15 per cent" and "increased significantly". It is then stated that producers should have been able to pass on this cost increase but were not able to do so. Clearly, if it is true then this is another factor affecting prices and has nothing to do with the imports from India.

190. In the more recent injury 're-confirmation'¹¹² the EC suddenly refers to "gap left by Community factory closures", the "fall in imports from certain other third countries" and the "imports from India, which most were found to be dumped." Apart from the fact that 53 per cent of the sample imports from India were not dumped, India fails to see what factory closures of producers not belonging to the Community industry have to do with the state of the domestic industry.¹¹³ Again, India objects to the EC trying to introduce alleged injury by references to non-industry through the backdoor.

¹⁰⁹ The total investments of the sampled companies for Bed Linen for five years amounted to more than 300 million ECU.

¹¹⁰ Normal repair and maintenance would not have been booked as separate investments. Nor would they have ever reached such enormous levels. Normal maintenance in the textile sector would not exceed a few percentage points, at most.

¹¹¹ Re-determination recital (44).

¹¹² Regulation 696/2002.

¹¹³ As the original Panel stated in para. 6.182:

"Information concerning the Article 3.4 factors for companies outside the domestic industry provides no basis for conclusions about the impact of dumped imports on the domestic industry itself."

The magnitude of the margin of dumping

191. We first recall the meaning of the word "magnitude".

192. According to the *New Shorter Oxford Dictionary* magnitude is, in its second meaning, described as: "great size or extent; great degree or importance."

193. Fact is that the dumped imports from the Indian sample represented, as shown above, less than half. The two largest exporters from India, representing more than 50 per cent of the exports of the sample were not dumping. One further dumping margin was 3 per cent. These three margins represented over 70 per cent of the sample.

194. While there could perhaps be many perceptions of the words "great size or extent; great degree or importance" it appears unlikely that the absence of dumping by two producers, and one producer with 3 per cent would be covered by such understanding. This was perhaps also the view of EUROCOTON by filing its recent complaint which has led to *Bed Linen-III* initiated in February 2002; if EUROCOTON would have considered that the duties, all based on the dumping margins, would have been of such "great size or importance", it would not have filed yet another complaint.

195. Again, in the recent "re-confirmation" the EC concludes that the dumping margins found:

"are still substantial and distinctly above *de minimis* levels."

196. This statement is at odds with the facts, which showed that two producers had zero dumping margins. Also the margin of 3 per cent can also hardly qualify for the statement to be correct. Again, these three producers represented 70 per cent of the sample. These examples illustrate that the assertion of the EC in the last sentence of recital (19) is also incorrect.

197. India considers that the evaluation by the EC, restricted to a cursory one sentence, was inadequate and factually incorrect.

Actual and potential negative effects on cash flow

198. The 'evaluation' of cash flow is restricted to two sentences.¹¹⁴ It is mentioned that cash flow remained positive but declined from 25 million Ecu to 18 million Ecu. It is then mentioned that cash flow followed a similar decreasing trend as profitability.

199. Apart from the fact that India does not consider this 'evaluation' adequate at all, it is also based on a factual error. As will be explained further below, the cash flow declared in the re-determination was the cash flow of the *sampled* producers, not that of the *Community industry*.

Inventories

200. India has earlier signalled its fundamental objections against the manner in which the item inventories has been addressed. In India's view information was not collected, let alone evaluated, let alone evaluated adequately.

¹¹⁴ Re-determination recital (37).

Employment

201. Employment decreased from 7,000 to 6,700.¹¹⁵ The EC has clubbed the discussion of employment with that of production and productivity. Under the EC's logic, the producers suffered from imports, had to lay off 300 jobs, managed to force the remaining labour to work 8.7 per cent per cent harder (without any trade union protests), and—notwithstanding their injured position, spent 20 per cent on investments in new Bed Linen machinery. India considers that such reasoning is fallacious.

202. Instead, based from the facts on the record it seems more probable that the continuous investments in new machinery resulted in an increased production. The increased production from more efficient machines could have been the reason to the 300 lay-offs in the sector.

203. In other words, since production increased during the same period with 8.7 per cent (a productivity increase of 11 per cent), the decrease in employment is not caused by imports but rather is a function of the productivity increase (India notes in this context the data on investments in new machinery showing heavy investments of over 20 per cent being made throughout the injury investigation period).

204. In any event, India also takes issue with the factual error in the re-determination. While it is stated in recital (91) of the provisional Regulation that employment in the Community industry decreased from 7,000 to 6,700, the EC's re-determination qualifies this as a decline of 5.3 per cent. However, if we express 300 as a percentage of 7,000 or 6,700 then the result is either 4.28 per cent or 4.47 per cent. The EC has yet to account for its 5.3 per cent.

Wages

205. Wages *increased* during the injury investigation period. The evaluation of the EC is restricted to the observation that for part of the IIP the wages went up in line with consumer prices. India does not consider this evaluation adequate. In any event the factor does not point towards injury.

Growth

206. The evaluation of growth of the Community industry is restricted to part of the facts, *i.e.* from 1994 to the I.P. and is restricted to sales volume. The EC disregards that overall sales volume *increased*, and that other important growth factors such as output, productivity, capacity utilization, market share, wages, ability to raise capital, all showed a *positive* trend.

207. The EC then even refers to the supposed *growth of the dumped imports* which has nothing to do with the "state of the domestic industry". India is of the opinion that it is the *growth of the domestic industry* that should be evaluated. In any event the data that allegedly refer to the "low-priced dumped imports" are wrong, since they include a country that did not dump. In its recent injury 're-confirmation' the EC changed this discussion into the imports from India. As pointed out earlier in this submission, the calculation of dumped imports from India was wrong. In any event, the alleged increase of dumped imports is not directly relevant in the context of growth of the *domestic industry*.

208. India considers that the evaluation was not adequate.

¹¹⁵ Provisional Regulation recital (91).

Ability to raise Capital

209. The sampled producers were able to raise capital throughout the IIP at a stable and, eventually, increasing level.

210. The EC's evaluation is however restricted to the observation that there was no claim nor any indication that there were problems to raise capital. The EC then even goes on to state that no major investments were made, despite the fact on the record that the average yearly investments amounted to approximately 20 per cent. India considers that the evaluation was factually wrong, not adequate and that also this factor does not point towards injury.

EC's conclusion on injury

211. The conclusion that follows in recitals (48) through (51) of the re-determination is in itself wrong since it bases itself on wrong figures; for example, the data in recital (48) regarding the volume of imports cannot be sustained by facts. Based on such wrong base-data, it is impossible that the conclusion could be correct. Accordingly, by not basing itself on positive evidence, the EC in its conclusions acted contrary to Article 3.1.

212. Moreover, in the conclusions in recitals (50) and (51) the EC misleadingly attribute the actual absolute data of the *sampled producers* to the *Community industry*.¹¹⁶ Such factual errors in themselves taint the conclusions.

213. In any event, the EC's conclusion is based on inadequate or poor evaluations, as shown above. Also in the conclusions there is a clear absence of an overall reconsideration and analysis, as would have been in line with the requirements of *HFCS 21.5* (as confirmed by the Appellate Body). The complete inadequacy of the examination, renders the EC's conclusion inconsistent with the requirements of Articles 3.1 and 3.4.

(iii) Argument 3: Errors on the factual record invalidate the re-determination

214. The re-determination also contains factual errors that might be pointed out. The existence of such errors makes it not possible that the evaluation was based on positive evidence. It also casts doubt on the objectivity of the examination. We will distinguish between facts that appear to have been ignored, facts that appear to have changed without explanation, and facts that have been misrepresented.

3.a Facts on the record appear to have been deliberately ignored

215. Recital (54) of the original provisional Regulation indicated that the EC had eliminated (the data from) one sampled company, *after verification*, because it imported Bed Linen from Pakistan. In this regard the EC had (presumably) resorted to Article 4.1(i) of the ADA, which is the only legitimate justification on the basis of which such elimination can legally be explained.

216. Hence, since Pakistan was not dumping, the re-investigation of injury 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. The consideration of this available and verified evidence should have taken place before the deadline of 15 August 2001. However, consideration of that evidence never took place within the

¹¹⁶ For example, absolute figures on profits, cash flow, *etc.* are all erroneously attributed as belonging to the Community industry.

RPT. The consideration of that evidence did also not take place in the "re-confirmation" issued eight months after the RPT.

217. The result is that by examining only a certain part of the information pertaining to the domestic industry, the EC did not properly evaluate the state of the domestic industry as a whole. The EC has purposefully disregarded "positive evidence" on the record. Therefore, this failure to consider the evidence pertaining to the company in question is inconsistent with the requirements of an objective examination in Article 3.1 of the Anti-Dumping Agreement.

3.b Facts on the record appear to have changed without explanation

218. In the provisional Regulation the sales values of the sampled producers for Bed Linen rose from ECU 280.6 million in 1992 to ECU 285.3 million in the I.P.¹¹⁷ In the re-determination, these sales values changed into ECU 276.9 million and ECU 281.2 million, respectively.¹¹⁸ The EC did not provide any explanation for this change in facts. Despite this change in turnover, the alleged profit reduction remained the same: from 3.6 per cent to 1.6 per cent.

219. A similar change took place as regards the market share of the Community industry. In the provisional Regulation this market share allegedly developed from 22.4 per cent to 25.1 per cent (+2.7 per cent).¹¹⁹ In the re-determination, this market share increased from 18.1 per cent to 19.7 per cent (+1.6 per cent).¹²⁰ While under both calculations the share went *up*, the EC did not provide an explanation for this apparent change in facts.

3.c Facts on the record are misrepresented

220. Also important, the re-determination contains errors as regards the information presented on profits, cash flow, and return on investments.

221. Starting with recital (19), it is clear that the EC asserts that information on factors such as profit, cash flow, and investments was only collected at the level of the *sample*. As far as profits are concerned, the provisional Regulation contained the same assertion.¹²¹ Allegedly (and unfortunately) profits for the *Community industry* were never collected (or revealed).

222. Yet despite the assertion that this information was collected at the level of the *sample*, the EC suddenly, further in the re-determination at recital (36), asserts that profitability of the *Community industry* shrunk from ECU 10 million to ECU 4.6 million. In the table that accompanies the disclosure of 19 June 2001 the EC also refers to the profit figures of 10 million and 4.6 million. These latter *profit* data pertain to sales turnovers of ECU 276 million and ECU 281 million, which were the turnovers of the *sampled* producers.¹²² This implies that the profit reduction from 10 to 4.6 million is that of the *sampled* producers and not, as explicitly asserted, those of the *Community industry*.

223. The same errors are repeated for cash flow and for investments.

¹¹⁷ Provisional Regulation recital (83).

¹¹⁸ See, table attached to disclosure of 19 June 2001 (Exhibit-India-RW-5). The table is attached to the end of this disclosure; the turnovers are reported on page 1 of that table.

¹¹⁹ Provisional Regulation, recital (85).

¹²⁰ Re-determination, recital (35).

¹²¹ Re-determination, recital (89).

¹²² Since the sales of the Community industry was 428.6 million in 1992 and 446.6 million in the I.P., the data in the disclosure of 19 June 2001 (276 and 281 million respectively) can logically only relate to the sales of the sampled producers.

224. As another example of misrepresentation of facts can serve the recent injury 're-confirmation.' In recital (19) it is stated that:

"the dumping margins found are still substantial and distinctly above *de minimis* levels."

225. Clearly, this is not true. The dumping margins for the two largest exporters from the sample were zero, *i.e.* lower than *de minimis*. This means that the statement of recital (19) is factually wrong.

226. Similarly, the statement in the next sentence of the recital, that "one third of the undercutting would have disappeared if the imports from India had not been dumped" is equally puzzling. The EC conveniently forgets that normal value is one part of the dumping margin and that a change in normal value does nothing to the margins of undercutting.

227. The issue of these misrepresentations is material, since the conclusions that are drawn in the re-determination, in recitals (50) and (51), as well as in the re-confirmation, are all based on these misrepresentations and other errors. Accordingly, the EC did not base itself on positive evidence when drawing its conclusions. It therefore acted contrary to Article 3.1. Equally, the examination cannot be said to have been objective since the evaluation is based on misrepresented facts; this again is therefore contrary to Article 3.1.

2. Intermediate conclusions

228. India considers that it has presented a *prima facie* case with respect to the inconsistencies with Articles 3.1 and 3.4. Data were evaluated which had not even been collected. No overall re-consideration and analysis has ever taken place. Injury is based on reduction in profit of a profitable sample, while price depression is the other reason mentioned (even though average prices increased). Most, if not all, injury factors point towards a healthy industry making significant investments over a long period of time. Important factors such as market share, output, and productivity all showed positive trends and there was no reasoned nor fact-supported explanation concerning why these improvements were not probative in ascertaining the condition of the industry.

229. For these reasons an objective injury determination did not take place and the EC acted contrary to Articles 3.1 and 3.4. In case the Panel would require any further clarifications that may be of assistance in making its findings India would be pleased to provide these clarifications.

E. THE EC IMPROPERLY 'ESTABLISHED' A CAUSAL LINK. THE EC DISREGARDED THE NON-ATTRIBUTION LANGUAGE

1. Claim 6: The EC acted inconsistently with its obligations under Article 3.5 of the Agreement on Implementation of Article VI of GATT 1994

(a) Introduction

230. Not only the injury finding, but also the determination of the alleged cause of the alleged injury is of concern to India.

231. In its conclusions the EC declares in 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 or to keep pace with inflation in prices of consumer goods."

232. Despite this pertinent statement on what is, in effect, *causation* of alleged injury by *other factors*, the EC under point 5 again discusses causation.

233. In that point 5 of the re-determination however the EC completely fails to ensure that the injurious effects of the other known factors are not "attributed" to dumped imports. For example, one factor mentioned in recital (50), the result of prices not being able to pace with inflation in prices of consumer goods, is not discussed at all in point 5.3. Another fact, that in the provisional Regulation the Commission had "concluded that increases in raw material prices had caused injury",¹²³ is not separated and distinguished from the alleged injury caused by dumped imports.

234. Further factors that are curtly discussed are also not separated and are merely lumped together and remain indistinguishable from alleged injury caused by dumped imports:

"the effects of other factors ... confirmed the above direct causal link."¹²⁴

235. Thus, in the absence of such separation and distinction of the different injurious effects, the EC would have no rational basis to conclude that the dumped imports were indeed *causing* the alleged injury. Accordingly, the EC acted contrary to Article 3.5 when it concluded, without more, that the alleged injury was caused by the dumped imports.

(b) Facts

236. Before presenting its arguments India briefly highlights some perplexing factual determinations by the EC contained in the causality determination.

237. The EC starts off by declaring in recital (50) that the alleged injury was actually caused by another factor: 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 or to keep pace with inflation in prices of consumer goods."

238. In recital (53) the EC states that it does not consider relevant the references to producers not forming part of the Community industry; yet in recital (61) the EC includes such very reference.

239. In recital (54) the EC recalls the volume of dumped imports. It is clear that these figures are wrong, since they include the volume of a country that was not found dumping.

240. In recital (55) the EC recalls the market share increase of the Community industry. The EC also states in this recital that the Community industry's weighted average sales price remained "by and large stable". India is therefore asked to accept that an increase of sales prices with 3.1 per cent¹²⁵ is "by and large stable" while a decrease in profits with 2 per cent is "declining."¹²⁶

241. In recital (56) the EC recalls that the low prices offered by the exporting producers have exercised downward pressure on prices on the Community market. The statement is based on a premise where non-dumping countries are taken into consideration.

¹²³ Provisional determination, recital (103).

¹²⁴ Re-determination. Recital (69).

¹²⁵ Total sales value of Community industry in 1992 is ECU 428.6 million (Provisional Regulation at (83)) and sales volume, per the figures of the re-determination is 36,205 tonnes. *I.e.* the weighted average price in 1992 is 11.83 ECU/kg. These figures are in the I.P., respectively, ECU 446.6 million and 36,553 tonnes, *i.e.* 12.21 ECU/kg. The price rise is therefore 0.38 ECU/kg, or 3.1 per cent.

¹²⁶ Re-determination, recital (50).

242. In recital (57) the EC again states that: "average sales prices did not increase." As India pointed out, the fact is that the average sales prices went up with 3.1 per cent.¹²⁷ In this recital India is therefore again asked to accept that an increase of sales prices with 3.1 per cent means that these "sales prices did not increase" while a decrease in profits with 2 per cent is "declining."¹²⁸

243. More recently, in its Regulation 696/2002 (the 're-confirmation'), the EC changed some of the facts on which it 'establishes' the causal link.

244. Under point 3.2 of that 're-confirmation' the effect from what previously were the dumped imports from three countries is replaced by the effect of the dumped imports from India. The alleged market share increase of the re-determination (15.3 per cent to 21.4 per cent) is replaced by 5.1 to 8.5 per cent. Under this point India takes issue with the fact that the Indian dumped imports are characterized to have increased in market share from 5.1 to 8.5 per cent. As shown earlier,¹²⁹ India considers that this calculation is erroneous.¹³⁰

245. Under point 3.3 of the 're-confirmation' the EC "re-examines" other factors with a focus on imports from third countries. For this purpose the EC first recalls five countries with a market share above *de minimis*. The EC then summarizes the imports from *all* other countries. The EC then summarizes the development of Pakistani and Egyptian imports. *At no point* does the EC summarize together the imports from *all* third countries (with a market share over the *de minimis* level).¹³¹

246. Under point 3.4 of the re-confirmation the EC basically confirms its previous findings on the causal link except that in the re-confirmation the cause of the alleged injury is the Indian imports instead of the imports from Egypt, India, and Pakistan.

(c) Arguments

(i) *Argument 1: The causality determination is incorrect*

247. As noted earlier, the re-determination contains factual assertions, *e.g.* concerning the alleged dumping countries that are not true. To the extent that these assertions are repaired in the re-confirmation it is clear that this took place after the reasonable period of time. As regards the allegedly dumped imports from India alone, India takes issue with the calculation of the amount of dumped imports. Those amounts were overstated. This claim has been elaborated above.

248. In any event, India considers that the EC has not adequately proven at all that the increase in market share of dumped imports from India with 1.9 per cent (over a five year period)—and which coincided with an increase in market share of the Community industry from 18.1 to 19.7 per cent (or

¹²⁷ Total sales value of Community industry in 1992 is ECU 428.6 million (Provisional Regulation at (83)) and sales volume, per the figures of the re-determination is 36,205 tonnes. *I.e.* the weighted average price in 1992 is 11.83 ECU/kg. These figures are in the I.P., respectively, ECU 446.6 million and 36,553 tonnes, *i.e.* 12.21 ECU/kg. The price rise is therefore 0.38 ECU/kg, or 3.1 per cent.

¹²⁸ Re-determination, recital (50).

¹²⁹ See *supra* paragraph 100.

¹³⁰ As India has shown, the increase of the market share of dumped imports was from 2.7 to 4.6 per cent.

¹³¹ If the EC would have shown such table then such imports would have increased from 37,965 tonnes in 1992 (19 per cent market share) to 48,110 tonnes in the I.P. (25.8 per cent market share). These figures can be calculated by adding the imports of the table with countries with more than 1 per cent market share with the imports from Egypt and Pakistan.

from 22.4 to 25.1 per cent)¹³²—were *the cause* of the profit reduction of the Community industry from 3.6 to 1.6 per cent (over a period of five years and which was, in fact, the alleged 'injury').

(ii) *Argument 2: The EC disregarded the non-attribution language: neither did the EC examine all other factors which might have caused injury nor did the EC separately distinguish the injury caused by other factors*

249. India considers that the EC has disregarded the non-attribution language contained in Article 3.5. The Appellate Body in *United States—Hot Rolled Steel* had occasion to provide its views in detail with respect to this provision.¹³³ The Appellate Body noted that:

"This provision requires investigating authorities, as part of their causation analysis, first, to examine *all* "known factors", "other than dumped imports", which are causing injury to the domestic industry "at the same time" as dumped imports."¹³⁴ (Emphasis added by Appellate Body)

250. India is of the view that the factor identified by the EC authorities in recital (50) that "prices ... had not been able ... to keep pace with inflation in prices of consumer goods" has not been examined at all in section 5.3. Since this factor was singled out by the EC as one of the causes for the declining profitability, the EC cannot argue that this factor was not known. India considers therefore that this first aspect of the non-attribution language of Article 3.5 has been frustrated.

251. Second, the Appellate Body continued,

" ... investigating authorities must ensure that injuries which are caused to the domestic industry by known factors, other than dumped imports, are not "*attributed* to the dumped imports."¹³⁵ (Emphasis added by Appellate Body)

252. This second aspect was further explained in detail in subsequent sections of the Report.

253. In paragraph 223, the Appellate Body added that:

" ... If the injurious effects of the dumped imports are not appropriately separated and distinguished from the injurious effects of the other factors, the authorities will be unable to conclude that the injury they ascribe to dumped imports is actually caused by those imports, rather than by the other factors. Thus, in the absence of such separation and distinction of the different injurious effects, the investigating authorities would have no rational basis to conclude that the dumped imports are indeed causing the injury which, under the *Anti-Dumping Agreement*, justifies the imposition of anti-dumping duties."

254. In paragraph 228, the Appellate Body explained that:

" ... If the injurious effects of the dumped imports and the other known factors remain lumped together and indistinguishable, there is simply no means of knowing whether injury ascribed to dumped imports was, in reality, caused by other factors.

¹³² This depends on whether one takes the data of the provisional Regulation, recital (85) or those of the re-determination, recital (35).

¹³³ *United States—Anti-Dumping Measures on Certain Hot Rolled Steel Products from Japan*, Report of the Appellate Body of 24 July 2001, WT/DS184/AB/R.

¹³⁴ *Ibid.*, paragraph 222.

¹³⁵ *Ibid.*

Article 3.5, therefore, requires investigating authorities to undertake the process of assessing appropriately, and separating and distinguishing, the injurious effects of dumped imports from those of other known causal factors."

255. Clearly, therefore, there is the obligation to separate and distinguish the different injurious effects caused by other factors, from the effects of the dumped imports.

256. In India's view, the EC did not engage in such separation nor did it distinguish the different injurious effects. For example, as regards the increase in raw cotton prices, the EC merely confirmed the findings of the provisional Regulation.¹³⁶ That provisional Regulation, in recital (103) stated that "The Commission concluded that increases in raw material prices had caused injury." Nowhere in the provisional Regulation, nor elsewhere for that matter, are the injurious effects caused by this price increase separated and distinguished from the effects of the dumped imports.

257. By not engaging in such mandatory separation and distinguishing of effects of this other factor the EC therefore acted manifestly inconsistently with the non-attribution language of Article 3.5 as clarified by the Appellate Body.

2. Intermediate conclusions

258. India considers that it has presented a *prima facie* case showing that the EC has not respected the requirements of Article 3.5, as clarified by the Appellate Body. The EC has (1) not proven a causal link between the dumped imports and the alleged injury, (2) not examined all other factors which might have caused injury, and (3) not separately distinguished the injury caused by other factors. Moreover, the causality findings contain pertinent factual errors, some of which were only partially 'repaired' as an afterthought more than eight months after the deadline. Needless to say, India would be pleased to provide any further information or clarification which the Panel might need in reaching its findings.

F. THE EC DID NOT PAY PARTICULAR ATTENTION TO THE INTERESTS OF INDIA EVEN THOUGH THE MEASURES HAD BEEN SUBJECT TO DISPUTE SETTLEMENT. THE EC FAILED TO EXPLORE ANY *REMEDY*, CONSTRUCTIVE OR OTHERWISE

1. Claim 7: The EC acted consistently with its obligations under Article 15 of the Agreement on Implementation of Article VI of GATT 1994

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

(a) Introduction and Facts

259. The Panel is fully aware of the facts of the original dispute. The EC failed to explore any constructive remedy, even though the desire for undertakings had been broached. As a result of the EC's complete and bare rejection of the Indian request for an undertaking, Indian exporters have, from 28 November 1997 to 14 August 2001 had to face illegal anti-dumping duties. They were prevented from 'benefiting from' any constructive remedy, such as for example a price undertaking.

260. As a result of these illegal duties (both on account of dumping as well as on account of injury) a number of Indian exporters have faced bankruptcy, the most glaring example of which is perhaps the company Omkar. While Omkar never dumped, as was finally admitted, it had to face a high anti-dumping duty. Other similar examples abound.

¹³⁶ Re-determination at recital (60).

261. Yet, despite the disastrous results of the original Regulation for the Indian companies, the EC refuses to take responsibility for its actions. Indian exporters respectfully requested that the EC compensate for the damage done.¹³⁷ Despite this logical request, the EC did nothing other than adopt 'emergency legislation', which although drafted in generic form, *de facto* appears to be specifically tailored to address the results of the *Bed Linen* dispute.¹³⁸ If this emergency legislation would not have been adopted (with *retro-active effect!*), two weeks before Regulation 1644/2001, importers could have qualified for a legitimate refund under EC legislation.

262. In other words, inadmissible duties were collected on Indian exports, which otherwise could all these years have legitimately gone to the Indian exporters by means of a price undertaking.

263. Apart from this first aspect, the EC, as we know, took no steps to terminate the proceeding. On the contrary, measures were kept alive, in a 'dormant' form. Indian exporters (once again) sought to explore a 'constructive remedy'¹³⁹ but no response was forthcoming from EC.

264. On the other hand, the first, immediate, EC action with a legal consequence was the suspension of the new results, even though the Panel had clearly held that:

"[a] decision not to impose an anti-dumping duty, while clearly within the authority of a Member under Article 9.1 of the AD Agreement, is not a "remedy" of any type, constructive or otherwise".¹⁴⁰

265. The second, less immediate event, was the action to initiate a review, this time with India as the sole target. Indeed, India's hope that non-initiation on its part of an Article 21.5 proceeding on 16 August 2001 might have the effect of de-escalating the dispute, has unfortunately proven to be a *fata morgana*. On the contrary, *diametrically opposite* to any offer of a remedy, constructive or otherwise, the EC initiated yet another anti-dumping investigation: *Bed Linen-3*. As a result of the speed with which that partial interim review has been conducted Indian exporters may soon, once again, have to face another ordeal of inadmissible anti-dumping measures on imports of Bed Linen from India to EU.

(b) Arguments

(i) *First Argument: the EC acted contrary to Article 21.2 of the DSU*

266. Article 21.2 of the DSU sets forth that:

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

267. Clearly, the text is not permissive. The word "should", rather than "may", clearly adds the mandatory element to the attention to be paid. There is no indication that there is discretion on part of the importing country authority in the sense that such attention would not have to be paid.¹⁴¹

¹³⁷ India-Exhibit-RW-14, page 3.

¹³⁸ India-Exhibit-RW-16.

¹³⁹ India-Exhibit-RW-14, page 3.

¹⁴⁰ Original Panel report, paragraph 6.229, last sentence.

¹⁴¹ Cf. *Canada-Aircraft AB*, Report of 2 August 1999, WT/DS70/AB/R at paragraph 187 *ff.* At Paragraph 187 the Appellate Body held:

268. *Paraphrasing* the relevant reasoning of the Appellate Body to the situation at hand: 'If Members that are requested, under Article 21.2 DSU, to pay particular attention to matters affecting the interests of developing country, and Members had no legal duty to pay such particular attention then this Article would be rendered meaningless.'¹⁴²

269. Thus, Article 21.2 contains a clear obligation once the other elements of the provision are fulfilled. This line of reasoning was also the view of the EC in *Korea–Dairy Products*.¹⁴³ In that proceeding the EC argued, as regards the meaning of 'should', that "even assuming that an obligation which is not accompanied by criteria is not mandatory"¹⁴⁴ (emphasis added) this would be different in the case there were express criteria. It will be noted that Article 21.2 *does* contain two express criteria that trigger the obligation; thus *even assuming that* 'should' alone is not always mandatory as such, the two additional express criteria leave no doubt.

270. That these two other criteria are fulfilled and are not disputed is beyond doubt: the matter affects the interests of India,¹⁴⁵ and has been subject to dispute settlement.¹⁴⁶

"We note that Article 13.1 of the DSU provides that "A Member *should* respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate." (emphasis added) Although the word "should" is often used colloquially to imply an exhortation, or to state a preference, it is not always used in those ways. It can also be used "to express a duty [or] obligation".¹²⁰ The word "should" has, for instance, previously been interpreted by us as expressing a "duty" of panels in the context of Article 11 of the DSU.¹²¹ Similarly, we are of the view that the word "should" in the third sentence of Article 13.1 is, in the context of the whole of Article 13, used in a normative, rather than a merely exhortative, sense. Members are, in other words, under a duty and an obligation to "respond promptly and fully" to requests made by panels for information under Article 13.1 of the DSU.

¹²⁰ *The Concise Oxford English Dictionary*, (Clarendon Press, 1995), p. 1283. See also *The Shorter Oxford English Dictionary*, (Clarendon Press, 1993), Vol. II, p. 2808, and *Black's Law Dictionary*, (West Publishing Co., 1990), p. 1379, which states that "should" "ordinarily impl[ies] duty or obligation; although usually no more than an obligation of propriety or expediency, or moral obligation, thereby distinguishing it from 'ought'."

¹²¹ *European Communities – Hormones, supra*, footnote 64, para. 133."

¹⁴² *Ibid.* Paraphrase based on first sentence of para. 188, where the Appellate Body stated that:

"If Members that were requested by a panel to provide information had no legal duty to "respond" by providing such information, that panel's undoubted legal "*right* to seek" information under the first sentence of Article 13.1 would be rendered meaningless. A Member party to a dispute could, at will, thwart the panel's fact-finding powers and take control itself of the information-gathering process that Articles 12 and 13 of the DSU place in the hands of the panel.¹²² A Member could, in other words, prevent a panel from carrying out its task of finding the facts constituting the dispute before it and, inevitably, from going forward with the legal characterization of those facts. Article 12.7 of the DSU provides, in relevant part, that "...the report of a panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes." If a panel is prevented from ascertaining the real or relevant facts of a dispute, it will not be in a position to determine the applicability of the pertinent treaty provisions to those facts, and, therefore, it will be unable to make any principled findings and recommendations to the DSB."

¹²² *United States – Shrimp, supra*, footnote 24, para. 106."

¹⁴³ *Korea–Definitive Safeguard Measure on Imports of Certain Dairy Products*, Report of the Appellate Body of 14 December 1999, WT/DS98/AB/R, paragraph 33.

¹⁴⁴ *Ibid.*, paragraph 34. The EC therefore also departs from the point of view that in fact *even without* express criteria the word 'should' contains an obligation.

¹⁴⁵ Original Panel report, paragraph 6.221, second sentence.

¹⁴⁶ India-Exhibit-RW-1.

271. Despite these criteria having been fulfilled, and accordingly the obligation having been triggered beyond doubt, the EC did not pay any particular attention to the Article. Nothing particular happened, except the suspension of measures, which, however, as already indicated by the original panel, is not a remedy of any type, constructive or otherwise. The EC would not wish to defy common sense by arguing that where suspension does *not* qualify as a 'remedy' (constructive or otherwise), it *does* qualify as 'particular attention'. Perplexing enough, and contrary to *any* interpretation of Article 21.2 DSU, Indian exporters are the target of a third Bed linen anti-dumping proceeding.

(ii) *Second Argument: The EC acted contrary to Article 15 ADA*

272. As pointed out, the Panel had previously held that:

"[a] decision not to impose an anti-dumping duty, while clearly within the authority of a Member under Article 9.1 of the AD Agreement, is not a "remedy" of any type, constructive or otherwise".¹⁴⁷

273. Despite this pertinent finding of the Panel, this decision not to impose is *exactly* what the EC did. The EC neither terminated the proceeding, as the outcome-decisive injury findings would have mandated, nor explored any remedy, constructive or otherwise.

274. India had in the past already explained the preference of exporters for an undertaking. The EC was reminded of this fact on 3 July 2001.¹⁴⁸

275. Yet, once again, nothing was explored, despite the mandatory language of the text of Article 15: "*shall*". India once again regrets the inaction. India requests the Panel to find that the failure to pay heed to the mandatory language of the provision, and moreover to do *exactly* what the Panel found *not* to be a remedy, constitutes an inconsistency with Article 15.

3. Intermediate Conclusions

276. India considers that it has presented a *prima facie* case with respect to the question as to how the EC has acted inconsistently with Articles 15 ADA and 21.2 DSU. Accordingly, India requests that the Panel make such finding.

V. CONCLUSIONS

277. For the above reasons, India requests the Panel to find that:

1. 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 within the mutually agreed reasonable period of time, the EC has failed to comply with the DSB recommendations and rulings in this dispute; and

2. The re-determination, as amended, and the subsequent actions, as identified above, are inconsistent with the following provisions of the Anti-Dumping Agreement and the DSU:

? Article 2.2.2(ii) of the ADA by not properly calculating a "weighted average" of amounts for SG&A and profits;

¹⁴⁷ Original Panel report, paragraph 6.229, last sentence.

¹⁴⁸ Exhibit-India-RW-14.

- ? Articles 3.1 and 3.3 of the ADA by cumulating Indian imports with those from a country for which no dumping was found;
- ? Article 5.7 of the ADA by not simultaneously considering the evidence of dumping and injury;
- ? Articles 3.1 and 3.2 of the ADA by not properly excluding the portion of non-dumped imports from the total volume of Indian imports;
- ? Articles 3.1 and 3.4 of the ADA by reciting factors without even collecting them and by failing to enter into an overall reconsideration and analysis of the information in light of the requirements of the Anti-Dumping Agreement;
- ? Article 3.5 of the ADA by incorrectly establishing a causal relationship between dumped imports and injury and by disregarding the non-attribution language;
- ? Article 15 of the ADA by not exploring any remedy, constructive or otherwise; and
- ? Article 21.2 of the DSU by failing to pay particular attention to this matter affecting India, and which already had formed the subject of dispute settlement.

ANNEX A-2

FIRST SUBMISSION OF THE EUROPEAN COMMUNITIES

Geneva, 29 July 2002

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I. INTRODUCTION AND SUMMARY

1. This first submission of the European Communities (the “EC”) is filed in response to the submission of India of 15 July 2002. In Section II the EC raises a series of preliminary objections in accordance with paragraph 13 of the Working Procedures. In Section III the EC addresses the claims and arguments made by India.

2. The EC requests the Panel to make preliminary rulings to the effect that certain claims raised in India’s submission are not within the Panel’s jurisdiction, because they concern measures which were not “taken to comply” with the recommendations and rulings of the Dispute Settlement Body (the “DSB”) in the original dispute, or because they concern findings which could have been raised by India during the original proceeding, or because they were not properly stated in the request for the establishment of the Panel.

3. To the extent that the Panel would consider that the claims raised in India’s submission are within its jurisdiction, the EC submits that they are manifestly unfounded.

4. Article 2.2.2(ii) of the *Agreement on Implementation of the General Agreement on Tariffs and Trade 1994* (the “Anti-Dumping Agreement”) does not prescribe the use of any specific averaging method. By using the sales value of the “other exporters or producers” as averaging factor, the EC authorities have exercised the discretion afforded by Article 2.2.2 (ii) in a reasonable manner. In contrast, the averaging method proposed by India would lead to a meaningless and unreasonable result. In any event, the violation alleged by India is inconsequential and does not give rise to nullification or impairment.

5. The EC authorities acted consistently with Article 3.3 of the *Anti-Dumping Agreement*. At the time when Regulation 1644/2001¹ (which is the only measure “taken to comply”) was adopted, the EC authorities were entitled to treat imports from Pakistan as “dumped”. In any event, as of the date of establishment of the Panel (which is the relevant date for assessing the consistency of the measures “taken to comply” with the covered agreements) the injury finding was based exclusively on the effects of the dumped imports from India.

6. Article 5.7 of the *Anti-Dumping Agreement* applies only with respect to the original investigation. It does not apply to subsequent reviews or to re-determinations made for the purpose of implementing the DSB’s rulings and recommendations or of applying the legal interpretations made in adopted Appellate Body or panel reports.

7. The EC authorities found that all imports from non-sampled exporters (both co-operating and non-co-operating) were “dumped”. Therefore, they were entitled to consider all such imports as “dumped” for the purposes of Article 3.2 of the *Anti-Dumping Agreement*. India’s claim is illogical and untenable. It implies that the same imports may be simultaneously “dumped” and “non-dumped” under different provisions of the *Anti-Dumping Agreement*.

8. The EC carried out an overall reconsideration and analysis of the economic indicators pertaining to injury. In doing so, it properly evaluated these factors, for which it had already collected data in the original investigation, in accordance with the requirements of Article 3.1 and 3.4. It concluded that whilst the Community industry managed to increase production and to slightly increase its sales volume and market share by concentrating on sales of higher value niche products, it nevertheless suffered declining and inadequate profitability, which was basically the result of price

¹ Council Regulation (EC) No 1644/2001, of 7 August 2001 (OJ L 219/1, 14.8.2001) (“Regulation 1644/2001”) (Exhibit India – RW – 18).

suppression. The injury indicators for cash flow, return on investments and employment also showed declining trends. The EC did not base its injury determination on erroneous or misrepresented facts.

9. The EC authorities made a proper determination that dumped imports were a genuine and substantial cause of injury, as required by Article 3.5 of the *Anti-Dumping Agreement*. They did examine all known causes of injury. The increase in the cost of raw cotton was not a separate cause of injury.

10. The requirement to explore “constructive remedies” provided for in Article 15 of the *Anti-Dumping Agreement* must be fulfilled before “applying” anti-dumping duties. Since the EC is not “applying” anti-dumping duties, it cannot be accused of having violated that obligation. Assuming *arguendo* that the EC authorities had been required to explore “constructive remedies”, the suspension of the application of the anti-dumping duties would qualify as a “constructive remedy”.

11. Article 21.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the ‘DSU’) is a non-mandatory provision. In any event, the EC authorities did pay “particular attention” to the interests of India.

II. REQUESTS FOR PRELIMINARY RULINGS

1. Introduction

12. The EC requests that the Panel make the following preliminary rulings in accordance with paragraph 13 of its Working Procedures:

- (1) Regulations 160/2002² and 696/2002³ are not measures “taken to comply” with the DSB’s rulings and recommendations within the meaning of Article 21.5 of the *DSU* and, therefore, are not within the Panel’s jurisdiction;
- (2) 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;
- (3) certain claims raised by India in its first submission with respect to findings set out in the original measure which were not challenged by India before the original Panel, and which have not been modified by the measures at issue in this dispute, are not properly before this Panel; and
- (4) the following claims raised by India in its first submission were not stated in its request for the establishment of the Panel, contrary to the requirement imposed by Article 6.2 of the *DSU*, and are, therefore, not within the Panel’s terms of reference:
 - the claim that the EC acted inconsistently with Article 4.1(i) of the *Anti-Dumping Agreement* by excluding from the “Community industry” a producer which had imported bed linen from Pakistan;
 - the claim that the EC failed to respect the “reasonable period of time” agreed by the parties under Article 21.3 b) of the *DSU*.

² Council Regulation (EC) No 160/2002, of 28 January 2002 (OJ L 26/1, 30.1.2002) (“Regulation 160/2002”) (Exhibit India – RW – 22).

³ Council Regulation (EC) No 696/2002, of 22 April 2002 (OJ L 109/3, 25.4.2002) (“Regulation 696/2002”) (Exhibit India – RW – 30).

2. Regulations 160/2002 and 696/2002 are not measures “taken to comply” within the meaning of Article 21.5 of the DSU

A. Summary of relevant facts

13. 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 2398/97.⁴ Nor, consequently, did the DSB make any rulings or recommendations with respect to such findings.

14. 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. This was clearly explained in Regulation 1644/2001, which states that

The findings on dumping with regard to imports originating in Egypt and Pakistan have not been revised. The relevant dumping margins are set out in recitals 29 to 31 of the definitive Regulation.⁵

15. Subsequently, nevertheless, the EC authorities decided, on their own motion, to determine whether imports originating in Pakistan and Egypt were dumped in the light of the legal interpretations made by the panel and the Appellate Body in *Bed Linen*. The results of that re-determination are set out in Regulation 160/2002.

16. The EC authorities concluded in Regulation 160/2002 that imports originating in Pakistan were not dumped.⁶ It was decided, therefore, to terminate the anti-dumping proceeding with respect to those imports.⁷

17. As regards imports originating in Egypt, the EC authorities concluded that they lacked the necessary information to re-calculate the dumping margin in accordance with the legal interpretations made in *Bed Linen* and, therefore, to reach a finding on whether or not imports from Egypt were dumped. More specifically, Regulation 160/2002 states that

There are no data available from the original investigation which would allow the determination of the amount for profit on the basis of any methodology provided for under Article 2(6) of the basic regulation. In these circumstances, a detailed reconsideration of the dumping margin for Egypt is not possible.⁸

18. In view of the above, it was decided to suspend the application of the anti-dumping duties on imports from Egypt.⁹ It was further provided that the duties would expire unless an interested party requested a review within a certain time-limit.¹⁰ Eventually, no such review was requested and the duties on imports originating in Egypt expired as of 28 February 2002.¹¹

⁴ Council Regulation (EC) No 2398/1997, of 28 November 1997 (OJ L 133/1, 4.12.1997) (“Regulation 2398/97”) (Exhibit India – 9).

⁵ Regulation 1644/2001, recital 15.

⁶ Regulation 160/2002, recital 13.

⁷ *Ibid.*, Article 2.

⁸ *Ibid.*, recital 14.

⁹ *Ibid.*, Article 1.1.

¹⁰ *Ibid.*, Article 1. 2.

¹¹ Notice of Expiry published on OJ C65/12, 14.3.2002 (Exhibit India – RW – 24).

19. Following the termination of the proceeding against Pakistan and the expiry of the duties on Egypt, the EC authorities re-assessed the finding of injury made in Regulation 2398/97, as amended by Regulation 1644/2001, in order to determine whether imports from India were, on their own, a cause of injury. The results of that re-assessment are set out in Regulation 696/2002.

20. The EC authorities concluded in Regulation 696/2002 that imports of India, when considered in isolation, were a cause of injury and, therefore, confirmed the imposition of definitive anti-dumping duties on those imports.¹² At the same time, nonetheless, the EC authorities confirmed also the suspension of the application of those anti-dumping duties.¹³

21. India has asserted that the EC authorities “quickly came up” with Regulation 696/2002 “in reaction to” India’s request for consultations of 8 March 2002.¹⁴ That is not true. Regulation 160/2002 already envisaged expressly that it could be necessary to re-assess the injury findings.¹⁵ The reason why no such re-assessment was conducted in Regulation 160/2002 was because of the uncertainty at that moment as to whether the measures applied with regard to imports originating in India and/or Egypt would expire. Following the subsequent decision by the EC Commission to open a review of the measures applied to imports from India and the expiry of the measures on Pakistan and Egypt, the EC Commission conducted a re-assessment of the injury findings, the results of which were promptly disclosed to India.

B. Argument

22. Article 21.5 of the *DSU* provides in pertinent part that

Where there is disagreement as to the existence or consistency with a covered agreement of measures *taken to comply* with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures ...¹⁶

23. As clarified by the Appellate Body in *Canada – Aircraft (21.5)*,

Proceedings under Article 21.5 do not concern just *any* measure of a Member of the WTO; rather, Article 21.5 proceedings are limited to those ‘measures *taken to comply* with the recommendations and rulings’ of the DSB. In our view, the phrase “measures taken to comply” refers to measures which have been, or which should be, adopted by a Member to bring about compliance with the recommendations and rulings of the DSB.¹⁷

24. Of all the measures cited in India’s panel request, the only measure “taken to comply” with the DSB’s recommendations and rulings is Regulation 1644/2001. Accordingly, that is the only measure which should be considered by the Panel when addressing India’s claims.

25. Regulation 160/2002 is not a measure “taken to comply” with the DSB’s recommendations and rulings in *Bed Linen*. As explained, Regulation 160/2002 sets out the results of the re-examination of the findings of dumping made in Regulation 2398/97 with regard to imports originating in Pakistan

¹² Regulation 696/2002, Article 1.

¹³ *Ibid.*

¹⁴ India’s First Submission, para. 78.

¹⁵ Regulation 160/2002, recitals 20 –21.

¹⁶ Emphasis added.

¹⁷ Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft – recourse by Brazil to Article 21.5 of the DSU* (“*Canada – Aircraft (21.5)*”), WT/DS/AB/RW, para. 36. (Emphasis added in the original).

and Egypt. The DSB made no recommendations or rulings with respect to such dumping findings, which were not challenged by India at any point during the original panel proceedings. Thus, the EC was under no obligation to re-examine the findings of dumping for Egypt and Pakistan. Therefore, Regulation 160/2002 cannot be considered as a measure “taken to comply” within the meaning of Article 21.5. It is a subsequent and distinct measure, which can be reviewed only by an ordinary panel established under Article 4.7 of the *DSU*.

26. For the same reason, Regulation 696/2002 is not a measure “taken to comply” with the DSB’s rulings and recommendations in *Bed Linen*. The injury re-determination made in Regulation 696/2002 was rendered necessary by the earlier decision of the EC authorities to re-determine the findings of dumping for Pakistan and Egypt, which decision, as explained, was not itself a measure “taken to comply” with the DSB’s recommendations and rulings in that dispute.

27. Since Regulations 160/2002 and 696/2002 are not measures “taken to comply” with the DSB’s recommendations and rulings in *Bed Linen*, any claims involving the findings made by the EC authorities in those two regulations are beyond this Panel’s jurisdiction. Those claims should have been brought by India before an ordinary panel established in accordance with Article 4.7 of the *DSU*.

3. The relevant date for assessing the consistency of the measures “taken to comply” is the date of establishment of the Panel

A. Summary of relevant facts

28. In accordance with Article 21.3 (b) of the *DSU*, on 26 April 2001 the EC and India agreed on a “reasonable period of time” for implementing the recommendations and rulings of the DSB of five months and two days, i.e. until 14 August 2002.¹⁸

29. Regulation 1644/2001 was adopted on 7 August 2001 and published in the EC’s Official Journal on 14 August 2001. Regulation 160/2002 was adopted on 28 January 2002 and published on 30 January 2002. Finally, Regulation 696/2002 was adopted on 22 April 2002 and published on 25 April 2002.

30. This Panel was established on 22 May 2002 on the basis of a request made by India on 3 May 2002.

31. Thus, Regulation 1644/2001 was adopted and published before the end of the “reasonable period of time”, while Regulations 160/2002 and 696/2002 were adopted and published after the end of the “reasonable period of time”, but before this Panel was established.

B. Argument

32. At several points in its submission, India argues that, even if the alleged inconsistencies with the *Anti-Dumping Agreement* had been cured by Regulations 160/2002 and 696/2002, those regulations cannot provide a valid “justification” because they were adopted outside the “reasonable period of time”.¹⁹

33. India’s allegations reflect a basic misunderstanding of the scope of a panel’s mandate under Article 21.5 of the *DSU*. India assumes erroneously that such mandate is limited to establish whether the measures “taken to comply” within the “reasonable period of time” are consistent with the covered agreements.

¹⁸ WT/DS141/10 of 1 May 2001 (Exhibit India - RW - 2).

¹⁹ See e.g. paras. 73, 82, 134 and 247 of India’s First Submission.

34. As noted by the panel in *US – Shrimps (Article 21.5)*, “the DSU is silent as to the date on which the existence or consistency of the implementing measure must be assessed”.²⁰ The same panel went on to find that

... it should take into account all the relevant facts occurring until the date the matter was referred to it. By applying this approach, an Article 21.5 panel can reach a decision that favours a prompt settlement of the dispute. Indeed, it avoids situations where implementing measures allowing for compliance with the DSB recommendations and rulings would be disregarded simply because they occur after the end of the reasonable period of time. The Panel, while mindful of the obligation of the United States to bring its legislation into conformity by the end of the reasonable period of time, considers that it is consistent with the spirit of Article 3.3 of the DSU to take into account any relevant facts until the date on which the matter was referred to the Panel.²¹

35. The EC agrees with the views of the panel in *US – Shrimps (21.5)*.²² As submitted above, the EC considers that Regulations 160/2002 and 696/2002 are not measures “taken to comply”. However, should the Panel conclude that they are, the EC submits 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, and not that of the end of the “reasonable period of time”.

36. Of course, the EC is not suggesting that the implementing Member is under no obligation to implement the DSB’s rulings and recommendations within the “reasonable period of time”. That obligation, however, does not flow from Article 21.5, but instead from Article 21.3 of the *DSU*, which states in pertinent part that

If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period to comply.

37. It is obvious, nevertheless, that a finding that a Member has violated Article 21.3 of the *DSU* by implementing late the DSB’s recommendations and rulings would be necessarily declaratory, since there is nothing that such Member could do in order to correct that violation. In any event, as discussed below, in the present case India did not state in its panel request any claims based on Article 21.3 of the *DSU*.

4. Claims that could have been raised in the original dispute but were not

A. Summary of relevant facts

38. In its First Submission, India raises a number of claims against findings set out in the original measure which were not challenged by India before the original Panel and which have not been modified by the findings made in the measures at issue in this proceeding.

39. For example, in the original proceeding India’s only claim under Article 3.5 was that the EC authorities had not established that injury had been caused “through the effects of dumping” because

²⁰ 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. 5.12.

²¹ *Ibid.*, para. 5.13.

²² In *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 by Canada*, WT/DS18/RW, para. 7.10, the panel went even further by taking into account facts that occurred after the end of the establishment of the panel.

they had treated as “dumped imports” what India considered to be “non-dumped transactions”.²³ That claim was dismissed by the Panel.²⁴

40. Yet, India now complains that the causality determination is inconsistent with Article 3.5, *inter alia*, because the EC authorities failed to examine the effects of the increase in consumer prices.²⁵ and to separate the effects of the increase in the cost of raw cotton.²⁶ The findings made by the EC authorities with respect to those factors have been confirmed without any modification in the re-determination at issue in this dispute. Thus, the claims now raised by India under Article 3.5 are claims which India could have raised during the original proceedings, but which India chose not to raise.

41. Similarly, in the original proceeding, India’s only claim under Article 3.4 was that the EC authorities had failed to consider all the relevant injury factors.²⁷ Yet, now India contests the adequacy of the findings made by the EC authorities with respect to those Article 3.4 factors which were examined in the original measure. For example, India claims that the evaluation of factors such as sales²⁸, market share²⁹, price development³⁰, production³¹, profitability³² or employment³³ is inadequate, even though Regulation 1644/2001 limits itself to confirm the findings with respect to those factors made in Regulation 1069/1997.³⁴ Thus, once again, India is making claims under Article 3.4 which it could have raised in the original proceeding.

B. Argument

42. The EC submits that, to the extent that the re-determination at issue in this dispute does nothing but confirm the findings already set out in the measure at issue in the original proceeding, it cannot be considered that such re-determination constitutes a measure “taken to comply” within the meaning of Article 21.5 of the *DSU*. Therefore, any claims relating to those findings should be dismissed as not being properly before the Panel.

43. The EC is aware that in *Canada – Aircraft (21.5)*, the Appellate Body noted that³⁵

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

²³ India’s First Submission to the original Panel, paras. 4.217- 4.220, reproduced in Panel report, p. 221.

²⁴ Panel report, para. 6.142.

²⁵ India’s First Submission, para. 250.

²⁶ *Ibid.*, para. 256.

²⁷ India’s First Submission to the original Panel, paras. 4.56-4.76, reproduced in Panel report, pp. 170-177.

²⁸ India’s First Submission, paras. 166-171.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*, paras. 180-182.

³² *Ibid.*, paras. 172-1793

³³ *Ibid.*, paras. 201-204.

³⁴ Commission Regulation (EC) No 1069/97, of 12 June 1997, imposing a provisional anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan, (OJ 13.6.97 L 156/11) (“Regulation 1069/97” or “Provisional Regulation”) (Exhibit India – 8), at recitals 31, 34 and 36.

³⁵ Appellate Body Report, *Canada – Aircraft (Article 21.5)*, para. 41

44. Nevertheless, the present case differs fundamentally from *Canada – Aircraft (21.5)*. In that case, Canada objected to the claims raised by Brazil against a new and different measure on the grounds that no similar claims had been raised against the original measure. Had Canada's objection been upheld, Brazil would have been barred from making claims that could not have been raised in the original proceedings. In contrast, the issue before this Panel is whether India should be allowed to raise at this stage claims that it could have raised before the original panel.

45. Even if the Panel were to take the view that the claims at issue concern measures "taken to comply", the EC submits that by not raising those claims in a timely manner, India has acted inconsistently with the requirements of Article 13.10 of the *DSU*, which provides that

... if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute.

46. In *US – FSC*, the Appellate Body noted that³⁶

Article 3.10 of the *DSU* commits Members of the *WTO*, if a dispute arises, to engage in dispute settlement procedures "in good faith in an effort to resolve the dispute". This is another specific manifestation of the principle of good faith which, we have pointed out, is at once a general principle of law and a principle of general international law. This pervasive principle requires both complaining and responding Members to comply with the requirements of the *DSU* (and related requirements in other covered agreements) in good faith. By good faith compliance, complaining Members accord to the responding Members the full measure of protection and opportunity to defend, contemplated by the letter and spirit of the procedural rules. The same principle of good faith requires that responding Members seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the *DSB* or the Panel, so that corrections, if needed, can be made to resolve disputes. The procedural rules of *WTO* dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes.

47. In the same way as the principle of good faith requires that the defendant raises its objections "seasonably and promptly", it requires also that the complaining party raises its claims in a timely manner.

48. The purpose of Article 21.5 is to provide an expeditious procedure to establish whether a Member has properly implemented the *DSB*'s recommendations and rulings. Article 21.5 is not intended to provide a "second service" to complaining parties which, by negligence or calculation, have omitted to raise certain claims during the original proceeding.

49. By withholding certain claims which it could have raised before the original panel until these proceedings, India has prejudiced the procedural rights of the EC. In the first place, the deadlines are shorter in Article 21.5 proceedings, thus rendering more difficult the EC's defence. (The EC recalls that it has been granted only two weeks for replying to India's first submission, which India had had several months to prepare, and that a request for a one week extension was summarily rejected due to India's opposition). Second, and more important, were the Panel to uphold the claims at issue, the EC would not be entitled to a "reasonable period of time" for implementation.

³⁶ Appellate Body Report, *United States – Tax Treatment for Foreign Sales Corporations*, ("US – FSC"), WT/DS108/AB/R, para. 166. [footnotes omitted]. See also Report of the Appellate Body in *Mexico Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States (Recourse to Article 21.5)*, WT/DS132/AB/R, para. 50.

50. In so far as India did not make claims with respect to a finding set out in the original measure, the EC authorities could assume legitimately that such finding was WTO consistent and need not be corrected. It would be manifestly unfair to expose the EC to the possibility of an immediate suspension of concessions under Article 22 of the *DSU* in response to a violation which the EC could not have anticipated when the implementing measures were taken and which it will be given no opportunity to correct.

5. Claims not stated in the panel request

A. Introduction

51. In the original proceeding, the Panel ruled that certain claims raised by India were not within its terms of reference because India had not even cited the relevant treaty Articles in the panel request, contrary to the requirement imposed by Article 6.2 of the *DSU*³⁷.

52. India has done the same again. As discussed below, in its first submission, India has asserted certain claims that are based on legal provisions which were not cited in the panel request. The EC requests the Panel to make a preliminary ruling to the effect that such claims are outside the scope of its terms of reference.

B. Article 4.1 (i)

53. India alleges that, by not taking into account for the purposes of the injury analysis evidence concerning a company which was excluded from the “Community industry” in the original investigation because it had imported the product under investigation from Pakistan, the EC authorities acted inconsistently with Article 3.1.³⁸

54. Although India appears to allege exclusively a violation of Article 3.1, this claim involves necessarily a claim based on Article 4.1(i). The Panel cannot find a violation of Article 3.1 unless it determines first whether the exclusion of the company concerned from the “domestic industry” was consistent with Article 4.1 (i). Yet, that provision is nowhere stated in the Panel request.

C. Claims that the EC failed to respect the agreed “reasonable period of time”

55. As mentioned above, at several points in its submission, India alleges that the EC did not respect the deadline agreed under Article 21.3 b).³⁹

56. This claim is not mentioned in the panel request. Furthermore, even in its first submission, India fails to identify these allegations as a separate claim and to cite the appropriate legal basis, which, as explained above, is Article 21.3 of the *DSU* and not Article 21.5.

³⁷ Panel report, paras. 6.12-6.17.

³⁸ India’s First Submission, paras. 215-217.

³⁹ See e.g. paras. 73, 82, 134 and 247 of India’s First Submission.

III. CLAIMS BROUGHT BY INDIA

A. CLAIMS UNDER THE ANTI-DUMPING AGREEMENT

1. Claim 1 : Article 2.2.2 (ii)

A. Claim

57. India alleges that the EC authorities acted inconsistently with Article 2.2.2 (ii) “by not properly calculating a weighted average of actual amounts for SGA & profits”.⁴⁰

58. More precisely, India claims that the EC authorities violated that provision by weighting the amounts for administrative, selling and general costs (“SGA”) and profits according to the sales value of each of the “other exporters and producers”. According to India, those amounts should have been averaged according to the sales volume of those exporters, measured by “units/sets”.

B. Summary of relevant facts

59. In the re-determination of dumping for India contained in Regulation 1644/2001, the EC authorities resorted to constructed normal value for the five exporters included in the sample (Anglo-French, Bombay Dyeing, Madhu, Omkar and Prakash).

60. The amounts for SGA and profit included in the constructed normal value of one of the five exporters in the sample (Bombay Dyeing) were established in accordance with the *chapeau* of Article 2.2.2, while the amounts for SGA and profits for the other four exporters were calculated in accordance with the method laid down in Article 2.2.2 (ii).

61. For the purposes of applying Article 2.2.2 (ii), the EC authorities averaged the amounts for SGA and profits incurred and realised by Bombay Dyeing and by Standard Industries (a reserve company) on the basis of the net value of their domestic sales.

C. Argument

(a) Introduction

62. Article 2.2.2(ii) does not prescribe the use of any specific averaging factor. Therefore, the investigating authorities have discretion to use the averaging factor which they deem most appropriate.

63. In the case at hand, the EC authorities have exercised that discretion in a reasonable manner. The pertinence of using the value of the domestic sales made by the “other exporters or producers” for averaging the amounts for SGA and profits incurred and realised in respect of such sales is beyond question. Furthermore, the sales value is an objective and neutral criterion which, *a priori*, does not confer an advantage to any interested party. In contrast, the method proposed by India would lead to a meaningless result and is manifestly unreasonable.

64. Even assuming that Article 2.2.2 (ii) required to use the sales volume, India advances no reason to justify why the sales volume must be measured in “units/sets” rather than by weight or size. As shown below, had the EC authorities used the sales volume measured by weight, the dumping margins would be higher than those calculated by using the sales value. Thus, in any event, the

⁴⁰ Request for the Establishment of a Panel of 7 May 2002, WT/DS141/13/Rev.1.

violation alleged by India would be inconsequential and give rise to no nullification or impairment of benefits accrued to India under Article 2.2.2 (ii).

(b) *India's claim has no basis on the text of Article 2.2.2 (ii)*

65. It is manifest that, contrary to India's assertions⁴¹, the text of Article 2.2.2 (ii) lends no support to its claim that the EC authorities were not permitted to average the amounts for SGA and profits according to sales value.

66. Article 2.2.2 (ii) states that, where the method set out in the *chapeau* of Article 2.2.2 cannot be applied, the amounts for SGA and for profits may be determined on the basis of

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

67. Thus, while Article 2.2.2(ii) provides for the calculation of a "weighted average", it does not prescribe the use of any specific averaging factor.

68. India's allegations that the EC method reduces the terms "weighted average" to redundancy⁴² are groundless. It is beyond question that the EC method involves the calculation of a "weighted average" of the amounts for SGA and profits incurred and realised by other exporters and producers, as required by Article 2.2.2 (ii).

69. The EC agrees with India's obvious proposition that the weighted average must reflect the "relative importance" of the "other exporters or producers".⁴³ However, contrary to India's assumption, there is no reason why the "relative importance" of each exporter or producer should be measured necessarily in terms of sales volume, rather than of sales value.

(c) *India's contextual arguments are without merit*

70. Well aware that its interpretation finds no support in the text of Article 2.2.2 (ii), India puts forward a series of contrived "contextual" arguments⁴⁴. All of them are without merit.

71. The provisions of the *Anti-dumping Agreement* invoked by India address different issues and serve different purposes. They cannot be relied upon in order to read into Article 2.2.2 (ii) an additional requirement which, quite simply, is not there.

72. In fact, if anything, Footnotes 2 and 5 and Article 6.10 suggest that, when the drafters of the *Anti-Dumping Agreement* intended that quantities be used, they said so expressly. *A contrario*, it may be inferred from those provisions that, when the *Anti-Dumping Agreement* remains silent, the investigating authorities must be accorded discretion to choose between sales volume and other pertinent criteria.

73. Footnotes 2 and 5 do not provide for the calculation of "weighted averages". Therefore, it is difficult to see how they could be relevant for the interpretation of those terms in Article 2.2.2 (ii). Furthermore, the purpose of the "5 per cent rule" in Footnote 2 and of the "20 per cent rule" in Footnote 5 is to establish whether the domestic price (i.e. the domestic sales value) provides a reliable

⁴¹ India's First Submission, paras. 51-53.

⁴² *Ibid.*, paras. 53-54.

⁴³ *Ibid.*, paras. 52-53.

⁴⁴ *Ibid.*, paras. 55-60.

basis for calculating the normal value. In view of that, it would have been illogical to apply those thresholds to the sales value.

74. Article 6.10, which India itself describes as “indirect context”⁴⁵, is equally irrelevant. Article 6.10 is not concerned with the calculation of “weighted averages”. It provides that the investigating authorities may resort to sampling where the determination of individual dumping margins for all the exporters is “impracticable”. The “practicability” of a dumping determination is a function of the number of sales to be examined and not of their price: the examination of a sale does not become more cumbersome simply because it is made at a higher price. This explains why Article 6.10 refers to the “largest volume of the exports ... which can reasonably be investigated”, rather than to the “largest value of exports ... which can be investigated”.

75. The Judgement of the Court of First Instance (“CFI”) of 17 July 1998 in the case T-118/96 cited by India⁴⁶ does not constitute “context” within the meaning of Article 31 of the *Vienna Convention*. Moreover, that judgement does not address the interpretation of Article 2.6 (a) of the EC Basic Regulation (the equivalent of Article 2.2.2 (ii)). In any event, the CFI’s reasoning does not support, but rather contradicts, India’s position. Contrary to India’s assertions, the CFI did not rule that “volume should be the norm”.⁴⁷ Rather, the CFI held that

The decision to apply a figure of 10 per cent to the volume rather than the value of domestic sales falls within the broad discretion enjoyed by the institutions.⁴⁸

76. In other words, the CFI was of the view that, in the absence of any specific provision in the EC Basic Anti-Dumping Regulation, the institutions had discretion to use either volume or value, which is also the position maintained by the EC in this case.

77. Nor is correct India’s assertion that the CFI found “that the volume-context of the Regulation was sufficient to override any preference for a value-based determination”.⁴⁹ After concluding that the EC institutions had broad discretion to use either volume or value, the CFI went on to note that

Moreover, the institutions’ decision does not exceed the limits of their discretion. It should be observed that the criteria they use in connection with the concept of the ordinary course of trade ... and for assessing whether sales on the domestic market are representative apply also to the volume of sales of the like product.⁵⁰

78. Thus, the CFI relied upon the “5 per cent rule” and the “20 per cent rule” exclusively for the purpose of confirming that, by choosing to use volume when applying the “10 per cent rule”, the EC authorities remained within the limits of their margin of discretion. Furthermore, the CFI did not mention Article 2.6 (a) of the EC Basic Anti-Dumping Regulation among those provisions which provided relevant context for the interpretation of the “10 per cent rule”.

⁴⁵ Ibid., para. 55.

⁴⁶ Ibid. para. 59.

⁴⁷ Ibid., footnote 51.

⁴⁸ Judgement of the CFI of 17 July 1998 in the case T - 118/96, at para. 76.

⁴⁹ India’s First Submission, footnote 51.

⁵⁰ Judgement of the CFI of 17 July 1998 in the case T - 118/96, para. 79.

(d) *The EC's interpretation does not contradict the positions expressed in the original proceeding*

79. India appears to assume that the figures mentioned in the EC's statements to the original panel which it cites in its submission⁵¹ are percentages of the sales volume. That assumption is incorrect. As the EC authorities have already explained to the Indian exporters⁵², those figures are percentages of the sales value. They differ from the percentages used in the calculation of the reasonable amount for profit and SGA because they are percentages of all domestic sales, and not of the combined value of sales by Bombay Dyeing and Standard Industries.

(e) *The EC has exercised reasonably the discretion afforded by Article 2.2.2 (ii)*

80. The averaging method used in this case is the same generally applied by the EC authorities when resorting to Article 2.2.2 (ii). The EC authorities average the amounts for SGA and profits according to the sales value because that method is easier to apply and can be used in all the investigations. In contrast, if the averaging was made according to volume, it would be necessary to choose in each investigation one of the several possible criteria for measuring the sales volume of the product concerned. For example, in the case at hand it would have been necessary to decide whether to average the SGA and profits according to the number of "units/sets", as proposed now by India, or according to weight or size.

81. Moreover, the method applied by the EC is consistent with the methodologies applied by the EC authorities at previous steps of the dumping calculation in the *Bed Linen* investigation. Thus, in accordance with well established practice, the SGA expenses of each exporter were allocated among the different products manufactured by that exporter, and then among the different types of the product under consideration, on the basis of turnover, and not on the basis of quantity. Likewise, the SGA and profits incurred and realised by each exporter with respect to each product type were averaged according to value, rather than volume, in order to establish the SGA and profit margins for the product under investigation. India has at no point challenged the use of these methodologies.

82. Furthermore, the EC authorities generally use the same averaging factor whenever it is necessary to calculate a weighted average of data for different companies. For instance, when calculating the "all-others" dumping rate in accordance with Article 9.4 (i) of the *Anti-Dumping Agreement*, the EC authorities averaged the dumping margins of the exporters included in the examination according to their sales value, and not according to their sales volume. Similarly, to mention but another example, for the purposes of the injury determination, the EC authorities averaged the profit margins of the EC producers included in the sample according to their sales value. Again, India has not challenged the use of the sale value for these purposes.

83. Compared to the method proposed by India, the averaging method applied by the EC authorities gives a greater weight to the exporters with relatively higher unit prices for the product under consideration. However, higher unit prices for the product under consideration do not imply necessarily higher SGA or profit margins. They may reflect also a different product mix (and more specifically, a greater proportion of relatively higher priced product types) or higher production costs (other than SGA). Thus, the method applied by the EC authorities does not result necessarily in higher amounts for SGA and profits than India's proposed method.

84. Indeed, India does not seem to argue that the method used by the EC authorities is inherently biased against the exporters. Rather, the only basis for India's claim is that, had the EC authorities

⁵¹ India's First Submission, paras. 61-64.

⁵² EC Commission's reply to Texprocil comments on the disclosure document of 19 June 2001, p. 2 (Exhibit India – RW –17).

applied India's method in this specific case, the "reasonable" amount for SGA and profits would have been lower. However, the mere fact that, in the specific circumstances of this case, the method applied by the EC authorities yields a result which is less favourable to the exporters than India's proposed method is not sufficient to render the EC's method inconsistent *per se* with Article 2.2.2 (ii). In a different set of factual circumstances, the EC's method might well have been more favourable to the exporters than India's own method.

85. India's position would have unacceptable implications for the conduct of anti-dumping investigations. By India's logic, the investigating authorities would be prevented from adopting any generally applicable rules for the calculation of dumping margins. Instead, they 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.

(f) *The method proposed by India is unreasonable*

86. Whilst the averaging method used by the EC authorities constitutes a reasonable exercise of the discretion afforded by Article 2.2.2 (ii), India's own method would lead to a meaningless result and is manifestly unreasonable

87. The EC recalls that the product under investigation (bed linen) includes bed sheets, duvet covers and pillow cases, packaged for sale either separately or in sets.⁵³ The "units/sets" used in India's calculation can be units of any of those products or of sets of those products. Thus, for example, a pillow case sold separately is accounted by India as one "unit", just like a sheet sold separately or a set consisting of a pillow case, a sheet and, sometimes, a duvet cover.

88. In other words, India's averaging method gives identical weight to all the product types covered by the investigation, regardless of their differences. For example, a pillow case sold separately is accorded the same weight as a double set comprising one sheet, one duvet covers and two pillow cases. As a result, the weight of each "other exporter or producer" included in the average will depend to a large extent on its product mix. For instance, an exporter which sells 100,000 pillow cases in India will be accorded the same weight as an exporter who sells 100,000 sets comprising, in addition to 100,000 (or 200,000) pillow cases, also 100,000 thousand sheets and 100,000 thousand duvet covers.

89. The above example evidences clearly that, to use India's own terms⁵⁴, India's averaging method fails to reflect the "relative importance" of each of the "other exporters or producers". Therefore, unlike the EC's method, India's method cannot be considered a reasonable exercise of the discretion afforded by Article 2.2.2 (ii).

(g) *Averaging the SGA and profit according to volume measured by weight would result in higher dumping margins*

90. Sales volume may be measured in a number of different ways. In the present case, for instance, it can be measured in weight (as the EC authorities did for the purposes of the injury determination), in size (square metres) or in pieces (of pillow cases, sheets, duvet covers, sets, etc).

91. India argues that Article 2.2.2 (ii) requires to average the SGA and profits on the basis of the sales volume of the "other exporters and producers" and does not permit the use of the sales value.

⁵³ Regulation 1069/97, recital 10.

⁵⁴ India's First Submission, para. 53.

But it has not advanced any single reason to justify why the sales volume must be measured in “units/sets” rather in kilos or in square metres.

92. The EC submits that, even assuming that, on the basis of India’s arguments, Article 2.2.2(ii) had to be interpreted as requiring the use of the sales volume, nothing would prevent the EC authorities from using the sales volume measured by weight rather than by “units/sets”.

93. For the sake of argument, the EC has calculated the weighted average amount for SGA and profit on the basis of the sales volume measured by weight. The relevant information was available from the questionnaire responses of the companies concerned. As shown by the table below, the amounts thus obtained are higher than those obtained by using the sales value.⁵⁵

	Bombay Dyeing	Standard Industries	Total/average
Domestic turnover in Rs	134,154,064	13,276,083	147,430,147
Domestic sales in tones	465.00	43.39	508.39
Domestic sales in units/sets	627,764	179,775	807,539
SG&A plus profit/loss	22.48% (10.39%+12.09%)	-16.34% (19.15%-35.49%)	
Allowances for fair comparison	2.23%	0.37%	
Company's weight on turnover	91.0%	9.0%	SG&A+profit/loss: 18.99% Allowances: 2.06%
Company's weight on tones	91.5%	8.5%	SG&A+profit/loss: 19.17% Allowances: 2.07%
Company's weight on units/sets	77.7%	22.3%	SG&A+profit/loss: 13.84% Allowances: 1.82%

94. The above table evidences that, had the EC authorities used the sales volume measured by weight as averaging factor, the weighted average SGA and profit and, consequently, the constructed normal values and the dumping margins for the companies concerned would be higher than those calculated by using the sales value. Thus, even if the Panel were to conclude that Article 2.2.2 (ii) requires the use of sales volume, the violation alleged by India would not result in the nullification or impairment of the benefits accrued to India under that provision.

2. Claim 2: Articles 3.1 and 3.3

A. Claim

95. India alleges that the EC “acted inconsistent with Articles 3.1 and 3.3 of the ADA by cumulating Indian imports with those of a country for which no dumping was found”.⁵⁶

96. More specifically, India alleges that Regulation 1644/2001 is inconsistent with Articles 3.1 and 3.3 because the EC authorities cumulated imports originating in India with imports originating in Pakistan, which “were in fact not dumped, a fact which was revealed by publication of Regulation 160/2002.”⁵⁷

⁵⁵ The EC requests that the information set out in this table be treated as confidential pursuant to Article 17.7 of the *Anti-Dumping Agreement* and paragraph of the Panel’s Working Procedures.

⁵⁶ Request for the Establishment of a Panel of 7 May 2002, WT/DS141/13/Rev.1.

⁵⁷ India’s First Submission, para. 70.

B. Summary of relevant facts

97. The pertinent facts for the examination of this claim have already been summarised above in section II.3.A.

C. Argument

98. As submitted above, the only measure “taken to comply” with the DSB’s recommendations and rulings is Regulation 1644/2001, which is, therefore, the only measure within the Panel’s jurisdiction.

99. Regulation 1644/2001 confirmed the finding of dumping for Pakistan reached in Regulation 160/2002. Thus, at the time when Regulation 1644/2001 was adopted, the EC authorities were entitled to treat imports originating in Pakistan as “dumped” and, consequently, to cumulate them with imports from India in accordance with Article 3.3 of the *Anti-Dumping Agreement*.

100. India cannot rely on the finding of no-dumping reached in Regulation 160/2002 in order to claim that imports from Pakistan were “in fact”⁵⁸ non-dumped already when Regulation 1644/2001 was adopted. The finding of no-dumping contained in Regulation 1644/2001 was reached under EC law and does not prejudice the consistency with the *Anti-Dumping Agreement* of the finding of dumping made in Regulation 2938/97 and confirmed by Regulation 1644/2001. The WTO consistency of that finding can be examined and ruled upon only by a WTO panel. Yet, India did not challenge that finding before the original panel. Nor has India brought a claim against that finding before this Panel.

101. Should the Panel take the view that the other regulations cited in India’s panel request are also measures “taken to comply” and, therefore, within its jurisdiction, the EC submits in the alternative that in Regulation 696/2002 the EC authorities established that imports of India, when taken in isolation, were a cause of injury. Therefore, as of the date of establishment of the Panel, the “measures taken to comply” were not based on the cumulation of imports from India with non-dumped imports from Pakistan.

3. Claim 3: Article 5.7

A. Claim

102. India alleges that

The EC acted inconsistent with Article 5.7 of the ADA by not simultaneously considering the evidence of dumping and injury. In fact, by cumulating countries for injury purposes and by subsequently excluding a particular source on account of non-dumping, the EC engaged in sequencing that was entirely improper.⁵⁹

103. More precisely, India claims that the EC authorities acted inconsistently with Article 5.7 by

- (1) making the dumping re-determination for Pakistan after the adoption Regulation 1644/2001; and
- (2) separating the dumping and injury findings in Regulations 160/2002 and 696/2002.

⁵⁸ Ibid.

⁵⁹ Request for the Establishment of a Panel of 7 May 2002, WT/DS141/13/Rev.1.

B. Summary of relevant facts

104 The relevant facts for the examination of this claim have been already summarised in section II.3.A of this submission.

C. Argument

105. At the outset, the EC recalls once again its position that Regulations 160/2002 and 696/2002 are not measures “taken to comply” with the DSB’s recommendations and rulings and, therefore, are not within the Panel’s jurisdiction. Accordingly, the arguments presented here below are submitted only in the event that the Panel were to rule that those regulations are measures “taken to comply”.

106. India’s claim reflects a basic misunderstanding with regard to the scope of the obligations imposed by Article 5.7. By its own words, Article 5.7 applies only with respect to the original investigation. It states that

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

107. Thus, Article 5.7 does not apply to subsequent reviews. This is confirmed by Articles 11.2, which envisages expressly that a review may be limited to dumping or to injury.⁶⁰ Further confirmation is provided by Article 11.4, which does not mention Article 5.7 among the procedural provisions that apply to reviews carried out under Article 11.⁶¹

108 The EC submits that, by the same token, Article 5.7 does not apply to the re-determination of dumping or injury findings for the purposes of implementing the DSB’s recommendations and rulings (regardless of whether such re-determinations may be characterised as reviews under Article 11.2). Indeed, implementation re-determinations do not involve an “investigation”, but merely a re-assessment of the evidence gathered during the course of the original investigation. Moreover, applying Article 5.7 to implementation re-determinations would have the absurd consequence of requiring the implementing Member to re-consider all the findings made during the investigation, regardless of whether those findings have any connection with the DSB’s recommendations and rulings.

⁶⁰ Article 11.2 provides in relevant part that

Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both.

Further confirmation is provided by Article 11.3, which states that

Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 *if that review has covered both dumping and injury*, or under this paragraph)... (emphasis added).

⁶¹ Article 11.4 provides that

The provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article ...

109. Finally, and for the same reasons, the EC submits that Article 5.7 does not apply either where, as in the case at hand, a Member conducts voluntarily a re-determination of the dumping or injury findings in order to apply the legal interpretations made in a panel or Appellate Body report adopted by the DSB.

4. Claim 4: Articles 3.1 and 3.2

A. Claim

110. India claims that the EC “acted inconsistent with Articles 3.1 and 3.2 of the ADA, by not properly excluding the correct portion of non-dumped imports from the total volume of Indian exports”.⁶²

111. Specifically, India alleges that since Omkar and Prakash, two exporters which were found not to be dumping, accounted for 53 per cent of all the imports in the sample, the EC authorities should have considered that the same proportion of imports outside the sample was not dumped for the purposes of the injury analysis.

B. Summary of relevant facts

112. Given the large number of Indian producers and exporters concerned by the investigation, the EC authorities decided to limit their examination to a sample of exporters in accordance with Article 6.10 of the *Anti-Dumping Agreement*.

113. In the re-determination of dumping contained in Regulation 1644/2001, the EC authorities established the following dumping margins for the five exporters included in the sample.⁶³

Anglo French Textile	9.8 %
Bombay Dyeing & Manufacturing	5.5 %
Madhu	3.0 %
Omkar	0.0 %
Prakash Cotton Mills	0.0 %

114. Co-operating exporters not included in the sample were attributed the average dumping margin of the sampled exporters, weighted on the basis of their export turnover to the EC. In accordance with Article 9.4 (i) of the *Anti-Dumping Agreement*, zero margins were disregarded. The dumping margin thus established for the non-sampled co-operating exporters was 5.7 per cent.⁶⁴ India has not challenged the method used to calculate that margin.

115. Co-operating exporters represented approximately 82 per cent of the total exports from India to the EC.⁶⁵ The dumping margin for the non co-operating exporters, was established on the basis of “facts available”. More specifically, the EC authorities attributed to the non-cooperating exporters the highest dumping margin established for the exporters in the sample, i.e. 9.8 per cent.⁶⁶ India has not challenged the method applied to establish that dumping margin.

⁶² Request for the Establishment of a Panel of 7 May 2002, WT/DS141/13/Rev.1.

⁶³ Regulation 1644/2001, recital 12.

⁶⁴ Ibid., recital 13.

⁶⁵ Regulation 1069/97, recital 16.

⁶⁶ Regulation 1644/2001, recital 14.

116. In the injury re-determinations made in Regulations 1644/2001 and 696/2002, the EC authorities assessed the volume and the effect of “dumped imports” both when exports by Omkar and Prakash were included in that notion and when they were excluded.⁶⁷ They concluded that the exclusion of Omkar and Prakash would not affect the outcome of the analysis.

117. The EC authorities treated all the imports from co-operating exporters not included in the sample and from non-co-operating exporters as “dumped imports” for the purposes of the injury analysis.

C. Argument

118. In the original proceeding, India claimed that non-dumped transactions should be excluded from the injury analysis.⁶⁸

119. In response, the EC argued that dumping is determined for countries and, therefore, that it was entitled to consider all imports from a country found to be dumping as “dumped imports” for the purposes of Article 3.

120. The Panel rejected India’s claim without, however, ruling on the EC’s defence. The Panel considered the question of whether imports from an exporter found not to be dumping could be considered as “dumped imports” for the purposes of the injury analysis. But, as India had not contested the injury finding on this ground and there were no Indian producers in that situation, the Panel refrained from reaching any conclusions.⁶⁹

121. The EC refers the Panel to the arguments made in the original proceedings and reiterates its position that it was entitled to consider all imports from India as “dumped imports” for the purposes of the injury analysis.⁷⁰

122. However, should the Panel reach the conclusion that imports from an exporter which has been found not to be dumping must be excluded from the injury analysis, the EC submits that, in any event, all imports from co-operating exporters not included in the sample, as well as all imports from non-co-operating exporters were found to be “dumped” by the EC authorities, which, therefore, were entitled to treat them as “dumped imports” also for the purposes of Articles 3.1 and 3.2.

123. India has not challenged in these proceedings the finding that all imports outside the sample (both from co-operating and from not co-operating exporters) were “dumped”. Therefore, it is illogical and contradictory for India to claim that some of those imports should be considered as “non-dumped” for the purposes of the injury determination.

⁶⁷ Regulation 160/2002, recitals 22-24 and Regulation 696/2002, recitals 7-10 and 45-46

⁶⁸ Panel report, paras. 6.132-6-142.

⁶⁹ Ibid., para. 6.138

⁷⁰ In addition, the EC would like to point out that its interpretation is also warranted in view of the fact that a joint injury analysis is possible or even warranted when anti-dumping and anti-subsidy proceedings concerning the same country run in parallel. The salmon Panel has recognized that the injury analysis can be carried out jointly for both such proceedings (see paras 572 and 573 of the Panel Report on *United States - Imposition of Anti-Dumping Duties on Imports of Fresh Atlantic Salmon from Norway*, ADP/87, adopted on 27 April 1994). Indeed, since the starting point for such analysis is the volume and the prices of the imports concerned (and not the level of dumping or subsidization), it does not seem appropriate to distinguish at company level. If the EC’s interpretation were not accepted, two different injury examinations would have to be carried out if a company is found to be dumping but not to be subsidized or *vice versa*. This makes injury examinations often unworkable and that cannot have been the intention of the drafters of the *Anti-Dumping Agreement*.

(a) *Imports from cooperating exporters not included in the sample*

124. Article 6.10 of the *Anti-Dumping Agreement* states that

The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exporters which can reasonably be investigated.

125. Thus, Article 6.10 provides that, as a rule, the authorities must determine an individual dumping margin for each exporter. By way of exception, in the circumstances described in the second sentence of Article 6.10, the authorities may limit their examination to a sample of exporters and calculate individual dumping margins only for those exporters.⁷¹

126. It is implicit in Article 6.10 that, when the authorities limit their examination to a sample of exporters, they may calculate an “all-others” dumping margin for all the non-examined cooperating exporters on the basis of the margins determined for the companies included in the sample.

127. Indeed, as argued by India, the purpose of a sample is precisely “to provide an estimate relating to the whole”.⁷² However, India disregards that Article 6.10 allows the use of samples with the specific purpose of rendering practicable the determination of dumping margins for all the exporters under investigation, and not for the purpose of calculating the volume of dumped imports. Therefore, the data pertaining to a sample established in accordance with Article 6.10 must be used in order to calculate the dumping margin for “the whole”, and not in order to establish what proportion of “the whole” is dumped.

128. The *Anti-Dumping Agreement* does not prescribe any specific rules for calculating the “all-others” dumping margin.⁷³ Nevertheless, Article 9.4 of the *Anti-Dumping Agreement* places a maximum limit or ceiling on the level of the anti-dumping duty that may be applied to imports from non-examined exporters.⁷⁴

129. Specifically, Article 9.4 provides as follows:

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

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

⁷¹ Panel Report, *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS189/R, para.6.90

⁷² India’s First submission, para. 104.

⁷³ Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan (“US- Hot Rolled Steel”)*, WT/DS184/AB/R, para. 116.

⁷⁴ *Ibid.*

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

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

130. Article 9.4 contains no suggestion to the effect that the “all-others” duty may be applied only to a certain proportion of imports from the non-examined exporters. It contemplates that the “all-others” duty will be applied to “imports from exporters or producers not included in the examination”, without any restriction or qualification. The only exclusion from the “all-others” duty envisaged by Article 9.4 concerns the imports from non-examined exporters which have requested individual dumping margins in accordance with Article 6.10.2. *A contrario*, this confirms that all imports from the non-examined exporters may be subjected to the “all-others” duty.

131. The *Anti-Dumping Agreement* is premised on the basic notion that anti-dumping duties can be applied only to imports which are “dumped”. This is reflected in Article 9.3, which provides that

... the amount of the duty shall not exceed the margin of dumping as established under Article 2.

and in Article 11. 1, which stipulates that

an anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.

as well as in the system of refunds and reviews provided for in Articles 9.3.1 and 9.3.2 and in Articles 11.2 and 11.3, respectively.

132. Thus, if Article 9.4 allows the application of anti-dumping duties to all imports from all the exporters not included in the examination, it is because all such imports can be considered as “dumped”, including for the purposes of Articles 3.1 and 3.2.

133. India does not dispute the application of the “all-others” duty to all imports from co-operating exporters not included in the sample. Nor does India contest the underlying determination of dumping made by the EC authorities with respect to all such imports. Yet, India pretends that some of those imports should not be considered as dumped for the purposes of the injury analysis. India’s interpretation is contradictory and untenable. It implies that imports from the non-sampled exporters can be simultaneously “dumped” and “non-dumped” under the *Anti-Dumping Agreement*. That proposition is manifestly illogical. If imports from the non-sampled exporters are considered “dumped” for the purposes of applying anti-dumping duties, then it follows that they can be treated as such also for the purposes of the injury analysis.

134. India seeks to deny the relevance of Article 9.4 by arguing that Article 9 refers to the imposition and collection of anti-dumping duties, and “does not bear on the determination of injury – including the volume of dumped imports – under Article 3”.⁷⁵ Yet, the EC would recall that the

⁷⁵ India’s First Submission, para. 119.

original Panel held expressly that Article 9.2 was relevant context for the interpretation of the term “dumped imports” in Article 3.2.⁷⁶

135. In similar vein, India argues that “the rules in [Article 9.4], including the obligation to disregard, are restricted for the purposes of this paragraph”.⁷⁷ To begin with, however, the phrase “for the purposes of this paragraph” only applies with respect to the obligation to disregard certain margins, and not with respect to other “rules” provided for in Article 9.4. Moreover, that phrase serves simply to clarify that zero, *de minimis* and “best fact available” margins cannot be disregarded for the purposes of applying duties to the exporters in the sample for which those margins have been established.

136. The supposedly “absurd consequences” alleged by India do not result from the EC’s position that the term “dumped imports” must be interpreted consistently throughout the Agreement, but rather from the specific rules for the calculation of the “all-others” rate contained in Article 9.4, and more specifically from the requirement to disregard zero and *de minimis* margins. It is well known, however, that the exclusion of those margins is the *quid-pro-quo* for the exclusion of the “best-facts-available” margins. The finely balanced compromise embodied in Article 9.4 may yield less than perfect results in extreme cases, such as the one described in India’s example, but it has been accepted by all Members, including India.

137. Finally, the EC rejects India’s unsupported allegation that the EC authorities applied “different standards, as to what a sample is supposed to mean, on the export and domestic side of an investigation”.⁷⁸ The EC authorities used the dumping margins established for the companies in the sample in order to estimate the overall dumping margin for the companies outside the sample. The same kind of analysis was applied to the data pertaining to the sample of domestic producers. For example, the EC authorities used the profit data for the companies in the sample in order to estimate the level of profitability of the EC industry as a whole, rather than the proportion of sales of the EC industry that was made profitably, as would have been required by India’s interpretation.

(b) *Imports from non-co-operating exporters*

138. As explained above, the EC authorities calculated the dumping margin for the non-co-operating exporters by resorting to “facts available”. On that basis, the EC concluded that imports from non-co-operating exporters were dumped.

139. India has not challenged the dumping determination made by the EC authorities with respect to imports from non-co-operating exporters. In particular, India has not claimed that such determination is inconsistent with Article 6.8 and Annex II.

140. Since India does not contest the finding that imports from non-co-operating exporters were “dumped”, it cannot challenge the treatment of such imports as “dumped imports” for the purposes of the injury analysis.

⁷⁶ Panel report, para. 6.137.

⁷⁷ India’s First Submission, para. 119.

⁷⁸ *Ibid.*, paras. 126-127.

5. Claim 5: Articles 3.1 and 3.4

A. Claim

141. India claims that

The EC acted inconsistently with Articles 3.1 and 3.4 of the ADA by evaluating data without even collecting them, or even if the data were collected, a proper implementation of the Panel's findings required not only a mere recitation of injury factors but an overall reconsideration and analysis of the information in the light of the requirements of the Anti-Dumping Agreement.

B. Summary of relevant facts

142. It should be pointed out that the first limb of India's claim rests on the assumption that information relating to certain data was never collected. India tries to find support for its claim by relying on paragraph 6.167 of the original Panel report. This assumption is entirely incorrect.

143. First of all, India's statement that the Panel "factually established this absence of data collection as a substantive violation" of Article 3.4 is misleading.⁷⁹ In particular, the Panel merely found that in the absence of any indication on the face of the Provisional and Definitive Regulations, it could not simply assume that the data had been collected. Indeed, the Panel acknowledged that **"some of the data collected for other factors may have included data for the factors not mentioned"**.

144. Secondly, during the Panel proceeding, the EC consistently indicated that the data constituting the basis for the evaluation of all injury factors was collected during the investigation.⁸⁰

145. In its reply of 27 July 2001⁸¹ to Texprocil's comments on the disclosure document of 19 June 2001, the EC Commission further explained how such data had been collected at the time of the original investigation.

146. Since the information concerning the injury factors mentioned in Article 3.4 had therefore been collected, it could be and was properly evaluated in accordance with the requirements of that provision.

⁷⁹ India's First Submission, para 145.

Para 6.167 of the Panel Report provides:

"It appears from this listing that data was not even collected for all the factors listed in Article 3.4, let alone evaluated by the EC investigating authorities. Surely a factor cannot be evaluated without the collection of relevant data. While some of the data collected for the factors that are mentioned in the Provisional Regulation by the EC authorities may have included data for the factors not mentioned, we cannot be expected to assume that this was the case without some indication to that effect in the determination. Nor is the relevance or lack thereof, as assessed by the EC authorities, of the factors not mentioned under the heading "Situation of the Community industry" at all apparent from the determination." (emphasis added). Thus, the Panel merely concludes that there is no indication in the determination that the EC authorities evaluated (the relevance of) all of the factors listed in Article 3.4.

⁸⁰ See EC submission of 27 March 2000, point D: reply to India claim no. 11 point 1; in particular para 249 to 255

⁸¹ Exhibit India – RW –17.

C. Argument

147. India makes three arguments in support of its claim:

- (1) That data which has not been collected cannot be evaluated;
- (2) That if even data has been collected it has not been an adequate evaluation; and
- (3) That factual errors have invalidated the redetermination.

The EC will rebut each of these arguments in turn.

(a) *Data not collected cannot be evaluated*

148. As already explained, the EC authorities did in fact collect the data in respect of the injury factors mentioned in Article 3.4⁸² and was therefore able to evaluate that data in its redetermination. There are no ‘clear-cut findings’ of the original Panel to the contrary. Moreover, since the EC in its redetermination reassessed and evaluated this information it cannot be argued that the redetermination constitutes ‘a mere restatement of the notice.’⁸³

149. Neither did the Panel decide that the EC’s infringement of Article 3.4 could not possibly be remedied by way of a redetermination consistent with the requirements of the *Anti-Dumping Agreement*. At paragraph 6.259 of the Panel report it is found that

... Having found a violation of the substantive requirement to consider all the factors set forth in Article 3.4 in assessing the impact of imports, the question of whether the notice of either the preliminary or affirmative determination of injury is “sufficient” under Article 12.2 is immaterial. A notice may adequately explain the determination that was made, but if the determination was substantively inconsistent with the relevant legal obligations, the adequacy of the notice is meaningless. Further, in our view, it is meaningless to consider whether the notice of a decision that is substantive inconsistent with the requirements of the AD Agreement is, as a separate matter, insufficient under Article 12.2. A finding that the notice of an inconsistent action is adequate does not add anything to the finding of violation, the resolution of the dispute before us, or to the understanding of the obligations imposed by the AD Agreement. We therefore make no findings on claim 13.

150. The Panel merely found that it was unnecessary to make a finding regarding the procedural violation having already found that the substantive violation exists. Whilst the EC accepts that it is necessary to take account of the findings regarding the substantive violation, it rejects the suggestion that it was not possible to do so in this case. As stated above, India’s arguments in this respect are based on the misplaced notion that the EC had not collected certain data in the first place. The EC will now demonstrate how misplaced India’s allegations are with respect to the two examples they have given, namely inventories and capacity utilisation.⁸⁴

⁸² Ibid.

⁸³ India’s First Submission, para 131.

⁸⁴ India’s First Submission, para. 146.

(i) *Inventories*

151. India alleges that no data for inventories were obtained and that therefore no proper evaluation could be made. This is simply incorrect. The EC Commission's findings⁸⁵ on stocks were precisely made after examining the situation of stocks for the sampled Community producers. Even the Panel acknowledged that some of the data collected for other factors may have included data for the factors not mentioned⁸⁶, and this is exactly the case for data concerning stocks.

152. 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 collected⁸⁷, the EC authorities did have data on stocks, as was clearly confirmed to Texprocil in the EC Commission's letter of 27 July 2001.⁸⁸ This information was also obtained from the accounts and verified on spot for sampled producers. The EC will address the question of whether it properly evaluated the relevance of this factor at paragraph 192 below.

153. As regards India's argument that stock levels should have been taken into account when establishing consumption⁸⁹, the EC points out that complete industry data was not available from all the Community producers. This is often the case in anti-dumping investigations and consumption is analysed in such circumstances on the basis of apparent consumption, without taking account of stocks. Finally, during the original investigation neither India nor any other interested party questioned this calculation.

(ii) *Utilisation of capacity*

154. India alleges that the EC authorities did not collect and properly evaluate data concerning capacity utilisation. India tries to argue that the EC confuses 'production capacity' and 'utilisation of capacity'. In order to analyse utilisation of capacity, however, it is clearly necessary to consider the level of production capacity. Under the heading 'capacity', the EC therefore considered both production capacity and capacity utilisation. In evaluating this factor the EC took into account information which was submitted in the complaint questionnaire replies and subsequently verified on spot. The investigation confirmed that reliable statistics on production machinery for the product concerned are extremely difficult to establish because the machinery can be bought, sold or used for different products with relative ease. As the same machinery could yield different production capacity depending on the nature of the product mix, it is difficult to draw any meaningful data. It should be noted that the product concerned consists of a large number and variety of products which differ in size, colour, construction and quality. The original complaint mentioned that "statistics about production machines in bed linen making up do not exist, being by far too specific."⁹⁰ This was never disputed by India or any other interested party.

155. Whilst the EC was able to establish that a number of producers were contracting out surplus productions and may therefore have been able to maintain a high rate of capacity utilisation, this data was not available for all sampled producers or the Community industry for the reasons explained above. Thus, the EC considered that in the absence of meaningful data for all companies in the sample, this factor did not have a bearing on the situation of the industry within the meaning in Article 3.4.

⁸⁵ Regulation 1644/2001, recital 29.

⁸⁶ Panel report, para. 6.167. It is recalled that the Panel merely found that it could not "be expected to assume that [such data had been collected] without some indication to that effect in the determination."

⁸⁷ Regulation 1069/97, recitals 63, 81 and 82.

⁸⁸ Exhibit – India – RW – 17, page 4.

⁸⁹ India's First Submission, para. 147.

⁹⁰ See page 30 of the complaint (Exhibit-India-6).

156. The EC concludes that the two examples used by India to highlight the fact that no data was collected by the EC are totally unfounded.

(iii) *Assessment of relevance*

157. Finally, the EC submits that India's claims in relation to the assessment of relevance of the factors 'inventories' and 'capacity utilisation' are equally unfounded. India alleges that the EC just dismissed the factors concerning capacity and stocks as irrelevant and only then referred to the data collected. It argues that this amounts to a violation of Article 3.4 since facts pertaining to a certain factor must first be 'collected and brought on record' after which they can be evaluated. India seems to exclude the possibility that sometimes it may not be materially possible to bring on record data which simply does not exist or for which data only exists but not in any reliable or comparable form.

158. The EC would submit that in order to comply with Article 3.4 it is not necessary to adopt a checklist approach to the evaluation of (the relevance of) the factors cited therein. What is required is an evaluation of all the factors which may result in some of them not having a bearing on the situation of the domestic industry. Whether an administrative authority sets out the result before or after setting out the evaluation on which those results are based does not determine the adequacy of that evaluation. There was no '*a priori*' dismissal of the relevance of these factors. The key point is that each factor is considered and that the evaluation is objective. The EC submits that its evaluation of relevance met the required standards under Article 3.4.

(b) *Alleged inadequate evaluation*

(i) *Preliminary remark*

159. India argues that the EC failed to properly evaluate or offer any comment on a number of factors which it submits do not point towards injury. The EC will demonstrate that these submissions are incorrect and that its careful analysis of all the factors was consistent with the requirements of Article 3.4.

160. To dismiss out of hand, as India implies one should, any possibility of material injury being suffered simply because certain factors do not on the face of it show a clear negative development, would, on the contrary fall foul of Article 3.4 and the very obligation to examine objectively each factor mentioned in Article 3.4. In the context of Article 3.4, one Panel said:

An evaluation of a factor implies putting data in context and assessing such data both in their internal evolution and vis-à-vis other factors examined.⁹¹

161. In any event, as explained above, India completely misrepresents the degree of evaluation and analysis performed by the EC in reaching its conclusions on injury.

162. The EC recalls that according to Article 17.6 (i) of the *Anti-Dumping Agreement*

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

⁹¹ Panel Report, *United States – Hot Rolled Steel*, para 7.232.

163. It should be noted that India argues several times that the EC's evaluation of injury is somehow not objective simply because it is based on or includes analysis of data collected for the sample. Since India did not contest the representativity of the sample, however, the EC fails to understand what violation of Article 3.4 or 3.1 is supposed to have occurred.

164. India suggests that the references in Regulation 1644/2001 to the Provisional regulation indicate a failure to reconsider the information. This is a purely formalistic argument which must be rejected along with the assertion that the redetermination is only a 'restatement'. The fact that the EC may have confirmed certain of its original findings is of no relevance to the question of whether the findings are consistent with a proper evaluation.

(ii) Sales

165. At paragraph 166 of its First Written Submission, India suggests that as information on sales by sampled producers is available in addition to information on sales by the Community industry, the sampled data should be 'set aside'. The EC fails to understand India's complaint in this respect, since it actually evaluated sales at the level of the Community industry.⁹² India relies on the statement by the original Panel at paragraph 6.181 that

It is not possible to have an objective evaluation of the evidence if some of the evidence is required to be ignored, even though it relates precisely to the issues to be resolved.

166. This statement by the original Panel does not support India's contention that sampled data should be set aside. The Panel's statement must be read in context –it did not suggest that any information pertaining to the sample must be ignored. It should be noted that the original Panel pointed out that

In our view, it would be anomalous to conclude that because the EC chose to consider a sample of the domestic industry, it was required to close its eyes to and ignore other information available to it concerning the domestic industry it had defined.⁹³

167. Thus, the Panel simply found that it the EC did not act inconsistently with Article 3.4 by taking into account information relating to the Community industry as a whole, including information relating to companies that were not included in the sample. Since this is precisely what the EC did here, it fails to understand what violation of Article 3.4 it is supposed to have committed. In any event, an increase in sales is not inconsistent with a finding of injurious price suppression.

(iii) Market share

168. Contrary to what India claims, there is no difference in figures regarding the market share of the Community industry. It is correct that it increased its market share by volume from 18.12 per cent in 1992 to 19.67 per cent in the IP, whereas it increased its market share by value from 22.4 per cent to 25.1 per cent during that period.⁹⁴ As explained in Regulation 1644/2001, market share is considered to have increased due to the focus on higher value niche products.⁹⁵

⁹² Regulation 1644/2001, recital 35; Regulation 1069/97, recitals 82 and 83.

⁹³ Panel Report, *EC-Bed Linen*, para 6.181.

⁹⁴ Whilst India refers to these latter figures being set out in recital 85 of the Provisional Regulation, that provision describes market share by value, not market share by volume.

⁹⁵ Regulation 1644/2001, recital 35. See also Regulation 1069/97, recital 84.

(iv) *Prices*

169. It is not disputed that, at the level of the Community industry, the increase in sales in value terms is greater than the increase in volume terms, and that consequently, average prices increased by 3.2 per cent. However, this analysis does not take account of the change in product mix by the Community industry, including the sampled producers, over the period of analysis concerned. This is quite obvious when the data for average prices are compared with data for the defined reference products, which decreased over roughly the same period.

170. The EC authorities collected and verified data on prices at the level of the sample for a constant product mix. Whilst the average prices per kilogram of the sampled producers increased by 3.2 per cent, the development in average prices for the defined reference products fell in index terms from 100 in 1993 to 99.2 in the IP⁹⁶. Hence the EC examined both the overall increase in prices by both the Community industry and sampled producers and the decrease in average prices for the defined reference products sold by sampled producers and noted that the more positive overall development in prices compared to the defined reference products reflected the fact that the sampled producers had moved into niche markets and away from high volume mass markets.⁹⁷

171. India argues that the explanation relating to higher value niche products is inconsistent with its determination in recital 97 of the Provisional Regulation that the market for bed linen is characterised by product substitutability and transparency. However, the fact that the market for bed linen is characterised by product substitutability does not necessarily undermine the finding that there are some high quality niche products. Indeed, it is quite common that a product, which consists of several types or ranges the highest and lowest of which may not be directly substitutable with one another, will nevertheless be sufficiently substitutable to be considered a like product. Furthermore, the EC notes that India has not disputed that there are some high quality niche products.

172. India further submits⁹⁸ that the reference to higher value niche products is contrary to the Appellate Body's finding in *Bed Linen* regarding the existence of one like product. In the context of zeroing, the Appellate Body criticised the EC for its failure to calculate overall margins of dumping for the product under investigation:

Having defined the product as it did, the EC was bound to treat that *product* consistently thereafter in accordance with that definition. Thus it follows that, with respect to Article 2.4.2, the EC had to establish "the existence of margins of dumping" for the *product* –cotton-type bed linen –and not for various types of models of that product.⁹⁹

173. The same criticism cannot be made here: the EC has evaluated overall sales, prices and market share data for the Community industry. It has also done so at the level of the sample for a number of defined reference products. The fact that the increase in overall prices and in market share was found to be explained by the shift in the product mix does not alter the fact that the EC evaluated these indicators at the level of the like product.

(v) *Profits*

174. India alleges that in regard to profits (and certain other factors), the EC has attributed absolute amounts from the sample to the total pool. However, recital 36 of Regulation 1644/2001 must be read

⁹⁶ Regulation 1069/97, recital 86.

⁹⁷ Regulation 1069/97, recital 87.

⁹⁸ India's First Submission, paras 170-171.

⁹⁹ Appellate Body Report, *EC-Bed Linen*, para 53.

together with recital 19(ii) of that Regulation, which makes it perfectly clear that data for trends concerning profitability were analysed at the level of the sample. Since India does not challenge the representativity of the sample it cannot argue that the EC is obliged to collect, verify and evaluate company specific data for the entire Community industry; to do so would completely ignore the fundamental purpose of sampling.

175. India goes on to suggest that any analysis of profits which did not include an evaluation of profits for the entire Community industry and not just sampled Community producers, fails to meet the requirements of objectivity in Article 3.1. Such an interpretation completely ignores the purpose of sampling which enables the authorities to base their conclusions on the data collected and verified for the members of the sample in certain circumstances, for instance where the domestic industry is particularly fragmented. In such situations, certain macro-economic information may also be available to the investigating authority and could therefore be taken into account at the level of the domestic industry too. However, information regarding profits, and other company specific data related to profitability which must be properly verified, can normally only be obtained at the level of the sample.

176. India also relies on paragraph 206 of the Appellate Body Report in *US- Hot Rolled Steel*:

Accordingly, an examination of only certain parts of a domestic industry does not ensure a proper evaluation of the state of the domestic industry as a whole and does not therefore satisfy the requirements of “objectiv[ity]” in Article 3.1 of the Anti-Dumping Agreement.¹⁰⁰

177. The EC points out that the Appellate Body was considering in that context whether an examination of the merchant industry to the exclusion of the captive industry would have satisfied the requirements of objectivity in Article 3.1. This is not analogous with the selection of a sample, the representativity of which is not contested. In any event, since the EC did not exclude from its consideration of injury the other Community producers forming part of the Community industry its analysis was not automatically biased. The fact that the EC was only able to collect and verify data concerning profitability for a representative number of sampled producers within the definition of the Community industry does not disclose any bias either; this is normal in cases where it is justified to base findings on a representative sample of the domestic industry. In the light of the above, and since India states that it takes no issue with the sample representing the total Community industry, the EC fails to understand what violation of the *Anti-Dumping Agreement* is alleged.

178. As regards the factual errors alluded to, the EC admits that a minor clerical error occurred in the disclosure document dated 19 June 2001.¹⁰¹ Recital 83 of the Provisional Regulation provides

Sales by the Community industry rose by 4.2 per cent from ECU 428.6 million in 1992 to ECU 446.6 million in the investigation period. Sales by the sampled producers also rose, from 280.6 million in 1992 to ECU 285.3 million (a rise of 1.7 per cent).

These figures are correct.

179. In the disclosure of 19 June 2001, however, the turnover for sampled producers is shown as ECU 276.9 million in 1992 and ECU 281.2 million in the IP. This figure is incorrect as it does not take account of the turnover of a small producer included in the definition of the Community industry.

¹⁰⁰ Appellate Body Report, *United States – Hot Rolled Steel*, para 206.

¹⁰¹ Exhibit India – RW – 17.

180. It is not disputed that the profits of sampled producers decreased by over 50 per cent from 3.6 per cent to 1.6 per cent. India states that this factor is not adequately evaluated since the EC “did nothing more than allege that the profit is below the minimum level of 5 per cent” without providing any proof for such a level of profit. The EC does however provide evidence in support of this level of profitability, since it was actually achieved by the sampled companies in the past, in a year in which dumped imports were 30 per cent lower than in the IP.¹⁰² The fact that this level is derived from actual profit levels is important.

181. India seeks to rely on paragraph 6.100 of the Panel Report in *Bed Linen* to demonstrate that the fact that the profits of EC producers are lower in the IP than in an earlier year does not render those profit levels inadequate. If this analogy is at all applicable, however, it does not support India’s contention. The 5 per cent profit level cannot be said to be arbitrarily chosen or subjective since it represents an amount based on actual profit data.

182. In any event India has not suggested any alternative supposedly more objective level of profitability which could be expected in the absence of unfair competition from dumped imports. Moreover, the low level of profitability was also found by the EC to be below levels achieved by importers.

183. India goes on to argue that the profits for sampled producers would have exceeded 20 per cent if one takes into account the level of investments made.¹⁰³ This is grossly inaccurate and based on a lack of understanding of established international accounting practices. It has been made quite clear that the figures for investment do not represent yearly amounts but rather the accumulated amounts.¹⁰⁴ In other words India implies that a proper evaluation of profits consists in adding the amount of investments accumulated over many fiscal years to the profit realised one single year. Moreover, India fails to recognise that according to established international accounting practices investments are considered part of the assets of a company and cannot simply be added to profits.

(vi) *Output*

184. The Community industry was found to have increased production by 8.7 per cent from 39370 tonnes in 1992 to 42781 tonnes in the IP. India argues that since output increased, this does not point towards injury and the EC cannot rely on the reasoning in recital 81 of the Provisional Regulation that those companies were the ones which were strong enough to survive the competition from dumped imports and which to a certain extent had benefited from the demise of other producers which had not survived.

185. India submits that this reasoning runs counter to the Panels findings as it “refers” to producers outside the domestic industry. The Panel criticised the EC for basing some of its conclusions regarding injury on the negative developments for producers outside the definition of the domestic industry. It did not prohibit all references to facts which merely put in context the information relating to the domestic industry.

186. Whilst there was an increase in production by the Community industry, which consisted of some relatively strong companies which had managed to survive in circumstances where others had not, the Community industry only managed to increase production (and to increase its sales volume and market share) by concentrating on more sales of higher value niche products. It nevertheless suffered declining and inadequate profitability, due *inter alia* to price suppression caused by dumped imports.

¹⁰² Regulation 1069/97, recital 89.

¹⁰³ India’s First Submission, para. 178.

¹⁰⁴ See the table at page 8 of the fax from EC to Texprocil of 27 July 2002 (India Exhibit RW-17).

187. India seems to completely ignore other pertinent analysis relating to output. From 1994 to the IP the Community industry's output actually decreased by 1.6 per cent. Furthermore, it was noted that the increase in exports had also led to the overall increase in production.¹⁰⁵

(vii) *Productivity*

188. The EC found that productivity had improved as a result of the decline in employment. The investigation showed that the gain in productivity occurred mainly in the period from 1992 to 1994 when most of the jobs were lost.

(viii) *Return on investments*

189. First, it has already been pointed out that the figures for investments in the table attached to the disclosure document of 19 June 2001¹⁰⁶ represent accumulated and not yearly amounts.¹⁰⁷ Whilst the return on investments remained positive throughout the injury analysis period, it decreased by over 50 per cent.¹⁰⁸

(ix) *Factors affecting domestic prices*

190. India alleges that the contraction in demand and raw cotton prices have nothing to do with the imports from India. The EC found, however, that in fair market conditions, and in the absence of other factors preventing this, domestic producers should have been able to increase their prices and pass on to their customers the increase in the cost of the raw material.¹⁰⁹ Furthermore, despite the contraction in demand the Community industry should have been able to benefit from the gap left by factory closures; instead the growth of the Community industry was negative between 1994 and the IP.

(x) *Margin of dumping*

191. India alleges that the EC's evaluation in its redetermination was factually incorrect and inadequate. It bases its argument on the fact that two producers had zero dumping margins and one producer had a dumping margin of 3 per cent. Given that India has argued that the determination of injury should only be based on the effects of dumped imports by excluding Indian exports found not to have dumped, it seems somewhat surprising that India now contends that the zero margins of dumping should be taken into account. Based on the positive margins of dumping found, presumably India would not argue that these margins are not substantial or above *de minimis* levels. Even taking into account the margins of non-dumping producers, it can still be said that the margin of dumping is substantial and above *de minimis*.

(xi) *Cash flow*

192. 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 submits that the evaluation regarding cash flow is inadequate, this allegation is wholly unsupported.

¹⁰⁵ Regulation 1069/97, recital 81.

¹⁰⁶ Exhibit -India- RW -5.

¹⁰⁷ This is clearly indicated in the table in page 8 of the EC's fax to Texprocil of 27 July 2001 (India exhibit RW-17).

¹⁰⁸ Regulation 1644/2001, recital 39.

¹⁰⁹ Regulation 1644/2001, recital 45. See also Regulation 1069/97, recital 88.

(xii) *Inventories*

193. As has been demonstrated, data was obtained in relation to inventories from questionnaire replies and company accounts (see paras 150 - 151 above). At recital 29 of Regulation 1644/2001 it was explained in detail that production (e.g. of printed patterns) 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. While some increase in stocks was observed in some companies, there was no suggestion that this was evidence of injury. An increase in stocks or decrease in stocks in this sector can thus indicate actual or anticipated orders rather than unsold production.¹¹⁰ Consequently, the EC was entitled to conclude that stocks did not have a bearing on the state of the domestic industry.

(xiii) *Employment*

194. India claims that the decrease in employment¹¹¹ is more probably due to the increase in productivity from more efficient machines. However no evidence is provided in support of this claim: it is merely asserted that “the increased production from more efficient machines could have been the reason to the 300 lay-offs in the sector”.¹¹² In any event, there is not an increase but rather a decrease in production during the periods in which employment for the Community industry decreased. The same trend was found at the level of the sampled producers, as is evident from the table annexed to the disclosure document of 19 June 2001.¹¹³

(xiv) *Wages*

195. It is accepted that wages increased over the injury investigation period¹¹⁴, but this factor is not decisive as to the determination of injury and has to be viewed alongside all other factors.

(xv) *Growth*

196. The EC considered the growth of the domestic industry and evaluated this in context by comparison to the growth in dumped imports. Whether one compares the growth of the domestic industry to the growth of the low priced dumped imports from India alone or from dumped imports from all countries concerned, it is clear that growth on the part of the Community industry was far less significant in both absolute and relative terms.

197. The EC does not disregard the fact that sales volume overall has increased but it does note that growth was negative for a significant period of the injury analysis period, i.e. between 1994 and the IP and growth in market share was also very limited during that period. In analysing the trends over the whole of the injury investigation period an investigating authority cannot be expected to ignore clear negative trends during that period. In this context, the EC recalls the finding of the Appellate Body in Argentina – Footwear Safeguard

¹¹⁰ Regulation 1644/2001, recital 29.

¹¹¹ Recital 91 of Regulation 1069/97 provides that direct employment in the Community industry decreased from “around 7000 jobs to 6900”. The exact figures (7059 in 1992 to 6684 in the IP) correspond to the decrease of 5.3 per cent mentioned; see page 31 of provisional disclosure document of 2 June 1997 (Exhibit-India-23). The decrease in employment is mirrored at the level of the sample (a decrease of 5.9 per cent) as disclosed to Texprocil on 19 June 2001 (Exhibit-India –RW-5).

¹¹² India’s First Submission, para 202.

¹¹³ Exhibit –India –RW-5.

¹¹⁴ Regulation 1644/2001, recital 33.

... we do not dispute the view and ultimate conclusion that the competent authorities are required to consider the *trends* in imports over the period of investigation (rather than just comparing the end points) under Article 4.2 (a).¹¹⁵

198. Furthermore, whilst some factors may have showed a positive trend overall, this does not necessarily mean that there could have been no objective finding of injury. Indeed, in order to evaluate injury it is necessary to consider all the relevant economic indicators in context. Where there are both positive and negative trends, a balancing act must normally be performed, as one or several of these factors cannot necessarily give decisive guidance.

(xvi) Ability to raise capital

199. The EC evaluated the sampled producers' ability to raise capital and found that the level of credits increased by 3 per cent from 1992 to the IP. Whilst the level of credits raised decreased during the period considered and then increased during the IP, there was no indication that the Community industry had encountered difficulties raising capital. The fact that credits raised increased does not necessarily indicate that sampled producers were performing better. Indeed, whilst the level of credits remained fairly stable, the debt ratio was particularly high.

(c) Alleged factual errors

200. India alleges that there are a number of factual errors or factual misrepresentations in the EC's redetermination. By and large, these allegations have already been raised and dealt with under the second argument, so the EC shall limit its treatment of these claims and refer where appropriate to its earlier comments.

(i) Composition of the sample

201. India considers that the producer which was eliminated from the sample during the original investigation because it was found to have imported dumped imports from Pakistan should have been included in the sample in the redetermination since Pakistan was no longer found to be dumping. First, the EC submits that this amounts to a claim that the EC has violated Article 4.1(i), however since this claim was not stated in the Panel request it is outside the scope of the Panel's terms of reference.¹¹⁶ Second, the original Panel and Appellate Body findings do not give rise to any obligation to alter the composition of the sample. Finally, this can hardly be described as a deliberate decision to ignore positive evidence, as suggested by India. Nor can it seriously be contended that even if the EC committed an error in not including the data again for this one excluded producer – *quod non* – that this would have amounted to a manifest error such as to render the entire evaluation biased or otherwise not objective.

(ii) Sales values

202. Whilst it is admitted that there was a minor clerical error in the table annexed to the disclosure document of 19 June 2001 in respect of sales values for the sampled companies, the redetermination correctly confirms that profit on turnover decreased from 3.6 per cent in 1992 to 1.6 per cent in the IP.¹¹⁷

¹¹⁵ Appellate Body report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, (“*Argentina – Footwear Safeguard*”) para. 129

¹¹⁶ See paras 51-54 above.

¹¹⁷ See paras 177-178 above.

(iii) *Market share*

203. There is no change in figures for market share of the Community industry in the redetermination; India has itself confused the figures for market share by value and market share by volume, as explained at para 187 above.

(iv) *Attribution of sampled figures to Community industry*

204. The EC has already explained that it was made clear in recital 19 of Regulation 1644/2001 that certain information was collected only at the level of the sampled producers. The fact that India points this provision out itself demonstrates that it was not misled by any of these figures, rather, it understood perfectly well that they related to sampled producers.

(v) *Margin of dumping*

205. In the event that the alleged factual errors or misrepresentations regarding Regulation 696/2002 are considered to be within the jurisdiction of the Panel, the EC submits that the margin of dumping was objectively examined for the same reasons set out at para 211 above. Similarly, the statement in recital 19 of that Regulation regarding undercutting and the level of dumping is based on the established findings for normal value and for dumping during the investigation period

206. In the light of the above, the EC submits that it did not base itself on erroneous or misrepresented facts and did not act inconsistently with Article 3.1.

(d) *Conclusion on Article 3.1 and 3.4*

207. The EC submits that it did carry out an overall reconsideration an analysis of the economic indicators pertaining to injury. In doing so, it properly evaluated these factors in accordance with the requirements of Article 3.1 and 3.4. It concluded that whilst the Community industry managed to increase production and to slightly increase its sales volume and market share by concentrating on sales of higher value niche products, it nevertheless suffered declining and inadequate profitability, which was basically the result of price suppression. The injury indicators for cash flow, return on investments and employment also showed declining trends.

208. India fails to demonstrate that the EC did not have due regard to the relevant economic factors and concentrates in its criticism of the EC's analysis by referring to the fact that certain information was collected only at the level of the representative sample (a practice which is perfectly legitimate for the reasons given above), and it alleges a number of factual errors, which have been demonstrated to be either false or inconsequential.

6. Claim 6: Article 3.5

A. Claim

209. India alleges that "the EC acted inconsistent with Article 3.5 of the ADA, by incorrectly establishing a causal relationship between dumped imports and injury".¹¹⁸

¹¹⁸ Request for the Establishment of a Panel of 7 May 2002, WT/DS141/13/Rev.1.

B. Facts

210. India “briefly highlights” what it describes as “some perplexing factual determinations by the EC”.¹¹⁹ The precise relevance of those determinations to the arguments made subsequently by India is nowhere explained. In any event, as shown below, India’s criticisms are unjustified.

(a) *Regulation 1644/2001*

211. India suggests that in recital 50 of Regulation 1644/2001 the EC authorities would have acknowledged that the alleged injury was actually caused by other factors, namely the increase in the costs of raw cotton and in consumer prices.¹²⁰

212. As will be shown below, the passage quoted by India has been taken out of context. Recital 50 is not part of the causation analysis. It belongs to the analysis of the situation of the EC, the purpose of which is to establish whether the EC industry has suffered injury, regardless of the causes.

213. India complains that in recital 61 the EC includes “references to producers not forming part of the Community industry”.¹²¹ The EC believes that this criticism is based upon a misreading of the findings of the original report. The original panel found that

information concerning companies that are not within the domestic industry is irrelevant to the evaluation of the ‘relevant economic factors and indices having a bearing on the state of the industry’ required under Article 3.4.¹²²

214. Thus, the original panel did not say that information concerning companies that are not within the domestic industry can never be relevant, but rather that such information is irrelevant for the purpose of assessing the state of the domestic industry. Recital 61, however, is not concerned with the state of the domestic industry. The point made in recital 61 is that the impact of the decrease in consumption was felt notably by EC producers which were not part of the domestic industry, rather than by the domestic industry. The EC submits that such finding is perfectly relevant for the causation analysis.

215. India criticises that recital 54 considers as “dumped imports” the imports from Pakistan.¹²³ This issue has already been addressed in the EC’s reply to Claim 4.

216. India also criticises the price analysis made in recitals 55 and 57, and in particular that “an increase of sales prices with 3.1 per cent is ‘by and large stable’, while a decrease in profits with 2 per cent is ‘declining’”.¹²⁴

217. The evolution of the prices of the domestic industry has been discussed in detail in the EC’s response to Claim 5. At this point, the EC will limit itself to note that India’s comparison is misleading. Indeed, India compares an increase in percentage points (for profits) to an increase in percentage (for sales). In percentage terms, profits fell by 56 per cent. The EC considers that, in view of that, it is no exaggeration to say that profits were “declining”. Nor is it inaccurate to say that that, where prices vary by 3.1 per cent over five years, they are “by and large stable”.

¹¹⁹ India’s First Submission, para. 236.

¹²⁰ India’s First Submission, para. 237.

¹²¹ *Ibid.*, para. 237.

¹²² Panel report, para. 6.182.

¹²³ India’s First Submission, para. 239.

¹²⁴ *Ibid.*, paras. 240 and 242. [Footnotes omitted]

(b) *Regulation 696/2002*

218. India contests that the market share held by dumped Indian imports increased from 5.1 per cent to 8.5 per cent.¹²⁵ This issue has already been addressed at length in the EC's rebuttal to Claim 4.

219. India contends that, for the purposes assessing the effects of the imports from other countries, the EC should have disregarded imports from countries with a market share *de minimis*, which India defines as less than 1 per cent.¹²⁶

220. The EC is not aware of any provision in the *Anti-Dumping Agreement* that requires to disregard particular sources of imports on account of their volume for the purposes of Article 3.5. In particular, the EC considers that the rule on "negligible" imports contained in Article 5.8 does not apply in this context. In any event, even if it applied, imports from countries which individually accounted for less than 3 per cent of total imports accounted collectively for more than 7 per cent of total imports.

C. *Argument*

221. India puts forwards three different arguments in support of this claim¹²⁷:

- (1) that the EC "has not proven a causal link between the dumped imports and the alleged injury";
- (2) that the EC "has not examined all the factors which might have caused injury"; and
- (3) that the EC "has not separately distinguished the injury caused by other factors".

222. The EC will address and rebut in turn each of the above three arguments.

(a) *India's first argument*

223. India alleges two different grounds in support of its argument that the EC authorities have not proven the causal link between dumped imports and injury.

224. In the first place, India contends that the determination of causality is based on incorrect factual findings.¹²⁸ Specifically, India mentions the following findings:

- (i) the EC treated imports from Pakistan as dumped imports; and
- (ii) the EC overstated the amount of dumped imports from India.

225. The EC has already dealt with these two alleged errors in its rebuttal of Claims 2, 3 and 4.

226. Second, India argues, in no more words, that

... the EC has not adequately proven at all that the increase in market share of dumped imports from India with 1.9 per cent (over a five year period) – and which coincided with an increase in market share of the Community industry from 18.1 to

¹²⁵ Ibid., para. 244.

¹²⁶ Ibid., para. 245.

¹²⁷ Ibid., para. 258.

¹²⁸ Ibid., para. 247.

19.7 per cent (or from 22.4 to 25.1 per cent)- were *the cause* of the profit reduction of the Community industry from 3.6 to 1.6 per cent (over a period of five years and which was, in fact, the alleged injury).¹²⁹

227. As will be shown below, the above statement is, despite its brevity, replete with both legal and factual errors. In particular,

- ? Article 3.5 does not require that dumped imports be the sole cause of injury;
- ? injury can be found to exist even if dumped imports have not gained market share;
- ? the finding of injury reached by the EC authorities is not based upon the loss of market share by the domestic industry; and
- ? in any event, the increase in market share of the dumped imports was significant.

(i) *Dumped imports do not have to be the sole cause of injury*

228. The EC authorities were not required to prove that dumped imports were *the cause* of the injury suffered by the EC industry. The EC recalls that in *US – Wheat Gluten* the Appellate Body has clarified that

the language in the first sentence of Article 4.2 (b) [of the *Agreement on Safeguards*] does not suggest that increased imports be the sole cause of injury, or that “other factors” causing injury must be excluded from the determination of serious injury. To the contrary, the language of Article 4.2 (b), as a whole, suggests that “causal link” between increased imports and serious injury may exist, even though other factors are also contributing, “at the same time”, to the situation of the domestic industry.¹³⁰

229. In the same case, the Appellate Body emphasised that the non-attribution language in the second sentence of Article 4.2 (b) of the *Agreement on Safeguards* means that the effects of increased imports must be examined in order to determine whether the effects of those imports establish a “genuine and substantial relationship of cause and effect”¹³¹ between the increased imports and serious injury.

230. The wording of Article 3.5 of the *Anti-Dumping Agreement* is similar to that of Article 4.2 (b) of the *Agreement on Safeguards*. For that reason, as confirmed by the Appellate Body in *US - Hot Rolled Steel*, adopted panel and Appellate Body reports relating to the non-attribution language in the *Agreement on Safeguards* can provide guidance in interpreting the non-attribution language in Article 3.5 of the *Anti-Dumping Agreement*.¹³²

231. In view of the above, the EC submits that, contrary to India’s position, the relevant issue is not whether dumped imports were *the cause* of the injury suffered by the EC industry, but rather whether there was a “genuine and substantive relationship of cause and effect” between the two.

¹²⁹ India’s First Submission, para. 248.

¹³⁰ Appellate Body report, *United States – Definitive Safeguard Measure on Imports of Wheat Gluten from the European Communities* (“*US – Wheat Gluten*”), WT/DS166/AB/R, , para. 67. See also the Appellate Body report in *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen lamb meat from New Zealand and Australia* (“*US – Lamb*”), WT/DS177/AB/R, WT/DS178/AB/R, para. 166.

¹³¹ Appellate Body Report, *US – Wheat Gluten*, para. 69; Appellate Body report, *US – Lamb*, para. 168.

¹³² Report of the Appellate Body Report, *US – Hot Rolled Steel*, para. 230.

(ii) *Injury can be found to exist even where dumped imports have not increased*

232. India's argument suggests that if the increase in the market share held by the dumped imports is relatively small, those imports cannot be considered a cause of injury. That suggestion is incorrect.

233. Article 3.2 of the *Anti-Dumping Agreement* requires the investigating authorities to consider not only the volume of imports, but also the effect of the dumped imports on prices, including

whether the effect of such imports is otherwise to depress prices to a significant degree or prevent increases, which otherwise would have occurred, to a significant degree.

234. Clearly, if the *Anti-Dumping Agreement* directs the investigating authorities to consider the existence of price depression and price suppression, it is because those two situations are considered as a relevant form of injury. Yet, the existence of price depression or price suppression is perfectly consistent with the lack of increase, or even the decrease, in the market share held by dumped imports.

235. Further evidence that an increase in the market share of the dumped imports (and a correlative decrease in the market share of the domestic industry) is not necessary in order to establish the existence of injury is provided by Article 3.4. The first sentence of that Article lists the market share as one of the relevant factors having a bearing on the state of the domestic industry. Nevertheless, the second sentence of Article 3.4 provides that neither one nor several of those factors (including the market share) can "necessarily give decisive guidance". India's argument effectively renders the market share of the domestic industry a "decisive" factor.

(iii) *the injury finding was not based upon a decrease of the EC industry's market share*

236. The finding of injury reached by the EC authorities was not based upon the loss of market share by the domestic industry, but mainly upon its declining profitability, which was the result of price suppression and not of a decrease in sales.¹³³

237. Given the type of injury suffered by the EC industry, the contribution to that injury by the dumped imports cannot be measured by considering only the market share gained by those imports. Indeed, the prices of the dumped imports and their effects on the prices of the EC industry should also be considered. In any event, as explained below, dumped imports from India did increase significantly.

(iv) *the market share of dumped imports increased significantly*

238. The market share held by the dumped imports from India increased from 5.9 per cent to 9.9 per cent (5.1 per cent to 8.5 per cent, if imports from exporters found not to be dumping are excluded) between 1992 and the investigation period. As a result, dumped imports from India represented over 50 per cent of the EC industry's sales volume during the investigation period.¹³⁴

239. Imports from India increased more than imports from any other source¹³⁵ in both absolute and relative terms. For example, imports from Pakistan increased by 1.5 percentage points.¹³⁶

¹³³ Cf. Regulation 1644/2001, recitals 50 and 51.

¹³⁴ *Ibid.*, 17.

¹³⁵ *Ibid.*, recital 30.

240. Moreover, imports from India grew most in the period between 1994 and the investigation period (from 6.8 per cent to 9.9 per cent)¹³⁷, thus coinciding with the deterioration of the financial situation of the Community industry.¹³⁸

(b) *India's second argument*

241. India alleges that the EC authorities cited the increase in consumer prices as one of the causes of injury but then failed to examine it as an "other factor" under Article 3.5.¹³⁹

242. This argument misrepresents the findings made by the EC authorities. The EC authorities did indeed make the observation that the prices of the domestic industry did not keep pace with inflation in prices in consumer prices.¹⁴⁰ But they did not identify that fact as a cause of injury. The statement cited by India is not part of the causality analysis, but instead of the assessment of the state of the domestic industry. The fact that the domestic prices failed to keep pace with the inflation in prices for consumer goods was regarded as a further indication of price suppression and inadequate profitability. The causes of that price suppression and inadequate profitability were examined in a subsequent section of the determination (Section 5), where the EC authorities concluded that they were the consequence of the downward pressure on prices applied by dumped imports.¹⁴¹

(c) *India's third argument*

243. India states this argument as follows¹⁴²:

In India's view, the EC did not engage in such separation nor did it distinguish the injurious different effects. For example, as regards the increase in raw cotton prices, the EC merely confirmed the findings of the provisional Regulation. That provisional Regulation in recital (103) stated that "The Commission concluded that increases in raw materials had caused injury. Nowhere, in the provisional Regulation, nor elsewhere for that matter, are the injurious effects caused by this price increase separated and distinguished from the effects of the dumped imports.

244. The EC rejects India's broad and unsupported allegations to the effect that the EC authorities failed to separate and distinguish the effects of dumped imports from those of other, unspecified, causes of injury. The EC refers the Panel to the relevant sections of the Provisional Regulation and of Regulation 1644/2001 and, to the extent that it was considered a measure "taken to comply", of Regulation 696/2002, where the EC authorities set out in detail the results of its careful examination of all relevant "other factors".

245. Since India has presented arguments with respect to only one alleged "other factor" (the increase in the cost of raw cotton), the EC will limit itself to reply to those arguments.

246. Once again, India's arguments misrepresent the findings of the EC authorities through selective quotation. While the EC authorities stated that the increase in the cost of raw cotton "had

¹³⁶ Ibid.

¹³⁷ Ibid, recital 5.

¹³⁸ Ibid., recital 26.

¹³⁹ India's First Submission, para. 249.

¹⁴⁰ Regulation 1644/2001, recital 51. See also Provisional Regulation, recital 86.

¹⁴¹ Provisional Regulation, recitals 102 and 102, confirmed by Regulation 1644/2001, recital 60.

¹⁴² India's First Submission, para. 256.

caused injury”, the context makes it clear that the EC authorities did not consider that factor as a separate cause of injury.

247. The relevant findings are set out in recitals 102 and 103 of the Provisional Regulation, which state that

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

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

248. Also of relevance is recital 45 of Regulation 1644/2001:

The price of raw cotton, which can represent up to 15 per cent of the total cost of bed linen, increased significantly during the period considered. Normally, in fair market conditions, producers should have been able to pass on his cost increase to customers. The investigators has shown that the Community industry was not able to do so in this case.

249. The above passages evidence that the EC authorities considered that the increase in the cost of raw cotton “had caused injury” only because the EC industry was unable to reflect that increase in its prices. (In other words, because the Community industry had suffered “price suppression”, as described in Article 3.2). The EC authorities found that, 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 the injury were the dumped imports, and not the increase in the cost of raw cotton. 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.

7. Claim 7: Article 15

A. Claim

250. India alleges that “the EC acted inconsistent with Article 15 of the ADA by failing to explore constructive remedies”.¹⁴³

B. Summary of relevant facts

251. In order to implement the DSB’s rulings and recommendations, the EC authorities carried out a re-determination of the dumping findings made in Regulation 2398/97 with respect to imports of bed linen originating in India, as well as a re-determination of the injury findings reached in the same regulation. The results of those re-determinations are set out in Regulation 1644/2001.

¹⁴³ Request for the Establishment of a Panel of 7 May 2002, WT/DS141/13/Rev.1.

252. Although the EC authorities concluded in Regulation 1644/2001 that imports originating in India were dumped¹⁴⁴ and, together with the imports originating in Pakistan and Egypt, caused injury to the EC industry¹⁴⁵, they decided to “suspend the application” of anti-dumping duties on imports originating in India.¹⁴⁶

253. The suspension stipulated in Regulation 1644/2001 has been confirmed by Regulation 696/2002.¹⁴⁷ Thus, currently the EC is applying no anti-dumping duties on imports of bed linen originating in India.

254. Regulation 1644/2001 further provided that the anti-dumping duties on imports originating in India would expire six months after its entry into force unless a review was initiated before that date.¹⁴⁸ Further to duly substantiated application made by the EC industry, the EC authorities opened a review on 13 February 2002.¹⁴⁹ That review is still ongoing. The EC authorities will decide whether or not to levy anti-dumping duties, or to accept an undertaking, once that review is completed. In the meantime, the application of the duties imposed pursuant to the original investigation will remain suspended.¹⁵⁰

255. Contrary to what is suggested now by India¹⁵¹, the Indian exporters proposed no “constructive remedies” to the EC authorities. Instead, following the disclosure by the EC authorities of the findings which provided the basis for Regulation 1644/2001, the Indian exporters requested the following.¹⁵²

- the repeal of the anti-dumping measures with retroactive effect;
- the reimbursement of the duties paid;
- the reparation of the damages suffered; and
- a moratorium on the initiation of new investigations until 31 December 2004

256. The above actions would not have provided any relief to the domestic industry and, therefore, are not “constructive remedies” within the meaning of Article 15.

257. The EC also wishes to clarify that Regulation 1515/2001¹⁵³ is not, contrary to India’s allegations, “emergency legislation”.¹⁵⁴ The adoption of Regulation 1515/2001 was rendered necessary by the *Bed Linen* report, which was, and remains, the only adopted report concerning an anti-dumping or anti-subsidy measure of the EC. Nonetheless, Regulation 1515/2001 is a generally applicable regulation which was not “specifically tailored to address the results of the Bed Linen

¹⁴⁴ Regulation 1644/2001, recitals 8-14.

¹⁴⁵ Ibid., recitals 17-70.

¹⁴⁶ Ibid., Article 1.1

¹⁴⁷ Regulation 696/2002, Article 1.

¹⁴⁸ Regulation 1644/2001, Article 2.2.

¹⁴⁹ OJ C 39/17, 13.2.2002 (Exhibit India-RW-23).

¹⁵⁰ Regulation 1644/2001, Article 2.2.

¹⁵¹ India’s First Submission, para. 261.

¹⁵² Texprocil’s comments to the disclosure of 19 of June of 2001, pp. 17-18 (Exhibit IND – RW – 15).

¹⁵³ Council Regulation (EC) No 1515/2001, of 23 July 2001, on the measures that may be taken by the Community following a report adopted by the WTO Dispute Settlement Body concerning anti-dumping and anti-subsidy matters (OJ L 201/10, 26.7.2001) (“Regulation 1515/2001”) (Exhibit India – RW – 16).

¹⁵⁴ India’s First Submission, para. 261.

dispute”.¹⁵⁵ Furthermore, contrary to India’s assertions¹⁵⁶, Regulation 1515/2001 has no retroactive effect. Article 3 of Regulation 1515/2001 provides that

Any measures adopted pursuant to this Regulation shall take effect from the date of their entry into force and shall not serve as basis for the reimbursement of the duties collected prior to that date, unless otherwise provided for.

258. Regulation 1515/2001 would have been retroactive if, as requested by the Indian exporters, it had provided for the adoption of implementing measures with effects from the day of introduction of the disputed measure.

C. Argument

(a) Introduction

259. The obligation to explore constructive remedies 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 with the Indian exporters. In the meantime, India’s claim is premature and should be rejected by the Panel.

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

(b) The EC is not “applying” anti-dumping duties

261 The second sentence of Article 15 provides that

Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.

262. Thus, the obligation to explore constructive remedies must be fulfilled “before applying anti-dumping duties”.¹⁵⁷ It follows that, as long as a developed country Member is not “applying” any anti-dumping duties, it has still the possibility to explore constructive remedies and, therefore, cannot be found to be in violation of Article 15.

263. Currently the EC is not “applying” any anti-dumping duties on imports of bed linen originating in India. Although those imports were found to be dumped and to cause injury, the EC authorities decided to “suspend the application” of duties. Moreover, such suspension will remain in place for as long as the EC authorities do not decide expressly otherwise.

264. Should the EC authorities decide at a later stage to “apply” duties on imports of bed linen from India, they will still be able to comply with the obligation imposed by Article 15.

¹⁵⁵ Ibid., para. 261.

¹⁵⁶ Ibid.

¹⁵⁷ According to the original Panel, “the phrase ‘before applying anti-dumping duties’ in Article 15 means before the application of definitive measures” (para. 6.231).

265. More precisely, in the event that, as a result of the ongoing review, the EC authorities decided to “apply” duties on imports of bed linen from India, they would explore first the possibilities of constructive remedies, and in particular the possibilities of a price undertaking.

266. As long as no such decision to “apply” duties is taken by the EC authorities, India’s claim that the EC authorities have acted inconsistently with Article 15 is premature and unfounded and should be rejected by this Panel.

(c) *In the alternative, the suspension of the application of duties is a “constructive remedy”*

267. If, notwithstanding the decision of the EC authorities to “suspend the application” of anti-dumping duties on imports of bed linen originating in India, the Panel were to conclude that the EC is “applying” those duties within the meaning of Article 15, the EC submits in the alternative that such suspension would have to be considered as a “constructive remedy” for the purposes of Article 15.

268. The EC recalls that the original Panel held that a price undertaking is a “constructive remedy”.¹⁵⁸ In essence, a price undertaking amounts to the suspension of the application of duties subject to the condition that the exporters respect certain price conditions. The suspension decided by the EC in the case at hand is more advantageous for the exporters than a price undertaking, because it is unconditional. It is, therefore, “constructive” *a fortiori*.

269. India argues that the suspension decided by the EC authorities is not “a remedy of any type” and, therefore, cannot be a “constructive remedy”.¹⁵⁹ This argument begs the question: if the suspension of duties is not a “remedy of any type” for the EC industry, why does India consider it necessary to complain against that measure?

270. In fact, this argument undermines India’s own position. If the suspension is “no remedy of any type”, it follows that, as argued by the EC in the first place, the EC authorities are under no obligation to explore “constructive remedies”, because such obligation only arises before, and as an alternative to, applying the basic “remedy” envisaged by the *Anti-Dumping Agreement*: definitive duties. Put another way, if a Member decides to “apply” no “remedy” at all, what could be the point of requiring that Member to explore possibilities of applying “constructive remedies”?

271. India further argues that the suspension is “a pretext to continue the proceeding and circumvent the Panel’s finding with respect to Article 15”.¹⁶⁰ This allegation is unfounded, and indeed illogical.

272. In the first place, the EC authorities need no “pretext to continue the proceeding”. They have established that imports of bed linen from India are dumped and cause injury to the EC industry. Therefore, they would be entitled to apply anti-dumping duties on such imports.

273. Second, as recalled by the original Panel, Article 15 imposes “no obligation to actually provide or accept any constructive remedy that may be identified and/or offered”.¹⁶¹

274. Third, the suspension of duties decided by the EC authorities is far more favourable to the exporters than a price undertaking, the “constructive remedy” which India appears to have in mind.¹⁶²

¹⁵⁸ Panel report, para. 6.229.

¹⁵⁹ Request for the Establishment of a Panel, claim (h), WT/DS141/13/Rev.1, 8 May 2002. See also paras. 272-273 of India’s First Submission.

¹⁶⁰ *Ibid.*

¹⁶¹ Panel report, para. 6.233.

It is absurd to pretend that, in order to avoid “exploring the possibilities” of a price undertaking, which, as explained above amounts to a conditional suspension of the application of duties, the EC authorities would have decided to suspend it unconditionally.

275. Finally, as explained repeatedly, should the EC authorities decide to apply duties as a result of the pending review, they will explore first with the Indian exporters the possibilities of constructive remedies.

B. CLAIMS UNDER THE DSU

1. Claim 8: Article 21.2

A. Claim

276. India alleges that the EC has “failed to respect the stipulations of Article 21.2 of the DSU”.¹⁶³

B. Summary of relevant facts

277. The relevant facts for the examination of this claim have been summarised above in section II.7.B.

C. Argument

278. Article 21.2 provides that

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

279. As explained below, Article 21.2 of the *DSU* is a non-mandatory provision, which therefore imposes no binding obligations upon developed country Members, such as the EC. In any event, the EC authorities did pay “particular attention” to the interests of India.

(a) Article 21.2 is not a mandatory provision

280. Article 21.2 is worded in hortatory terms: it uses the word “should”, rather than “shall”. India has not identified any relevant contextual element which would suggest that “should” is used in Article 21.2 with the meaning of “shall”, unlike in the case of the provision examined by the Appellate Body in *Canada – Aircraft*.¹⁶⁴

281. Moreover, Article 21.2 is cast in exceedingly broad and vague terms. It fails to specify with a minimum degree of precision what action, if any, is expected from developed country Members. As noted by a recent panel report in connection with a similarly worded provision contained in the first sentence of Article 15 of the *Anti-Dumping Agreement*¹⁶⁵, “Members cannot be expected to comply with an obligation whose parameters are entirely undefined”.¹⁶⁶

¹⁶² India’s First Submission, para. 274.

¹⁶³ Request for the Establishment of a Panel of 7 May 2002, WT/DS141/13/Rev.1.

¹⁶⁴ Appellate Body Report, *Canada – Measures affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, para. 187.

¹⁶⁵ The first sentence of Article 15 of the *Anti-Dumping Agreement* provides that

282. The EC recalls that the *Decision on Implementation- Related Issues and Concerns* adopted at the Ministerial Conference of Doha instructed the Committee on Trade and Development

to identify those special and differential treatment provisions that are already mandatory in nature and those that are non-binding in character, to consider the legal and practical implications for developed and developing Members of converting special and differential treatment measures into mandatory provisions, to identify those that Members consider should be made mandatory, and to report to the General Council with clear recommendations for a decision by July 2002.¹⁶⁷

283. By issuing that instruction, the Ministerial Conference recognised that some of the special and differential treatment provisions included in the *WTO Agreements* are non-mandatory. The EC submits that Article 21.2 of the *DSU* is one of such non-mandatory provisions.¹⁶⁸

284. India itself has acknowledged as much in the proposal which it has submitted to the Committee on Trade and Development, where it has suggested that in Article 21.2 “the word ‘should’ be replaced by ‘shall’, so as to make this provision mandatory”.¹⁶⁹

285. The EC supports India’s proposal. But, as the law stands now, Article 21.2 of the *DSU* imposes no obligation upon developed country Members which can be enforced by resorting to dispute settlement.

(b) *Article 21.2 does not restrict the discretion of Members to select the implementing measures*

286. Assuming *arguendo* that Article 21.2 imposed a binding obligation upon developed country Members, 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 any implementing measures adopted by those Members.

287. In other words, a developed country Member could not be found to violate Article 21.2 simply because it has chosen to take an implementing measure which, while being fully consistent with its substantive obligations under the *WTO Agreement*, is less favourable to the “interests” of a developing country Member than another measure suggested by that Member.

288. India has agreed with the above proposition outside the context of this proceeding. Thus, in the proposals which it has submitted to the Trade and Development Committee it has suggested that the phrase “matters affecting the interests of developing countries” should be clarified by providing that, where the dispute is brought by a developing country Member against a developed country Member,

It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement.

¹⁶⁶ Panel Report, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India*, WT/DS206/R, para. 7.110.

¹⁶⁷ WT/MIN (01)/17, at para. 12.1.

¹⁶⁸ The Notes by the Secretariat of 4 February 2002 on *Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions – Mandatory and Non-Mandatory Special and Differential Treatment Provisions* (WT/COMTD/W/77 Rev. 1/Add.1/Corr.1) and on *Non Mandatory Special and Differential treatment Provisions in WTO Agreements and Decisions* (WT/COMTD/W/77/Rev. 1/Add. 3) categorise Article 21.2 of the *DSU* as a non-mandatory provision.

¹⁶⁹ TN/CTD/W/6 of 17 June 2002.

The defending developed country Member should be given no more than 15 months of RPT in any circumstance; existing 90 days time limit for 21.5 procedures should be observed strictly. In case of delay, it should entail an obligation to compensate for continuing trade losses to the developing country complainants.

289 The above suggests that India considers that any obligations imposed by Article 21.2 are procedural, rather than substantive.

(c) *The EC authorities did pay particular attention to the interests of India*

290. If, despite the above, the Panel were to conclude that Article 21.2 is a mandatory provision, the EC submits that, in any event, the facts of this case evidence that it did pay “particular attention” to the interests of India.

291. 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, i.e. considerably less than the 15 months period, which India’s proposal to the Trade and Development Committee considers sufficient to satisfy the obligation imposed by Article 21.2.¹⁷⁰

292. 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, even though, in accordance with Article 6.1 of the *DSU*¹⁷¹ and well established practice, it could have delayed the establishment of the panel until the following DSB meeting.

293. 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 submits 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.

IV. CONCLUSION

294. In light of the foregoing, the EC respectfully requests the Panel:

- (1) to make the other preliminary rulings specified under Section II;
- (2) to all the claims submitted by India for the reasons stated in Section III; and
- (3) should the Panel conclude that the EC has violated Article 2.2.2 (ii) of the *Anti-Dumping Agreement*, to find that such violation has not nullified or impaired the benefits accrued to India under that provision

¹⁷⁰ Cf. Agreement between the EC and India under Article 21.3 (b) of the DSU, of 26 April 2001, WT/DS141/10 (Exhibit India-RW-2).

¹⁷¹ Article 6.1 of the *DSU* provides as follows:

If the complaining party so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB’s agenda, unless at that meeting the DSB decides by consensus not to establish a panel [footnotes omitted]