

ANNEX C

Second Submission by the Parties

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ANNEX C-1

SECOND WRITTEN SUBMISSION OF INDIA

(12 August 2002)

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I. INTRODUCTION

1. India respectfully submits to the Panel its second written submission in rebuttal to the first written submission of the EC.

2. The EC requests four preliminary rulings. India will therefore commence this second written submission in Section II below by responding to the EC's requests for preliminary rulings. India will respectfully request the Panel to dismiss the four requests as unfounded. India will also point out that the third request contradicts the EC's own rebuttal arguments and expressly confirms India's Article 3.4 claim.

3. Another feature of the EC's first written submission is that it contains errors of fact as well as misleading arguments. Once revealed these errors well illustrate the unfoundedness of certain of the EC's defences. India will comment on these errors in Section III below in order to clarify these issues for the Panel.

4. The legal arguments of the EC, including those statements that misrepresent certain of India's arguments, are rebutted in Section IV below. India will discuss the legal issues in the following order:

- ? The relative size of companies with domestic sales (claim 1);
- ? The unwarranted cumulation and *ex-post* reparations (claims 2 and 3);
- ? The significant overstatement of dumped imports from India (claim 4);
- ? The absence of a re-evaluation of data that were not even collected (claim 5);
- ? The improper causal link and the absence of non-attribution (claim 6); and
- ? The EC's disregard for India's status as a developing country (claims 7 and 8).

5. Finally, India will summarize its conclusions (Section V).

II. THE EC'S REQUESTS FOR PRELIMINARY RULINGS

A. THE EC'S FIRST REQUEST

6. The EC argues that since "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"¹, "Regulations 160/2002 and 696/2002 are not measures "taken to comply" with DSB's recommendations and rulings in *Bed Linen*"² and, therefore, "any claims involving the findings made by the EC authorities in those two regulations are beyond this Panel's jurisdiction."³

7. Such reasoning represents a misunderstanding of the terms of reference of a 21.5 panel. Although as a matter of principle it is true that the Appellate Body stated in *Canada – Civilian*

¹ EC First Written Submission (FWS), paragraph 13.

² EC FWS, paragraph 27.

³ *Ibid.*

Aircraft 21.5 AB that "Article 21.5 proceedings are limited to those measures *taken to comply* with the recommendations and rulings"⁴, (emphasis in original) a clear limitation on the procedure to determine what constitutes a "measure taken to comply" is contained not in this report, but in the following statement made by the Panel in *Australia–Salmon 21.5*:

"We note that an Article 21.5 panel cannot leave it to the full discretion of the implementing Member to decide whether or not a measure is one "taken to comply". If one were to allow that, an implementing Member could simply avoid any scrutiny of certain measures by a compliance panel, even where such measures would be so clearly connected to the panel and Appellate Body reports concerned, both in time and in respect of the subject-matter, that any impartial observer would consider them to be measures "taken to comply"."⁵

8. It is obvious that the EC reasoning in its request for a preliminary ruling goes in a direction opposite to this finding in spite of the fact that Regulations 1644/2001, 160/2002 and 696/2002 are closely connected to the panel and Appellate Body reports concerned. To accept the request of the EC at this stage, before the Panel has undertaken any substantive consideration of the issue would amount to leaving it to the full discretion of the implementing Member to decide whether or not a measure is one "taken to comply".

9. India also recalls that in *Australia–Leather 21.5* the Panel rejected Australia's argument that the measure mentioned in the request for the establishment of a panel was not within the terms of reference of a panel since it was not part of the implementation of the DSB's ruling and recommendation:

"For us to rule, as suggested by Australia, that we are precluded from considering the 1999 loan, would allow Australia to establish the scope of our terms of reference by choosing what measure or measures it will notify, or not notify, to the DSB in connection with its implementation of the DSB's ruling."⁶

10. For these reasons India submits that the Panel should dismiss the EC's first request for a preliminary ruling.

B. THE EC'S SECOND REQUEST

11. The EC argues that "the relevant date for assessing the consistency of the measures "taken to comply" is the date of establishment of the Panel. Therefore, it argues, India's claims that Regulation 1644/2001 could not be "cured" through subsequent regulations 160/2002 and 696/2002 should be dismissed."⁷

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

⁴ *Canada – Civilian Aircraft 21.5 AB*, paragraph 36. Full references of frequently quoted reports are attached in table to this submission.

⁵ *Australia – Salmon 21.5*, paragraph 7.10, subparagraph 22

⁶ *Australia – Leather 21.5*, paragraph 6.4.

⁷ EC FWS, paragraphs 28 ff.

13. The EC's argument once again reveals misunderstanding of terms of reference of a 21.5 panel as well as misinterprets provisions of Article 21 of the DSU.

14. As stated by the Panel in *Australia – Salmon 21.5* the terms of reference of a 21.5 panel are of 'dual nature':

"Two benchmarks apply when defining our terms of reference. First, Article 21.5 of the DSU pursuant to which this Panel was established. Second, our specific terms of reference set out in document WT/DS18/15, a document that refers, in turn, to the matter and relevant provisions of the covered agreements referred to by Canada in its request for this Panel (document WT/DS18/14)."⁸

15. Respectively a 21.5 panel is entitled to examine the consistency of "measures taken to comply" not only from the point of view of their consistency with the DSB's rulings and recommendations, but also from the point of view of their overall consistency with covered agreements. The Appellate Body has addressed this 'dual consistency' issue in the following terms:

"Accordingly, 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. Although these may have some relevance in proceedings under Article 21.5 of the DSU, Article 21.5 proceedings involve, in principle, not the original measure, but rather a new and different measure which was not before the original panel. ... "⁹

16. Besides that, the 'dual compliance' should also be examined in light of timing. Logically, the first step that a 21.5 panel should make is to examine whether a Member has complied with an adverse recommendation of the DSB *within* the reasonable period of time. The fact that there is an obligation to comply within the "reasonable period of time" is not questioned by the EC.¹⁰ However, contrary to its statement, this obligation does not flow from Article 21.3 of the DSU, but from the Article 21.1 of the DSU:

"It is useful to recall the essential principle and rule that WTO Members are committed to "prompt compliance" with DSB recommendations and rulings¹¹ and that "prompt compliance" translates into "immediate" compliance.¹² When, however, such "immediate" compliance is "*impracticable*," then the Member bound to comply becomes entitled to "a reasonable period of time" within which to comply."¹³
(Footnotes in original, emphasis in original)

17. The role of Article 21.3 is to substantiate this obligation of "prompt compliance" by determining a formal deadline to comply. Failure of a complying Member to respect this deadline gives right to initiate proceedings under Article 21.5. Otherwise such 21.5 proceeding would not even be initiated. If the deadline of 21.3 is meaningless, as the EC seems to suggest, *then when* can an applicant initiate action under Article 21.5? Could India as a matter of legal right request an establishment of panel before the expiration of a reasonable period of time?

⁸ *Australia – Salmon 21.5*, paragraph 7.10.

⁹ *Canada – Aircraft 21.5 AB*, paragraphs 40–41.

¹⁰ EC FWS, paragraph 36.

¹¹ Article 21.1 of the DSU.

¹² Article 21.3 of the DSU.

¹³ *US – Hot Rolled Steel 21.3*, paragraph 25.

18. India also submits that this obligation under Article 21.1 is further served by the obligation contained in Article 21.2:

"... where the DSU, immediately after stressing that "prompt compliance" with the recommendations and rulings of the DSB is essential for the WTO dispute settlement system, provides that: "Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement".¹⁴

19. It is obvious that the "particular attention" to "the interests of developing country Members" as for the "prompt compliance" with the DSB's recommendations in its favour is best served by a strict interpretation of the binding nature of the obligation to comply.

20. Once the Panel has finished its analysis as to whether measures taken to comply *within* the reasonable period of time are consistent with covered agreements, it can also examine due to its 'dual' mandate the subsequent measures taken to comply which were taken, however, *outside* of the reasonable period of time:

"The Panel takes the view 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."¹⁵ (Footnotes omitted)

21. Thus, the 'dual' terms of reference of a 21.5 panel allow for a finding by a 21.5 panel in a preliminary way of (in)consistency of measures taken to comply that were taken *within* the reasonable period of time and, at a later stage, for a final finding of whether the preliminary finding should be corrected due to subsequent developments. It may be the case that these two findings are identical or divergent. Naturally, in the latter case the decisive finding for the purpose of drafting recommendations to the DSB will be the one that takes into account the subsequent developments up to the date of the request for the establishment of the panel. Respectively, the finding of non-consistency of measures taken to comply *within* the reasonable period of time will be "necessarily declaratory" that, however, does not whatsoever diminish its value from the point of view of nullification and impairment.

22. As a side comment, India notes that the obligation of "prompt compliance" under Article 21.1 does nothing else, but to substantiate in terms of timing the general obligation contained in the DSU to comply with rulings and recommendation of the DSB. Therefore, the inconsistency of a measure with the covered agreements under Article 21.5 proceedings automatically results into a violation of Article 21.1. This makes it unnecessary for a complaining Member to raise violation of Article 21.1 as an independent claim.

23. For these reasons India respectfully submits that the Panel should dismiss as unfounded the EC's second request for preliminary ruling stating that subsequent Regulations 160/2002 and 696/2002 could cure inconsistencies contained in the measure "taken to comply" *within* the reasonable

¹⁴ *Chile – Alcoholic Beverages* 21.3, paragraph 44.

¹⁵ *US – Shrimp 21.5*, paragraph 5.13.

period of time, which is the Regulation 1644/2001. This is without prejudice to the right of the Panel to assess the overall consistency of the measures "taken to comply" up to the date of, and specified in, the request for the establishment of the Panel.¹⁶

C. THE EC'S THIRD REQUEST

24. The EC argues in its third request for a preliminary ruling that India's claims under Articles 3.5 and 3.4 could have been raised during the original proceeding but were not.¹⁷

25. First of all, as regards Article 3.5 and the non-attribution language, the assertions of the EC are not correct. India *had* originally made a claim regarding the EC's violations of the non-attribution language under Article 3.5 but the Panel determined that India had in that instance not met its burden of presenting a *prima facie* case (Panel report paragraph 6.144).¹⁸ For that reason alone the EC's assertion is without basis since the claim was made.

26. India also recalls that the fact that the claim was dismissed in the original proceedings does not preclude a 21.5 panel from its examination within the Article 21.5 proceedings. In *US – Shrimp 21.5* the Appellate Body found that the measure which had been found WTO consistent in the original proceeding and remained therefore unchanged was not immune from scrutiny by a 21.5 panel.¹⁹

27. As regards Article 3.4 India first wishes to highlight some startling statements before addressing that request for a ruling. First, the EC expressly states that:

" ... India claims that the evaluation of factors such as sales, market share, price development, production, profitability or employment is inadequate, even though Regulation 1644/2001 limits itself to confirm the findings with respect to those factors made in Regulation 1069/1997."²⁰ (Footnotes omitted, underlining added)

28. This latter statement is not even incidental but repeated in the next paragraph where the EC immediately even draws the logical conclusion itself:

"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*." (Underlining added)²¹

29. India agrees and said as much in paragraph 157 of its first written submission where it stated that:

¹⁶ E.g. *US – Shrimp 21.5*, paragraph 5.13. See *supra* at paras. 0-0.

¹⁷ EC FWS, paragraph 40, last sentence, and EC FWS, paragraph 41.

¹⁸ Original Panel Report at paragraph 6.144:

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

¹⁹ *US – Shrimp 21.5 AB*, paragraph 91.

²⁰ EC FWS, paragraph 41.

²¹ EC FWS, paragraph 42.

"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. ..."

30. The statements by EC are further proof that India's second argument under its claim 5 was correct:²² the EC did simply not engage in an overall reconsideration and analysis even though the findings of the Panel and the Appellate Body warranted exactly that. The Panel will recall that the "EC-type" of "re-determination" can *indeed not* be considered as a measure "taken to comply" in light of the case law pronounced in *Mexico–HFCS 21.5* (Panel, confirmed by Appellate Body):²³

" ... 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." (Emphasis added)

31. In the admitted absence of this overall reconsideration and analysis, the Panel is entitled to find that India's claim 5, argument 2, was correct and that, accordingly the EC did not comply with the findings of the original Panel and the relevant case law on such matter.

32. To the extent that the EC later in its first written submission argues, in response to India's second argument of claim 5, that it had engaged in a "careful analysis"²⁴, this contradicts the statement in paragraph 42 that the EC did "nothing but confirm" the original findings. Accordingly, the EC's third request for a preliminary ruling should be dismissed outright as a mere "litigation technique" for which the EC has appropriately quoted the Appellate Body in *US – FSC*. As the EC quoted the Appellate Body:

" ... The procedural rules of WTO dispute settlement are designed to promote, not development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes."²⁵

33. The fact that the EC merely engages in "litigation techniques" becomes even clearer when the relevant case law is reviewed in more detail. In *Canada–Aircraft 21.5* the Appellate Body overruled the Panel's refusal to examine new arguments put forth by the complainant because that argument did not form part of the reasoning of the original panel:

" ... 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."²⁶

34. "Rather", the Appellate Body stated, "the Article 21.5 Panel was obliged to examine the revised TPC programme."²⁷ Otherwise, "the utility of the review envisaged under Article 21.5 of the DSU would be seriously undermined."²⁸

²² India's FWS, paragraphs 157 ff.

²³ *Mexico–HFCS* Panel, at paragraph 6.37. In the present *Bed Linen* case the EC itself takes away any doubt by stating that it merely confirmed its original findings.

²⁴ EC FWS, paragraph 158.

²⁵ EC FWS paragraph 46, last sentence.

²⁶ *Canada – Aircraft AB 21.5* paragraph 41.

²⁷ *Canada – Aircraft AB 21.5* paragraph 42.

²⁸ *Canada – Aircraft AB 21.5* paragraph 41.

35. In *US – Shrimps 21.5*, where the scope of panel review under Article 21.5 was again an issue, the Appellate Body reiterated its above-cited ruling from *Canada–Aircraft 21.5*. The Appellate Body quoted with approval the Panel's observation that a 21.5 Panel:

"is fully entitled to address all the claims ... whether or not these claims, arguments and the facts supporting them were made before the Original Panel and in the Appellate Body proceedings ... ".²⁹

36. The Appellate Body also approved the Panel's examination of whether the (US) compliance measure would amount to a 'disguised restriction on international trade' under GATT Article XX, *chapeau*, an issue which was not examined by the original Panel/Appellate Body.

37. In the context of the EC's third request one may therefore say that the only limitation on a 21.5 Panel is that it cannot go beyond the claims raised by the complainant in its request for establishment of 21.5 Panel.³⁰

38. In light of the above, India respectfully submits that the EC's third request for a preliminary ruling should be dismissed as unfounded. To the extent that the EC is admitting the correctness of India's second argument of its fifth claim (no overall reconsideration and analysis) India trusts that the Panel takes note of the EC's express admission of its violation of Article 3.4.

39. As regards the EC's point raising of claims in a timely manner,³¹ India fails to see the problem of the EC. The claims and the measure were duly identified before the Panel. Claims and measures together form the matter, which forms the basis for the terms of reference for a Panel.³²

D. THE EC'S FOURTH REQUEST

40. The EC claims that India is raising claims outside the terms of reference.

41. This is an attempt of the EC to deliberately misrepresent the nature of India's claims and arguments.

²⁹ *US – Shrimp AB 21.5* footnote 46. See also paragraphs 101 and 102 of that same report.

³⁰ *Ibid.* paragraphs 87 and 88.

³¹ EC FWS paragraph 47.

³² Cf. *Guatemala–Cement AB*, paragraph 72:

" ... Article 7 of the DSU itself does not shed any further light on the meaning of the term "matter". However, when that provision is read together with Article 6.2 of the DSU, the precise meaning of the term "matter" becomes clear. Article 6.2 specifies the requirements under which a complaining Member may refer a "matter" to the DSB: in order to establish a panel to hear its complaint, a Member must make, in writing, a "request for the establishment of a panel" (a "panel request"). In addition to being the document which enables the DSB to establish a panel, the panel request is also usually identified in the panel's terms of reference as the document setting out "the matter referred to the DSB". Thus, "the matter referred to the DSB" for the purposes of Article 7 of the DSU and Article 17.4 of the Anti-Dumping Agreement must be the "matter" identified in the request for the establishment of a panel under Article 6.2 of the DSU. That provision requires the complaining Member, in a panel request, to "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." (Emphasis added) The "matter referred to the DSB", therefore, consists of two elements: the specific measures at issue and the legal basis of the complaint (or the claims)." (Emphasis added by Appellate Body)

42. As regards the first Article referred to by the EC, Article 4(1)(i), it is clear that India has nowhere made a claim under that provision. India trusts that it is clear to the Panel that it is not making such a separate *claim*.

43. While even the EC cannot create claims that are not there, it still tries to create one. The EC states that Article 3.1 "involves necessarily a claim based on Article 4(1)(i)".³³

44. This statement from the EC is a less than candid characterization of India's claim 5 with respect to Articles 3.1 and 3.4. India had explained, as an *argument* in support of its *claim* (that the EC's injury finding was inconsistent with Articles 3.1 and 3.4), that factual evidence on the record had been disregarded.³⁴ The deliberate disregard of evidence of one EC producer who *had* been verified was one such example to illustrate the fact that no overall reconsideration and analysis had, nor could have, taken place. India made no separate claim under Article 4(1)(i)—even though it could have done so given the pertinent violation.

45. Indeed, for the difference between claims and arguments India needs only to recall one example from the original Panel report. In the original *Bed Linen* Report the Panel found (a second) violation of Article 3.4 since the EC had for its injury determination included EC producers that did not even form part of the domestic industry. India had at that time raised no separate *claim* under Article 4 (definition of domestic industry) but had focused on the violations of Article 3 alone. Nowhere did the Panel find, or did the EC argue, that in order to find fault with Article 3 there should first be a separate claim of a violation of Article 4. The EC did not appeal that finding of the Panel.

46. In the current situation India restricted claim 5 to Articles 3.1 and 3.4—even though the EC's actions undoubtedly would also violate Article 4(1)(i) separately.

47. Nowhere has India requested or suggested the Panel to go beyond the claims raised in the request for the panel. The sweeping statement that "India has done the same again"³⁵ is baseless and should be dismissed as such.

48. Finally, the EC mentions that India should have mentioned Article 21.3 of the DSU rather than Article 21.5. Probably fully aware of the surreal nature of this preliminary request the EC does not spend more than three curt sentences on this issue.³⁶

49. Article 21.3(b) deals with the reasonable period of time in a situation where parties mutually agree on that period. An Article 21.5 proceeding in itself is all about *compliance* within that reasonable period of time. If the complaining party would consider that compliance within the RPT did exist then it would not have initiated an Article 21.5 proceeding.

50. India did therefore not mention Article 21.3(b) in its request for the Panel as a separate *claim*. In no other Article 21.5 proceeding has an applicant ever mentioned the inconsistency of Article 21.3 as a separate claim.³⁷

³³ EC FWS, paragraph 54.

³⁴ Doubtless, the EC is fully aware of the distinction between *claims* and *arguments* such as for example explained in *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Appellate Body Report, WT/DS27/AB/R, 9 September 1997, paragraphs 141-145 or *Korea – Dairy Products AB* at paragraph 123. The EC's attempt to confuse the two concepts may therefore be characterized as a simple litigation technique for which, as noted above, the EC has already quoted the relevant views of the Appellate Body in *FSC*.

³⁵ EC FWS paragraph 52, first sentence.

³⁶ See also the discussion at para. 0 *supra*.

³⁷ See: *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, Recourse by New Zealand to Article 21.5 of the DSU, Request for the Establishment of a Panel, WTO

51. For these reasons India respectfully submits that also the EC's fourth request should be dismissed.

E. INTERMEDIATE CONCLUSION

52. India has explained above why the EC's requests for preliminary rulings are unfounded. As India has shown, the EC has with its requests merely engaged in "litigation techniques" in order to deviate attention from the real violations that were committed by the EC.

53. For the above reasons, India respectfully submits that the Panel dismiss all of the EC's requests for preliminary rulings.

III. ERRORS OF FACT

A. GENERAL

54. As mentioned above, there are a number of incorrect and/or misleading statements in the EC first written submission. India will comment on and correct the statements that it considers most relevant and important for a proper understanding of the case.

B. THE UNEXPLAINED SIZES OF BOMBAY DYEING *VERSUS* STANDARD INDUSTRIES

55. The EC's 'defence' in paragraph 79 of its first written submission as regards the original relative size of Bombay Dyeing and Standard Industries—as quoted by India in its first written submission in paragraphs 61 through 63—is limited to a mere reference back to the EC's earlier contention that these quantities were *already* based on sales *value* rather than sales *volume*.

Document WT/DS113/23, 6 December 2001; *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, Recourse by the United States to Article 21.5 of the DSU, Request for the Establishment of a Panel, WTO Document WT/DS103/23, 6 December 2001; *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, Recourse by New Zealand to Article 21.5 of the DSU, Request for the Establishment of a Panel, WTO Document WT/DS113/16, 19 February 2001; *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, Recourse by the United States to Article 21.5 of the DSU, Request for the Establishment of a Panel, WTO Document WT/DS103/16, 19 February 2001; *Brazil – Export Financing Programme for Aircraft*, Second Recourse by Canada to Article 21.5 of the DSU, WTO Document WT/DS46/26, 22 January 2001; *United States–Tax Treatment for 'Foreign Sales Corporations'*, Recourse to Article 21.5 of the DSU by the European Communities, Request for the Establishment of a Panel, WTO Document WT/DS108/16, 8 December 2000; *Brazil – Export Financing Programme for Aircraft*, Recourse by Canada to Article 21.5 of the DSU, WTO Document WT/DS46/13, 26 November 1999; *Canada – Measures Affecting the Export of Civilian Aircraft*, Recourse by Brazil to Article 21.5 of the DSU, WTO Document WT/DS70/9, 23 November 1999; *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or Above from Korea*, Recourse by Korea to Article 21.5 of the DSU, WTO Document WT/DS99/12, 25 October 2000; *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, Recourse by the United States to Article 21.5 of the DSU, WTO Document WT/DS132/6, 13 October 2000; *United States – Import Prohibition Of Certain Shrimp And Shrimp Products*, Recourse by Malaysia to Article 21.5 of the DSU, WTO Document WT/DS58/17, 13 October 2000; *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather*, Recourse by the United States to Article 21.5 of the DSU, WTO Document WT/DS126/8, 4 October 1999; *Australia – Measures Affecting Importation of Salmon*, Request by Canada for Determination of Consistency of Implementation Measures, WTO Document WT/DS18/14, 3 August 1999; *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Recourse by Ecuador to Article 21.5 of the DSU, WTO Document WT/DS27/41, 18 December 1998; *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Request for the Establishment of a Panel by the European Communities, WTO Document WT/DS27/40, 15 December 1998.

56. More specifically, the EC explains that the percentages as quoted by India ("almost 80 per cent of the domestic market"; "80 per cent of its domestic market"; and "80 per cent of the market ... than one with only 14 per cent") were already value-based percentages of *all* domestic sales.

57. The EC offers no proof for its assertion but merely states that it had *already* explained this earlier on page 2 of India-Exhibit-RW-17. In that exhibit the EC had asserted that Bombay Dyeing held 80 and Standard Industries 14 per cent of the domestic market, respectively. The current explanation in the EC's first written submission remains therefore no more than a repeated assertion not sustained by evidence. Indeed, the repetition of the explanation raises more questions than answers while it would have been for the EC to produce the contrary *evidence*.

58. Let us accept for a moment that there were indeed a few more companies with domestic sales for the missing 6 per cent in addition to 80 per cent for Bombay Dyeing and 14 per cent for Standard Industries. We suppose therefore that originally the total pool was 100 for domestic sales. Let us assume now that this total pool of 100 domestic sales is reduced to 94 for the total of Bombay Dyeing (80) and Standard Industries (14) only.

59. Then it is arithmetically *not* possible that as a percentage of that pool of 94 the amount for Bombay Dyeing would allegedly be 91 per cent while the other amount for Standard Industries would allegedly be 9 per cent! The respective sizes 80 per cent (out of 100) and 14 per cent (out of 100) are logically—as relative sizes vis-à-vis *each other*—85 per cent (80 out of 94) *versus* 15 per cent (14 out of 94), respectively.³⁸ These relative sizes are never 91 *versus* 9.

60. Indeed, with the volume figures now being revealed as 77.7 per cent *versus* 22.3 per cent India can only suspect that in its declarations before the original Panel, the EC had tried to understate the actual relative size of Standard Industries by mentioning a volume of 14 instead of 22 per cent. By contrast, the 77.7 per cent size of Bombay Dyeing based on volume is more than remarkably in line with the repeated declarations of "almost 80 per cent" and "80 per cent". This again shows that the EC originally did use a different means (volume) of measuring the respective size of the companies on the domestic market (rather than now value).

C. THE EC'S 'CONFUSION' BETWEEN A DUMPING *MARGIN* AND A DUMPING *DUTY*

61. A general feature of the first written submission of the EC is the confusion it seeks to create between a dumping *duty* and a dumping *margin* and the way of determining both.

62. As India had pointed out in its first written submission, Article 9, by its very title, regulates the imposition and collection of anti-dumping *duties*. It does not address the question of how non-dumped exports of a sample should be treated in the context of an injury or dumping determination.

63. Yet, by repeatedly intermingling the concepts of *duty* and *margin* the EC eventually comes to argue that since the weighted average *duty* should exclude three sets of margins (zero, *de minimis*, and facts available), the determination of the weighted average dumping *margin* must follow those same specific and restricted rules.

64. Having done that first, the EC ultimately comes to argue that this weighted average *margin* cannot represent imports that are simultaneously dumped and non-dumped.³⁹ Hence, by first interjecting that "exclusion concept" for *duty* purposes into the concept of a weighted average

³⁸ More precisely: $[(80 \div 94) * 100] = 85\%$; $[(14 \div 94) * 100] = 15\%$.

³⁹ EC FWS paragraph 132.

dumping *margin*, and subsequently taking this *margin* to override the concept of a sample, the EC eventually comes to defeat the very purpose of a sample.

65. In fact, if that argument of the EC is followed to its consequences then that means that this case must immediately be terminated because of negative dumping for the entire country on a weighted average basis.⁴⁰

66. Coming back to India's point: once it is acknowledged, following the guidance of the Appellate Body⁴¹, that the purpose of a *duty* determination under Article 9 ("Imposition and Collection of Anti-Dumping *Duties*) is restricted to just that, it is perfectly clear that the EC has violated both Articles 3.1 and 3.2 by deliberately disregarding positive evidence on the record, based on sample data, as regards the real volume of dumped and non-dumped imports.

D. THE MISQUALIFICATION OF THE "ALL OTHERS" RATE

67. The EC's references as regards the calculation of its "all others" rate⁴² are unfortunate since they mix the concepts of "residual duty", the "weighted average duty", and the US concept of an "all others" rate. In order to clarify this confusion for the Panel, India briefly wishes to correct the statements of the EC.

68. Basically, the anti-dumping duty applied to non co-operating companies is, under EC law frequently referred to as the "residual duty". For example Regulation 1644/2001 states at recital (14) that, in view of the high level of co-operation:

" ... it is considered appropriate to set the dumping margin for non cooperating companies in India at the level of the highest dumping margin established for a company in the sample."

69. Under EC law this residual duty is the duty applied to "all others", *i.e.* everyone who did not co-operate. This duty is typically set at the same level as the highest dumping margin in case of a high co-operation (such as in *Bed Linen*) and a higher (punitive) level in case of a low cooperation.

70. Under US law, the "all others" rate is also the rate that is applied to the non-co-operating producers, but there it is calculated as a weighted average of the co-operating companies.⁴³ This concept of what is the "all others" duty is therefore different in US and EC law.

71. In EC law, in order to qualify for the weighted average rate, one has to be cooperating but not sampled; it cannot be obtained through non-cooperation.⁴⁴ This is therefore called the "weighted average duty for co-operating non-sampled producers."

72. Thus, in simple terms, under EC law the "all others" rate is the highest, while under US law this is generally⁴⁵ a weighted average.

⁴⁰ See paragraph 0 *infra*.

⁴¹ Appellate Body *Bed Linen* report, footnote 30.

⁴² EC FWS paragraphs 82, 126, 130, 132, 135.

⁴³ To be more precise it should be noted that in US law a company which has been designated by DOC as a "mandatory" respondent must participate or face the application of adverse facts available; in such situation it cannot elect the "all-others" rate by non-co-operation. A second caveat is that in a non-market economy case in the US, the "all others" rate is based on adverse facts available. This is because in such cases, the DOC presumes that all companies in the country are under government control, such that failure to respond to the questionnaire is deemed to be non-co-operation.

⁴⁴ Except in the case of "newcomers".

⁴⁵ But see the above caveats.

73. The difference is important to clarify since in paragraphs 82, 126, 128, 130, 132, 135 of its submission the EC refers to the "all others" rate when in fact it means to refer to the "weighted average duty for cooperating non-sampled producers."

IV. RESPONSE TO THE LEGAL ARGUMENTS OF THE EC

A. GENERAL

74. India will now proceed to refute in detail the arguments that the EC has made in its first written submission.

B. THE RELATIVE SIZE OF COMPANIES WITH DOMESTIC SALES (CLAIM 1)

1. Introduction

75. The EC seeks to misrepresent India's claim by resorting to strong language: "the method proposed by India would lead to a meaningless result and is manifestly unreasonable".⁴⁶ The EC then proclaims that its own method is "beyond question"⁴⁷ and that even if the EC were proven wrong then it "would be inconsequential and give rise to no nullification or impairment of benefits accrued to India".⁴⁸

76. Upon scrutiny these statements are not convincing.

77. First of all, the method proposed by India is not meaningless but merely flows from the EC's earlier position. Since that earlier position would have led to one more company not being found dumping it is clear that what India proposes is neither meaningless nor manifestly unreasonable.

78. Indeed, India's view makes perfect sense: while the EC's value-method results in the company with the highest prices on the domestic market also weighing the most heavily in the establishment of the weighted average normal value, India's method is neutral as regards the price element of the companies on the domestic market. It is not biased towards a more heavy weight of companies with higher prices. Probably for this reason Article 6.10—on the mirror side—also includes no price element, since it is designed to be neutral as regards in- or exclusion of companies with the highest or lowest export prices.

79. Second, the assertion that even if the EC is wrong, no benefit is nullified finds no basis in the DSU. This is similar to the argument of Guatemala or Argentina, which tried to raise a final defence of "harmless error";⁴⁹ the Panels in *Cement-II* and *Floor Tiles* have clarified that "[q]uite the contrary is true."⁵⁰ The Panels explained that Article 3.8 of the DSU provides that there is a presumption that benefits are nullified or impaired where a provision of the Agreement has been violated.

80. To rebut this presumption, one has to show that there was no change in the competitive relationships, rather than that there was or there would have been no effect due to a violation. As the Appellate Body has stated in *EC – Bananas* quoting the *US – Superfund* panel:

⁴⁶ EC FWS, paragraph 63, last sentence.

⁴⁷ *Ibid.*

⁴⁸ EC FWS, paragraph 64.

⁴⁹ *Argentina – Floor Tiles*, paragraph 6.102. See also, *Guatemala – Cement-II*.

⁵⁰ *Ibid.*, paragraph 6.104.

"A change in the competitive relationship contrary to [Article III:2, first sentence] must consequently be regarded *ipso facto* as a nullification or impairment of benefits accruing under the General Agreement. A demonstration that a measure inconsistent with Article III:2, first sentence, has no or insignificant effects would therefore in the view of the Panel not be a sufficient demonstration that the benefits accruing under that provision had not been nullified or impaired even if such a rebuttal were in principle permitted."⁵¹ (emphasis added)

81. India submits that the EC argument⁵² fails to take this finding of the Appellate Body into account.

82. Further, rather than—as the EC suggests—imposing an "unreasonable burden on the investigating authorities"⁵³ by using all possible calculation methods at each step of the dumping determination, this appears to be exactly what the EC did in this case. When faced with the dilemma of admitting that 70 per cent per cent of the exports of the sample were not dumped, rather than 53 per cent, the decision to shift from the original relative size 80-14 (later characterized as 77-22) to a new proportion (91-9) was quickly made.

2. Facts

83. India has already illustrated above, in paras. 0-0, that the factual shift in position as regards the relative size of the companies is mathematically beyond doubt. While the EC seeks to shore up support by a simple reference to an earlier statement on the same matter, that 'justification' remains without evidence.

3. Arguments

84. The EC was simply reluctant to follow its own fact-sheets to their logical conclusion. That reluctance to implement the findings of the Panel and the Appellate Body also surfaced in the EC's re-determination where it resorted to defiant language (penultimate and last sentence of recital (74) of Regulation 1644/2001).

85. The EC first argues on the text of Article 2.2.2(ii).⁵⁴ It states that by choosing any method to average under Article 2.2.2(ii) it has not acted inconsistently with that provision.

86. However, it is not for India—nor for the EC—to interpret the provision in light of the Appellate Body's interpretation already on record: an interpretation should not be such so as to "substantially empt[y] the phrase "weighted average" of meaning."⁵⁵

87. As pointed out by India, by coming up with a new weighing method, the relative importance of Standard Industries has become less than 1/10th of the mean. This happened because companies with higher prices obtained more relative weight in the mean.

88. The EC subsequently seeks to characterize India's contextual argument as "contrived".⁵⁶ Yet, it is clear that India's argument is in accordance with the Vienna Convention which, apart from the

⁵¹ Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, 9 September 1997, paragraph 252.

⁵² EC FWS, paragraph 94.

⁵³ EC FWS, paragraph 85.

⁵⁴ EC FWS, paragraph 65 *ff.*

⁵⁵ India FWS, paragraph 53.

⁵⁶ EC FWS, paragraph 70 *ff.*

ordinary meaning of the terms, also attaches significance to those terms in their context and in the light of its object and purpose.

89. The EC argues that the provisions invoked by India address different issues and serve different purposes.⁵⁷ The US follows the same line of reasoning.⁵⁸ It is however not clear that the type of questions to be solved here are so different. All provisions cited by India address the question of measuring the relative size of sales, be it domestic sales in proportion to export quantity (footnote 2), domestic sales at a loss in proportion to total domestic sales (footnote 5), or the relative size of a company's export quantity in proportion to the total size of export quantity (Article 6.10). This is perfectly logical because prices are the core of the investigation and therefore are not 'neutral.'

90. The EC subsequently submits that its own case law does not constitute context.⁵⁹ India has already pointed out that the principle of good faith as enshrined in the Vienna Convention ensures that such case law can serve as relevant context.⁶⁰ The EC subsequently argues that its own CFI judgement contradicts India's position. India however fails to see the contradiction: does it mean that the investigating authorities are permitted one day to weigh on value and the next day on volume? Clearly this would not be the discretion the Court had in mind. Rather it seems conceivable that the Court gave the institutions one choice. Having made that choice, it must be applied consistently.

91. The EC then refers to its own previous position.⁶¹ India has already addressed this issue separately.⁶²

92. The EC then states that it has reasonably exercised the discretion granted to it under the provision.⁶³ The question however is not that of judgment calls as to the reasonability of the discretion exercised. Rather, the question is whether a provision was "properly applied", as India asserts it was not. As the Panel noted in its original report:

" ... the use of actual data itself ensures that subjective judgments about the reasonability of the results do not affect the calculation of constructed normal value. We consider that no purpose would be served by testing the results obtained under the chapeau and subparagraphs (i) and (ii) against some arbitrary or subjective standard of reasonability."⁶⁴

93. The EC rather seems to imply that if the interpretation proposed by the EC is "reasonable", then that is actually what Article 2.2.2(ii) means. This approach to interpretation of legal acts seems

⁵⁷ EC FWS, paragraph 73.

⁵⁸ US Third party submission paragraph 10.

⁵⁹ EC FWS, paragraph 75.

⁶⁰ Compare Lennard who states that:

"Issues of estoppel and acquiescence are not strictly issues of 'interpretation' and ... may derive from the obligation to *perform* treaties in good faith, or else from generally accepted domestic law principles as a source of international law." (Emphasis in original, footnotes omitted).

Lennard, Michael (2002) *Navigating by the Stars: Interpreting the WTO Agreements*, JIEL 17-89 at 77.

⁶¹ EC FWS paragraph 79.

⁶² Section 0 *supra*.

⁶³ EC FWS, paragraphs 63 and III.A.1.C.e., paragraphs 80 *ff*. In paragraph 63 the EC states:

"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. In the case at hand, the EC authorities have exercised that discretion in a *reasonable* manner..." (Emphasis added)

⁶⁴ Original Panel Report paragraph 6.99.

similar to the so-called *Chevron* doctrine extensively applied in US administrative law⁶⁵ and reflected to a certain extent in Article 17.6(ii)ADA.⁶⁶ In this regard, India submits that this doctrine is inappropriate if applied at the international level in the way proposed by the EC.

94. 'Reasonability' is not listed among the tools that could be used to interpret an international treaty in accordance with Articles 31 and 32 of the VCLT. Only after the options provided for in these Articles are exhausted can an interpreter turn to clarification of the ambiguous provisions from the point of view of what should be reasonable in such case:

"As the Appellate Body has repeatedly stated, panels are to consider the interpretation of the WTO Agreements, including the AD Agreement, in accordance with the principles set out in the *Vienna Convention on the Law of Treaties (Vienna Convention)*. Thus, we look to the ordinary meaning of the provision in question, in its context, and in light of its object and purpose. Finally, we may consider the preparatory work (the negotiating history) of the provision, should this be necessary or appropriate in light of the conclusions we reach based on the text of the provision. We then evaluate whether the United States' interpretation is one that is "permissible" in light of the customary rules of interpretation of international law."⁶⁷

95. The EC does not follow this order of interpretation, probably *assuming* that interpretation in accordance with the VCLT will produce several 'permissible' or 'reasonable' interpretations. However, as the Appellate Body has stated, merely to assume something is not enough in such case. Well reasoned argument should prove that the application of the VCLT gives rise to at least two 'permissible' interpretations:

"This second sentence of Article 17.6(ii) *presupposes* that application of the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention* could give rise to, at least, two interpretations of some provisions of the *Anti-Dumping Agreement*, which, under that Convention, would both be "permissible" interpretations". In that event, a measure is deemed to be in conformity with the *Anti-Dumping Agreement* "if it rests upon one of those permissible interpretations."

It follows that, under Article 17.6(ii) of the *Anti-Dumping Agreement*, panels are obliged to determine whether a measure rests upon an interpretation of the relevant provisions of the *Anti-Dumping Agreement* which is *permissible under the rules of treaty interpretation* in Articles 31 and 32 of the *Vienna Convention*. In other words, a permissible interpretation is one which is found to be appropriate *after* application of the pertinent rules of the *Vienna Convention*.⁶⁸ (Footnotes omitted, emphasis original)

⁶⁵ Croley, Steven P., and John H. Jackson. "WTO Dispute Settlement Procedures, Standard of Review, and Deference to National Governments." *American Journal of International Law* 90 (1996): 193-213: "Courts applying the Chevron doctrine face two sequential questions, often referred to as "step one" and "step two" of Chevron. First: Has Congress "directly spoken to the precise question at issue," or is the statute interpreted by the agency "silent or ambiguous"? ... If the court concludes ... that ?it is ?, then the reviewing court proceeds to a second question – step 2: Is the agency's interpretation of the statute a "reasonable" or "permissible" one?"

⁶⁶ The negotiating history of Article 17.6(ii) of the ADA shows that its wording is actually derived from the *Chevron* doctrine. Croley, Steven P., and John H. Jackson, *id.*, at 146 ff.

⁶⁷ Panel Report, *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R, 1 February 2001, paragraph 6.4.

⁶⁸ Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-rolled Steel Products from Japan*, WT/DS184/AB/R, 24 July 2001, paragraphs 59-60.

96. In India's view however a well-reasoned argument cannot prove that the alleged silence of the text of the Article leads to the discretion of Article 17.6(ii).⁶⁹ The question of more than one permissible interpretation, *i.e.* the question of a choice, does not arise. At the risk of repetition: the stipulations of the Appellate Body, and the context of the Article do not allow value-based weighing. Notably the volume-criterion on the side of the export sales of exporters may not permit a different criterion on the domestic sales side of the exporters.

97. The EC then provides an example as to the fact that SGA and profit regularly follow a turnover allocation.⁷⁰ India is aware of this point but considers it irrelevant for answering the question. The issue in question is the relative size of domestic sales of various companies in the mean in a weighing exercise.

98. The EC then refers to the calculation of the "all others" rate.⁷¹ India has already pointed out that the EC has unfortunately confused the concept of "all others" with that of the weighted average duty for co-operating producers (paras. 0-0).

99. The EC then seeks to draw India's argument away from the facts of the case by stating that the method applied by the EC authorities does not result necessarily in higher amounts for SGA and profits than India's proposed method.⁷² This is beside the point: the EC had already established a relative proportion and then decided to depart from it when the outcome would have resulted in lower dumping margins.

100. The EC continues its line of arguing by stating that 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.⁷³ India does not contest this. However, this is beside the point since provisions have to be applied properly.

101. The EC then refers to unacceptable implications and an unreasonable burden.⁷⁴ Yet, since the EC appears determined to use calculation methods resulting in the highest margin it seems reasonable to ask that some consistency in method be followed in order to maintain legal predictability. To choose, invariably, the method that always results in the highest possible dumping margin may be a consistency in goal but is not a consistency in method.

102. Indeed, even if the Panel were to accept that the text is "silent"—*quod non*—and that the above considerations put forward by India do not mandate the authority to use a neutral volume method, the question first becomes whether the discretion granted to the Member is absolute. India submits that that is *not* the case if there are specific criteria that limit such discretion.⁷⁵ The ADA, as clarified by the Appellate Body, created such limitations. One of these criteria has already been put

⁶⁹ Similar to the EC, this appears also the suggestion of the US Third Party Submission at paragraph 11.

⁷⁰ EC FWS paragraph 81 *ff.*

⁷¹ EC FWS paragraph 82.

⁷² EC FWS paragraph 83 *ff.*

⁷³ EC FWS paragraph 84 *ff.*

⁷⁴ EC FWS paragraph 85.

⁷⁵ *Cf.* Case of the S.S. "Lotus" (France v. Turkey), PCIJ Series A, No. 10 (1927). At paragraph 18 the PCIJ held that:

"International law governs relations between independent states. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed".

A fortiori, once restrictions on the discretion exist, they must be heeded.

forward and was the finding of the Appellate Body that the text should have a meaning. Another important point to recall is that the text of the first sentence of Article 15 applies in a case against a developing country member. That sentence mandates that "special regard must be given." (Emphasis added). Clearly this also imposes a norm that limits the discretion granted to a Member. The EC would agree that a calculation method that results in a lower margin is one such form of complying with the first sentence under Article 15.

103. The EC then suggests that the proposal by India is unreasonable and would involve new choices as to the several possible criteria for measuring the sales volume of the product concerned.⁷⁶ This suggestion is however not correct; India's methodology only stems from taking the EC's original position to its conclusion and from applying the Article as it should be.

104. The EC seeks to explain that India's method is manifestly unreasonable and leads to a meaningless result.⁷⁷ Nothing is less true. India's method would have led to three exporters not being found dumping. Objectively such result is relevant since it would have reflected the absence of dumping of more than two-thirds of India's exports. (Even though under the EC's extravagant "logic" of treating a sample this would probably still have implied that the EC found that virtually all of India's exports were dumped). In this connection the EC draws attention to pillows and duvets. Fact of the matter remains that it was the EC who had originally defined the relative volume as 80-14.

105. Contrary to the EC's assertion,⁷⁸ India's method is reasonable. India's method is *a priori* neutral as regards the influence of companies with the highest or lowest prices and merely takes the facts to their conclusion.

106. Finally the EC refers to a newly discovered calculation method by which it could have found even more dumping.⁷⁹ Undoubtedly more methods might exist when one re-studies the facts. This however does no justice to the original facts as originally declared. India had seven calendar days to study and comment on the weighing method by the EC.⁸⁰ It immediately identified the illegality of the result-oriented value based weighing method.

C. THE UNWARRANTED CUMULATION AND THE *EX-POST* REPARATIONS (CLAIMS 2 AND 3)

1. Unwarranted cumulation: Claim 2 regarding Articles 3.1 and 3.3

107. The EC argues that only Regulation 1644/2001 is within the Panel's jurisdiction and that it revised the dumping determination for Pakistan only after August 2001. For that reason, it says, it was entitled to cumulate Indian imports with those of Pakistan in Regulation 1644/2001.⁸¹

108. As India mentioned in its first written submission in paragraph 73: such reasoning in itself is proof that the EC did not respect the deadline of 14 August 2001. The EC was required to prepare a legally correct *measure* within the deadline. The EC should have understood that a correct injury assessment against India—which originally involved cumulation—could not have been made without a double-check as to the dumped imports of other countries. The measure against India was closely

⁷⁶ EC FWS paragraph 86 *ff.*

⁷⁷ EC FWS paragraph 86 *ff.*

⁷⁸ EC FWS paragraph 89.

⁷⁹ EC FWS paragraph 91-93. The EC found a new method to calculate volume in kgs.

⁸⁰ India FWS paragraphs 12-13.

⁸¹ In this connection India assumes that the EC reference in paragraph 99 of the EC's FWS that "Regulation 1644/2001 confirmed the finding of dumping for Pakistan reached in Regulation 160/2002." is a misprint since Regulation 1644/2001 predates 160/2002. India assumes that the EC probably meant to refer to Regulation 2398/97 when it said 160/2002.

intertwined with those of other countries and a re-determination of that measure would have involved an entire re-examination of the pertinent facts. One could even argue that Regulation 2938/97 as such (against the three countries) was the *measure* to be brought in conformity.

109. The fact that the injury attributed to the Indian imports was repaired in April 2002 proves that a correct measure for India should from the outset have involved a correct dumping and injury finding for Pakistan and Egypt in August 2001.

110. In case the Panel finds that the EC was permitted to calculate the dumping margin for part of the re-determination (*i.e.* for the Pakistani imports) at a later stage, then the fact remains a measure against India was in force from 28 January 2002 to 25 April 2002 whereby injury was based on imports from a country that did not dump. This is contrary to the text of Article 3.3 which permits cumulation only of dumped imports. As pointed out earlier, this violates both Articles 3.3 and 3.1. The issue is material since on 13 February 2002 (within that illegal injury period as far as Articles 3.3 and 3.1 are concerned) the EC initiated its "partial interim review" against India. Accordingly, the EC initiated its interim review based on an illegal measure.

111. In fact, the EC's argumentation that India's argument on cumulation is invalid appears rather cynical and unprincipled given the similar type violation of which the EC has recently accused the US.⁸²

112. Further, to the extent that Regulation 160/2002 repaired the dumping findings of Regulation 1644/2001 it is clear that the EC did not respect the synchronicity requirement enshrined in Article 5.7 (which India will address separately below).

113. To the extent that Regulation 696/2002 subsequently repaired both Regulations 1644/2001 and 160/2002 it is clear that the EC again did not respect the synchronicity requirement enshrined in Article 5.7 (which India will address separately below).

2. *Ex-Post* reparations: claim 3 regarding Article 5.7

114. The EC starts off by recalling that Regulations 160/2002 and 696/2002 are outside the jurisdiction of the Panel. In the EC's view these are not measures taken to comply. India has already clarified that it had identified these measures in its Request for the Panel and should therefore be permitted to bring claims with respect to them. The Regulations are closely intertwined and they seek to repair the re-determination for India.

115. The EC subsequently argues that Article 5.7 does not operate in the context of reviews or re-determinations following the implementation of a Panel report. For this purpose the EC provides certain arguments, most of which hinge on the application of Article 11 that deals with reviews.

116. One may separately contest whether the purported implementation of a Panel and Appellate Body report qualify as a form of "review" in the sense of Article 11. However, let us assume for the sake of argument that this is the case.⁸³

117. The EC first states that a review may address only dumping or only injury and that *therefore* these determinations can be made separately. While the first part of the statement is true, the second

⁸² *United States–Sunset Reviews of Anti-Dumping and Countervailing Duties on Certain Steel Products from France and Germany*, Request for consultations by the EC of 30 July 2002, WT/DS262/1, 3^d and 6th matter raised in that request.

⁸³ If it is determined that a re-determination is tantamount to a new investigation then Article 5.7 applies without any question.

part is not. The point is that *once both* dumping and injury are under review, the findings on them should not be separated: neither by doing part of the dumping aspects in August 2001 and the rest in January 2002, nor by doing dumping aspects in January 2002 and injury aspects in April 2002. Under such logic the EC could even have waited with injury reparations until the year 2003 or later.

118. The EC points to perceived "absurd consequence" of requiring re-consideration of all the findings.⁸⁴ This misrepresents the argument of India and tries to deflect attention from its own actions. As noted, in the previous paragraph, it is in theory possible that a given measure would only have problems on account of injury while dumping would have been correctly determined. In *such* a case there would not be the need to reconsider dumping once more. *But*, given the fact that in this *Bed Linen* case there was a need to carefully re-consider and re-analyse *both* dumping and injury on an overall basis, given various findings of the Panel and Appellate Body reports, it would be pointless to do this in three episodes as the EC did this time. Exactly to curtail such excesses and continued harassment, Article 5.7 contains the requirement of synchronicity.

119. Further, the EC puts up the view that since Article 5.7 is not mentioned in Article 11, it finds no application. In this connection India only needs to recall the recent Panel Report concerning *Certain Corrosion Resistant Carbon Steel Flat Products from Germany*.⁸⁵ In that case it was *the EC* which took the view that the *de minimis* standard contained in Article 11 of the ASCM should also apply in review proceedings even though Article 21 does not expressly repeat that *de minimis* standard.⁸⁶ The Panel in that case agreed with the EC.⁸⁷ While that Panel recognized that the text of the *de minimis* provision did not mandate its application in a review, it found that the terms of the provision were unequivocal.⁸⁸

120. That Panel took into account that the provision in question was couched in mandatory and strong language, conveying that the drafters had in mind a particular outcome to protect exporters and to prevent trade harassment. Eventually the panel concluded, *inter alia*, that finding otherwise would compromise the disciplinary framework that the drafters sought to create throughout the Agreement.⁸⁹

⁸⁴ EC FWS paragraph 108.

⁸⁵ *US – German Steel*. One may also compare the recent EC's request for consultations in the case WT/DS262/1, *op. cit.*, where the EC repeats this argument.

⁸⁶ *Ibid.*, for example, paragraph 5.41 last sentence:

"The EC submits that, for the reasons stated above, this threshold is not appropriate, and that since 0.53 per cent is below the 1 per cent *de minimis* level which should apply in sunset reviews, the US was in breach of Article 21.3 in continuing the measure" (emphasis in original) and paragraph 5.112:

"... a systematic and good faith interpretation of Article 21.3 with Articles 21.1, 22.1, 22.7 and 11.9 of the *SCM Agreement*, would suggest clearly that the *de minimis* rule of 1 per cent should be applied also in sunset reviews."

Or, as the EC stated in paragraph 5.417:

"... the US is proposing again a formalistic interpretation of the terms of Article 21.3 and in complete isolation of its object, purpose and context."

⁸⁷ *Ibid.*, paragraphs 8.56-8.81.

⁸⁸ *Ibid.* paragraph 8.59.

⁸⁹ *Ibid.* paragraph 8.59:

"... we recognise, at the outset, that nothing in the text of the provision provides for its *de minimis* standard to be implied in Article 21.3. What is clear from this language, however, is that a *de minimis* subsidy cannot be countervailed, and that, upon a finding of a *de minimis* subsidy, the Agreement mandates but one outcome. Investigating authorities must not only terminate the investigation, but they must do so immediately. The terms of the provision are unequivocal. Such mandatory ("shall") and strong ("immediate") language would suggest that the drafters had an important consideration in mind in drafting this provision, reflected in the precise choice of words. In particular, the mandatory nature and strong language of the provision convey, in our view, that the drafters sought a particular

121. India respectfully submits that the EC admit that similar logic applies to Article 5.7 of the Anti-Dumping Agreement. In light of this history of continued amendments India has the fearful premonition that the next amendment will be the imposition of excessive punitive duties as a result of the EC's "partial interim review".

122. Moreover, India submits that while interpreting Article 5.7, as for its applicability to the re-determination of dumping or injury findings for the purposes of implementing the DSB's recommendations and rulings, it is important to take into account as part of context Article 21.2 of the DSU. It goes without saying that the obligation contained in this Article to pay particular attention to *prompt* compliance with the DSB recommendations in favour of a developing country is, *inter alia*, served by an interpretation of Article 5.7 according to which the re-determination of dumping and injury are necessarily simultaneous.

123. For these reasons India requests the Panel to uphold its claim on Article 5.7. The provision also contains mandatory language, and the drafters would have had in mind a particular outcome. It forms part of a disciplinary framework contained in the Anti-Dumping Agreement and *does* have a meaning, which is, *inter alia*, to protect exporters from harassment.

D. THE SIGNIFICANT OVERSTATEMENT OF DUMPED IMPORTS FROM INDIA (CLAIM 4)

124. Central to the EC's defence that 'to the extent a sample does not show dumping it is not relevant for the injury analysis' is the rule contained in Article 9.4. As is known, that rule addresses the determination of the maximum *duty* that can be imposed on co-operating non-sampled producers. Yet, the EC not only continues to invoke Article 9.4—directly or indirectly—but also continues to assimilate the different concepts of *duty* and *margin* when in truth those are distinct or at most only partially overlap. For this purpose India has already dismantled that confusion in paragraphs 0-0 *supra*.

125. The confusion of the concepts of the "all others" (*i.e.* residual) duty with the "weighted average duty for co-operating non-sampled producers" has also been pointed out.⁹⁰

126. Further, India had in its first written submission already pointed to the irrelevance of Article 9 (imposition and collection of duties) for the question under consideration. For that purpose India had already recalled the guidance of the Appellate Body that the rules on the imposition and collection of duties do not bear on the issue of the establishment of the existence of dumping margins.⁹¹

outcome, to protect exporters under investigation and prevent trade harassment through continuation of an investigation of a de minimis subsidy."

And 8.79:

"In sum, we consider that the rationale for the de minimis standard set out in Article 11.9 is clearly that CVDs are to be used to counter injurious subsidisation, and the threshold set out in this provision demarcates the level below which subsidisation is deemed to be so small as to be non-injurious for purposes of the imposition of CVDs. Having found this to be the case, and having established that one of the objects and purposes of the SCM Agreement is to regulate the imposition of CVDs and to create a disciplinary framework therefor, we are of the view that the de minimis standard must be applicable to sunset reviews as it is to investigations. Finding otherwise would compromise the very object and purpose of the SCM Agreement and the disciplinary framework that the drafters sought to create through the Agreement."

⁹⁰ Section 0 *supra*.

⁹¹ India's first written submission paragraph 120. Appellate Body in *Bed Linen* footnote 30.

127. The EC itself is also forced to admit in its paragraph 128 that the Appellate Body stated that the only thing that Article 9.4 does is to place a limit on the level of the anti-dumping *duty* that may be applied to imports from non-examined exporters.⁹²

128. If the EC would indeed *follow* that logic then it is clear that Article 9 is irrelevant for the calculation of a dumping margin. Yet, the EC does not follow that logic. It only continues to invoke Article 9 but also continues to disregard the specific admonition in paragraph 4 of Article 9 ("for the purpose of this paragraph"); that paragraph underlines its own restricted purpose. The EC's statement that rule in paragraph 4 only applies with regard to the obligation to disregard but not with respect to the other rules makes no sense.

129. The EC goes on and contradicts its own re-determination by presenting the argument that imports from a country cannot simultaneously be both dumped and non-dumped for the purposes of the ADA. That assertion contradicts, *inter alia*, the EC's own finding that 53% of the sample was not dumped while 46 per cent was dumped. Common sense dictates that part of the imports of a country can be dumped and the remainder non-dumped. This is also the view of the important non-attribution language contained in Article 3.5. Article 3.5 mentions as an example of one such possible other factor the volume and prices of imports not sold at dumping prices and mandates that these "must" not be attributed to the dumped imports.

130. Yet, let us, for the sake of argument, take the "logic" of the EC (*that there can be only one weighted average dumping margin for the country*) to its logical consequence. Then it becomes clear that on a weighted average basis India was not dumping:

	CIF value	Dumping Result	Margin	Duty (per Art 9.4) (%)
Bombay Dyeing / Nowrosjee Wadia	100,924,637.03	5,612,587.09	5.56%	5.5
Madhu	183,063,049.40	5,630,527.42	3.08%	3.0
Omkar	212,877,521.30	-829,312.23	-0.39%	
Anglo-French	126,464,036.70	12,458,213.32	9.85%	9.8
Prakash	314,529,134.10	-36,949,733.62	-11.75%	
Total	937,858,378.53	-14,077,718.02		
Weighted Average "All Others"			-1.50%	5.7
				9.8

(Source: India-Exhibits-RW-6, -7, -8, -9)

131. If *this* EC argument is therefore to be followed, then the EC should have concluded that the *whole* of India was not dumping (the weighted average *margin* was *minus* one point five!).⁹³ *India had not even gone that far* since, according to the original Panel Report, dumping is normally a determination made with reference to a product from a particular *producer/exporter*⁹⁴—and not with reference to a country. India only made the point that a *sample* should be considered what it is supposed to mean: "a relatively small part or quantity intended to show what the whole is like; a

⁹² The EC quotes the Appellate Body in *Hot Rolled Steel* paragraph 116.

⁹³ This is even before any correction in the dumping margin of Madhu.

⁹⁴ Original *Bed Linen* panel report, paragraph 6.136.

specimen." By disregarding this pertinent fact, the violations with Articles 3.1 and 3.2 have been specified in detail in India's First Written Submission.⁹⁵

132. For the record India hereby respectfully submits that if *the particular* line of reasoning from the EC is accepted, and therefore leads to the calculation that the entire product of the country is not dumped on a weighted average basis, the violation with Articles 3.1 and 3.2 also exists. In such case, the *entire* imports from the country should not have been considered dumped for the injury analysis. In such situation, the case should have been *immediately* terminated because of no dumping.

133. Finally, in its first written submission, the EC's assertions about its treatment of the sample on the domestic industry side and on the exporters side are incomprehensible. India's view was straightforward: if a domestic sample is taken to represent the domestic industry on the one hand, then the exporters' sample should also represent the exporting producers on the other hand.

E. THE ABSENCE OF AN AUTHENTIC RE-EVALUATION OF DATA THAT WERE NOT EVEN COLLECTED (CLAIM 5)

1. Arguments

134. India recalls that it had presented two arguments with respect to its claim under Articles 3.1 and 3.4. First, India had pointed out that data that were not collected cannot suddenly be evaluated. Second, even if data had been collected—*quod non*—there should have been an overall reconsideration and analysis: the evaluation should be adequate and not merely a gloss that pays lip service to the findings of the Panel and contradicts facts on the record.

2. Data which were not collected cannot be evaluated

135. As India had pointed out in its first written submission, the Panel had originally found a substantive violation of Article 3.4.

136. For this purpose India had highlighted two examples that were illustrative of the fact that data had not been collected.

137. It may be that the EC considers that it has responded to the two examples. Upon inspection its answers are unimpressive. The EC's justification that it had collected data on stocks is limited to a reference back to an earlier explanation.

138. The EC states that stock information was obtained from accounts and then verified on spot but offers no evidence to support its statement. In any event, such statement is too simplistic and calls for clarification. Accounts only reflect stock data at a company level. Exactly for such purpose the questionnaires for *exporters* invariably contain separate detailed questions and tables on stock data for the product concerned. The issue is material since data on stocks form an important means in EC anti-dumping practice through which sales and production data are double-checked.

139. Yet, the questionnaires for EC *producers* contained no such questions on stock data.

140. The Panel and the EC will recall that India has two years ago *already* made available in Exhibit-53 of its original First Written Submission the copies of all non-confidential questionnaire

⁹⁵ India recalls its example provided in its first written submission which showed that the logic of the EC would lead to nearly all the imports from a country being found dumped, even if there was only one exporter in the sample found dumping. (Paragraph 123 India FWS). The EC has not even attempted a refutation other than stating that its method is perhaps less than perfect. (Paragraph 135 EC FWS).

replies of the Community Industry. No information on stock or capacity utilization (to restrict us to these two examples) was ever collected. Sections II and III of those questionnaires dealt with sales. Sections IV and V dealt with production. The only 'collection' that ever took place was that in section VI producers were *permitted*, on less than half a page, to "please *describe* the effects" ("*Bitte beschreiben Sie die Auswirkungen*" (page 726 of Annex 53)) of the imports on nine factors: market share, sales, prices, production, capacity utilization, stocks, employment, profitability, ability to invest, etc. *If needed*, they could continue on another paper ("*Utilisez, si necessaire, une autre feuille de papier*" (page 791 of Annex 53)). None of these seventeen producers ever provided hard data on stock or capacity utilization (nor on any of those other factors).⁹⁶ This pertinent absence of facts may well have formed part of the Panel's finding that it appeared that data were not even collected.

141. By contrast, the Bed Linen questionnaire for *exporters* did contain such detailed questions for the product concerned.⁹⁷

142. Another step in the false reasoning in paragraph 152 is that the EC admits that the error of establishing consumption is not only a feature of the Bed Linen case but also of other proceedings. While it is possible that other proceedings suffer from the same deficiency that does not justify the mistake here.

143. The EC then points out⁹⁸ that it should have been the task of third parties to ensure that the investigating authority correctly satisfies its job obligations. Such a statement is bizarre. Article 3.1 ADA imposes the obligation on the authorities to objectively examine the situation based on positive evidence, regardless of whether third parties remind them.

144. India has in its first written submission already had occasion to the fallacies in the reasoning on capacity in the re-determination. The EC's defence now becomes absurd:

"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."⁹⁹

145. In other words: *Because these data were absent they were not relevant*. What if the producers had had huge profits and had chosen not to disclose them? Probably the EC would have considered them not relevant as well. Yet, it is exactly the task of the authority to collect these data and evaluate them.

146. In short, by allowing domestic producers to decide what data to provide, and by accepting that only that is relevant, the injury determination becomes a meaningless self-fulfilling prophecy. Data was simply not collected for a large number of factors, a fact which India already pointed out in its original first written submission to the Panel more than two years ago.

147. Finally, India had in its first written submission pointed that the sequence in which the evaluation was conducted was entirely improper. It amounted to an *a priori* dismissal of factors. For this purpose India already recalled that the original Panel Report had also quoted *Korea – Dairy*

⁹⁶ Compare pages 726, 736, 756, 763, 764, 772, 791, 806, 813, 829, 842, 851, 871, 923 and 950 of Annex 53. Certain companies did not even answer Section VI (the QR that starts on p. 929 ends on p. 942 without section VI. In these pages, nearly all these companies limited their information on the factors to a few sentences or paragraphs. None of them gave any concrete information on stocks or capacity utilization.

⁹⁷ India Exhibit-63, page 1108. For capacity and capacity utilization of the product concerned: page 1107.

⁹⁸ EC FWS paragraph 153 last sentence.

⁹⁹ EC FWS paragraph 154 last sentence.

Safeguards that had made clear that facts pertaining to a certain factor must *first* be collected and *then* brought on record, *after* which they can be evaluated. Only this may form a basis for a proper injury determination.¹⁰⁰

148. The EC concludes its section 157 with one correct observation that:

"The key point is that each factor is considered and that the evaluation is objective"

149. To sum it up: *that* is exactly what *never* happened in *Bed Linen*. The logical impossibility of that had already been pointed out in the original Panel report: without collection of the necessary evidence it was impossible to even engage in a proper and objective evaluation.

3. Even if data had been collected—*quod non*—there should have been an overall reconsideration and analysis

150. The EC starts off with the preliminary remark that "its careful analysis of all the factors was consistent with the requirements of Article 3.4". India needs only to refer back to the opening paragraphs of the EC first written submission where it states that Regulation 1644/2001 limits itself to "nothing but confirm" the original findings.¹⁰¹ The EC itself was already forced to admit that to that extent "it cannot be considered that such re-determination constitutes a measure "taken to comply".¹⁰²

151. India already had occasion to note that these observations of the EC were in line with paragraph 157 of India's first written submission.

152. For that purpose India had in its first written submission identified a number of elements, as well as the relevant case law of *Mexico – HFCS 21.5*, that would have mandated an *overall reconsideration and analysis*.

153. Other than that, the EC's first written submission, for the most part, does not directly address the arguments of India. Instead, the EC has largely done no more than summarize its re-determination and contend in a *pro forma* manner that it satisfies the requirements of the AD Agreement.

154. For example, in paragraph 159 the EC quotes the Panel in *US – Hot Rolled Steel*. The EC misrepresents India's arguments by stating that India implied that injury could not be suffered if certain factors would not show injury. By contrast, and apart from *Mexico – HFCS 21.5* as already quoted by India in its first written submission, India recalls that the Panel in *Thailand – H-Beams* also made abundantly clear that there should be an overall analysis containing an adequate evaluation:

"While we do not consider that positive trends in a number of factors during the IP would necessarily preclude the investigating authorities from making an affirmative determination of injury, we are of the view that such positive movements in a number of factors would require a compelling explanation of why and how, in light of such apparent positive trends, the domestic industry was, or remained, injured within the meaning of the Agreement. In particular, such a situation would require a thorough and persuasive explanation as to whether and how such positive movements were outweighed by any other factors and indices which might be moving in a negative direction during the IP."¹⁰³

¹⁰⁰ These steps in the investigation should not be confused since they are separate and distinct.

¹⁰¹ EC FWS, paragraph 41.

¹⁰² EC FWS, paragraph 42.

¹⁰³ *Thailand–H-Beams*, Panel, paragraph 7.249.

155. India does not consider that the *Bed Linen* re-determination meets this standard *at all*. For this purpose it has already provided its views in its first written submission.¹⁰⁴

156. India denies the EC's false suggestion that it would have suggested that data on the sample are not relevant.¹⁰⁵ Of course these data are relevant, provided that they are interpreted properly.

157. India does not dispute that the EC's re-determination provides a recitation of data concerning the Article 3.4 factors. However, such recitation alone is insufficient to satisfy EC's obligation under Article 3. The Panel Report¹⁰⁶, consistent with the findings of other panels¹⁰⁷, indicated that the ADA requires an analysis of the pertinent information, not merely a reference to it.

158. The EC accuses India of making a "formalistic argument" that a mere reference back is nothing more than a restatement of a previous finding.¹⁰⁸ Yet, it would have been up to the EC to explain what the difference is between their approach and a simple restatement. An overall reconsideration and analysis cannot simply be assumed by references back to earlier findings. This is witnessed, to name but one example, in the context of market share: while the EC merely states that the previous findings are confirmed, an overall reconsideration and analysis should have led to the inclusion of the verified sampled EC producer who was importing the product from Pakistan. This should at least have led to a change in the market share data.

159. For the sake of brevity India will not re-enter again the entire discussion on each of the factors. Basically India disagrees with all the EC has stated unless it explicitly agrees. However, for certain points India wishes to make additional observations.

Sales, Market Share, Prices

160. As for sales volume and market share India had pointed out that under any measure of the percentage, or any of the EC data, both went *up*. The EC has not explained why this increasing trend was not probative for the state of the industry. The continued reference to the sale of *niche* products is irrelevant since *it was the EC* itself who defined the 'like product'.

161. If the EC would have wished to investigate and/or protect the producers of a certain type or model (say the high value merchandise) of that '*like product*', then the EC would have been free to define the '*like product*' as such and initiate a proceeding against such '*like product*'.

162. Following the EC's 'logic' this would always give rise to injury for sales volume and market share: *in a case where sales volume and market share go down, then this is a sign of injury of the like product; if by contrast sales volume and market share go up, then this is due to a special product mix which overrides the criterion of like product*. Such reasoning is fallacious.

163. The same observation goes for the average prices: *if average prices would have gone down, then the EC would have taken this as a sign of injury for the like product; yet now that average prices went up, the supposed reason is the existence of shift in the product mix which overrides the criterion of like product*. Again, such reasoning is fallacious.

¹⁰⁴ India FWS, paragraphs 157-213.

¹⁰⁵ EC FWS paragraph 162.

¹⁰⁶ For example at 6.162 the Panel held that authorities "must explain their conclusion as to the lack of relevance or significance of such factors." Yet, to name but one example, the EC never mentioned why the 8.7 per cent increase in output was not probative for the state of the industry. It merely mentioned that this increase in output "explains" the increased productivity. Re-determination at recital (31).

¹⁰⁷ E.g. *Thailand – H-Beams*.

¹⁰⁸ EC FWS paragraph 163.

164. Accordingly, for these three important factors the EC's evaluation makes no sense: Heads the EC wins, tails India loses. In India's view such evaluation focusing on a shift in the product mix does not fulfil any standard of an objective examination.

Profits

165. The EC still does not reveal the profits of the Community industry; rather it states that it was only able to collect profit data for a "number of" (all?) sampled producers.¹⁰⁹ This still does not explain how total sales, output, employment, wages, figures could all be obtained at the industry level, while profit data could not. It could be that, following the EC's logic, because producers chose not to give these figures, the EC found these not relevant.¹¹⁰

166. As regards the admitted clerical error in turnover India can no longer understand the EC's findings on profits. The fact remains that with different turnovers the EC now came to exactly the same percentage of profits. This is incomprehensible.

167. As regards the level of profit India further fails to see why a year outside the IIP would be relevant. First of all one may wonder where the information came from if it is outside the IIP. Second, one may wonder about the perceived relevance of 1991. Why not 1980. Or 1880.

168. India still has reservations as to the EC's explanation regarding investments. The explanation is restricted to a mere reference back to one title in a table of India-RW-17. When returning to the original source, the tables attached to India-RW-3, the EC had provided a comparative profit and loss table for five years. In that table there was for each year of the IIP the production, turnover, wages paid, as well the investments. While the production, turnover, and wages are all yearly figures, the investments should now be considered accumulated figures, according to the EC.

Output

169. The EC does not offer any compelling explanation as to why the increase in output was not probative for the state of injury. It only states that this increase in output was due to the concentration on higher value niche products. India already pointed to the fallacy in such reasoning: if the output had reduced the EC would have considered this as a sign of injury for the *Bed Linen* industry. Now that it goes up, it is also a sign of injury because of the alleged change in product mix. India considers such reasoning fallacious and, again, recalls that the 'like product' definition under Article 2.6 applies "throughout" the ADA, and not only when the factor points towards injury.

170. The EC then states that the declining profits override the increase in output. This however does not meet the requirements of *Thailand-H-Beams* which made clear that issues such as this require:

"... a compelling explanation of why and how, in light of such apparent positive trends, the domestic industry was, or remained, injured within the meaning of the Agreement."¹¹¹ (underlining added)

¹⁰⁹ EC FWS paragraph 176.

¹¹⁰ EC FWS paragraph 154, last sentence.

¹¹¹ *Thailand – H-Beams*, Panel, paragraph 7.249.

Productivity

171. India had already explained in its first written submission how the EC's increased productivity could not result of the reduction in jobs, but rather was a result of more efficient machinery.¹¹² The EC merely refers to its earlier inverted 'logic': because workers were laid off, the remaining workers decided to start work harder, in order to become more productive.

Factors affecting prices

172. The injurious effects of the increase in raw material prices should have been separately established. India refers in this regard also to its discussion of causation and the non-attribution language, *infra* in section 0.

Margin of dumping

173. The EC takes the position that for the consideration of margins of dumping only the positive margins count. It again relies on the specific rule for duty purposes that zero margins can be disregarded. This disregards that the word "dumping margin" also has to be capable of covering the absence of dumping in case dumping is not there. Probably the EC would also argue that the dumping margins for Pakistan were substantial, since in its view the zeros should be disregarded.

Cash flow

174. The EC spent two curt sentences on the evaluation of cash flow. India had pointed to the inadequacy of that evaluation. The EC does further not dispute the factual error.

Inventories

175. India has already pointed to the absence of data collection for inventories, as well as to the fallacies in the analysis.

Employment

176. India refers to its earlier comments.

Wages

177. The EC fails to explain why this was not decisive.

178. *Growth*

179. The EC considers that the growth in market share was "very limited". Yet, market share is a relative figure. Does the EC expect this to grow every year and up to what level?

180. As for the alleged trends the EC remains selective in when to look at trends and when not. Fact is that the injury investigation period was originally determined at 1992 to the I.P. Moreover, it is not a requirement that "there could have been" a finding of injury. Injury must be "determined" based on an objective examination of positive evidence.

¹¹² India FWS, paragraph 201.

Ability to raise capital

181. Again this factor does not point towards injury.

4. Factual errors

182. India had in its first written submission highlighted a number of factual errors. The answers of the EC are not convincing. For the sake of brevity India will be short.

183. As regard the deliberate disregard of verified information of one producer, the EC has requested a preliminary ruling. India has already pointed out that that request misrepresents the nature of India's argument. As noted, there was no separate claim under Article 4.1(i) but this does not prevent India from making an argument in which this Article is mentioned.¹¹³

184. The EC then mentions that there were no findings that would have mandated any change in the composition of the sample. Yet, according to the second paragraph of recital (54) of the provisional Regulation that producer *was* in the original sample and *was* verified. Its information was only excluded after the authorities determined that it was importing from a dumped source. Now that Regulation 160/2002 revealed that this source was in fact not dumping, the verified information of that producer could no longer be disregarded. Yet by deliberately disregarding such positive evidence as verified, the requirements of an objective examination were violated. Moreover, the fact that such verified information is disregarded also witnesses that no overall reconsideration and analysis ever took place.

185. The EC then states that there was no deliberate decision to disregard. Yet, the error remains and positive evidence has been ignored. The EC's characterization as 'harmless error' finds no basis in the DSU. Moreover, nobody knows whether the mistake was harmless or not, exactly because it is unknown how the injury determination would have looked had this producer been included.

186. As regards the change in sales data the EC admits its error. This in itself was not the sole point. The question was how data sheets with a different turnover than before could still show the same profit margin (from 3.6 to 1.6). With different turnovers the EC came to exactly the same percentage of profits. This remains beyond India's understanding.

187. As regards the change in market share India thanks the EC for its explanation on the measurement shift from value to volume.

188. Concerning the attribution of sample amounts to the Community industry the EC merely states that India was not misled by the figures. That is however beside the point. The point is that the errors are abundant and will mislead any reader without extensive and detailed background knowledge on the case.

189. Finally, concerning the level of the dumping margins the EC continues to defeat common sense. The EC again relies on the specific rule for duty purposes that zero margins can be disregarded. As noted, this disregards that the word "dumping margin" also has to be capable of covering the absence of dumping in case dumping is not there.

¹¹³ See the discussion in paragraphs 0-0 *supra*.

F. THE IMPROPER CAUSAL LINK AND THE ABSENCE OF NON-ATTRIBUTION (CLAIM 6)

1. General

190. India recalls that it had presented two arguments for its claim under Article 3.5. As a first argument India had argued that the EC had not proven the causal link. As a second argument India had argued that the EC had disregarded the non-attribution language by neither (a) examining all other factors which might have caused injury, nor (b) distinguishing the injury caused by other factors.

2. The Causal Link

191. As regards the error in including Pakistani imports as well as the error that overstated the volume of dumped imports, India refers to its earlier arguments, *supra*.

192. As regards the four other arguments of the EC,¹¹⁴ India wishes to present its views as follows.

193. The EC first states that it was not required for the investigating authority to prove that dumped imports were *the sole cause* of material injury.¹¹⁵ In support the EC quotes the Appellate Body Report in *US – Wheat Gluten* and refers to the Appellate Body Report in *US – Lamb*. The EC then concludes, based on the findings in *US – Hot Rolled Steel* concerning the non-attribution language, that the findings in *Wheat Gluten* and *Lamb* with respect to causation also apply *mutatis mutandis* in the context of the Anti-Dumping Agreement.

194. For this latter purpose the EC, *inter alia*, suggests that the wording of Article 3.5 is similar to that of Article 4.2(b) of the Agreement on Safeguards.

195. Let us first compare the two texts and then recall the findings of the Appellate Body.

196. Article 3.5 of the ADA states that:

"It must be demonstrated that the dumped imports are, through the effects of dumping, ... causing injury within the meaning of this Agreement." (emphasis added)

197. Article 4.2(b) of the ASG states that:

"The determination referred to in subparagraph (a) shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof."

198. Clearly, these texts are not identical.¹¹⁶ This is a first reason why India considers that it is not necessarily true that the standard of causation as pronounced in *Wheat Gluten AB* and *Lamb AB* must directly be transplanted to the Anti-Dumping Agreement.

¹¹⁴ EC FWS paragraph 226 *ff*.

¹¹⁵ EC FWS paragraph 226, first bullet point.

¹¹⁶ Compare also *US–Line Pipe AB* which, in paragraph 214, quoted approvingly *US–Hot Rolled Steel AB*:

"[a]lthough the text of the *Agreement on Safeguards* on causation is by no means identical to that of the *Anti-Dumping Agreement*, there are considerable similarities between the two Agreements as regards the non-attribution language."

199. More importantly, India said something *different* than what the EC is implying it said. India is *not* proposing that in the context of the ADA the standard of causation as per the Panel in *Wheat Gluten* should be applied.

200. In the case of *Wheat Gluten*, the *Panel* had expressly found that the increased imports had to be sufficient:

"... *in and of themselves*, to cause injury which achieves the threshold of "serious" as defined in the Agreement."¹¹⁷ (emphasis added)

201. The Panel in *Wheat Gluten* concluded that "Article 4.2(a) and (b) SA require that increased imports *per se* are causing serious injury."¹¹⁸

202. On appeal, the Appellate Body stated that:

"... the need to distinguish between the effects caused by increased imports and the effects caused by other factors does *not* necessarily imply, as the Panel said, that increased imports *on their own* must be capable of causing serious injury, nor that injury caused by other factors must be *excluded* from the determination of serious injury." (emphasis in original)¹¹⁹

203. India has *nowhere* gone as far as arguing that the dumped imports must *on their own* be capable of causing material injury, although it considers that good arguments exist to support this logic in the ADA context. However, in this case this is a bridge that need not be crossed. India has merely stated, that in this case it:

"considers that the EC has not adequately proven at all that the ... dumped imports from India were ... *the cause* of the profit reduction of the Community industry ...".¹²⁰ (emphasis in original)

204. India had therefore, in its first argument of its sixth claim, remained extremely close to the text of the first sentence of Article 3.5 which states that:

"It must be demonstrated that *the dumped imports are*, through the effects of dumping, ... causing injury within the meaning of this Agreement." (emphasis added)

205. Accordingly, India does not consider that it has contradicted the Appellate Body Report in *Wheat Gluten* or that it has set forth a wrong standard of causation in the context of the Anti-Dumping Agreement.

206. India's view fits with the non-attribution language, as interpreted in *US – Hot Rolled Steel AB*, since that language ensures that the effects of dumped imports must be distinguished from the injury caused by dumped imports. Through such non-attribution the investigating authorities ensure that injury caused by factors other than dumped imports is not attributed to dumped imports. Accordingly the determination finally rests on a genuine and substantial relationship of cause and effect between dumped imports and material injury.

¹¹⁷ *Wheat Gluten* Panel, paragraph 8.138.

¹¹⁸ *Ibid.*, paragraph 8.143.

¹¹⁹ Appellate Body *Wheat Gluten* paragraph 70, last sentence.

¹²⁰ India FWS, paragraph 248.

207. The Appellate Body in *US – Hot Rolled Steel* would appear to have ruled clearly that the dumped imports should *cause* the injury. In its Report the Appellate Body stated that if the non-attribution language is not heeded then:\$

" ... the 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."¹²¹ (underlining and emphasis added)

208. Therefore, investigating authorities should ensure that the dumped imports are indeed causing the injury, as required by the *Anti-Dumping Agreement*. Besides that, the causation analysis is as important as never before due to the Appellate Body statement in *US – Line Pipe* that under Article 5.1 of the ASG (which is textually similar to Article 11.1 of the ADA) "safeguard measures may be applied only to the extent that they address serious injury attributed to increased imports".¹²²

209. India respectfully submits that it has presented a correct view on the question of causation in the context of the *Anti-Dumping Agreement*.

210. The second argument of the EC¹²³ misrepresents the views of India. India had stated that the EC had not *demonstrated* that the tiny increase in imports had *caused* the injury.¹²⁴ This argument is now changed by the EC into that India had stated 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."¹²⁵ Since the EC is therefore addressing something that India has *not even* stated it seems rather pointless to react to it.

211. The third argument of the EC mentions that the injury finding was not based on a loss in market share.¹²⁶ Of course India has never suggested this since the market share of the Community industry went *up*. Indeed, since this market share went up it would have been not more than prudent to provide, as one Panel put it:

" ... a compelling explanation of why and how, in light of such apparent positive trends, the domestic industry was, or remained, injured within the meaning of the Agreement."¹²⁷

212. Finally the EC refers to the alleged increase in market share of dumped imports from India.¹²⁸ While India has already pointed out that the EC's calculation of "dumped imports" was wrong, the EC once more misrepresents the dumped imports from India. It states that the market share of "dumped imports" represented over 50 per cent of the EC industry's sales volume. Even following the EC's "logic" on calculating dumped imports (with dumped imports from India taken as 8.5 per cent (rather than 4.6 per cent)), this is still *less* than 50% of the 19.7% market share (in volume terms) as explained in recital (35) of Regulation 1644/2001. The argument of the EC is therefore based on a wrong presentation of facts.

¹²¹ *US – Hot Rolled Steel AB*, paragraph 253.

¹²² *US – Line Pipe AB*, paragraph 260.

¹²³ EC FWS, paragraphs 240-241.

¹²⁴ *Ibid.*

¹²⁵ EC FWS paragraph 231.

¹²⁶ EC FWS paragraph 235.

¹²⁷ *Thailand – H-Beams*, Panel, paragraph 7.249.

¹²⁸ EC FWS paragraph 237.

3. The Non-Attribution Language

213. As a first aspect, India fails to understand the EC's rebuttal concerning the non-examination of all other factors that might have caused injury. India had provided one example of such other factor, which was the inflation in prices of consumer goods.¹²⁹ While identified, this factor had not even been examined as a possible other factor. The EC states that this was regarded as a sign of injury, not a possible *cause*.¹³⁰ Yet, since price suppression and inadequate profits were singled out as the main indication of injury, the inflation could well have been a cause of that alleged injury. This should have been examined separately.

214. As a second aspect, India had mentioned that the EC had failed to engage in ensuring that injury caused by other factors should not be attributed to the dumped imports. For this purpose India had quoted the apposite paragraphs from the Appellate Body in *US – Hot Rolled Steel*.¹³¹

215. As India mentioned, there is the obligation to separate and distinguish the different injurious effects caused by other factors, from the effects of the dumped imports.¹³²

216. And, in India's view, the EC did not engage in such separation nor did it distinguish the different injurious effects. This observation from India was pertinent since the EC in recital (103) of the provisional Regulation had stated that:

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

217. Again, in the re-determination the EC stated at recital (50) that:

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

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

219. Accordingly, India submitted that by not engaging in such mandatory separation and distinguishing of effects of this other factor the EC acted inconsistently with the non-attribution language of Article 3.5 as clarified by the Appellate Body.

220. In rebuttal the EC merely concludes that:

"Since the increase in the cost of the raw cotton was not a separate cause of injury, its injurious effects cannot possibly be "separated/distinguished" from those of the dumped imports."¹³³

221. Yet this explanation is not in line with the obligations as expressed by the Appellate Body as regards the non-attribution of injury and the mandatory separation of injurious effects.¹³⁴ Once the

¹²⁹ India FWS, paragraph 250.

¹³⁰ EC FWS, paragraph 241.

¹³¹ India FWS, paragraphs 249, 251, 253, 254, quoting the Appellate Body in *US – Hot Rolled Steel* paragraphs 222, 223, and 228.

¹³² India FWS, paragraph 255.

¹³³ EC FWS, paragraph 248.

¹³⁴ *US – Hot Rolled Steel AB* paragraph 228. Moreover, the Appellate Body in *Line Pipe*, in the context of the ASG, at paragraph 217, did not leave any doubt:

EC determined that the increase in raw material prices caused injury,¹³⁵ such cause *had* to be separated from the alleged injury caused by dumped imports. While the Appellate Body recognized that:

" ... it may not be easy, as a practical matter, to separate and distinguish the injurious effects of different causal factors"¹³⁶

it immediately added that:

" ... although this process may not be easy, this is precisely what is envisaged by the non-attribution language."¹³⁷

222. Accordingly, India respectfully submits that, the EC, by failing to do *precisely that*, acted inconsistently with Article 3.5.

G. THE EC'S DISREGARD FOR INDIA'S STATUS AS A DEVELOPING COUNTRY (CLAIMS 7 AND 8)

1. India's claim 7 regarding Article 15

223. First of all, India recalls that the core of the problem here is that the EC did, once again, nothing to help Indian exporters in a constructive fashion. The imposition of duties was merely suspended with the sole goal of (soon) seeking to impose duties higher than ever. As the Panel had already clearly stated in its original report: suspension of measures is not a "remedy" of any type, constructive or otherwise.

224. The EC does not try to deny these facts but tries to argue that its failure to respect Article 15 results from one word in the Article, which is the word 'applying'. That shift in attention does not solve the problem which is that the EC did exactly that what it was not supposed to have done.

225. Nevertheless, India wishes to briefly address that EC argument since it does not agree with it. One needs only to compare the word 'apply' with the word 'action'. Each of these words has to be capable of covering an activity in case something is done. However, this does not detract from the fact that both can also include the meaning of an 'inactivity' or a 'decision not to act.'

226. Similarly, the suspension of an imposition of duties can in itself also qualify as a form of application. This is for example recognised in Article 7, addressing the question of provisional measures. Article 7.1, and the rest of that Article, uses variations of the word 'apply', rather than 'impose'. In Article 7.2, the "withholding of appraisal" is a recognised form of a provisional measure, even though no duty is imposed.

227. The Appellate Body followed a similar line of reasoning in *Line Pipe*:

" ... Article 9.1 is concerned with the application of a safeguard measure on a *product*. And we note, too, that a duty, such as the supplemental duty imposed by

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

¹³⁵ Provisional Regulation recital (103).

¹³⁶ *US – Hot Rolled Steel AB* paragraph 228.

¹³⁷ *Ibid.*

the line pipe measure, does not need actually to be enforced and collected to be "applied" to a product. In our view, duties are "applied against a *product*" when a Member imposes conditions under which that product can enter that Member's market—including when that Member establishes, as the United States did here, a duty to be imposed on over-quota imports. Thus, in our view, duties are "applied" irrespective of whether they result in making imports more expensive, in discouraging imports because they become more expensive, or in preventing imports altogether.¹³⁸ (Underlining added)

228. In similar vein, the suspension of imposition of duties equally qualifies as an application of measures. The measures are dormant, but they apply. If they would not apply then there would be no need to suspend their imposition. This suspension is conditional upon the partial review not being concluded.¹³⁹ There is therefore a very clear timing condition within imports have to take place—a condition which moreover will soon run out and after which no more imports can take place.

229. Having dismantled the semantic confusion that the EC has sought to create, India wishes to return to the root of the problem. India recalls that the obligation to explore rests on the EC, not on India. Thus, while the EC recognises that India had provided various alternatives as possible constructive remedies, the only reaction from the EC (now, after one year) is that all of India's suggestions do in the EC's view not qualify as constructive remedies. One may only wonder how more often an initiative has to come from India while the onus to explore rests on the EC?

230. The EC also hastens to explain that Regulation 1515/2001 was neither emergency legislation nor retroactive. Yet, one only needs to read Article 4 of that Regulation: even though the Regulation entered into force on 27 July 2001, "it applies to reports adopted after 1 January 2001 by the DSB." Since the Bed Linen reports were adopted by the DSB on 12 March 2001, Regulation 1515/2001 applied to it, even though that Regulation entered into force four months later. This also addresses the question of being specifically tailored: there is only one set of Reports affected by that retroactivity—the Bed Linen Reports of 12 March 2001. The issue is material since the legitimate refunds under EC law could have served as some sort of remedy, even though for many bankrupt companies it is already too late.

231. Finally, the EC tries to rebut the Panel's finding that non-imposition of measures is not a remedy of any type. The EC argues that suspension is a remedy, directly contrary to what the Panel had held. It is therefore not for India to refute such assertions. The Panel had already enunciated itself on this issue in paragraph 6.228 of its original Report. The EC did not appeal these findings. Hence it is inappropriate for it to do so now.

2. India's claim 8 regarding Article 21.2 DSU

232. The EC states that Article 21.2 is not mandatory, despite relevant case law of the Appellate Body on the question of 'should'. India has already identified that case law. India has also quoted and paraphrased the relevant sections in its first written submission.

233. The EC then wrongly states that India has not identified any *specific element* render the word 'should' mandatory beyond doubt. Yet, India had identified *two* express criteria that were fulfilled and triggered the obligation beyond doubt. In return to that identification of two express criteria the EC has not attempted a refutation.

234. The EC hides behind formalistic arguments.

¹³⁸ *US-Line Pipe AB*, paragraph 129.

¹³⁹ Re-determination Article 2 paragraph 2.

235. The EC first mentions that the Article is vague. Yet that does not render the obligation inoperative. If provisions would have *no* meaning then there is no purpose for such provisions. If such view is upheld then that also implies that Articles 4(10) and 24 (first sentence) of the DSU are meaningless. If this is so they might as well be deleted. Yet, an interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs to redundancy or inutility.¹⁴⁰

236. Indeed:

"A treaty interpreter is not entitled to assume that ... usage [of words] was merely inadvertent on the part of the Members who negotiated and wrote the Agreement."¹⁴¹

237. To confirm its reasoning India recalls that in the arbitral award in *Chile–Alcoholic Beverages*, it is said that:

"because Article 21.2 is in the DSU, it is not simply to be disregarded."

238. The award goes on to say that:

"Article 21.2, whatever else it may signify, usefully enjoins, *inter alia*, an arbitrator functioning under Article 21.3(c) to be generally mindful of the great difficulties that a developing country Member may, in a particular case, face..."¹⁴² (underlining added)

239. India also recalls that in *all* arbitrations under Article 21.3(c) of the DSU Article 21.2 has been enforced when requested so by the developing countries.¹⁴³

240. Moreover, in *India–Quantitative Restrictions* the Panel anticipating the difficulties of India to comply with an adverse decision stated the following:

"The foregoing factors take an added importance in light of the principle of special and differential treatment. This principle should be highlighted, given that Article 21.2 of the DSU requires 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."¹⁴⁴ (Underlining added)

241. India also wishes to remind the EC that on at least one occasion the EC has *itself* stated that 'should' in Article 21.2 of the DSU means 'must':

"The European Communities argues that though in accordance with Article 21.2 of the DSU, when assessing the "reasonable period of time" the arbitrator must take into account the "interests" of Argentina as a developing country, this does not mean that the arbitrator must take into account "circumstances" which are "qualitatively

¹⁴⁰ *Ut res magis valeat quam pereat*. This is clear-cut and undisputed case law, ever since paragraph 23 of *US – Gasoline AB*.

¹⁴¹ *EC – Hormones AB* paragraph 164. Other examples abound. *E.g. Argentina – Footwear AB* paragraph 88, *Korea – Dairy Products AB* paragraph 80-81, *Japan–Alcoholic Beverages AB* page 12, *Canada – Milk AB* paragraph 135, *US – Underwear* page 15.

¹⁴² *Chile–Alcoholic Beverages* 21.3, paragraph 45. (also quoted by Arbitrator in *Argentina–Bovine Hides* 21.3, paragraph 51).

¹⁴³ *Indonesia–Autos* 21.3, *Chile–Alcoholic Beverages* 21.3, *Argentina–Bovine Hides* 21.3.

¹⁴⁴ *India–Quantitative Restrictions*, Panel Report, paragraph 7.6.

different" from those that would be relevant for a developed country."¹⁴⁵ (Underlining added)

242. The EC refers to another Panel report which dealt with Article 15. India has however already addressed the question of Article 15 in its claim 7. In any event the facts and history of this case are entirely different. *Bed Linen* has a history of violations, including that of Article 15. The EC should have exercised much more caution rather than to initiate yet another review.

243. Now that the EC has brought up Article 15 in the context of Article 21.2 DSU, India wishes to briefly elaborate on this. India has already explained how Article 15 has been violated by the EC in the re-determination, by doing exactly the opposite of what the Panel held. The EC's repetition of its inconsistency—after the Panel already found fault with the EC's actions—brings with it also a violation with Article 21.2. India considers that the compelling logic of the Appellate Body enunciated in *Line Pipe*¹⁴⁶ also applies in the relation between Articles 21.2 of the DSU and Article 15 of the ADA: a Member cannot be considered to have paid particular attention unless, as a first step, it has heeded the essential interests of developing country Members under Article 15. The violation of Article 15 therefore brings with it the inconsistency with Article 21.2 DSU. India considers this one more reason that Article 21.2 has been violated.

244. The EC then refers to the negotiating of possible future legislation. This however is no 'context' foreseen in Article 31.2 of the Vienna Convention. That argument should therefore be dismissed as such. Moreover it is common knowledge that statements in negotiations may not always reflect the exact legal position of an Article in question; it could form part of an overall negotiating strategy.

245. The EC suggests that the obligations under Article 21.2 of the DSU are procedural rather than substantive. India disagrees that the Article sets forth a preference of form over content. In any event, the EC did just nothing that would qualify as an action under Article 21.2. On the contrary, the initiation of yet another *Bed Linen* review suggests that the EC did rather the *exact* opposite of paying particular attention to the interests of India.

246. Finally the EC states that it did pay particular attention. The examples that are mentioned however do not qualify as such. The implementation period depended on the mutual agreement and not on the fact that India is a developing country; moreover, the EC did not respect that period. The EC then asserts that it accepted India's request for a Panel the first time it was put on the agenda; however, this is not correct since the request had *de facto* been made once before.¹⁴⁷

247. As a last resort the EC mentions that it took account of India's interests by suspending the imposition of the measures. As we know now that later action seems not to have been taken in good faith: in retrospect it appears no more than temporary lip service to enable the initiation of yet another *Bed Linen* proceeding and soon to impose duties higher than ever.

¹⁴⁵ *Argentina–Bovine Hides* 21.3, paragraph 33.

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

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

¹⁴⁷ India's first written submission paragraph 24.

248. Indeed, as for Article 21.2 DSU, the parameters are *not* completely undefined. *Particular attention should* be paid, yet the EC did entirely nothing. At least *something* discernible should have been done that should have shown the extra attention.

249. Similar to with the word *action*, *particular attention* can under circumstances also encompass the decision not to act. A published decision *not* to initiate *Bed Linen-3* could have qualified as such.

250. Indeed, and finally, even if parameters are not defined then that does not mean that *nothing* should be done. For example, it is an unwritten and basic rule in traffic that drivers in cars should pay particular attention to the situation of pedestrians. While parameters in those circumstances are also not expressly defined then this does not mean that drivers can simply ignore pedestrians. They are under the obligation to exercise additional *caution*, even though that can take several forms depending on the situation.

251. Yet, we all know that the contrary happened: *Bed Linen-3* was initiated.

V. CONCLUSION

252. For the above reasons, India maintains the conclusions set out in its first written submission.

List of Regularly Quoted Panel and Appellate Body Reports and Arbitration Awards

Argentina – Bovine Heads 21.3	<i>Argentina – Measures on the Exports of Bovine Hides and the Import of Finished Leather, Arbitration under Article 21.3(c) of the DSU, WT/DS155/10 of 31 August 2001</i>
Argentina – Floor Tiles	<i>Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy, WT/DS189/R of 28 September 2001</i>
Australia – Leather 21.5	<i>Australia – Subsidies Provided to Producers and Exporters of Automotive Leather, Recourse to Article 21.5 of the DSU by the United States, WT/DS126/RW of 21 January 2000</i>
Australia – Salmon 21.5	<i>Australia – Measures Affecting Importation of Salmon, Recourse to Article 21.5 by Canada, WT/DS18/RW of 18 February 2000</i>
Canada – Civilian Aircraft 21.5 AB	<i>Canada – Measures Affecting the Export of Civilian Aircraft, recourse to Article 21.5, Report of the Appellate Body, WT/DS70/AB/RW of 21 July 2000</i>
Chile – Alcohol 21.3	<i>Chile – Taxes on Alcoholic Beverages, Arbitration under Article 21.3(c) of the DSU, WT/DS87/15 and WT/DS110/14 of 23 May 2000</i>
EC – Bed Linen	<i>European Communities – Anti-Dumping Duties On Imports Of Cotton-Type Bed Linen From India, WT/DS141/R of 30 October 2000</i>
EC – Bed Linen AB	<i>European Communities – Anti-Dumping Duties On Imports Of Cotton-Type Bed Linen From India, Report of the Appellate Body, WT/DS141/AB/R of 1 March 2001</i>
EC – Hormones AB	<i>EC Measures concerning Meat and Meat Products (Hormones), Report of the Appellate Body, WT/DS26/AB/R and WT/DS48/AB/R of 16 January 1998</i>
Guatemala – Cement-II	<i>Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico (Cement-II), WT/DS156/R of 24 October 2000</i>
India – Quantitative Restrictions	<i>India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, WT/DS90/R of 6 April 1999</i>
Indonesia – Autos 21.3	<i>Indonesia – Certain Measures Affecting the Automobile Industry, Arbitration under Article 21.3(c) of the DSU, WT/DS54/15, WT/DS55/14, WT/DS54/14, WT/DS59/13 and WT/DS64/12 of 7 December 1998</i>
Korea – Dairy Products AB	<i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products, Report of the Appellate Body, WT/DS98/AB/R of 14 December 1999</i>
Mexico – HFCS 21.5	<i>Mexico – Anti-Dumping Investigation Of High Fructose Corn Syrup (HFCS) From The United States, recourse to Article 21.5, WT/DS132/RW of 22 June 2001</i>
Thailand – H-Beams	<i>Thailand – Anti-Dumping Duties On Angles, Shapes And Sections Of Iron Or Non-Alloy Steel And H-Beams From Poland, WT/DS122/R of 28 September 2000</i>
US – Gasoline AB	<i>United States – Standards for Reformulated and Conventional Gasoline, Report of the Appellate Body, WT/DS2/AB/R of 29 April 1996</i>
US – German Stee	<i>United States – Countervailing Duties on Certain Corrosion Resistant Carbon Steel Flat Products from Germany, WT/DS213/R of 3 July 2002</i>
US – Hot Rolled Steel AB	<i>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</i>
US – Hot Rolled Steel 21.3	<i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, Arbitration under Article 21.3(c) of the DSU, WT/DS184/13 of 19 February 2002</i>
US – Lamb AB	<i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia, Report of the Appellate Body, WT/DS178/AB/R and WT/DS178/AB/R of 1 May 2001</i>

<i>US – Line Pipe AB</i>	<i>United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea, Report of the Appellate Body, WT/DS202/AB/R of 15 February 2002</i>
<i>US – Shrimp 21.5</i>	<i>United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia, WT/DS58/RW of 15 June 2001</i>
<i>US – Shrimp 21.5 AB</i>	<i>United States – Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, Recourse to Article 21.5 by Malaysia, WT/DS58/AB/RW of 22 October 2001</i>
<i>US – Wheat Gluten AB</i>	<i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, Report of the Appellate Body, WT/DS166/AB/R of 22 December 2000</i>

ANNEX C-2

SECOND SUBMISSION OF THE EUROPEAN COMMUNITIES

12 August 2002

I. INTRODUCTION

1. This Second Submission of the European Communities (the « EC ») addresses the arguments made by Japan and the United States in their Third Party Submissions filed on 5 August 2002. The EC notes in this respect that Japan's submission is limited to India's claims 5 and 6, whereas the United States has commented on the significance of measures taken after the expiry of the "reasonable period of time" and India's claims 1, 2, 3, 5, 6 and 8. The EC will address each of these in turn.

II. ARGUMENT

A. Measures taken after the expiry of the « reasonable period of time »

2. The EC agrees with the arguments made by the United States at paragraphs 2 to 4 of its submission to the effect that a Member can still take «measures to comply » after the end of the «reasonable period of time».¹

3. Nevertheless, the EC understands India's position to be not that a Member cannot take « measures to comply » after the end of the «reasonable period of time» but, rather, that the mandate of this Panel is limited to establishing whether the measures taken within the «reasonable period of time» are consistent with the covered agreements. As explained by the EC, Article 21.5 of the *DSU* does not provide for such limitation of the Panel's mandate.² The EC notes that the United States agrees with that view.³

4. The EC has argued that the relevant date for assessing the consistency of the measures taken to comply is that of the date of establishment of the panel because that appears to have been the date taken into account by the panel in *US – Shrimps (21.5)*.⁴ However, as observed by the United States, the Panel need not decide whether the relevant date is the date of the panel request, that of the establishment of the panel, or a later date (as decided by the Panel in *Australia – Salmon (21.5)*⁵), because, in any event, all the measures at issue in this case were taken before the date of the panel request.

B. Article 2.2.2(ii) of the Anti-dumping Agreement (India's claim 1)

5. The EC notes that the United States shares its view that Article 2.2.2(ii) of the *Anti-Dumping Agreement* does not prescribe the use of any specific averaging factor according to which weighted average SGA and profit must be calculated.⁶ The United States likewise disagrees with India's claim

¹ US Third Party Submission, paras. 2-4.

² EC First Submission, paras. 32-37.

³ US Third Party Submission, paras. 5-6.

⁴ EC First Submission, para. 35.

⁵ See EC First Submission, footnote 22.

⁶ US Third Party Submission, paras. 9 and 10.

that it can be inferred from references to sales volume or quantity elsewhere in the *Anti-Dumping Agreement* that Article 2.2.2(ii) implies that SGA and profit must be calculated on the basis of sales volume.

6. The EC agrees with the United States' conclusion that weighting could therefore be done on the basis of either sales value or sales volume, both being, in principle, "permissible interpretations" within the meaning of Article 17.6(ii) of the *Anti-Dumping Agreement*. Nevertheless, the EC has shown that the specific method proposed by India in this case (averaging by volume measured in terms of "sets/units") leads to a meaningless result. In other words, India's method does not allow a "proper establishment of the facts" within the meaning of Article 17.6 (i). For that reason, it cannot be considered a "permissible interpretation".

7. Finally, even if Article 2.2.2(ii) required the weighted average to be calculated on the basis of volume, India has not justified why sales volume should be measured in units/sets rather than by weight or size.⁷ As the EC has highlighted, a weighting by sales volume measured by weight would have resulted in higher dumping margins than those calculated using sales value⁸, thus giving rise to no nullification or impairment of benefits to India under Article 2.2.2(ii).

C. Article 3.3 of the Anti-Dumping Agreement (India's claim 2)

8. The EC notes that the United States concurs with the view that Regulation 160/2002 is not subject to this Article 21.5 proceeding because it is independent from the measures taken by the EC to comply with the recommendations and rulings of the DSB.⁹

9. The United States also agrees with the EC's position that the EC authorities were entitled to continue to treat imports from Pakistan as dumped for the purposes of the re-determination of injury made in Regulation 1644/2001.¹⁰

D. Article 5.7 of the Anti-Dumping Agreement (India's claim 3)

10. The EC endorses the arguments made by the United States at paragraph 15 of its submission to the effect that Article 5.7 applies only with respect to the original investigation.

E. Articles 3.2 and 3.4 of the Anti-Dumping Agreement (India's claim 5)

11. The EC agrees with Japan that information related to factors listed in Article 3.4 must be collected and evaluated to determine injury. The EC complied fully with this obligation in its re-determination following the DSB recommendations and rulings. The EC endorses the United States' view that whilst each of the factors enumerated in Article 3.4 must be evaluated, the question of whether or not a factor is relevant to the determination of injury will depend on the facts and circumstances of the industry in question.¹¹

12. The EC notes the United States view that, in the light of Article 12.2, investigating authorities are not required to make a specific finding on each enumerated factor in Article 3.2 and 3.4, provided that it is discernible from their determination that they evaluated each of those factors. In any event, the EC submits that the fact that it evaluated each factor is not only discernible from Regulation

⁷ EC First Submission, paras. 86-89.

⁸ EC First Submission, para. 64 and paras. 90-94.

⁹ US Third Party Submission, para. 13.

¹⁰ Ibid., para. 14.

¹¹ US Third Party Submission, para 17. See also *EC-Bed linen*, report of the Panel, para. 6.168.

1644/2001, but that its re-determination actually sets out specific findings in relation to each of those factors.

F. Article 3.5 of the Anti-dumping Agreement (India's claim 6)

13. The EC agrees with Japan that Article 3.5 of the *Anti-dumping Agreement* requires that investigating authorities examine any known factors other than dumped imports which are causing injury at the same time as dumped imports, and that injuries caused by these other factors must not be attributed to the dumped imports. The EC submits that it did carefully examine such other known factors and did not attribute injury caused by them to the dumped imports. The United States agrees with the EC that Article 3.5 does not require that the dumped imports are the sole cause of injury.¹² As the EC has made clear, the relevant issue is not whether the dumped imports were *the cause* of injury suffered by the EC industry, but rather whether there was a genuine and substantial relationship of cause and effect.

14. The EC notes that the United States also agrees with the EC that injury can be found to exist even where dumped imports have not increased.¹³ In any event, the EC established in the present case that market share held by dumped imports from India had increased significantly over the injury analysis period.¹⁴

C. Article 21.2 of the DSU (India's claim 8)

15. The EC notes that the United States agrees with the EC's position that Article 21.2 of the *DSU* is a non-mandatory provision¹⁵ and that Japan has not expressed any views to the contrary. The EC endorses the argument made by the United States at paragraph 12 and footnote 2 of its submission.

16. The EC recalls that, in any event, the facts of this case evidence that the EC authorities did pay particular attention to the interests of India.¹⁶

¹² US Third Party Submission, para. 19; EC First Submission, paras. 227-230.

¹³ US Third Party Submission, para. 20.

¹⁴ EC First Submission, paras. 237-239.

¹⁵ US Third Party Submission, para. 12.

¹⁶ EC First Submission, paras. 289-292.