ANNEX D

ORAL STATEMENTS

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ANNEX D-1

ORAL STATEMENT OF THE REPUBLIC OF KOREA

11 September 2002

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

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

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

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

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

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

6. What is important is that, as the Appellate

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

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

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

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

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

ANNEX D-2

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

11 September 2002

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

I. THE PROVISIONS OF ANTI-DUMPING AGREEMENT ARTICLE 5.7 DO NOT

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

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

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

8. If a Member chooses to implement DSB recommendations and rulings by reconsidering a dumping determination, neither the Anti-Dumping Agreement nor the DSU requires investigating

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

III.

ANNEX D-3

ORAL STATEMENT OF THE EUROPEAN COMMUNITIES

10 September 2002

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

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

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

13. India agrees with that request[5]. Nevertheless, it argues that, in addition, the Panel should assess the consistency of the measures "taken to comply" also as of the date of expiry of the "reasonable period of time".[6]

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

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

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

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

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

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[5] India's Second Submission, para. 12.
[6] Ibid.
[7] Ibid., para. 16.
[8] Ibid., para. 17.
[9] Ibid., para. 22.
[10] Ibid., para. 22.

19. While it may be true that no Member has ever invoked a violation of Article 21.3 in Article 21.5 proceedings[11], this does not prove that it is unnecessary to state that claim separately. Rather, it seems more likely that no Member has ever bothered to invoke a violation of Article 21.3 because a ruling that the implementing Member has complied late would be declaratory and devoid of practical consequences.

20. India also argues that, in light of Article 21.2 of the *DSU*, when the complaining Member is a developing country, panels should make a "strict interpretation of the binding nature of the obligation to comply".[12] This argument is misguided. The EC does not dispute the binding nature of the obligation to comply within the "reasonable period of time". The EC has never suggested that such obligation is "meaningless".[13]

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

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

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

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

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

28. The EC notes India's explanation that it is not submitting a claim under Article 4.1(i).[20] However, such claim is implicit in India's claim under Articles 3.1 and 3.4 to the effect that the data

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

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

III. CLAIMS

A. CLAIM 1: ARTICLE 2.2.2 (II)

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

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

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

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

35. Unlike the EC's method, India's method does not allow a "proper establishment of the facts" and, hence, it is not a "permissible" interpretation of Article 2.2.2 (ii). As explained, India's method gives the same weight to a pillow case as to a double set comprising one sheet, one duvet cover and two pillow cases.[27] Thus, in the words of the Appellate Body[28], India's method fails to "reflect the relative importance" of each of the "other exporters or producers".

[22] India's Second Submission, para. 45.
[23] India's Second Submission, paras. 49-50.
[24] EC's First Submission, paras. 71-74.
[25] Cf. Article 17.6 (i) of the Anti-Dumping Agreement.
[26] India's Second Submission, para. 100.
[27] EC's First Submission, paras. 86-88.

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

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

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

? first, the method applied in the *Bed Linen* investigation is the same generally applied by the EC authorities in all the anti-dumping investigations where it has become necessary to resort to Article 2.2.2 (ii).[35] India has not disputed this;

? second, the method applied by the EC authorities is consistent with the methodologies applied at previous steps of the dumping calculation in the *Bed Linen* investigation. It is also consistent with the methods applied to calculate other weighted averages, such as the "all others" rate or the profit margin of the domestic industry.[36] Again, India does not dispute this[37]; and

? third, there is no inconsistency between the method applied in this case and the Judgement of the EC Court of First Instance in the case 118/96 cited by India, which addresses a different issue.[38]

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

[29] India' Second Submission, para. 77. See also para. 104.

[30] Ibid., para. 102.

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

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

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

[33] Ibid., para. 7.111.

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

[35] EC's First Submission, para. 81.

[36] EC's First Submission, para. 82.

[37] India's Second Submission, paras. 97 and 98.

[38] EC's First Submission, paras. 75-78.

39. In fact, India's allegations of inconsistency rest on little else than a series of incidental statements made by the EC to the original Panel to the effect that the sales of the company Bombay

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

43. Obviously, India has misunderstood the EC's argument. Unlike the United States in the *Superfund* case, to which India refers[45], the EC is not arguing that the averaging method which it applied in *Bed Linen* has had no actual effects on the volume of imports. (Indeed, since the EC is applying no duties, this fact would be impossible to ascertain). Rather, the point made by the EC is that, by applying a method which results in a lower dumping margin, and consequently in a lower duty, than another method which, by India's own admission, is consistent with Article 2.2.2 (ii), the EC is effectively improving the competitive opportunities of the Indian imports. Indeed, India would surely agree that the competitive opportunities of the Indian imports would be impaired if the EC were to increase the duty rates above the current level following a recalculation of the reasonable amounts for SGA and profits based on the use of weight as the averaging factor.

B. CL the

D. CLAIM 4: ARTICLES 3.1 AND 3.2

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

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

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

57. While IshoulFan-dia accD -0.0819 t0.13the8no2la7qm cs pa thther s

accordance with Article 9.4 as the "all others" rate simply because that was the terminology used by the Appellate Body in *United States – Hot Rolled Steel*.[57] The EC has clearly explained that the duty applied to non-cooperative exporters not included in the sample was calculated on the basis of "facts available", and not of the formula set out in Article 9.4.[58] Thus, the confusion alleged by India does not arise.

E. CLAIM 5: ARTICLE 3.4

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

1. Data not collected cannot be evaluated

63. In its First Submission, India claimed that the Panel had "factually established the absence of data collection as a substantive violation" of Article 3.4.[59] Even though watered down, in its Second Submission, India still insists on arguing that the original Panel "found" that it appeared that data had not been collected.[60] The original Panel did not find, as a matter of fact or of law, that data had not been collected. It merely found that there was no indication in the determination that the EC authorities had evaluated the relevance or significance of all of the factors listed in Article 3.4. India conveniently ignores the fact that the original Panel acknowledged that some of the data collected for other factors may have included data for the factors mentioned; in the absence of any indication to that effect in the determination, however, it could not assume that that was the case. In other words, the information might well have been collected but this was not sufficiently clear from the determination. The original Panel's remarks have thus been taken out of context and exaggerated, and India's continued reliance on those remarks merely exposes the weakness of its assertion that certain information was never collected.

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

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

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

> We observe, first, that Article 9.4 applies only in cases where investigating authorities have used "sampling", that is, where investigating authorities have in accordance with Article 6.10 of the Anti-Dumping Agreement, limited their investigation to a select group of exporters or

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

Stocks

66. Inventories increase or decrease depending on the volume produced and the volume sold/ exported during a given period. Since data concerning production, sales volumes and exports were collected[62], the EC authorities did have data on stocks, as was clearly confirmed to Texprocil in the EC Commission's letter of 27 July 2001.[63] Information concerning stocks was further verified on spot for sampled producers. India ignores the fact that information on stocks could be derived from other data, and stresses that the information requested on stocks in the exporter's questionnaire was much more detailed and that this level of detail would be necessary also for properly establishing the

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

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

2. Adequate evaluation of Article 3.4 factors

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

An overall reconsideration does not prevent any confirmation of previous findings

72. First, contrary to what India alleges in its Second Submission, the EC did not contradict itself by stating that there had been an overall reconsideration and analysis even though certain previous findings were confirmed. As has already been explained, India takes out of context[68] the EC's reference to the 'confirmation' of original findings. The fact that the EC did not, upon reconsideration of the matter, find it necessary to amend certain of its previous findings, whilst it did revise other findings, in no way supports the allegation that there has been no overall reconsideration.[69]

Use of the sample

73. Second, we note that India does not contest the relevance of the sample for determining injury[70]. Apart from the fact that India has not previously stated that it contested the representativity of the sample, we have already noted that the claim in relation to one producer excluded from the

[67] Exhibit EC-2. The EC requests that the information set out in this Annex be treated as confidential pursuant to Article 17.7 of the *Anti-Dumping Agreement* and paragraph 3 of the Panel's Working Procedures.
[68] India's Second Submission, para. 150.
[69] See also EC First Submission, para. 163.
[70] India's Second Submission, para.156.

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

74. So, whilst India purports not to contest either the representativity or the relevance of the sample, it still contests reliance on sampled data alone for certain injury factors. However, one must ask what is the point of allowing the use of a sample at all if one cannot rely on the data collected for that sample? Now, some basic information may be available at the level of the entire Community industry; this is generally information which is collected globally and readily available or ascertainable. (This normally includes information on production, sales, market share, employment

cent[76]. Average prices per kilogram therefore increased over the period. The investigation established that for the sampled producers, the increase in prices was due to a shift towards higher value niche products. This was confirmed in the redetermination.[77]

79. India rejects out of hand the EC's explanations regarding the shift towards niche products as far as prices are concerned. It seems to argue that since the like product includes the niche products, there can be no distinction between the two, implying that only average prices should be relevant. It submits that otherwise there would always be injury since there would be injury if prices decrease and if they increase this would just be put down to a supposed shift in the product mix. This suggestion is absurd- there is no conspiracy theory! Interestingly, India does not seem to dispute the actual existence of the shift in sales and production by the sampled producers towards higher value niche products. Nor is it disputed that average prices actually decreased for the defined reference products in the sample. Therefore, the EC found that average prices had increased, but on closer inspection it found that this was due to the shift in product mix. Had average prices decreased overall, it may have

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

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

Productivity and Employment

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

Wages

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

Growth

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

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

[80] EC First Submission, paras. 183 –186.
[81] Regulation 1644/2001, recital 44.

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

<u>*Profits*</u>

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

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

91. Indi

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

Factors affecting prices

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

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

3. Alleged factual errors

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

Dumping margin

98. The argument in relation to dumping margins has been dealt with under claim 4.[87]

Sample

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

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

Market share

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

Profits

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

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[86] Regulation 1644/2001, recital 50; Regulation 1069/97, recital 86.
[87] See paras. 54-61 above.
[88] See paras. 27-30 above.
[89] India's Second Submission, para. 187.
[90] India's Second Submission, para. 186.

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

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

4. Conclusion

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

? Profitability decreased by 54 per cent over the period considered;
? Profits for the sampled producers were below those for importers of the product concerned;
? Undercutting by dumped imports from India ranged between 13.8 and 40.7 per cent;
? Cash flow declined by 28 per cent; returns on investment also showed declining trends;
? Employment decreased by 5.3 per cent;
? Production decreased between 1994 and the IP;
? Average prices of the defined reference product for sampled producers decreased;
? Although sales value of the Community industry as a whole increased, sales volume increased by less (and even decreased for the sampled producers); average prices therefore increased -this was due to a shift towards higher value niche products;
? Average price increases were not sufficient to pass on fully to customers the substantial increase in the cost of raw cotton due to the downward pressure exerted by low priced dumped imports, which declined by up to 18 per cent;
? Market share increased by 1.6 percentage points, however sales volumes fell by 3 per cent between 1994 and the IP; this is despite the fact that there were several factory closures in the Community and the surviving producers of the Community industry ought to have benefited from this gap in the market;
? Growth of the Community industry was limited compared to the growth in imports from India – imports increased by 56 per cent in volume and gained 4 percentage points in market share[92];

105. Although certain factors appeared positive at first sight, these had to be analysed in context. Thus, as the EC found at recital 50 of Regulation 1644/2001,25 fd atee Community industry wasmlys be09n Tf -0.18

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

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

F. CLAIM 6: ARTICLE 3.5

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

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

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

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

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

120. In response, India limits itself to argue that the suspension of duties would not be a "remedy".[102] India cannot have it both ways. It is manifestly contradictory to argue, on the one hand, that the EC is "applying" duties, because, although suspended, they continue to affect imports potentially[103] and, at the same time, that such suspension constitutes no "remedy" for the EC industry.

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

H. CLAIM 8: ARTICLE 21.2 OF THE DSU

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

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

124. To say that Article 21.2 is not mandatory is not the same as saying that it is "inoperative[112]", "meaningless"[113] or "redundant".[114] Public international law provides many examples of non-binding

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[102] India's Second Submission, para. 231.
[103] Ibid., para. 228.
[104] Ibid., para 224. See also, para. 247.
[105] Ibid., para. 224
[106] EC's First Submission, paras. 270-274.
[107] Ibid., paras. 279-284.
[108] Ibid., paras. 289-292.
[109] Appellate Body Report, *Canada – Measures affecting the Export of Civil Aircraft*, WT/DS70/AB/R, footnote 120.
[110] Ibid., para. 187.
[111] Panel Report, *United States – Anti-dumping and Countervailing measures on Steel Plate from India*, WT/DS206/R, para. 7.110.
[112] India's Second Submission, para. 235.

instruments of unquestionable relevance. The *WTO Agreement* itself contains numerous provisions drafted in hortatory terms, including some of the provisions on special and differential treatment for developing country Members. Indeed, as explained in our First Submission[115], the *Decision on Implementation* adopted at the Doha Conference instructs the Committee on Trade and Development to identify those non-mandatory provisions and to consider whether they should be rendered mandatory. We note that India has not addressed this argument.

125. As recalled by India [116], in some arbitrations under Article 21.3 (c) of the *DSU* the arbitrators have followed the exhortation contained in Article 21.2 to pay particular attention to the interests of developing country Members when exercising the margin of discretion which is inherent in the determination of a "reasonable" period of time. Contrary to what is suggested by India, this does not imply that Article 21.2 imposes a mandatory obligation upon developed country Members.

126. Even if Article 21.2 imposed a mandatory obligation, any such obligation would relate to the procedural requirements of the implementation process set out in the other provisions of Article 21, and not to the content of the implementing measures. India appears to endorse this view in the proposal which it has submitted to the Trade and Development Committee.[117] Yet, in its Second Submission, it takes the opposite view. Thus, India argues now that, in view of Article 21.2, the EC was required to refrain from opening the ongoing review of the measures[118] or, even further, to publish a decision "not to initiate Bed Linen – 3".[119]

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

128. India also argues that the alleged violation of Article 15 would entail an automatic violation of Article 21.2. [121] The EC disagrees. Even if Article 21.2 imposed an obligation, and even if the EC had infringed Article 15, it remains that the EC could have paid "particular attention" to the interests of India in other, different ways. Indeed, as explained in our First Submission, the facts of this case evidence that the EC did pay "particular attention" to the interests of India in at least two other ways.

129. In the first place, the EC paid particular attention to India's interests by agreeing to an implementation period of only five months and two days. Contrary to India's allegations [122], the existence of an agreement between the parties does not detract from this. To be clear, the EC would not have agreed to such accelerated implementation, had India not been a developing country Member.

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[113] Ibid.
[114] Ibid.
[115] EC's First Submission, paras. 281-282.
[116] India's Second Submission, paras. 237-239.
[117] See EC's First Submission, paras. 287-288.
[118] India's Second Submission, paras. 242 and 251.
[119] Ibid., para. 249.
[120] Cf. Article 3.7 of the DSU
[121] India's Second Submission, para. 243.
[122] Ibid., para. 246.

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

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

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

This concludes our oral statement. Thanks for your attention.

[123] Ibid., para. 246.
[124] Ibid., para. 247.

ANNEX D-4

CLOSING STATEMENT OF THE EUROPEAN COMMUNITIES

11 September 2002

Mr. Chairman, Members of the Panel,

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

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

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

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

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

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

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

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

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

10. It should be noted, first of all, that this contradicts the claim raised by India in this Panel request. The result of applying India's method would be that either all imports from the non-sampled

ANNEX D-5

ORAL STATEMENT OF INDIA

10-11 September 2002

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Mr Chairman, Members of the Panel,

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

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

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

4. The answer is a clear No.

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

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

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

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

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

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

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

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

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

12. Indeed, if one steps back from the details and examines *what* the EC has done, the question of compliance needs to be put in perspective. Does the DSB ruling simply prohibit dumping margin
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comply".[4] Thus in the present case the EC strives to prove that on _22 May 2002_ it fulfilled its obligation to comply before *14 August 2001*. Mr Chairman, surely 22 May 2002 does not comeeh1

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

22. The EC never went out to collect the missing data. Indeed, as India pointed out, there is simply no evidence whatsoever that the EC *ever* collected data on stock or capacity utilization of the Community industry.[10] As pointed out, the data obtained from the accounts reflect stock data at a company level. Exactly for such purposes the questionnaires for *exporters* invariably contain separate detailed questions and tables on stock data for the product concerned. The issue is material: data onC Tw (10)

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

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

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

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

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

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

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

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

(1) Why did the EC not terminate the proceeding on 14 August 2001, when it was apparent to the EC that there was no dumping from India on a weighted average basis?

(2) Why did the EC engage once again in the "zeroing" of the negative dumping amounts of entire producers when the Appellate Body had already noted that Article 9 did not have bearing on the determination of dumping margins?

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

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

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

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

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

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

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

40. The EC states:

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

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

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

> "One application of [the principle of good faith], the application widely known as the doctrine of *abus de Eve 0 TD /F0 11.25 Tf -0.1634 departbus d47 Tr8. ratio 91-9. Indi 36.75*

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

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

VII. GOOD FAITH IN THE CONTEXT OF ARTICLE 21.5 PROCEEDINGS

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

> "adopted panel reports … create legitimate expectations among WTO Members".[25]

67. India submits that the first and immediate legitimate expectation generated by an adopted panel

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

ANNEX D-6

CLOSING STATEMENT OF INDIA

13 The EC believes that it is the fact that

19. The panel has surely noted that the EC's request is contradictory. First, the EC itself

India recalls in this concern that in its request for establishment of the panel[14] India requested the Panel to find that:

(a) By failing to withdraw the measures found to be inconsistent with the Anti-Dumping Agreement and to bring its measures into conformity with its obligations under the Anti-Dumping Agreement, the EC has failed to comply with the DSB recommendations and rulings in this dispute; and

(b) The re-determination, as amended, and the subsequent actions as identified above are inconsistent with the above provisions of the Anti-Dumping Agreement and the DSU.

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

Third Request

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

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

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

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

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

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

Fourth Request

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

Due Process

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

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

30. The EC did not want to do that.

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

III. A "SAMPLE" MEANS WHAT IT ALWAYS MEANS RATHER THAN WHAT IT

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

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

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

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

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

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

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

42. More specifically, the EC argues that imports cannot be simultaneously dumped and non-dumped. In essence, the EC is therefore making the point that there can be only one overall margin for the country as a whole, be it dumped or non-dumped. India has responded that if *that* line of reasoning is followed, the proceeding should have been terminated long ago since there was no dumping for the country as a whole. It was minus one point five. The EC argues that India cannot
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Appellate Body, the EC continues to zero this time even more than ever: it zeroed on the producer level!

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI. ARTICLE 2.2.2(II)

58. As Korea had occasion to point out today, the weighing on the basis of value has an intrinsic