WORLD TRADE ORGANIZATION

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EUROPEAN COMMUNITIES – ANTI-DUMPING DUTIES ON IMPORTS OF COTTON-TYPE BED LINEN FROM INDIA

AB-2000-13

Report of the Appellate Body

WORLD TRADE ORGANIZATION
APPELLATE BODY

European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India

European Communities, *Appellant/Appellee*
India, *Appellant/Appellee*

Egypt, *Third Participant*
Japan, *Third Participant*
United States, *Third Participant*

AB-2000-13

Present:

Bacchus, Presiding Member
Abi-Saab, Member
Feliciano, Member

I. Introduction

1. The European Communities and India appeal certain issues of law and legal interpretations in the Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* (the "Panel Report").[1] The Panel was established to consider a complaint by India with respect to definitive anti-dumping duties imposed by the European Communities on imports of cotton-type bed linen.

2. On 13 September 1996, the European Communities initiated an anti-dumping investigation into certain imports of cotton-type bed linen from, *inter alia*, India.[2] The European Communities made its preliminary affirmative determination of dumping, injury and causal link on 12 June 1997, and imposed provisional anti-dumping duties with effect from 14 June 1997.[3]

28 November 1997, and imposed definitive anti-dumping duties with effect from 5 December 1997.[4] The factual aspects of this dispute are set out in greater detail in the Panel Report.[5]

3. The Panel considered claims by India that, in imposing the anti-dumping duties on imports of cotton-type bed linen, the European Communities acted inconsistently with Articles 2.2, 2.2.2, 2.4.2, 3.1, 3.4, 3.5, 5.3, 5.4, 12.2.2, and 15 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*").[6]

4. In its Report, circulated to Members of the World Trade Organization (the "WTO") on 30 October 2000, the Panel concluded that:

> … the European Communities did not act inconsistently with its obligations under Articles 2.2, 2.2.2, 3.1, 3.4, 3.5, 5.3, 5.4, and 12.2.2 of the AD Agreement in:
>
> (a) calculating the amount for profit in constructing normal value (India's claims 1 and 4),
>
> (b) considering all imports from India (and Egypt and Pakistan) as dumped in the analysis of injury caused by dumped imports (India's claims 8, 19, and 20),
>
> (c) considering information for producers comprising the domestic industry but not among the sampled producers in analyzing the state of the industry (India's claim 15, in part),
>
> (d) examining the accuracy and adequacy of the evidence prior to initiation (India's claim 23),
>
> (e) establishing industry support for the application (India's claim 26), and
>
> (f) providing public notice of its final determination (India's claims 3, 6, 10, 22, 25 and 28).[7]
>
> … the European Communities acted inconsistently with its obligations under Articles 2.4.2, 3.4, and 15 of the AD Agreement in:

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

[5]Panel Report, paras. 2.1-2.11.

[6]The Panel did not examine the claims withdrawn by India in the course of the Panel proceedings and declined to consider certain claims falling outside the scope of its terms of reference. Furthermore, the Panel did not deem it necessary nor appropriate to make findings on a number of other claims in light of considerations of judicial economy. See Panel Report, para. 7.3.

[7]Panel Report, para. 7.1.

(g) determining the existence of margins of dumping on the basis of a methodology incorporating the practice of zeroing (India's claim 7),

(h) failing to evaluate all relevant factors having a bearing on the state of the domestic industry, and specifically all the factors set forth in Article 3.4 (India's claim 11),

(i) considering information for producers not part of the domestic industry as defined by the investigating authority in analyzing the state of the industry (India's claim 15, in part), and

(j) failing to explore possibilities of constructive remedies before applying anti-dumping duties (India's claim 29).[8]

5. The Panel recommended that the Dispute Settlement Body (the "DSB") request the European Communities to bring its measure into conformity with its obligations under the *Anti-Dumping Agreement*.[9]

6. On 1 December 2000, the European Communities notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the

II. Arguments of the Participants and the Third Participants

A. *Claims of Error by the European Communities – Appellant*

1. Article 2.4.2 of the *Anti-Dumping Agreement* – Practice of "zeroing"

8. The European Communities appeals the finding of the Panel that the European Communities acted inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement* by "zeroing" the "negative dumping margins" established for certain models or product types of cotton-type bed linen – the product under investigation – when calculating the overall rate of dumping for bed linen. The European Communities alleges the following specific errors committed by the Panel in reaching its finding.

9. The European Communities first claims that the Panel, in making its finding, did not follow the rules of interpretation of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*").[13] In particular, the Panel did not begin its analysis with the text of the provision at issue, Article 2.4.2, but, rather, with another provision, Article 2.

10. Next, the European Communities submits that the interpretation of the Panel fails to give proper meaning to the word "comparable" in Article 2.4.2. Article 2.4.2 requires only that weighted average normal value be compared with weighted average export prices for "comparable" transactions. By determining a dumping margin for individual product types, i.e., for "comparable" transactions, this is precisely what the European Communities did.

11. Furthermore, the European Communities contends that in this case, the calculation of the *overall* rate of dumping for the product under investigation does not fall within the express terms of Article 2.4.2. Article 2.4.2 provides no guidance as to how the "dumping margins" determined for individual product types should be combined in order to calculate an overall rate of dumping for the product under investigation.

12. The European Communities then argues that the Panel's interpretation is based on the erroneous premise that dumping margins can be established only for the *product* under investigation. The concept of "dumping margin", as used in the *Anti-Dumping Agreement*, may refer not only to the dumping margin for the *product* under investigation, but also to the dumping margin established for each *product type* or for each *individual transaction*.

13. The European Communities further claims that the Panel's interpretation would distort price comparability and disregard the notion of "normal value", as the existence of dumping margins would

18. India also claims that the Panel rightly applied Article 2.4.2 to the calculation of the overall rate of dumping for the product under investigation. The calculation of the amount of dumping for various models or types of the product under investigation is not separate from the calculation of the dumping margin for the product under investigation. Both fall within the terms of Article 2.4.2. Furthermore, the drafting history does not support the European Communities' view of Article 2.4.2 as allowing the practice of "zeroing".

19. Next, India argues that the Panel correctly determined that the concept of " u₹j.9(piny)13( )-10" u₹j.8(a)0.1(
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producer. The Panel's ruling to this effect is inconsistent with the rules of treaty interpretation in the *Vienna Convention*.

24. India stresses that Article 2.2.2(ii) refers to the "weighted average" of the "amounts" incurred and realized by other "exporters or producers". The use of the plural form of "amounts" and "exporters or producers", in combination with the reference to a "weighted average" of the "amounts", indicates that figures for multiple exporters or producers must be available if Article 2.2.2(ii) is to be relied on. The Panel's conclusion that Article 2.2.2(ii) may be applied where data is available for only one exporter or producer ignores the clear meaning of these words.

25. India further argues that the Panel should have examined whether the choice of the European Communities of the method to calculate the amounts for administrative, selling and general costs and for profits set out in Article 2.2.2(ii) was "objective and fair". Article 17.6(i) of the *Anti-Dumping Agreement* requires that the evaluation of the investigating authorities of the facts be "unbiased and objective". With viable alternatives, such as Article 2.2.2(i) and Article 2.2.2(iii), available, the insistence of the European Communities on using the second option cannot have been "unbiased and objective". By failing to consider whether this choice of methodology was proper, the Panel erred in law.

26. Finally, India contends that the finding of the Panel that the European Communities was not obligated to look at available information outside the sample is not only inconsistent with the standard of review set out in Article 17.6(i), but is also incompatible with the later finding of the Panel that "it is not possible to have an objective evaluation of the evidence if some of the evidence is required to be ignored, even though it relates precisely to the issues to be resolved."[14] In the circumstances of this case, data for an additional producer was available to the European Communities in the "reserve sample" it had established for the investigation. Information from this producer should have been taken into account when relying on the methodology provided in Article 2.2.2(ii). India recalls that, in examining the question of injury to the domestic industry, the European Communities relied on information from outside the sample, and the Panel upheld this decision by the European Communities. Failure to take into account the available information of an exporting producer included in the reserve sample for dumping, while simultaneously taking into account information outside the sample when establishing whether injury to the domestic industry had occurred, does not constitute an "unbiased and objective" investigation. The Panel's failure to reach this conclusion violates the standard of review set out in Article 17.6(i).

[14]Panel Report, para. 6.181.

proof of new facts. India's argument is not a substantive claim, because Article 17.6 of the *Anti-Dumping Agreement* establishes that the obligation of national authorities to be unbiased and objective applies to the evaluation of the facts of the case.

31. Finally, in the view of the European Communities, India's allegation that the implementation of Article 2.2.2(ii) by the investigating authorities of the European Communities was not "unbiased and objective", for not taking account of certain data from an additional producer, is similarly not a proper subject for appeal, for the same reasons as above.

2. Article 2.2.2(ii) of the *Anti-Dumping Agreement* – "actual amounts incurred and realized"

32. The European Communities argues that investigating authorities are allowed to disregard data relating to sales that are not made in the ordinary course of trade, in particular those made at prices below cost, when establishing a constructed normal value pursuant to Article 2.2.2(ii) of the *Anti-Dumping Agreement*. As the Panel observed, if sales not in the ordinary course of trade were

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models, the European Communities established a "*negative* dumping margin" for each model.[17] Thus, there is a "positive dumping margin" where there *is* dumping, and a "negative dumping margin" where there *is not*. The "positives" and "negatives" of the amounts in this calculation are an indication of precisely *how much* the export price is above or below the normal value. Having made this calculation, the European Communities then added up the amounts it had calculated as "dumping margins" for each model of the product in order to determine an *overall* dumping margin for the product *as a whole*. However, in doing so, the European Communities treated any "negative dumping margin" as zero – hence the use of the word "zeroing". Then, finally, having added up the "positive dumping margins" and the zeroes, the European Communities divided this sum by the cumulative total value of all the export transactions involving all types and models of that product. In this way, the European Communities obtained an overall margin of dumping for the product under investigation.

48. With respect to this first issue appealed, the Panel found that:

> … the European Communities acted inconsistently with Article inve dso u8 Tc0 Tw[0.23rsr the Pur

52. We observe that, in this case, the European Communities defined the *product* at issue in its anti-dumping investigation as follows:

> The *proceeding covers bed linen of cotton–type fibres*, pure or mixed with man-made fibres or flax, bleached, dyed or printed. Bed linen includes bed sheets, duvet covers and pillow cases, packaged for sale either separately or in sets.
>
> …
>
> Notwithstanding the *different possible product types* due to different weaving construction, finish of the fabric, presentation and size, packing, etc., *all of them constitute a single product for the purpose of this proceeding* because they have the same physical characteristics and essentially the same use.[22] (emphasis added)

53. Thus, of its own accord, the European Communities clearly identified cotton-type bed linen as the *product* under investigation in this case. This is undisputed in this appeal. Having defined the *product* as it did, the European Communities was bound to treat that *product* consistently thereafter in accordance with that definition. Thus, it follows that, with respect to Article 2.4.2, the European Communities had to establish "the existence of margins of dumping" for the *product* – cotton-type bed linen – and not for the various types or models of that product. We see nothing in Article 2.4.2 or in any other provision of the *Anti-Dumping Agreement* that provides for the establishment of "the existence of margins of dumping" for *types or models* of the product under investigation; to the contrary, all references to the establishment of "the existence of margins of dumping" are references to the *product* that is subject of the investigation. Likewise, we see nothing in Article 2.4.2 to support the notion that, in an anti-dumping investigation, two different stages are envisaged or distinguished in any way by this provision of the *Anti-Dumping Agreement*, nor to justify the distinctions the European Communities contends can be made among *types or models* of the same product on the basis of these "two stages". Whatever the method used to calculate the margins of dumping, in our view, these margins must be, and can only be, established for the *product* under investigation as a whole. We are unable to agree with the European Communities that Article 2.4.2 provides no guidance as to how to calculate an *overall* margin of dumping for the product under investigation.

54. With this in mind, we recall that Article 2.4.2, first sentence, provides that "the existence of

able to be compared. The European Communities argues before us that export transactions involving different types or models of cotton-type bed linen are not "comparable" because different types or models of cotton-type bed linen have very different physical characteristics. Specifically, the European Communities suggests that the differences between the various models or types of bed linen involved in the relevant export transactions are "so substantial that they cannot be eliminated by making adjustments for differences in physical characteristics".[25] However, as we have already noted, at the very outset of its anti-dumping investigation, the European Communities identified, of its own accord, cotton-type bed linen as the *product* under investigation. Moreover, in defining cotton-type bed linen as the product at issue, the European Communities stated that "the *different* possible *product types … constitute a single product* for the purpose of this proceeding because *they have the same physical characteristics* and *essentially the same use*".[26] (emphasis added) Furthermore, we observe that, in the context of defining the product at issue, the European Communities also made the following determination relating to the identity of the "like product" on the Community market subject to its investigation:

> The Commission examined whether cotton-type bed linen produced by the Community industry and sold on the Community market, as

> The Commission concluded that although there were differences in the mix of products produced in the Community and that sold for export to the Community or sold domestically in the countries concerned, *there were no differences in the basic characteristics and uses of the different types and qualities of bed linen of cotton-type fibres*. Therefore domestic and export types in the countries concerned and types produced in the Community were considered *like products* within the meaning of Article 1(4) of Regulation (EC) No 384/96 … [27] (emphasis added)

58. Having defined the product at issue and the "like product" on the Community market as it did, the European Communities could not, at a subsequent stage of the proceeding, take the position that some types or models of that product had physical characteristics that were so different from each other that these types or models were not "comparable". All types or models falling within the scope of a "like" product must necessarily be "comparable", and export transactions involving those types or models must therefore be considered "comparable export transactions" within the meaning of Article 2.4.2.

59. This interpretation of the word "comparable" in Article 2.4.2 is reinforced by the context of this provision. Article 2.4 of the *Anti-Dumping Agreement* states in relevant part:

> A *fair comparison* shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. *Due allowance* shall be made in each case, on its merits, *for differences which affect price comparability*, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. (emphasis added)

Article 2.4 sets forth a general obligation to make a "fair comparison" between export price and normal value. This is a general obligation that, in our view, informs all of Article 2, but applies, in particular, to Article 2.4.2 which is specifically made "subject to the provisions governing fair comparison in [Article 2.4]". Moreover, Article 2.4 sets forth specific obligations to make comparisons at the same level of trade and at, as nearly as possible, the same time. Article 2.4 also requires that "due allowance" be made for differences affecting "price comparability". We note, in particular, that Article 2.4 requires investigating authorities to make due allowance for "differences in … physical characteristics".

[27] Commission Regulation (EC) No 1069/97, *supra*, footnote 3, paras. 11 and 14. See also Council Regulation (EC) No 2398/97, *supra*, footnote 4, para. 9.

60. We note that, while the word "comparable" in Article 2.4.2 relates to the comparability of export transactions, Article 2.4 deals more broadly with a "fair comparison" between export price and normal value and "price comparability". Nevertheless, and with this qualification in mind, we see Article 2.4 as useful context sustaining the conclusions we draw from our analysis of the word "comparable" in Article 2.4.2. In our view, the word "comparable" in Article 2.4.2 relates back to both the general and the specific obligations of the investigating authorities when comparing the export price with the normal value. The European Communities argues on the basis of the "due allowance" required by Article 2.4 for "differences in physical characteristics" that distinctions can be made among

dumping of certain types or models of bed linen, it could have defined, or redefined, the *product* under investigation in a narrower way.[30]

63. Finally, the European Communities argues that the Panel did not establish that the interpretation of Article 2.4.2 by the European Communities was "impermissible" and that, therefore, the Panel failed to apply the standard of review laid down in Article 17.6(ii) of the *Anti-Dumping Agreement*.[31] On this, we observe that Article 17.6(ii) states:

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

64. In this case, the Panel explicitly recognized that it was to interpret the *Anti-Dumping Agreement* in accordance with the customary rules of interpretation of public international law as set out in the *Vienna Convention*.[32] Having interpreted Article 2.4.2 accordingly, the Panel found:

> … that the European Communities acted *inconsistently* with Article 2.4.2 of the AD Agreement in establishing the existence of margins of dumping on the basis of a methodology which included zeroing negative price differences calculated for some models of bed linen.[33] (emphasis added)

65. It appears clear to us from the emphatic and unqualified nature of this finding of inconsistency that the Panel did not view the interpretation given by the European Communities of Article 2.4.2 of the *Anti-Dumping Agreement* as a "permissible interpretation" within the meaning of Article 17.6(ii) of the *Anti-Dumping Agreement*. Thus, the Panel was not faced with a choice among multiple "permissible" interpretations which would have required it, under Article 17.6(ii), to give deference to the interpretation relied upon by the European Communities. Rather, the Panel was faced with a situation in which the interpretation relied upon by the European Communities was, to

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borrow a word from the European Communities, "impermissible". We do not share the view of the European Communities that the Panel failed to apply the standard of review set out in Article 17.6(ii) of the *Anti-Dumping Agreement*.

66. For all these reasons, we uphold the finding of the Panel in paragraph 6.119 of the Panel Report that the practice of "zeroing" when establishing "the existence of margins of dumping", as applied by the European Communities in the anti-dumping investigation at issue in this dispute, is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*.

V. Article 2.2.2(ii) of the *Anti-Dumping Agreement*

67. The two other issues raised in this appeal both concern the Panel's interpretation of Article 2.2.2(ii) of the *Anti-Dumping Agreement*. Pursuant to Article 2.2, the margin of dumping for the product under investigation may, in certain circumstances, be determined by comparison of the export price of the product with a constructTJT*1hrismtheete nconsisttof thiorductthe pr(duc)19(t)10.8(init)4(h)1ete ncoantryoin plus(a)10.8(tTJ9(aonta)13(btTJ9 aum)18.9o(an fco)12.8r adum)18.9(i)-2 "SG&tAlla(s(fo(pro)1234(f)-2.5it)75((t)-3.4(.s)-10.9s)-10.9(A)74(r)-252(t)757(i)-3-4(cl71.5(er)-21.82o)12342.2.(se)-

exporter or producer. The second issue is whether, in calculating the amount for profits under Article 2.2.2(ii), a Member may exclude sales by other exporters or producers that are not made in the ordinary course of trade.

69. With respect to the first issue, the Panel found:

> As we have concluded that Article 2.2.2(ii) may be applied in a case where there is data concerning profit and SG&A for only one other producer or exporter, we conclude that the European Communities was not precluded from applying the methodology set out in that

72. On the first of these two issues on appeal – that is, whether the method for calculating amounts for SG&A and profits set out in Article 2.2.2(ii) may be applied where there is data on SG&A and profits for only *one* other exporter or producer – we recall that Article 2.2.2(ii) states that, when this method is chosen by the investigating authorities, the amounts for SG&A and profits must be calculated on the basis of:

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

Here, we note especially that Article 2.2.2(ii) refers to "the *weighted average* of the actual *amounts* incurred and realized by *other exporters or producers*". (emphasis added)

73. In construing this provision, the Panel found that the phrase "other exporters or producers":

> … as a general matter, admits of an understanding where the plural form includes the singular case – the case where there is only one other producer or exporter. … In this context, we do not consider that the reference to other producers or exporters in the plural necessarily must be understood to preclude resort to option (ii) in the case where there is only one other producer or exporter of the like product.[39]

74. We disagree. In our view, the phrase "weighted average" in Article 2.2.2(ii) precludes, in this particular provision, understanding the phrase "other exporters or producers" in the plural as including the singular case. To us, the use of the phrase "weighted average" in Article 2.2.2(ii) makes it impossible to read "other exporters or producers" as "one exporter or producer". First of all, and obviously, an "average" of amounts for SG&A and profits *cannot* be calculated on the basis of data on SG&A and profits relating to only *one* exporter or producer.[40] Moreover, the textual directive to "weight" the average further supports this view because the "average" which results from combining the

this appeal, the European Communities conceded that the phrase "weighted average" envisages a situation where there is more than one exporter or producer.

75.

> For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits *shall be based on actual data pertaining to production and sales in the ordinary course of trade* of the like product by the exporter or producer under investigation. (emphasis added)

82. In contrast to Article 2.2.2(ii), the first sentence of the chapeau of Article 2.2.2 refers to "actual data pertaining to production and sales *in the ordinary course of trade*". (emphasis added) Thus, the drafters of the *Anti-Dumping Agreement* have made clear that sales *not* in the *ordinary course of trade* are to be *excluded* when calculating amounts for SG&A and profits using the method set out in the chapeau of Article 2.2.2.

83. The exclusion in the chapeau leads us to believe that, where there is no such explicit exclusion elsewhere in the same Article of the *Anti-Dumping Agreement*, no exclusion should be implied. And there is no such explicit exclusion in Article 2.2.2(ii). Article 2.2.2(ii) provides for an *alternative* calculation method that can be employed precisely when the method contemplated by the chapeau cannot be used. Article 2.2.2(ii) contains its own specific requirements. On their face, these requirements do not call for the exclusion of sales not made in the ordinary course of trade. Reading into the text of Article 2.2.2(ii) a requirement provided for *in the chapeau* of Article 2.2.2 is not justified either by the text or by the context of Article 2.2.2(ii). In our Report in *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, we stated:

> The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the *Vienna Convention*. But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.[46]

84. Therefore, we reverse the finding of the Panel in paragraph 6.87 of the Panel Report that, in calculating the amount for profits under Article 2.2.2(ii) of the *Anti-Dumping Agreement*, a Member may exclude sales by other exporters or producers that are not made in the ordinary course of trade.

85. In view of our findings in paragraphs 77 and 84 of this Report, we conclude that the European Communities, in calculating amounts for SG&A and profits in the anti-dumping investigation at issue in this dispute, acted inconsistently with Article 2.2.2(ii) of the *Anti-Dumping Agreement*.

[46]Appellate Body Report, WT/DS50/AB/R, adopted 16 January 1998, para. 45.

VI.

Signed in the original at Geneva this 8th day of February 2001 by:

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James Bacchus
Presiding Member

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Florentino P. Feliciano
Member

Georges-Michel Abi-Saab
Member