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EUROPEAN COMMUNITIES — ANTI-DUMPING DUTIES

EUROPEAN COMMUNITIES – ANTI-DUMPING DUTIES ON IMPORTS OF COTTON-TYPE BED LINEN FROM INDIA (DS141)

TABLE OF CONTENTS

I INTRODUCTION

1.1 On 3 August 1998, India requested consultations with the European Communities pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article XXIII of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and Article 17 of the Agreement on Implementation of Article VI of GATT 1994 ("AD Agreement") regarding Commission Regulation No. 2398/97 of 28 November 1997, imposing final anti-dumping duties on imports of cotton-type bed linen from India.[1] On 17 August 1998, Pakistan requested to be joined in the consultations requested by India.[2] India and the European Communities held consultations in Geneva on 18 September 1998 and 15 April 1999, but failed to reach a mutually satisfactor4ach,1s7rEs SeTc f1g6l.ally

1.7 The Panel met with the parties on 10-11 May 2000 and on 6 June 2000. It met with the third parties on 11 May 2000.

II FACTUAL ASPECTS

2.1 This dispute concerns the imposition of definitive anti-dumping duties by the European Communities on cotton-type bed linen from India.

2.2 On 30 July 1996, the Committee of the Cotton and Allied Textile Industries of the European Communities ("Eurocoton") – the EC federation of national producers' associations of cotton textile products – filed an application with the European Communities for the imposition of anti-dumping duties on cotton-type bed linen from, *inter alia*, India.[5]

2.3 On 13 September 1996, the European Communities published notice of the initiation of an anti-dumping investigation regarding imports of cotton-type bed linen originating in, *inter alia*, India.[6]

2.4 The European Communities established 1 July 1995 to 30 June 1996 as the investigation period, and the investigation of dumping covered this period. The examination of injury covered the period from 1992 up to the end of the investigation period.

2.5 In view of the large number of Indian producers and exporters, the European Communities conducted its analysis of dumping based on a sample of Indian exporters. The European Communities also established a reserve sample, to be used in the event companies in the main sample subsequently refused to cooperate.

2.6 The European Communities established normal value based on constructed value for all investigated Indian producers. One company, Bombay Dyeing, was found to have representative domestic sales of cotton-type bed linen taken as a whole. Five types comparable to those exported to the European Communities were sold in representative quantities on the domestic market. Those five

suffered by the Community industry, demonstrated, according to the European Communities, by the existence of heavy undercutting resulting in a significant increase in the market share of the dumped imports and corresponding negative consequences on volumes and prices of sales of Community producers.

2.9 The European Communities published notice of its preliminary affirmative determination of dumping, injury and causal link on 12 June 1997.[7] Provisional anti-dumping duties were imposed with effect from 14 June 1997.

2.10 The European Communities continued its investigation, received comments from interested parties, and provided an opportunity to be heard. Parties were informed of the essential facts and considerations on the basis of which it was intended to recommend the imposition of definitive anti-dumping duties, and the definitive collection, at the level of these duties, of amounts secured by provisional duties, on 3 October 1997.[8] An opportunity for further representations was subsequently provided.

2.11 Notice of the final affirmative determination was published on 28 November 1997. Injury margins were determined to be above the level of dumping margins in all cases, and therefore definitive anti-dumping duties in the amount of the dumping margins determined, ranging from 2.6% to 24.7%, depending on the exporter in question, were imposed on imports of cotton-type bed linen originating in India.[9] Certain handloom products were exempted from the application of the definitive

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produced Exhibit EC-4. India, therefore, requests that the exact status of Exhibit EC-4 be established.

V INTERIM REVIEW

5.1 On 31 July 2000, the Panel provided its interim report to the parties. The parties submitted their comments on the interim report on 7 August 2000. Neither party requested that the Panel hold an interim review meeting, and as a consequence no meeting was held.

5.2 Having reviewed the parties' comments, the Panel corrected a typographical error in the heading of section VI.C.1, and made a stylistic change to use the designation "European Communities". In addition, we made the following clarifying changes: (i) to the heading of section VI.C.1, to more accurately reflect the legal basis of the claim in question; (ii) to the third sentence of paragraph 6.215, to reflect the nature of inconsistencies in certain photocopied documents submitted to the Panel; and (iii) to footnote 90, to reflect the basis of the European Communities' decision not to apply a lesser duty. We did not make a requested change to the last sentence of paragraph 6.215, as the timing of the EC's offer to inspect documents is already set out in paragraph 6.207, and need not be repeated.

VI FINDINGS

A. REQUESTS FOR PRELIMINARY RULINGS

6.1 In its first written submission, the European Communities requested preliminary rulings with respect to (i) the scope of the claims before us, (ii) certain evidence contai Tj -31.25 Panel provideed prelOlt-1

defend itself. India also clarifies that claim 14 forms part of an argument in support of claim 13 (alleging inconsistency with Article 12.2.2 of the AD Agreement), which claim was explicitly mentioned in the request for establishment.

6.8 With regard to claim 19, insofar as it concerns Article 3.4 of the AD Agreement, India asserts that this claim was clearly identified in paragraph 13 of the request for establishment, which mentions Articles 3 and 3.4. India asserts that the reference to Article 3 of the AD Agreement includes Article 3.5. Moreover, India maintains that the European Communities had not been prejudiced in its rights of defence, citing in this regard the European Communities first submission, paragraphs 343-350.

6.9 Second, the European Communities argues that India's claims asserting violations in connection with the Provisional Regulation are beyond the Panel's jurisdiction.[11] In this regard, the European Communities argues that India failed to comply with the requirements of Article 17.4 of the AD Agreement to bring a provisional measure before the Panel, because it did not contend or present evidence that the provisional measure had a significant impact. In addition, the European Communities argues that the Provisional Regulation is moot, that no duties were ever collected under that regulation, and the measure is no longer in force. Consequently, the European Communities argues, there is no meaningful remedy that India can obtain with respect to that regulation - there is no measure to bring into conformity with the AD Agreement, and no measure to withdraw. The European Communities argues that in these circumstances, the Panel should decline to make a ruling on claims relating to the Provisional Regulation.

6.10 India argues that it was clear that the final anti-dumping measure was the measure at issue, but that this did not limit the nature of the arguments and claims that could be made. India refers to EC law and practice which provide that aspects of the Provisional Regulation are adopted by reference in the Definitive Regulation, and asserts that this automatically entails that aspects of the Provisional Regulation can be challenged in the context of the final anti-dumping measures. However, India clarified that, it being understood that this view was correct, it did not seek a ruling on its claims 2, 5, 9, 12, 17, 21, 24, 27, and 30.

6.11 Egypt, as third party, submits that the European Communities' argument that the Panel cannot entertain claims relating to the Provisional Regulation is unfounded and should be rejected by the Panel. Egypt posits that it is clear that, had India and the other countries affected by the measure not thought that the measure was imposed in breach of the provisions of Article 7.1 of the AD Agreement, they would not have found it necessary to participate in these panel proceedings. It also follows, for Egypt, that if the measure had not had any significant impact, India and other affected countries would not have made a complaint. The very fact that they cooperated in the investigation and provided evidence to refute the allegations means, according to Egypt, that they were concerned about the significant impact the imposition of anti-dumping duties would have on their bed linen industries.

(ii) Findings

6.12 At the end of the first meeting, we granted the European Communities' request to dismiss claims under Article 6 of the AD Agreement, that is, India's claims 14 and 16, having concluded that those claims were not within our terms of reference. Our reasons for this decision are set forth below.

[11] India's claims 2, 5, 9, 12, 17, 21, 24, 27, and 30 generally assert inconsistency on the part of the European Communities with Article 12.2.1 by failing properly to explain, in the Provisional Regulation, the legal and evidentiary basis for if42 Tc 425y7 would-0.2344 Tally assert inconsistency on the part of the

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6.13 Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter "DSU") provides that the request for the establishment of a panel "shall provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". In considering what must be in a request for establishment in order to comply with this provision, the Appellate Body has observed that:

> "**Identification of the treaty provisions** claimed to have been violated by the respondent **is always necessary** both for purposes of defining the terms of reference of a panel and for informing the respondent and the third parties of the claims made by the complainant; such **identification is a minimum prerequisite** if the legal basis of the complaint is to be presented at all." [12]

The Appellate Body went on to note that there might be situations where a "mere listing" of treaty Articles would not satisfy the standard of Article 6.2 of the DSU.[13] In this case, we are not faced with the question of whether a "mere listing" of the treaty Articles allegedly violated is sufficient to "present the problem clearly" as required by Article 6.2 of the DSU – rather, it is a case in which the t[redacted]ged to be violated **are not even listed** in the request for establishment - "Article 6" c[redacted]ment does on appear on the face of the document at all. In this circumstance, we c[redacted]egal basis of a complaint with respect to that Article has not been presented at all.

6[redacted]nowledged, at our first meeting, that Article 6 of the AD Agreement did not appear c[redacted] request for establishment, characterizing this as an inadvertent omission. India a[redacted]that its claims under that Article should nonetheless be allowed, asserting that the E[redacted]unities sustained no prejudice to its ability to defend its interests as a result of the c[redacted]le 6 of the AD Agreement from the request for establishment. In support of this

6.16 In the absence of any reference in the request for establishment to the treaty Article alleged to have been violated, the question of possible prejudice as a result of failure to state a claim with sufficient clarity simply does not arise. Moreover, we are of the view that the argument that there was no prejudice to the European Communities because Article 6 of the AD Agreement was mentioned in the request for consultations, and may even have been discussed during the consultations is, in this case, irrelevant. Consultations are part of the process of clarifying the matter in dispute between the parties. It is perfectly understandable, and indeed desirable, that issues discussed during consultations do not subsequently become claims in dispute. Thus, the absence of a subject that was discussed in the consultations from the request from establishment indicates that the complaining Member does not intend to pursue that matter further. Whether inadvertent or not, as a result of the omission of Article 6 from the request for establishment the defending Member, the European Communities, and third countries had no notice that India intended to pursue claims under Article 6 of the AD Agreement in this case, and were entitled to rely on the conclusion that it would not do so. Consequently, India would be estopped in any event from raising such claims.

6.17 We conclude that India failed to set forth claims under Article 6 of the AD Agreement in its request for establishment of a panel in this dispute. Therefore, those putative claims, that is, India's claims 14 and 16 as set forth in its first written submission, are beyond the scope of our terms of reference. As we noted in issuing our ruling at the end of the first meeting, this does not, of course preclude India from presenting arguments referring to the provisions of Article 6 of the AD Agreement. However, we make no findings on India's claims 14 and 16.

6.18 With respect to the European Communities' request concerning India's claims regarding Article 1 of the Anti-Dumping Agreement, India's claims regarding Article 3.6 of the Anti-Dumping Agreement, and India's claims challenging the Provisional Regulation under Article 12.2.1, that is, claims 2, 5, 9, 12, 17, 21, 24, 27, and 30, we took note at our first meeting of the statements of India in its written response, and the statements of the parties at the first meeting. In light of those statements, we did not consider it necessary to rule on these aspects of the European Communities' request. We noted at that time, and we reiterate here, our view that India has withdrawn these claims. Again, of course, this does not preclude India from presenting arguments referring to the provisions of these articles. However, as with India's claims 14 and 16, we make no findings on these claims.

6.19 We did not, at out first meeting, resolve the European Communities' assertion that India's claim 19 under Article 3.4 as set out in its first submission is not the same as the claim under Article 3.4 set out in the request for establishment. We turn to that question now.

6.20 India's request for establishment sets forth, as a provision allegedly violated, "Article 3, especially, but not exclusively Articles 3.1, 3.2, 3.4, and 3.5". With respect to India's claim number 19 under Article 3.4, the European Communities acknowledges that Article 3.4 appears on the face of the request for establishment, but argues that the facts and circumstances described as constituting a violation of Article 3.4 in the request for establishment are entirely different from those presented in support of the claim in India's first written submission. Therefore, the European Communities asserts that India failed to clearly identify this aspect of its claim under Article 3.4, thus preventing the European Communities from properly preparing its defense and denying third parties their right to be alerted to the issues that are the subject of this dispute.

6.21 The request for establishment contains the following statements in connection with Article 3.4 of the AD Agreement:

> "14. The European Communities has chosen a sample from the domestic industry, but did not consistently base its injury determination on this sample, In addition, the European Communities has explicitly determined that the domestic industry consists of 35 companies, but relied in its injury determination on companies outside this

satisfies the standard set out in Article 6.2 of the DSU.[17] We note that it is important that a panel request be sufficiently precise for two reasons: first, it often forms the basis for the terms of reference of the panel pursuant to Article 7 of the DSU; and, second, it informs the defending party and potential third parties of the legal basis of the complaint.[18]

6.25 As noted above, Article 6.2 of the DSU provides, in relevant part:

> "The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly . . . "

We recall that the Appellate Body addressed this requirement recently, in *Korea – Dairy Safeguard*.[19] The Appellate Body's analysis in that case offers guidance as to how a panel should address the issue of whether a request for establishment provides "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" in accordance with Article 6.2 of the DSU. First, the issue is to be resolved on a case-by-case basis. Second, the panel must examine the request for the establishment of the panel very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU. Third, the panel should take into account the nature of the particular provision at issue – *i.e.*, where the Articles listed establish not one single, distinct obligation, but rather multiple obligations, the mere listing of treaty Articles may not satisfy the standard of Article 6.2. Fourth, the panel should take into account whether the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings, by the fact that the panel request simply listed the provisions claimed to have been violated. It seems that even if the panel request is insufficient on its face, an allegation that the requirements of Article 6.2 of the DSU are not met will not prevail where no prejudice is established.

6.26 In essence, the Appellate Body seems to set a two-stage test to determine the sufficiency of a panel request under Article 6.2 of the DSU: first, examination of the text of the request for establishment itself, in light of the nature of the legal provisions in question; second, an assessment of whether the respondent has been prejudiced by the formulation of claims in the request for establishment, given the actual course of the panel proceedings.

6.27 Applying this "two step" approach to the facts of this case, we first consider the text of the request for establishment itself, to determine the extent to which Article 3.4 is addressed. In this case, Article 3.4 is explicitly listed in the request for establishment. However, we recall that a "mere listing" may not necessarily be sufficient for the purposes of Article 6.2 DSU. In this case, the explanation regarding Article 3.4 in the request for establishment does not refer to or relate in any way to the argument in the first submission concerning the consideration of all imports as dumped in the injury analysis under Article 3.4. This raises an implication that the request for establishment was not, in fact, sufficiently clear on this aspect of India's claims under Article 3.4.

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[17] The special or additional rules applicable to anti-dumping disputes have not been raised by the European Communities in this context. The Panel in *Mexico - HFCS* concluded that Article 17.4 of the AD Agreement, which describes the matters that may be referred for dispute settlement, "does not…set out any further or additional requirements with respect to the degree of specificity with which claims must be set forth in a request for establishment challenging a final anti-dumping measure.", and noted in this regard that Article 17.4 does not refer to "claims". *Mexico - Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States ("Mexico - HFCS")*, Panel Report, WT/DS132/R, adopted 24 February 2000, para. 7.14 and note 531.

[18] *EC - Bananas*, para. 142; *Brazil - Measures Affecting Dessicated Coconut*, Appellate Body Report, WT/DS22/AB/R, adopted 20 March 1997, p. 22.

[19] *Korea - Dairy Safeguard*, Appellate Body Report, para. 6.

6.28 We therefore turn next to the question whether the European Communities, or any of the third parties, has been prejudiced by this lack of sufficient clarity, "given the actual course of the panel proceedings". It is clear that the European Communities was able to respond to the Indian arguments in this regard. Moreover, while it is possible that potential third parties were not alerted to the fact that India intended to pursue the issue of consideration of all imports as dumped **under Article 3.4** of the AD Agreement, it was clear from the face of the request for establishment that India was pursuing this issue **under Article 3.5** of that Agreement. Moreover, all three third parties did address the issue of whether the European Communities acted inconsistently with the AD Agreement in considering all imports as dumped. In our view, this suggests a lack of prejudice to third parties' interests in this dispute. While it is not clear whether potential third parties understood the claim to be asserted under Article 3.4 or Article 3.5, the substance of the issue was clearly apparent to them, and was addressed by those Members that participated as third parties. The specific provision of the AD Agreement alleged to have been violated is, in our view, of less importance than the question whether the particular practice, consideration of all imports as dumped, is permitted by the AD Agreement or not, and that question has clearly been addressed by all parties and third parties in this dispute, and was clearly put before us by the request for establishment.

6.29 Thus, we conclude that, in the particular circumstances of this case, the lack of sufficient clarity in the request for establishment concerning India's claim 19 that challenges the consideration of all imports as dumped in the injurent Tj 0 cfly42oj 0wl it is possible that poteTD -0c -0.stancee2fEuropeawe c7

(c) Evidence containing confidential information from a different investigation

(i) Parties' arguments

6.36 Finally, the European Communities notes that India's Exhibit 49 to its first submission appears to contain a dumping calculation from a different anti-dumping investigation than the one at issue in this dispute. The European Communities asserts that if this is true, the submission of this evidence constitutes a breach of confidentiality obligations in that other case, and the European Communities is not prepared to comment on the substance of the document. The European Communities does not argue that the information in the Exhibit is untrue or irrelevant. Rather, the European Communities argues that India has, or may have, violated an obligation of confidentiality regarding the contents of Exhibit 49. The European Communities requests the Panel to rule that the document is not part of these proceedings.

6.37 India stated that it was entitled to present the information in question in support of its arguments, that the Panel's working procedures required that all information submitted be kept confidential, and that there was no breach of confidentiality, citing in this regard India's Exhibit 81, setting forth the explicit written consent of the producer whose information is at issue to its submission in this dispute settlement proceeding.

6.38 The United States, as third party, agrees with the European Communities that if India's Exhibit 49 is in fact a confidential document from another anti-dumping investigation, unless it is demonstrated that the parties whose confidential information is contained in that document consented to the release of that information, the submission of the document to this panel represents a deplorable breach of confidentiality which should not be encouraged by the Panel. However, the United States does not suggest any specific ruling in this regard.

(ii) Findings

6.39 The issue we must decide is whether certain confidential information which was before the European Communities in an anti-dumping investigation unrelated to the anti-dumping measure in dispute before us can be considered by this Panel. We note the view of the European Communities that the submission of this information constitutes a breach of confidentiality. Although the European Communities does not specifically so state, presumably the concern is with the alleged unauthorised disclosure of confidential information in violation of the last sentence of Article 6.5 of the AD Agreement. We recall, however, that there is no claim before us that India has violated Article 6.5 of the Agreement. Our task is limited to addressing those issues which are necessary to resolve the European Communities' assertion that this information is inadmissible.

6.40 We consider that an issue of the admissibility of evidence might be presented if we had reason to believe that the party to whom the confidential information belonged objected to its disclosure and consideration in this dispute. However, in this case the party to whom the information belongs and whose interests are protected by confidential treatment has waived its rights and stated its consent to our consideration of the information in question.[23] Under these circumstances, we can perceive no useful purpose to be served by excluding the information. That the document consenting to the submission of the information in this proceeding is dated after the date that the information was first submitted to us does not, in our view, change that conclusion. We note that, in any event, the evidence in question purports to demonstrate that the European Communities' practice concerning zeroing is not consistently applied by the European Communities in all cases. Since the issue before us is whether the European Communities' practice as applied in this case is consistent with its obligations under the AD Agreement, we do not consider it necessary to decide whether the European

[23] Exhibit India-81.

Communities applies that practice consistently.[24] If zeroing is prohibited, the European Communities has violated its obligations under the AD Agreement in this case. If zeroing is allowed, then it has not. Whether it has zeroed in some other anti-dumping investigation will not affect our conclusions on this point. We therefore deny the European Communities' request to rule that Exhibit 49 is not admissible in this proceeding.

2. India request

(a) Parties' arguments

6.41 India submitted a letter objecting to Exhibit 4 to the European Communities' first submission, and requesting a preliminary ruling concerning the exact status of the document in question. While not stated explicitly, it appears that India considers that this document was created *post hoc* for the purposes of this dispute, and that it should not be considered by the Panel.

6.42 The European Communities asserted that the document was a recapitulative table of the declarations of support for the application received prior to initiation, and did not constitute new evidence. On the contrary, the European Communities maintained that the exhibit simply systematised evidence that had always been available to India, and cited in this regard to India's Exhibit 59, which the European Communities asserted contained some of the same evidence.

(b) Findings

6.43 Article 17.5(ii) of the AD

dumping measure imposed by the European Communities, India is obliged to present a *prima facie* case of violation of the relevant Articles of the AD Agreement. In this regard, the Appellate Body has stated that ". . . a *prima facie* case is one which, in the absence of *effective refutation* by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case".[27] Thus, where India presents a *prima facie* case in respect of a claim, it is for the European Communities to provide an "effective refutation" of India's evidence and arguments, by submitting its own evidence and arguments in support of the assertion that the European Communities complied with its obligations under the AD Agreement. Assuming evidence and arguments are presented on both sides, it is then our task to weigh and assess that evidence and those arguments in order to determine whether India has established that the European Communities acted inconsistently with its obligations under the AD Agreement.

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6.45 Article 17.6 of the AD Agreement sets out a special standard of review for disputes arising under that Agreement. With regard to factual issues, Article 17.6(i) provides:

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Communities' interpretation is one that is "permissible" in light of the customary rules of interpretation of international law. If so, we allow that interpretation to stand, and unless there is error in the subsequent analysis of the facts under that legal interpretation under the standard of review under Article 17.6(i), the challenged action is upheld.

6.47 Finally, we note that, as a general matter, the object of a panel's review of a final anti-dumping measure focuses on the final determination of the investigating authority, in this case, the

6.50 India points out that the EC legislation – Article 2(6) of Regulation 384/96 – in fact lists the options for determining the amounts for SG&A and for profit identified in Article 2.2 of the AD Agreement in a different order than they appear in the Agreement. This would appear to suggest, according to India, that the European Communities implicitly does not consider the order of options to be relevant. The European Communities did not even consider which option would be most reasonable0 Tcb thsplicappeald inticle

alternatives, that the drafters of the Agreement intended no such hierarchy to exist among Articles 2.2.2(i), (ii) and (iii).

(ii) Findings

6.54 We first consider India's argument that the order of methodological options for calculating a reasonable amount for profit set out in Article 2.2.2 reflects a preference for one option over another, notably the option set out in paragraph (i) over that in paragraph (ii).

6.55 Article 2.1 of the AD

(i) the actual amounts incurred and realised by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products;

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

(iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realised by other exporters or

rate is not higher than the weighted average profit rate realised by *other investigated exporters* in respect of sales in the same *general category of products*.[32]

6.61 In our view, there is no basis on which to judge which of these three options is "better". Certainly, there were differing views during the negotiations as to how this issue was to be resolved,[33] and there is no specific language in the Agreement to suggest that the drafters considered one option preferable to the others. Given, as explained above, that each of the three options is in some sense "imperfect" in comparison with the chapeau methodology, there is, in our opinion, no meaningful way to judge which option is less imperfect – or of greater authority – than another and, thus, no obvious basis for a hierarchy. And it is, in our view, for the drafters of an Agreement to set out a hierarchy or order of preference among admittedly imperfect approximations of a preferred result, and not for a panel to impose such a choice where it is not apparent from the text.

6.62

"reasonable". India submits that Bombay Dyeing is a wholly atypical company in India, and the SG&A and profit from one peculiar and extraordinary company cannot be considered "reasonable". India submits that another company did have sufficient representative domestic sales, was included in the sample selection, and its data should have been taken into account by the European Communities.

6.65

precluded from applying the option set out in Article

6.73 We also consider that the negotiating history of Article 2.2.2 confirms our view that Article 2.2.2(ii) is not limited to the case where there is more than one "other" producer or exporter. There was no provision in the Tokyo Round Anti-Dumping Code corresponding to Article 2.2.2(ii). In the absence of guidance in this regard, it was the practice of some Members, notably the United

(c) Article 2.2.2(ii) – production and sales amounts “incurred and realised”

(i) Parties' arguments

6.76 India also asserts that the European Communities acted inconsistently with Article 2.2.2(ii) in its application of the provision by using the production and sales amounts "incurred and realised" on transactions in the ordinary course of trade, instead of the production and sales amounts “incurred and realised” on all transactions. For India, the European Communities' approach is demonstrably inconsistent with the express wording of Article 2.2.2(ii), which indicates that the entire purpose of the provision is to provide for a different and alternative basis from the basis contained in the chapeau of Article 2.2.2 upon which to establish SG&A and profits. Indeed, the second sentence of the chapeau of Article 2.2.2 expressly states that one is only entitled to resort to the methodology under Article 2.2.2(ii) when the basis under the chapeau of Article 2.2.2 “cannot” be used; it is clearly an

the profit rate, merely that it was permitted to do so, based on the general principle allowing the exclusion of sales not in the ordinary course of trade from the calculation of normal value.

6.85 We consider that this principle may be properly understood to apply to all provisions falling within Article 2.2, including Article 2.2.2(ii). We do **not** consider that a Member is obligated to exclude sales not in the ordinary course of trade for purposes of determining the profit rate under the subparagraphs of Article 2.2.2, merely that such exclusion is not prohibited by the text. In our view, to read Article 2.2.2 as prohibiting the exclusion of sales not in the ordinary course of trade might, in some cases, yield results under the alternatives set out in paragraphs (i) and (ii) that would be contradictory of a basic principle contained in the chapeau methodology. Article 2 establishes as a general principle that Members may base their calculations of normal value only on sales made in the ordinary course of trade. We consider that in this context, absent a specific prohibition, it is permissible to interpret the subparagraphs of Article 2.2.2 to allow application of this general principle in the specific case of a profit rate determination under Article 2.2.2(ii). If the alternative advocated by India were accepted, a prohibition on the exclusion of sales not in the ordinary course of trade might result in a constructed value being based on data concerning the very sales that could not be considered in determining normal value. Indeed, that would be the result in this case. Application of the methods in paragraphs (i)-(iii) might, thus, yield results inconsistent with the basic principles of Article 2.2.

6.86 We recall that the "ordinary course of trade" limitation forecloses the possibility of calculating profits on the basis of sales at prices below cost.[40] The profit amount on sales at prices below cost would be negative. In our view, to require the calculation of constructed normal value including such sales would not be in keeping with the overall object and purpose of the provision – to establish methodologies for the determination of a reasonable amount for profit to be used in the calculation of a constructed normal value. If sales that are considered not in the ordinary course of trade because they are below cost were used for the calculation of the profit rate, the constructed value could be equal to cost and thus would not include a reasonable amount for profit. This would render the calculation of a constructed value meaningless, and not consistent with Article 2.2.[41] In this context, we recall that one reason an investigating authority would construct a normal value is because the actual sales of the investigated exporter or producer are deemed inappropriate to serve as the basis of normal value because they are made below cost. To conclude that such sales below cost **must** then be taken into account in the construction of normal value in these circumstances makes no sense.

6.87 Thus, we consider that an interpretation of Article 2.2.2(ii) under which sales not in the ordinary course of trade are excluded from the determination of the profit amount to be used in the calculation of a constructed normal value is permissible. We therefore conclude that the European Communities did not err in its application of paragraph (ii) by using data only on transactions in the ordinary course of trade.

2. Claim under Article 2.2 – reasonability (claim number 4)

(a) Parties' arguments

6.88 India submits that the European Communities acted inconsistently with Article 2.2 by applying the SG&A and profit incorrectly determined under Article 2.2.2(ii) even though they were

[40] It may also foreclose the possibility of calculating profits on the basis of sales between related parties (albeit possibly made at cost). However, this is not an issue in this dispute.

[41] With regard to the comments made by Egypt, we note that India has not brought a claim of violation of Article 2.2.1.1 or the chapeau of Article 2.2.2. "Claims" brought by third parties are clearly not within the terms of reference of, and, therefore, not properly before, the Panel.

clearly not "reasonable". For India, Article 2.2.2 lays down how the "amounts for administrative, selling and general costs and for profits" are to be determined. It does not, however, explain how the **reasonable** amounts for SG&A and for profits are to be determined. For India, the word reasonable in Article 2.2 has a separate function, and the "reasonable" test of Article 2.2 is an independent, over-arching requirement in addition to the requirements of Article 2.2.2, rather than a rule concretised by Article 2.2.2. "Reasonable" must thus be interpreted as a substantive requirement: whatever method under Article 2.2.2 is used, Article 2.2 requires that the result must be "reasonable". Moreover, India

its turn, is intended to allow investigating authorities to construct a normal value that is as close as possible to the normal value that would have been established on the basis of domestic prices, had there been sufficient comparable sales in the ordinary course of trade. The European Communities points out that Bombay Dyeing has representative sales in the Indian market. That a single producer can have 80% of the domestic market for bed linen and make a profit of over 18%, while numerous other producers ignore this market and devote themselves to exports, may be an uncommon situation, but that does not make the results arising from the use of data from this company *ipso facto* unreasonable. Rather, the European Communities is of the view that it would have been unreasonable to ignore this company and choose another source, which would inevitably be less typical of sellers in that market.

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where the methodology is defined, in subparagraphs (i) and (ii), the application of those methodologies yields reasonable results. If those methodologies did not yield reasonable results, presumably the drafters would have included some explicit constraint on the results, as they did for subparagraph (iii).

6.98 Thus, we conclude that the text indicates that, if a Member bases its calculations on either the chapeau or paragraphs (i) or (ii), there is no need to separately consider the reasonability of the profit rate against some benchmark. In particular, there is no need to consider the limitation set out in paragraph (iii). That limitation is triggered only when a Member does not apply one of the methods set out in the chapeau or paragraphs (i) and (ii) of Article 2.2.2. Indeed, it is arguably precisely because no specific method is outlined in paragraph (iii) that the limitation on the profit rate exists in that provision.

6.99 We note further that the methodology set out in the chapeau of Article

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6.101 We, therefore, conclude that Article 2.2.2(ii), when applied correctly, necessarily yields reasonable amounts for profits, and that the AD Agreement does not require consideration of a separate reasonability test in respect of results arrived at through the use of that methodology. The European Communities did not, therefore, act inconsistently with the requirements of Article 2.2 by not having applied such a test to the results that it obtained under Article 2.2.2(ii).

3. Claim under Article 2.4.2 - "zeroing" (claim number 7)

6.102 The practice of "zeroing" arises in situations where an investigating authority makes multiple comparisons of export price and normal value, and then aggregates the results of these individual comparisons to calculate a dumping margin for the product as a whole. In this case, the European Communities compared weighted averages of export prices and normal value for each of several models or product types of bed linen. India has no complaint about this aspect of the EC determination.[44] The comparisons for the different models in some cases showed the export price to be lower than the normal value, and in some cases showed the export price to be higher than the normal value. The results of the latter comparisons are referred to as "negative" margins. The European Communities then calculated a weighted average dumping margin for the product at issue, cotton-type bed linen, on the basis of the results obtained in the comparisons by model. In the course of this part of the calculation, the European Communities summed up the total value of the dumping – the total "dumping amount" – on the investigated imports. The European Communities calculated the dumping amounts by multiplying the value of the imports of each model by the margin of price difference for each model. The European Communities counted as zero the dumping amount for those models where the margin was negative. The European Communities then divided the total dumping amount by the value of the exports involved, including the value of those models for which the individual margin was negative, and the dumping amount was thus counted as zero. It is this aspect of the calculation, the assigning of a value of zero to the comparisons yielding a "negative" margin, which constitutes the challenged practice of zeroing which is the subject of India's claim under Article 2.4.2.

(a) Parties' arguments

6.103 India argues that the European Communities acted inconsistently with Article 2.4.2 of the AD Agreement by zeroing "negative dumping" amounts for certain types of bed linen in calculating the overall weighted average dumping margin for the like product bed linen. According to India, the European Communities effectively averaged only within a model, and not between models, and thus

India asserts that the European Communities opted to apply the first option in establishing the dumping margin in this case, but did not properly make this comparison by engaging in the practice of zeroing.[45]

6.104 In India's view, the practice of zeroing is not consistent with the requirement set forth in Article 2.4.2 that the comparison take into account the "weighted average of prices of all comparable export transactions". India asserts that this language precludes excluding certain amounts from the calculation simply because they showed "negative" dumping. India argues that, given the use of the words “weighted average” in Article 2.4.2 and the definition of the word “average”, there is clearly no justification for excluding certain amounts in establishing an average. An “average” relates to the total of given amounts and not to a number of given amounts from which a selection can be made as to which ones are to be averaged. The use of the word “all” in Article 2.4.2 underlines this idea. And, finally, India posits that the practice of attributing a zero value to "negative dumping" for the eventual calculation of overall dumping margins is contrary to the concept of weighting and in fact distorts the process of actually weighting dumping margins. Moreover, India maintains that this EC method always will lead to a higher dumping margin compared to the method India asserts is envisaged by the ADen “av Mduc7 aypTc nertsiedcle

6.107 Egypt argues that the European Communities manipulated the calculation of the overall dumping margin for Egyptian producers by zeroing negative dumping amounts on a per-type basis, in violation of Article 2.4.2 of the AD Agreement. In Egypt's view, had the Commission followed strictly its own established practice, the outcome would have been different. In failing to do that, it is, for Egypt, clear that the European Communities was determined to have bigger dumping margins.

6.108 Japan asserts that the EC practice of "zeroing" is not consistent with the requirements of Article 2.4.2. In Japan's view, this provision explicitly calls for dumping margins to be based on a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions, and a proper weighted average does not arbitrarily raise some of the numbers in the average in an effort to increase the final result of the weighted average. Japan maintains that the term "comparable" as used in Article 2.4.2 cannot justify the European Communities' practice. In Japan's view, the term speaks only to the need to make the comparison on an "apples-to-apples" basis, and does not authorize zeroing. Japan argues that the European Communities seems to believe that if it properly weight-averages once **within** the product type, then it need not properly weight-average in the next stage, aggregation **across** the various product types. In Japan's view, this interpretation ignores the plain meaning of Article 2.4.2, which requires the comparison of a weighted average based on all comparable export transactions, not just those transactions found to be dumped. The EC approach, including the volume of the non-dumped product types in the overall average, considers only part of the export transactions, the volume element, but ignores the price element. By setting the value of the non-dumped product type to zero, Japan asserts that the European Communities essentially changed the prices of the underlying export transactions. In Japan's view, the text of Article 2.4.2 explicitly calls for a weighted average of the **prices**, not of some actual prices and some arbitrarily adjusted prices. In addition, Japan asserts that Article 2.4 creates an overall obligation of fair comparison for the calculation of dumping margins. Japan maintains that it is not fair to skew a weighted average by adjusting upward some prices used in the calculation of that weighted average.

6.109 The United States maintains that Article 2.4.2 does not prohibit the practice of zeroing.[46] In the United States' view, all that Article 2.4.2 requires is that, in making comparisons between the export price and the normal value of the like product in an investigation, each comparison shall be made either on a weighted-average-to-weighted-average basis or a transaction-to-transaction basis. This requirement of comparing weighted-average-to-weighted-average figures or transaction-to-transaction figures is explicitly made subject to the requirements of Article 2.4. Thus, it is clear that the weight-averaging normally is not to involve transactions which are distinct in terms of physical characteristics of the products, conditions and terms of sale, and other differences affecting price comparability. In the United States' view, the "zeroing" practice applied by the European Communities in this case is not covered by Articles 2.4 and 2.4.2 because it arises at a step **subsequent** to the comparison of export price and normal value, when the individual, model-specific margins were combined into an overall average rate of dumping. The United States asserts that its view is confirmed by the fact that Article 2.4.2 explicitly permits transaction-to-transaction comparisons without providing a methodology for combining margins calculated pursuant to that methodology either. The United States points out that when this stage of combining the results of the actual comparisons is reached, the individual, product-specific differences between normal value and export price may be positive or negative. If positive, they represent the aggregate amount of dumping duties that the importing country is permitted to collect for that product or group of transactions. If negative, they represent the amount by which the export price exceeded the normal value. However, the United States asserts that the AD Agreement imposes no requirement on the importing country to make payments with respect to a lack of dumping of the merchandise in question. The negative

[46] The United States notes that nothing in its argument on this issue should be construed as expressing agreement or disagreement with the European Communities' actual calculation of the dumping margin in this case, because the United States does not have access to the specific factual information considered by the European Communities.

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[7] It is understood that some of the above factors may overlap, and authorities shall ensure that they do not duplicate adjustments that have been already made under this provision.

The two subparagraphs of Article 2.4 deal with specific aspects of the comparison of normal value and export price. Article 2.4.1 (which is not at issue in this dispute) provides rules for the conversion of currencies, when such conversion is necessary for the purposes of a comparison under Article 2.4. Article 2.4.2 establishes that, subject to the provisions of Article 2.4 governing fair comparison, dumping margins should normally be established on the basis of an average-to-average comparison or a transaction-to-transaction comparison. These provisions are new to the AD Agreement - the Tokyo Round AD Code contained no similar provisions.

6.112 In accordance with the provisions of the *Vienna Convention* governing treaty interpretation, we look first to the ordinary meaning of the phrase "a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions", in its context and in light of its object and purpose, in determining whether the practice of zeroing is permitted under Article 2.4.2. Looking first at the text, we note that Article 2.4.2 requires that normally, except in circumstances not applicable here, the existence of "margins of dumping" is to be established on the basis of "a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions" or on the basis of comparison of individual transactions.

6.113 The European Communities argues that this provision simply does not address the question of what to do with "multiple" margins determined on the basis of comparisons for different models within the like product. This "subsequent stage" of the calculation simply does not fall within the scope of Article 2.4.2 in the European Communities' view, and therefore the methodology to be applied in arriving at the dumping margin for the like product as a whole, in a case where multiple comparisons are made, is within the discretion of the Member conducting the investigation.

6.114 We cannot agree. The language of Article 2.4.2 specifically establishes the permissible bases for establishing the "existence of margins of **dumping**". "Dumping" is defined in Article 2.1 of the AD Agreement, which states that

> "For the purpose of this Agreement, a **product is to be considered as being dumped**, *i.e.*, introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price in the ordinary course of trade, for the like product when destined for consumption in the exporting country".

The succeeding provisions of Article 2 of the AD Agreement, which is entitled "Determination of Dumping" set forth, in some detail, various information and methodologies to be used in the determination of whether dumping exists. Article 2.4.2 sets out the permissible bases for comparison of normal value and export price in order to establish the existence of margins of dumping. In light of Article

not, in fact, rest on a comparison with the prices of all comparable export transactions. By counting as zero the results of comparisons showing a "negative" margin, the European Communities, in effect, changed the prices of the export transactions in those comparisons. It is, in our view, impermissible to "zero" such "negative" margins in establishing the existence of dumping for the product under investigation, since this has the effect of changing the results of an otherwise proper comparison. This effect arises because the zeroing effectively counts the weighted average export price to be equal to the weighted average normal value for those models for which "negative" margins were found in the comparison, despite the fact that it was, in reality, higher than the weighted average normal value. This is the equivalent of manipulating the individual export prices counted in calculating the weighted average, in order to arrive at a weighted average equal to the weighted average normal value. As a result, we consider that an overall dumping margin calculated on the basis of zeroing "negative" margins determined for some models is not based on comparisons which fully reflect all comparable export prices, and is therefore calculated inconsistently with the requirements of Article 2.4.2.

6.116 We recognize that Article 2.4.2 does not, in so many words, prohibit "zeroing". However, this does not mean that the practice is permitted, if it produces results inconsistent with the obligations set forth in that Article, as we believe it does. We consider that the requirements of Article 2.4.2 must be understood to apply to the entire process of determining the existence of margins of dumping for

6.119 Based on the foregoing, we conclude 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.

D. CLAIMS UNDER ARTICLE

assessment period that was prior to the dumping investigation period.[50] In the United States' view, the requirements of the injury determination necessarily oblige Members to gather and consider information for a period longer than the period of the dumping investigation, in order to evaluate

6.135 Thus, we are faced with the question of the interpretation of the term "dumped imports" in Articles 3.1, 3.4, and 3.5 of the AD Agreement, rather than an assessment of the facts as such. If we were to conclude that the term "dumped imports" may be understood to comprise the volume of imports of the product in question from the country for which an affirmative determination of dumping has been made then we must, under the standard of review set forth in Article 17.6(ii), find in favor of the European Communities on this issue, at least with respect to the consideration of imports during the period of the dumping investigation. On the other hand, to sustain India's position, we would have to conclude that the phrase "dumped imports" must be understood to refer only to imports which are the subject of transactions in which export price was below normal value, which India considers to be "dumping" transactions.

6.136 However, consideration of the ordinary meaning of the phrase "dumped imports" in its context, and in light of the object and purpose of Article 3 of the AD Agreement, leads us to the conclusion that the interpretation proposed by India is not required. As discussed above,[52] we consider that dumping is a determination made with reference to a **product** from a particular producer/exporter, and not with reference to individual transactions. That is, the determination of dumping is made on the basis of consideration of transactions involving a particular product from particular producers/exporters. If the result of that consideration is a conclusion that the product in question from particular producers/exporters is dumped, we are of the view that the conclusion applies to all imports of that product from such source(s), at least over the period for which dumping was considered. Thus, we consider that the investigating authority is entitled to consider all such imports in its analysis of "dumped imports" under Articles 3.1, 3.4, and 3.5 of the AD Agreement.

6.137 We note that Article 9.2 of the AD Agreement, which may be considered relevant context for our analysis, provides:

> "When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury, except as to imports from those sources from which price undertakings under the terms of this Agreement have been accepted. The authorities shall name the supplier or suppliers of the product concerned".

We consider that this provision lends support to our conclusion that all imports from any producer/exporter found to be dumping may be considered as dumped imports for purposes of injury analysis.

6.138 In this regard, we note that, although the European Communities found *de minimis* margins for four Pakistani exporters of bed linen, it did not make a negative determination of dumping with respect to any producer or exporter subject to the investigation. India, of course, has made no claim with respect to the treatment of Pakistani imports as dumped. India does argue that, had the European Communities properly calculated the dumping margins for Indian producers, it would have come to the conclusion that imports from one company were not dumped. We have found above that the European Communities did act inconsistently with its obligations under Article 2.4.2 of the AD Agreement in its calculation of dumping margins for Indian producers. It is possible that a calculation conducted consistently with the AD Agreement would lead to the conclusion that one or another Indian producer should be attributed a zero or *de minimis* margin of dumping. In such a case, it is our view that the imports attributable to such a producer/exporter may not be considered as "dumped" for purposes of injury analysis. However, we lack legal competence to make a proper calculation and consequent determination of dumping for any of the Indian producers – our task is to review the determination of the EC authorities, not to replace that determination, where found to be

[52] *See* section VI.C.3 (zeroing), *supra*.

6.143 With respect to the question whether the European Communities improperly considered imports before the dumping investigation period as dumped, we note the European Communities' explanation that it did not determine injury caused by dumped imports for any period before the dumping investigation period. Since we have concluded, as discussed below, that the European Communities' determination of injury was not made consistently with its obligations under Article 3.4, we do not consider it necessary or appropriate to decide this question.

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

2. Claim under Article 3.4 - failure to evaluate "all relevant economic factors and indices having a bearing on the state of the industry" (claim number 11)

(a) Parties' arguments

6.145 India considers that the European Communities failed to consider all injury factors mentioned in Article 3.4 of the AD Agreement for the purpose of its determination of the impact of the dumped imports on the domestic industry concerned. In particular, India asserts that the European Communities did not consider the following elements: productivity; return on investments; utilisation of capacity; magnitude of margin of dumping; cash flow; inventories; wages; growth; and ability to raise capital or investments. In India’s opinion, the European Communities, therefore, acted inconsistently with Article 3.4.

6.146 India emphasises the use of the word "shall" in Article 3.4, arguing that it follows that the evaluation mentioned in Article 3.4 shall by necessity include "all relevant . . . factors". The word "all" indicates that all relevant factors must be included in this "evaluation". The word "all", according to India, is given further meaning by the word "including". In India's view, it follows from the word "including" that, at a minimum, the factors and indices listed after the word "including" must be evaluated.

6.147 The European Communities presents three defences to India’s claim, which it characterises as relying on the supposedly compulsory nature of the evaluation of the factors listed in Article 3.4 and not on the argument that, because of the circumstances of this particular case, the listed factors should be evaluated. First, the European Communities asserts that the factors listed in Article 3.4 were evaluated during the investigation.[55] For several of the factors, the data could be derived from the exporters’ accounts and, for others, from the questionnaire sent to the domestic derdidm " -12.75 TD -ldF1 11

Communities, India seeks to establish that Article 3.4 requires investigating authorities to evaluate in an explicit fashion all the fifteen listed factors. However, the wording of Article 3.4 refers almost exclusively to negative factors and, consequently, according to the European Communities, what

argument that some of the Article 3.4 factors are negative in character. The United States points out that the European Communities ignores that Article 3.5 refers to "the *effects* of dumping, as set forth in paragraphs 2 and 4 of Article 3". The "relevance" of the Article 3.4 factors extends beyond supporting an injury determination. Article 3.4 states that "all relevant economic factors and indices having a bearing on the state of the industry" must be evaluated. Thus, even if a factor does not lend support to an affirmative injury determination, the authority must evaluate it so long as it sheds light on the condition of the domestic industry.

(b) Findings

6.153 India's claim raises a number of issues. The most basic of these is the interpretation of Article 3.4, *i.e.*, whether the list of factors set out in that provision is illustrative or mandatory and, if mandatory, whether there are only four groups of "factors" represented by the subgroups separated by semicolons that must be evaluated, or whether each individual factor listed must be considered. We must also consider the nature of the evaluation of the factors that is required, how the "relevance" of a given factor is to be determined, and the extent to which the final determination must reflect the required consideration, whatever its nature. Finally, we must consider the facts.

6.154 Article 3.4 provides:

> "The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilisation of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance."

The use of the phrase "shall include" in Article 3.4 strongly suggests to us that the evaluation of the listed factors in that provision is properly interpreted as mandatory in all cases. That is, in our view, the ordinary me outpua25 2 these 9rr Tw ("The examination of impact of the . Fors and indic8f the marj 0ee 9.onc

6.156 With regard to the use of the word "including", we consider that this simply emphasises that there may be other "relevant economic factors and indices having a bearing on the state of the industry" among "all" such factors that must be evaluated. We recall that, in the Tokyo Round AD Code, the same list of factors was preceded by the phrase "such as", which was changed to the word "including" that now appears in Article 3.4 of the AD Agreement. The term "such as" is defined, *inter alia*, as "Of the kind, degree, category being or about to be specified; for example".[57] By contrast, the verb "include" is defined, *inter alia*, to mean "enclose"; "contain as part of a whole or as a subordinate element; contain by implication, involve"; or "place in a class or category; treat or regard as part of a whole".[58] We thus read the phrase "shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including . . ." as introducing a mandatory list of relevant economic factors which must be evaluated in every case. The change in the wording that was introduced in the Uruguay Round in our view supports an interpretation of the current text of Article 3.4 as setting forth a list that is mandatory, and not merely indicative or illustrative.[59]

6.157 The European Communities also focuses on the semicolons in the list of factors in Article 3.4. However, in our view, neither the presence of semicolons separating certain groups of factors in the text of Article 3.4, nor the presence of the word "or" within the first and fourth of these groups, serves to render the mandatory list in Article 3.4 a list of only four "factors". We further note that the two "ors" appear within – rather than between – the groups of factors separated by semicolons. Thus, we consider that the use of the term "or" here does not detract from the mandatory nature of the textual requirement that "all relevant economic factors" shall be evaluated. With respect to the second "or," it appears in the phrase "ability to raise capital or investments", which clearly indicates that the factor that an investigating authority must examine is the "ability to raise capital" or the "ability to raise investments", or both.

6.158 Finally, we consider the European Communities' assertion that not all factors listed in Article 3.4, "being solely negative in character", need to be evaluated. This characterisation of the European Communities of the factors listed in Article 3.4 is somewhat perplexing to us. Each of the factors to be evaluated may be found to indicate material injury, or not, to the industry. We fail to see the purpose of describing them as "negative factors", or factors having "negative character". Nor are we able to reconcile the European Communities' statement that "the listed factors are explicitly concerned with indications of injury, not the absence of injury" with its statement that "[t]he

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> "among "all relevant factors" that the investigating authorities "shall evaluate", the consideration of the factors listed is always relevant and therefore required, even though the authority may later dismiss some of them as not having a bearing on the situation of that industry". *Korea - Dairy Safeguard*, Panel Report, para. 7.55.

See also, *Argentina - Safeguard Measures on Imports of Footwear*, Appellate Body Report, WT/DS121/AB/R, adopted 12 January 2000, para. 136. The similarities between the drafting of the provisions is obvious, and we consider that the same conclusion is appropriate in interpreting Article 3.4 of the AD Agreement. While the standard for injury in safeguards cases ("serious injury") is different from that applied to injury determinations in the anti-dumping context ("material injury"), the same type of analysis is provided for in the respective covered agreements, *i.e.*, evaluation or examination of a listed series of factors in order to determine whether the requisite injury exists.

[57] *The New Shorter Oxford English Dictionary*

European Communities does not wish to suggest that non-negative factors have no relevance". On the contrary, the European Communities' comment that "[the] wording [of Article 3.4] refers almost exclusively to negative factors and, consequently, what might be called the 'comprehensive evaluation' requirement, if it exists, applies only to such factors" suggests that the European Communities believes that only factors indicating material injury to the industry must be evaluated. Such an interpretation of Article 3.4 clearly runs counter to the requirement

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> - at the level of the sampled Community producers, for the factors mentioned above and also for trends concerning prices and profitability."

6.167 It appears from this listing that data was not even collected for all the factors listed in Article 3.4, let alone evaluated by the EC investigating authorities. Surely a factor cannot be evaluated without the collection of relevant data. While some of the data collected for the factors that are mentioned in the Provisional Regulation by the EC authorities may have included data for the factors not mentioned, we cannot be expected to assume that this was the case without some indication to that effect in the determination. Nor is the relevance or lack thereof, as assessed by the EC authorities, of the factors not mentioned under the heading "Situation of the Community industry" at all apparent from the determination.

6.168 The European Communities explains that certain factors were evaluated, but were "found not to be a significant independent factor". In response to a question from the Panel regarding the meaning of the phrase "not a significant independent factor" as used by the European Communities, the European Communities states: "The interpretation to be given to the phrase 'an evaluation of all relevant economic factors and indices' must be flexible enough to cope with the enormous variety of circumstances that arise in investigations into injury and injury causation. Relevance is a matter of degree rather than of 'yes or no'."[64] While we certainly agree with the European Communities as to the "enormous variety of circumstances" that may arise in investigations, and the need to be flexible in the evaluation of relevant factors, we fail to see how relevance of a factor to the determination of injury **in a particular investigation** can be a matter of degree. That is to say, it is clear that not all factors will be, or will be equally, "relevant", in the sense of bearing on the state of the industry, in all cases. Nonetheless, it would seem to us that **in a particular** case, a particular factor either is or is not relevant to the determination of whether there is injury, depending on the particular facts and circumstances of the industry in question. Indeed, it is precisely because, as the European Communities states, "the process of determining the relevance of a factor may be little different from that of evaluating it" that the authorities' assessment of the lack of relevance of a factor, that is, the conclusion that it has no (or little) bearing on the determination of injury, should that be the case, must be as apparent from the determination as the authorities' evaluation of a factor that does bear on the determination of injury. Otherwise, it becomes impossible to determine which of the many factors that have a bearing on the state of the industry actually were considered to weigh in the determination of injury and were evaluated by the investigating authority. We find that, where factors set forth in Article 3.4 are not even referred to in the determination being reviewed, if there is nothing in the determination to indicate that the authorities considered them not to be relevant, the requirements of Article 3.4 were not satisfied. A conclusion that a factor is not relevant which must be assumed from the absence of any discussion of it is, in our view, simply not tenable.

6.169 Based on the foregoing, we conclude that the European Communities did not conduct "an evaluation of all relevant economic factors and indices having a bearing on the state of the industry" and, therefore, failed to act consistently with its obligations under Article 3.4 of the AD Agreement.

3. Claim under Article 3.4 - consideration of information for various groupings of EC producers in analysis of the state of the domestic industry (claim number 15)

(a) Parties' arguments

6.170 India submits that the European Communities acted inconsistently with Article 3.4 by considering information relating to different groupings of EC producers of bed linen in evaluating certain of the factors under Article 3.4. India asserts that the European Communities, after defining

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[64] *See* Response of the European Communities to Question 20 from the Panel following the first meeting, Annex 2-5.

the "Community industry" as a group of 35 producers, selected a sample of 17 of those 35 for purposes of the injury investigation. However, India argues, the European Communities did not consistently base the injury analysis on this sample group. India argues that the European Communities' reliance on information for companies outside this group, specifically by considering information for the "Community industry" as a whole, and for all EC producers of bed linen, in determining injury, was a violation of Article 3.4. Moreover, India maintains, the European Communities' choice of which group of producers to consider with respect to different aspects of its analysis was without any apparent reason other than a goal-oriented 'picking and choosing' in order to find injury.

6.171 The European Communities argues that Article 4.1 provides Members with two options for defining the domestic industry, either the "domestic producers as a whole" of the like product, or "those of them [the domestic producers] whose collective output of the products constitutes a major proportion of the total domestic production of those like products". In EC practice, a "major proportion" is defined by reference to the standing requirements of Article 5.4 of the Agreement, that is, producers accounting for at least 25 per cent of domestic production. The European Communities states that in the bed linen investigation, it applied the second option, defining as the "Community industry" a group of 35 producers of bed linen supporting the application whose collective output constituted more than 25 per cent of EC production of the like product. Because of the number of companies in the Community industry, the European Communities decided to resort to sampling. An initial list of 19 companies was decided upon for inclusion in the sample, which was subsequently reduced to 17 companies. The European Communities collected and analysed data for the examination of injury to the Community industry at three levels, *i.e.*, for the sampled companies, for the Community industry, and for all EC producers of bed linen.[65]

6.172 The European Communities notes that the conclusions drawn from evidence must ultimately concern the domestic industry as defined in the investigation, but argues that there is no intrinsic limit to the types of evidence that may be used to arrive at such conclusions. In particular, the European Communities submits that it cannot be excluded *ab initio* that the condition of EC producers of bed linen as a whole may provide evidence of the condition of those producers who comprise the domestic industry. The European Communities emphasises that the principal basis for the finding of material injury was the reduced profitability and price suppression of the Community industry as observed among the sampled companies.

6.173 In Egypt's view, there is no textual support in the AD Agreement for the approach adopted by the European Communities, which is incompatible with Article 3.1, as well as Articles 3.3, 3.4, 3.5 and 3.6, of the AD Agreement. These provisions require the European Communities to determine whether the domestic industry has suffered injury and do not permit an injury determination based on data relating to companies not belonging to the domestic industry. As an ancillary matter, Egypt states that the Commission, by ignoring the results of its own sample of the domestic industry, failed to make an unbiased and objective assessment of the facts and thus acted inconsistently with Article 6.10 in conjunction with Articles 3.4, 3.5 and 3.6. In Egypt's view, in assessing whether the

6.177 India's claim rests on premises concerning the correct definition of domestic industry and sampling which are outside the scope of our terms of reference. Focusing solely on the claim that is before us, we note that the European Communities defined the domestic industry by starting with the list of companies which supported the application. After eliminating seven found not to be complainants,[66] and excluding several others for various reasons, the European Communities arrived at a group of 35 companies whose production of bed linen the European Communities considered to constitute a "major proportion" of total EC production of the like product. The European Communities defined this group as the "Community industry".[67] The European Communities decided to establish a sample of this Community industry, and in consultation with the complainant Eurocoton, an initial list of 19 producers was arrived at, which was subsequently reduced to 17 producers. These 17 companies represented 20.7 per cent of total EC production of bed linen, and 61.6 per cent of the production of the Community industry (*i.e.*, the 35 producers referred to above). The EC investigating authorities considered this sample to be representative of the domestic industry.

6.178 As noted above, the European Communities collected information concerning injury with respect to three groups of companies – all EC producers of bed linen (referred to in the Provisional and Definitive Regulations as the "EU-15") for trends concerning production, consumption, imports, exports, and market share; the Community industry for trends concerning production, sales by value, and employment; and the sample for the factors mentioned above and for trends concerning prices and profitability.[68] In its analysis of factors regarding the state of the domestic industry, the EC authorities considered data for the three levels where available for the various factors.

6.179 To succeed, India's claim requires us to determine that, having selected a sample, the European Communities was **precluded** as a matter of law from considering, in its analysis under Article 3.4, any information for any factor for any producers of bed linen not included in the sample. One aspect of this claim relates to those producers of bed linen who, while not included in the sample set selected by the investigating authorities, were members of the "Community industry" as defined by the European Communities. A second aspect of India's claim relates to those EC producers of bed linen who were not members of the "Community industry" as defined by the European Communities.

6.180 There is simply no basis in the AD Agreement for the first aspect of India's claim. Keeping in mind that India has made no claim regarding the constitution of the sample, and no claim regarding

view, it would be anomalous to conclude that, because the European Communities chose to consider a sample of the domestic industry, it was required to close its eyes to and ignore other information available to it concerning the domestic industry it had defined. Such a conclusion would be inconsistent with the fundamental underlying principle that anti-dumping investigations should be fair and that investigating authorities should base their conclusions on an objective evaluation of the evidence. It is not possible to have an objective evaluation of the evidence if some of the evidence is required to be ignored, even though it relates precisely to the issues to be resolved. Thus, we consider that the European Communities did not act inconsistently with Articles 3.1, 3.4, and 3.5 of the AD Agreement by taking into account in its analysis information regarding the Community industry as a whole, including information pertaining to companies that were not included in the sample.

6.182 However, our conclusion with respect to the second aspect of India's claim is different. As we have noted, the determination of injury has to be reached for the domestic industry as defined by the investigating authorities, in this case the 35 producers comprising the "Community industry" as defined by the European Communities. In our view, information concerning companies that are not within the domestic industry is irrelevant to the evaluation of the "relevant economic factors and indices having a bearing on the state of the industry" required under Article 3.4. This is true even though those companies may presently produce, or may have in the past produced, the like product, bed linen. Information concerning the Article 3.4 factors for companies outside the domestic industry provides no basis for conclusions about the impact of dumped imports on the domestic industry itself. If other present or former bed linen producers had been considered part of the domestic industry, the fact that some of them went out of business would be relevant to the evaluation of the impact of dumped imports on the domestic industry. But given that the European Communities defined the domestic industry as 35 producers of bed linen, information concerning other companies does not inform the evaluation of "factors and indices having a bearing on the state of the industry" under Article 3.4 of the AD Agreement, and thus cannot serve as the basis of findings regarding the impact of dumped imports on the domestic industry.

6.183 We therefore conclude that, by relying on information concerning producers not part of the domestic industry in its evaluation of the impact of dumped imports on the domestic industry under Article 3.4 of the AD Agreement, the European Communities failed to act consistently with that provision.[69]

E.

1. Claim under Article 5.3 - failure to examine accuracy and adequacy of evidence (claim number 23)

(a) Parties' arguments

6.185 India asserts that the European Communities failed to comply with the obligation to "examine the accuracy and adequacy of the evidence in the application". India maintains there is no evidence on the record that such an examination was carried out prior to the initiation of the investigation. India argues that the available evidence from the first bed linen anti-dumping proceeding made such examination even more important in this case.[70] India asserts that it raised the issue of lack of sufficient evidence to initiate during the course of the proceeding, but received no response from the EC authorities beyond the bare statement in the Provisional Regulation that "the complaint contained

withdrawn because it would have been impossible to make an injury finding. In India's view, these circumstances strongly indicated that the EC industry might not be injured, since it had refused to support the previous proceeding. India asserts that the allegations in the complaint underlying the investigation at issue here largely covered the same products, period and countries. In India's view this was strong evidence against initiation, warranting further examination. India takes the position that, while an investigating authority is not required to conduct any particular sort of investigation prior to determining whether there is sufficient evidence, since there is an obligation to "examine" the evidence in the application, that evidence "can in itself never be the only element "to justify the initiation of an investigation"", citing the report of the Panel in *Guatemala-Cement*.[73]

6.188 In its reply to the Panel's question number 7 following the first meeting, India asserts that it did argue that the European Communities erred in determining that the evidence was sufficient to justify initiation, pointing to the above-quoted statement in support. India is of the view that the European Communities failed to take counter-evidence (relating to the first bed linen investigation) into account, and therefore failed to examine the accuracy and adequacy of the evidence in the application, and therefore initiated inconsistently with Article 5.3

6.189 In the European Communities' view, India's arguments are based on an impermissible and vague interpretation of Article 5.3 of the AD Agreement as requiring some specific action in connection with the "examination" of the accuracy and adequacy of the evidence in the application. The European Communities asserts that India's argument seems to suggest that the information in a complaint may not be relied upon, but must be substantiated by other information obtained by the investigating authorities, a position which the European Communities rejects as having no basis in the text of Article 5.3.

6.190 The European Communities argues that Article 5.3 must be considered in light of Article

account the circumstances of the previous bed linen investigation, but that nothing in those circumstances precluded the conclusion that there was sufficient evidence to justify initiation.

6.198 India claims that the European Communities failed **to examine** the accuracy and adequacy of the evidence before initiating the investigation. Thus, we must determine what the parameters are of the requirement to "examine" the accuracy and adequacy of the evidence, and on what basis can it be assessed whether the necessary examination was carried out. It is difficult to see a basis on which a violation of Article 5.3 could be found based purely on the claim that the investigating authorities failed to examine the accuracy and adequacy of the evidence in the application unless we conclude that the text of Article 5.3 establishes a specific process requirement, that is, a requirement as to **how** the examination of the evidence must be conducted. Further, it is difficult to see a basis on which a violation of Article 5.3 could be found on the basis of India's claim unless we conclude that Article 5.3 establishes **how** the fact of and sufficiency of that examination must be made known, beyond the notice required by Article 12.1, which as noted is not at issue here. We can find no such requirements in the text of Article 5.3.[77] It is clear that Article 5.3 requires an investigating authority to examine the evidence, and that the examination has a purpose – to determine whether there is

production of the 38 producers in justifying its standing determination after the fact. In support of this contention, India asserts that the volume of production referenced in a note to the file dated 12 September 1996[79] refers to the production of the 38 producers, and thus can only have been produced after the initiation, and back-dated.

6.205 The European Communities maintains that it properly made the standing determination required by Article 5.4 of the Anti-dumping Agreement. The European Communities asserts that India's argument is premised on the application of an unnecessarily and improperly high standard of proof regarding the standing determination under Article 5.4 of the AD Agreement. The European Communities also takes issue with India's view that the support of domestic producers for an application must be expressed by each producer itself directly to the investigating authorities, and, in particular, that support expressed by an association of producers does not count. The European Communities argues that India's position imposes unnecessary and unworkable limitations that are not intended by the text of the AD Agreement. In the European Communities' view, Article 5.4 of the AD Agreement does not define to whom support must be expressed by producers, or whether that expression of support must be made directly to the investigating authorities (although it obviously has to be brought to their attention), or may be made indirectly. Furthermore, the provision explicitly envisages that the *application* may be made *on behalf of* the domestic industry. Therefore, the European Communities argues that the phrase "expressed *by* domestic producers", considered in its context, and in the light of the object and purpose of the Agreement, may include expressions of support by a trade association.[80] The European Communities notes that there have been several GATT/WTO dispute proceedings in which the anti-dumping measures at issue were initiated at the instance of trade associations, and this fact was never challenged.[81]

6.206 In any event, the European Communities asserts that even without considering the support expressed by trade associations on behalf of their member-producers, the information on the record demonstrated that the 25 per cent threshold set in Article 5.4 of the AD Agreement was satisfied. The European Communities maintains that the record is clear that the individual expressions of support were received prior to initiation, and that the apparent confusion of dates in the letters themselves and the fax headers and footers is a result of photocopying. In addition, the European Communities asserts that the investigating authority had estimated total EC production of bed linen, on the basis of statistical information available to it from Eurocoton and Eurostat, as between 123,917 and 130,128 tonnes. Production of the 38 producers the European Communities considered as having expressed support for the application was 45,952 tonnes, or 34 per cent of that total. The European Communities points out that India bears the burden of proof in this regard, and argues that there is no basis for finding that the European Communities erred in concluding that the information before the investigating authority at initiation indicated that producers accounting for a sufficient percentage of production of the like product supported the application to justify the determination of standing made by the EC authorities.

6.207 After the second meeting with the parties, the European Communities offered to submit to the Panel, for its inspection, in India's presence, the originals of the disputed faxes.

6.208 Egypt, as third partyTTD /F1osern d fa2.21543 c2cpT TD / (European Com)47 Tw (sn tmrmwT

Egypt maintains that this percentage is sufficient **only if** producers accounting for the remaining 66 of production did not object to the initiation of the investigation. For Egypt, the information on the record does not contain conclusive proof that the complainants indeed represented 34 per cent of total EC production of the like product. Furthermore, Egypt maintains that the European Communities was obliged to inquire of EC producers to ascertain their position regarding the application, in order to verify the claim of the applicant Eurocoton that it represented a "major proportion of the Community industry" within the meaning of the AD Agreement.

6.209 The United States, as third party, argues that consideration of industry support information submitted by associations of domestic producers is not inconsistent with Article 5.4 of the AD Agreement. While the United States agrees with India that Article 5.4 places certain affirmative obligations upon the authorities to evaluate the evidence concerning standing prior to initiating an anti-dumping investigation and establishes numeric standards which the authorities must find to have been met prior to initiation, in the United States' view, Article 5.4 does not address from whom the authorities may receive this evidence. Rather, the evidence which may be considered by the authorities in making any determinations and the parties entitled to provide such evidence are discussed in Article 6 of the Agreement. The United States points out that Article 6.11(iii) of the AD Agreement makes clear that trade and business associations qualify as interested parties, provided that a majority of their members produce the like product in the territory of the importing Member. Further, the AD Agreement provides that these associations shall have the full opportunity to defend their interests. The United States notes that the AD Agreement does, however, provide a limited counter-balance to trade and business associations representing their members. Article 6.6 requires the authorities to satisfy themselves as to the accuracy of the information provided by interested parties upon which their findings are based. Nevertheless, if the authorities have, in fact, confirmed the accuracy of the representations, contrary to the position of India, the AD Agreement, in the view of the United States, does not prohibit reliance on the representations of the associations to determine the necessary level of support. The United States contends that the European Communities' interpretation of the Agreement is permissible under Article 17.6(ii) of the AD Agreement. The United States, however, takes no position as to whether the European Communities' determination of industry support, as a factual matter, was consistent with the standards required by Articles 5.4 and 6 of the AD Agreement.

(b) Findings

6.210 Article 5.4 of the AD Agreement provides:

> "5.4 An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed[13] by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry.[14] The application shall be considered to have been made "by or on behalf of the domestic industry" if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.

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[13] In the case of fragmented industries involving an exceptionally large number of producers, authorities may determine support and opposition by using statistically valid sampling techniques.

> [14] Members are aware that in the territory of certain Members employees of domestic producers of the like product or representatives of those employees may make or support an application for an investigation under paragraph 1".

6.211 Article 5.4 thus sets up two separate calculations to determine that a minimum level of "support" for the application is shown by domestic producers. The first requires that producers accounting for more than 50 per cent of production **of those producers expressing either support or opposition** express support for the application. That test is not at issue in this case, and we do not address it here.[82]

6.212 The second calculation requires that producers accounting for at least 25 per cent of **total** production of the like product by the domestic industry support the application. It is the European Communities' determination in this regard, both as a legal and as a factual matter, that is challenged by India.

6.213 The issues raised by the Indian claim in this regard are similar to those discussed above regarding Article 5.3 with respect to the lack of an express process requirement in Article 5.4 and the question of whether and how the determination of standing must be made known to the parties. As with Article 5.3, Article 5.4 of the AD Agreement requires that the investigating authorities make certain determinations before an investigation may be initiated, and establishes the substance of the determinations to be made, including that the application is supported by producers accounting for at least 25 per cent of domestic production, but does not set out any specific requirements as to the process by which that determination must be made. In our view, whether the necessary examination of the degree of support for the application was carried out prior to the initiation can only be assessed by reference to the determination that was actually made, and the evidence before the authority at the time it made the determination. In this case, the EC investigating authority clearly concluded that the application was supported by producers accounting for more than 25 per cent of total EC production of bed linen, and we have before us documents which it asserts contain the relevant evidence on which it relied. We therefore turn first to the facts of this matter.

6.214 We have carefully examined the documents submitted by both parties.[83] These documents are photocopies, and in some cases photocopies of photocopies, of faxes of (1) letters of support sent by individual producers of bed linen to the investigating authority indicating support for the application, (2) letters of support sent by national associations of producers of bed linen to the investigating authority expressing support on behalf of individual producers listed in annexes, and (3) letters of support from national associations of producers of bed linen sent to the investigating authority expressing support on behalf of their members. It appears that these letters of support were first sent, by fax, to Eurocoton, which then sent them on, again by fax, to the EC investigating authority. All of the letters themselves are dated prior to the initiation of the investigation by the European Communities on 13 September 1996. Based on the letters themselves, individual producers of bed linen individually communicating support for the application directly to the investigating authorities accounted for 26.7 per cent of total EC production of bed linen. This is more than the minimum necessary under Article 5.4 of the AD Agreement to find sufficient support for the application.

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[82] Consequently, we express no views on Egypt's arguments as third party, which seem to address this aspect of the Article 5.4 determination in asserting that the European Communities was obliged to inquire of producers concerning their support or opposition for the application, and that the European Communities erred in finding sufficient support without finding that producers who did not support the application did not object to it.

[83] These documents were submitted in various iterations as Exhibits India-59, India-86, India-87, EC-4 and EC-5.

6.215 India asks us to conclude that these letters were not, in fact, received by the EC investigating authority prior to initiation, that the EC investigating authority did not, in fact, examine them prior to initiation, and that the European Communities has tried to cover this fundamental error by manufacturing evidence *post hoc* and misrepresenting the facts before us. This we decline to do. We recognise that the dates in the fax headers and footers in the photocopied documents submitted to us are inconsistent with one another and with the dates of the letters themselves. However, all these dates are **prior** to the relevant date, that of initiation on 13 September 1996. We note that the European Communities has offered to submit the originals of the faxes for our (and India's) inspection in this disp47se

F. CLAIM UNDER ARTICLE 15

letter had indicated would be the case, and thus the European Communities replied that it would no longer be able consider any offers of undertakings, as it was necessary to proceed to conclude the investigation.

6.223 Egypt, as third party, argues that Article 15 of the AD Agreement obligated the European Communities to explore the possibilities of constructive remedies before applying anti-dumping

6.227 We turn first to consideration of the text of the second sentence of Article 15, which is the basis of India's claim.[85] We note that there is no dispute in this case that the application of anti-dumping duties would affect the essential interests of a developing country Member, India. However, the parties disagree on what constitutes "constructive remedies provided for by this Agreement", whether that exploration must take place before the application of provisional measures, or only before the application of final anti-dumping measures, and what is required by the obligation to "explore" the "possibilities" of such remedies.

6.228 "Remedy" is defined as, *inter alia*, "a means of counteracting or removing something undesirable; redress, relief".[86] "Constructive" is defined as "tending to construct or build up something non-material; contributing helpfully, not destructive".[87] The term "constructive remedies" might consequently be understood as helpful means of counteracting the effect of injurious dumping. However, the term as used in Article 15 is limited to constructive remedies "provided for under this Agreement". The European Communities states that, in what it refers to as the "spirit" of Article 15, it undertook several procedural steps which it considered helpful to Indian exporters, but it does not consider that these procedural steps constitute "constructive remedies" *per se*. Rather, the European Communities seems to view price undertakings as the constructive remedies provided for in Article 15. India has declined to offer concrete suggestions as to other possible "constructive remedies under this Agreement" that might be available under Article 15.[88] In India's view, the obligation is on the European Communities to find and propose such remedies to developing countries prior to imposition of anti-dumping measures. In this regard, India having asserted that the European Communities failed to engage in some action which it was obligated to undertake, we view it as part of India's burden to present a *prima facie* case of violation to indicate what actions it believes should have been undertaken. India did suggest that a "constructive remedy" might be a decision not to impose anti-dumping duties at all. We cannot agree. In our view, Article 15 refers to "remedies" in respect of injurious dumping. A decision not to impose an anti-dumping duty, while clearly within the authority of a Member under Article 9.1 of the AD Agreement[89], is not a "remedy" of any type, constructive or otherwise.

6.229 We cannot come to any conclusions as to what might be encompassed by the phrase "constructive remedies provided for under this Agreement" - that is, means of counteracting the effects of injurious dumping - except by reference to the Agreement itself. The Agreement provides for the imposition of anti-dumping duties, either in the full amount of the dumping margin, or desirably, in a lesser amount, or the acceptance of price undertakings, as a means of resolving an anti-dumping investigation resulting in a final affirmative determination of dumping, injury, and causal link. Thus, in our view, imposition of a lesser duty, or a price undertaking would constitute "constructive remedies" within the meaning of Article 15. We come to no conclusions as to what other actions might in addition be considered to constitute "constructive remedies" under Article 15, as none have been proposed to us.[90]

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[85] The parties are in agreement that the first sentence of Article 15 imposes no legal obligations on developed country Members. As there is no claim in this regard, we express no views on this matter.

[86] *The New Shorter Oxford English Dictionary*, Clarendon Press, Oxford, 1993.

[87] *Id.*

[88] *See, e.g.*, Response of India to Question 13 from the Panel following the first meeting, Annex 1-6, and Oral Statement of India at the first meeting of the Panel, Annex 1-4, paras. 87-91.

[89] Article 9.1 provides, in pertinent part, that "It is desirable that the imposition [of an anti-dumping duty] be permissive…".

[90] It is clear that the European Communities did consider the imposition of a lesser duty, although it concluded that such a duty would not be appropriate in this case since the injury margin exceeded the dumping margin for each company (paragraph 131, Provisional Regulation, Exhibit India-8). India has made no claim or arguments in this regard.

6.230 With regard to the timing of the obligation in the second sentence of Article 15, India argues that the exploration of possibilities of constructive remedies must take place prior to the imposition of any provisional measures, as well as prior to the application of any final measures, while the European Communities argues that the obligation only arises prior to the application of any final anti-dumping duties.

6.231 In this regard, we note Article 1 of the AD Agreement, which provides that:

> "An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in

however, impose an obligation to actively consider, with an open mind, the possibility of such a remedy prior to imposition of an anti-dumping measure that would affect the essential interests of a developing country.

6.234 Based on the foregoing understanding of Article 15 of the AD Agreement, we consider the issue before us in this case to be whether the EC authorities actively considered with an open mind the possibilities of price undertakings with Indian exporters prior to the imposition of final anti-dumping measures in the bed linen investigation.

6.235 India stresses that the Indian exporters and Texprocil made numerous arguments and submissions concerning the developing country status of India, and the importance of the bed linen proceeding for Indian interests. India appears to be dissatisfied as a general matter with the European Communities' failure to address these arguments in the various public notices, but makes no specific claims in this regard.[93] We make no specific findings in this regard, as a consequence. However, we do note in general that the provisions of Article 12, which we address below, are quite specific as to the matters to be addressed in public notices. Beyond those public notices, we are not aware of, and India has not presented any arguments indicating, a general obligation on the investigating authorities to "explain" any aspect of their analysis or determinations. Clearly, when, in dispute settlement, a *prima facie* case is made that a Member has failed to comply with its obligations under the AD Agreement, that Member must present evidence and explanations as to how it considers that it did comply with the relevant obligation. This does not, however, impose any general obligation to explain various elements of the analysis or decision during the course of the proceedings, or in dispute settlement, beyond the explanations required by the Agreement itself, or in order to rebut a claim of inconsistent action.

6.236 According to India, counsel for Texprocil, and Texprocil itself, sought during the course of the investigation to persuade Indian exporters to propose undertakings, but these attempts were unsuccessful until very late in the proceeding. During the month of October 1997, there were telephone communications between the EC authorities and counsel for the Indian producers' association, Texprocil. According to the European Communities, during these conversations, the EC authorities:

> "emphasised the difficulty of drafting satisfactory undertakings because the product was supplied in consignments according to individual specifications of purchasers, involving hundreds of suppliers. They were advised to discuss the possibilities with Texprocil, the exporters' association. This willingness to contemplate undertakings by a trade association is not an automatic feature of the European Communities' practice in this respect".[94]

Following the final disclosure of the anti-dumping calculations, a series of faxes between counsel for Texprocil and Texprocil and Indian government authorities indicate that counsel explained the nature

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> "The Panel noted that if the application of anti-dumping measures "would affect the essential interests of developing countries", the obligation that then arose was to explore the "possibilities" of "constructive remedies". **It was clear from the words "[p]ossibilities" and "explored" that the investigating authorities were not required to adopt constructive remedies merely because they were proposed.**" *EC - Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, Panel Report, ADP/volvingit cons, adred"

of undertakings and the relevant deadline for offering undertakings, in this case 13 October 1997.[95] Following further communications between the Indian parties and counsel,[96] on 13 October 1997,

6.247 With respect to India's claims 25 and 28, the European Communities disputes India's interpretation of Article 12.2.2. The European Communities asserts that India's approach fails to take proper account of the structure of the Article. In the European Communities' view, Article 12 is straightforward – initiation issues are dealt with by paragraph 1, while paragraph 2 covers the measures adopted during and after the investigation (that is, provisional measures, definitive measures and undertakings). India's claim 25 asserts failure to explain matters arising under Article 5.3, concerning alleged failure to examine the evidence prior to initiation. The European Communities maintains that the Definitive Regulation addresses the issues of dumping and causation of injury at the end of the investigation and the imposition of final measures, as required by Article 12.2.2. In the European Communities' view, arguments regarding the initiation of the investigation and the determination of standing were not relevant to the final determination and definitive measure and, therefore, there was no obligation to include any discussion of them in the Definitive Regulation. The European Communities also asserts that the investigating authorities are under no obligation to review

> 12.2.1 A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular:
>
> (i) the names of the suppliers, or when this is impracticable, the supplying countries involved;
>
> (ii) a description of the product which is sufficient for customs purposes;
>
> (iii) the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2;
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> (iv) considerations relevant to the injury determination as set out in Article 3;
>
> (v) the main reasons leading to the determination.
>
> 12.2.2 A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6."

Claims 3 and 6

6.252 We consider first India's claims 3 and 6, which assert that the Definitive Regulation failed to give sufficient notice of the European Communities' substantive determinations and analysis in applying Article 2.2.2, which India alleges, in its claims 1 and 4, were inconsistent with Articles 2.2.2 and 2.2. We recall our conclusion that the order in which the three options are set out in Article 2.2.2 is without any hierarchical significance and that Members have complete discretion as to which of the three methodologies they use in their investigations.[101] We found, therefore, that the European Communities was not required by the AD Agreement to resort to option (i) before it could resort to option (ii) and it did not act inconsistently with Article 2.2.2 by using the latter option. We note, further, that the European Communities resorted to the methodology set out in paragraph 2.2.2(ii) in accordance with Article 2(6) of its Regulation. In light of our finding in respect of the order of options set out in Article 2.2.2 and the fact that the European Communities applied what is its customary methodology for the calculation of SG&A and profit rates, and the basis for its determination in this regard is clear from the final determination, we do not consider that Article 12.2.2 requires the European Communities to explain its choice of methodology.

[101] *See* paras. 6.54-6.62, *supra*.

6.253 We also recall our conclusion that Article 2.2.2(ii) may be applied in a case where there are data concerning SG&A and profit for only one other exporter or producer.[102] We found, therefore, that the European Communities was not precluded from applying the methodology set out in that

with Articles 3.1, 3.4 and 3.5 of the AD Agreement by considering all such imports in its evaluation of the volume, price effects and consequent impact of dumped imports. That the European Communities carried out its analysis on the basis of all imports is clear from the final determination. It follows, therefore, in our view, that the European Communities' explanation of its determination is adequate and in conformity with the AD Agreement, and that India's claim 10 must fail.

6.258 We turn next to India's claim regarding the European Communities' failure to explain its consideration of imports from all producers/exporters as "dumped imports" in the years prior to the period of investigation. We recall that we did not address this issue as a substantive matter, in light of our conclusion that the European Communities' determination of injury was not made consistently with its obligations under Article 3.4.[106] We find it neither necessary nor appropriate to address India's claim 22 asserting a failure to explain this aspect of the determination.

Claim 13

6.259 We now turn to India's claim that the European Communities failed to adequately explain its evaluation of certain factors listed in Article 3.4. We recall our finding that the European Communities acted inconsistently with Article 3.4 of the AD Agreement by failing to evaluate all the economic factors set forth in Article 3.4.[107] In light of our finding of inconsistency with Article 3.4, we find it neither necessary nor appropriate to address India's claim of inadequate notice. We note that our finding concerning Article 3.4 was based principally on the explanation of the injury determination in the European Communities' notices. Having found a violation of the substantive requirement to consider all the factors set forth in Article 3.4 in assessing the impact of imports, the question of whether the notice of either the preliminary or affirmative determination of injury is "sufficient" under Article 12.2 is immaterial. A notice may adequately explain the determination that was made, but if the determination was substantively inconsistent with the relevant legal obligations, the adequacy of the notice is meaningless. Further, in our view, it is meaningless to consider whether the notice of a decision that is substantive inconsistent with the requirements of the AD Agreement is, as a separate matter, insufficient under Article 12.2. A finding that the notice of an inconsistent action is inadequate does not add anything to the finding of violation, the resolution of the dispute before us, or to the understanding of the obligations imposed by the AD Agreement. We therefore make no findings on claim 13.

Claims 25 and 28

6.260 We turn next to India's claims regarding the failure of the European Communities to explain, in the Definitive Regulation, its examination of the evidence in the application under Article 5.3 and the determination of industry support under Article 5.4. We do not agree with India's view that Article 12.2.2 requires explanations relating to initiation to be set out in the notice of final determination. Article 12.1 of the AD Agreement requires public notice of an initiation, and sets out the requirements regarding the information to be contained in such notices. India has made no claim under Article 12.1 in this dispute. Article 12.2 requires notice of preliminary and final determinations, whether affirmative or negative, and notice of undertakings, and sets forth in some detail in Articles 12.2.1, 12.2.2, and 12.2.3 the information to be included in such notices. Those requirements, in addition to basic information concerning the product and parties, all provide for transparency with respect to the decisions of which notice is being given. There is no reference to the initiation decision among the elements to be addressed in notices under Article 12.2. Moreover, in our view, it would be anomalous to interpret Article 12.2 as also requiring, in addition to the detailed information concerning the decisions of which notice is being given, explanations concerning the initiation of the investigation, of which notice has previously been given under Article 12.1. This is

[106] *See* paras. 6.153-6.169, *supra*.
[107] *Id.*

particularly the case with respect to elements which are not within the scope of the information to be disclosed in the notice of initiation itself.[108] We do not believe that Article 12.2.2 requires a Member to explain, in the notice of final determination, aspects of its decision to initiate the investigation in the first place. We find, therefore, that India's claims under Article 12.2.2 regarding the European

(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).

7.3 With respect to those of India's claims not addressed above we have:

(a) found that India has withdrawn those claims (claims 2, 5, 9, 12, 17, 21, 24, 27, and 30),

(b) concluded that the claims are not within our terms of reference (claims 14 and 16), and

(c) concluded that, in light of considerations of judicial economy, it is neither necessary nor appropriate to make findings on those claims (claims 13, 18, and 31).

7.4 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered