ANNEX 1-1

LIST OF ANNEXES

35. Comments by and on behalf of Bombay Dyeing on the definitive disclosure dated 13 October 1997
36. Comments by Omkar on the definitive disclosure dated 13 October 1997
37. Comments by Madhu on the definitive disclosure dated 13 October 1997
38. Comments by Prakash on the definitive disclosure dated 13 October 1997
39. Letter of 17 October 1997 (reference 092847) from the Commission Services to Bombay Dyeing
40. Letter of 17 October 1997 (reference 092870) from the European Commission to Prakash' legal representatives
41. Excerpt from *Oxford Concise Dictionary*
42. Excerpt from *Websters New Collegiate Dictionary*
43. Excerpt from *Oxford Student's Dictionary*
44. Excerpt from *Websters New Collegiate Dictionary*
45. Declaration of Standard Industries that it was willing to be sampled, and indicating its domestic sales
46. Excerpt from the disclosure document for Bombay Dyeing
47. Excerpt from W*ebsters dictionary*
48. Excerpts from the *Concise Oxford dictionary* and from *Websters dictionary*
49. Disclosure in another proceeding (excerpt)
50. Injury submission on behalf of Texprocil
51. Comments on behalf of Texprocil on the general disclosure document (injury, causation and procedural issues)
52. Excerpts from disclosure documents of the sample companies showing the total amount of non-dumped exports to the EC
53. Non-confidential summaries of the questionnaire responses of the producers in the EC sample
54. First post-hearing brief dated 13 January 1997, filed on 6 February 1997
55. Second post-hearing brief, dated 17 July 1997
56. Definitive disclosure document dated 3 October 1997
57. Excerpt from *Webster's New World Dictionary*
58. Letter of 7 January 1997 (reference 050071) from the European Commission to Texprocil's legal representatives regarding the non-confidential standing file
59. Non-confidential standing file as per 8 January 1997
60. Comments on behalf of Texprocil on the definitive disclosure document
61. Sheet issued during the consultations detailing the alleged domestic industry
62. Draft *Guide on how to draft an anti-dumping complaint* (excerpt)
63. Questionnaire for exporters used in the Bed linen II proceeding
64. Questionnaire used by the EC against OECD members
65. Questionnaire used by the EC against Taiwan
66. Questionnaire recently used by the EC against Taiwan
67. Letters of 18 October 1996 (reference 060965) and of 29 October 1996 (reference 061570) from the European Commission to Giraffe International and Nidhi Exports, respectively
68. Correspondence between Texprocil's legal representatives and the European Commission concerning the extension of the deadline for the sample companies in view of the Diwali festivities in India
69. Excerpt from *Webster's New Collegiate Dictionary*, 1975
70. Excerpt from *Webster's II New Riverside Dictionary*, 1984
71. Excerpt from *The Concise Oxford Dictionary of Current English*
72. Relevant correspondence on the possibilities to negotiate an undertaking
73. Examples of standard EC statements on prima facie evidence
74. Examples of statements on the standing determination in other anti-dumping proceedings

75. Commission Regulation (EC) No 1632/97 amending Regulation (EC) No 1023, and excerpt of Council Regulation (EC) No 2334/97 imposing a definitive anti-dumping duty on certain imports of flat pallets of wood originating in the Republic of Poland and collecting definitively the provisional duty imposed
76. Council Regulation (EC) No 1890/97 imposing a definitive anti-dumping duty on imports of farmed Atlantic salmon originating in Norway (excerpt)
77. Documents from the Unbleached cotton fabrics II proceeding: the relevant pages from the amendment to the definitive disclosure document and letter of 14 September 1998 (reference 068909) from the European Commission to Legal Representatives
78. Letter of 7 May 1999 (reference 067167) from the European Commission to Legal Representatives regarding access to the non-confidential file
79. Letter from ATEVAL (Asociacion de impresarios textiles de la Comunidad Valenciana) of 18 September 1996 to Eurocoton alleging 'non-opposition' on behalf of six companies
80. Letter of 25 March 1997 from Eurocoton to the European Commission concerning the 'disappeared' EC producers

EXECUTIVE SUMMARY

1. On 27 October 1999 the Government of India requested for the second time the establishment of a panel in the matter concerning the imposition by the EC of definitive anti-dumping duties on cotton-type bed linen from India. The Panel was constituted on 24 January 2000. This submission is the first submission of India to the panel.

2. India believes that the EC, by adopting Council Regulation (EC) No 2398/97 of 28 November 1997 imposing a definitive anti-dumping duty on imports of cotton-type bed linen originating in *inter alia* India, has in many ways acted inconsistently with the WTO Agreement, and more specifically with the Anti-Dumping Agreement [hereinafter: "ADA"]. As a result, India's benefits accruing under the WTO Agreement have been nullified and/or impaired.

3. The EC did not properly examine the standing of the complainant. Moreover, the EC failed to take into account information available to it at the time of initiation pointing to lack of material injury caused by dumped imports. In the determination of dumping an unreasonable profit margin of over 18 per cent was applied, leading to artificially inflated dumping margins. The dumping margins were further inflated through the use of a *partial* weighted-average to weighted-average comparison. In the injury determination, only certain injury factors were examined and discussed. Furthermore, the EC explicitly determined that the domestic industry consisted of 35 companies, but relied in its injury determination on companies outside this group in order to determine injury. The EC chose a sample from the domestic industry, but did not consistently base its injury determination on this sample. Rather, the EC chose to rely on different 'levels' of industry for different injury indices without any apparent reason other than goal-oriented 'picking and choosing' of injury. The EC has failed to appropriately determine to what ePrdmhe panel
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B. INJURY AND CAUSALITY ISSUES

18. **Claim 8:** Contrary to the wording of Article 3.1 of the ADA, the EC automatically and without further explanation assumed that *all* imports of the product concerned during the investigation period were dumped.

19. The EC's failure to explain this determination properly is inconsistent with Article 12.2.1 (**claim 9**) and Article 12.2.2 (**claim 10**);

20. **Claim 11:** The EC failed to consider all injury factors mentioned in Article 3.4 of the ADA for its determination on the state of the domestic industry. Particularly, the EC did not consider:

- Productivity;
- Return on investments;
- Utilization of capacity;
- The magnitude of the margin of dumping;
- Cash flow;
- Inventories;
- Wages;
- Growth;
- Ability to raise capital or investments.

The EC thus acted inconsistently with Article 3.4.

21. As far as the EC would argue that it did in fact consider all factors in Article 3.4, it failed to disclose or make public its findings thereon and thus acted inconsistently with Article 12.2.1 (**claim 2**) and Article 12.2.2 (**claim 13**). This also violates the rights of defence as contained in Article 6 (**claim 14)**;

22. **Claim 15:** The EC acted inconsistently with Article 3.4. The EC has explicitly determined that the domestic industry consists of 35 companies, but relied in its injury determination on companies outside this group in order to determine injury (**first argument of claim 15**). The EC has chosen a sample from the domestic industry, but did not consistently base its injury determination on this sample (**second argument of claim 15**). The EC chose to rely on different 'levels' of industry for different injury indices without any apparent reason other than goal-oriented 'picking and

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determinations required by Article 3.5 of the WTO Anti-Dumping Agreement was not proper and/or the evaluation of those facts was not unbiased and objective;

26. As far as the EC would argue that it did in fact make such analysis with respect to claim 18, it has insufficiently explained it, and thus acted inconsistently with Article 12.2.1 (**claim 21**) and Article 12.2.2 (**claim 22**);

C. PROCEDURAL ISSUES

27. The procedure leading up to Regulation 2398/97, including the imposition of provisional anti-dumping duties, suffered from among others the following shortcomings:

28. Inconsistently with Article 5, and especially Article 5.3 of the ADA, the EC did not examine the allegations in the complaint (**first argument of claim 23**). Moreover, and also inconsistently with Article 5.3, the EC failed to take into account information available to it at the time of initiation pointing to lack of material injury caused by dumped imports (**second argument of claim 23**);

29. In any event, even if the EC made such examination, no record has been made available in the file or in the notice of initiation or in the published Regulations attesting to this, even though Indian exporters had raised this issue. This is inconsistent with Article 12.2.1 (**claim 24**) and 12.2.2 (**claim 25**);

30. The EC did not properly examine the representativeness of the complainant, and/or failed to make a proper determination on representativeness as required by Article 5.4 of the ADA. Such information as has been made available belatedly in the non-confidential file appears to contradict the published findings. The EC thus acted inconsistently with Article 5.4 (**claim 26**);

31. Moreover, the EC has never during the investigation or in the published Regulations adequately responded to detailed queries from Indian exporters on this issue, and thus acted inconsistently with Articles 12.2.1 (**claim 27**) and 12.2.2 (**claim 28**);

D. OTHER ISSUES

32. **Claim 29**: Inconsistently with Article 15 ADA, the EC failed to consider India's special situation of developing country Member before imposing provisional anti-dumping duties. Even if the EC would have considered India's special status as a developing country it did not explain this in the public notice, or make available through a separate report that it did so. This is inconsistent with Article 12.2.1. (**claim 30**) and Article 12.2.2 (**claim 31**).

I. INTRODUCTION

1.1 On 27 October 1999 the Government of India requested for the second time the establishment of a panel in the matter concerning the imposition by the EC of definitive anti-dumping duties on cotton-type bed linen from India. This submission elaborates the claims made by India in the dispute concerning the second EC anti-dumping proceeding concerning bed linen from, *inter alia*, India.

1.2 The EC initiated the anti-dumping proceeding against the import of cotton type bed linen from India by publishing a notice of initiation in September 1996. Provisional anti-dumping duties were imposed by EC Commission Regulation N° 1069/97 dated 12 June 1997. This was followed by the imposition of definitive duties by the above-mentioned Regulation of 28 November 1997. The Government of India [hereinafter: GOI] considers that the procedure which led to the adoption of

Regulation 2398/97 including the initiation of the proceeding and the imposition of provisional duties, the determination of dumping and injury caused thereby in such Regulation, and thus that Regulation itself, are inconsistent with WTO law. Accordingly, India respectfully requests that the Panel recommend that the EC bring Regulation No 2398/97 of 28 November 1997 imposing a definitive anti-dumping duty on imports of cotton-type bed linen originating in, *inter alia*, India into conformity with the ADA and GATT 1994; and suggest that, in the light of the numerous outcome-decisive violations of the ADA, the EC immediately repeal the Regulation imposing definitive anti-dumping duties and refund anti-dumping duties paid thus far.

1.3 The structure of this first submission to the Panel is as follows: Part II discusses the general factual background to the matter. Part III discusses the claims relating to the dumping determination. Part IV discusses the claims relating to the injury and causality determination. Part V discusses claims relating to procedural matters. The claims relating to India's status as a developing country are discussed in Part VI. Last, the requests to the Panel are set forth in Part VII.

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1.4 India believes that in various instances the EC acted inconsistently with Article 12. For the sake of convenience, and in order to avoid tedious repetition, such claims are discussed as much as possible with the fact pattern to which they refer. Thus, claims concerning inconsistencies with Article 12 in the context of the dumping determination are discussed gulation 23a34.25 0 TD -0.3278 Tc -0.4897 Tw

2. History: the first Bed linen proceeding

2.3 On 25 January 1994 the Commission initiated an anti-dumping proceeding concerning bed linen[6] from India, Pakistan, Thailand and Turkey [hereinafter: "Bed Linen I"] (notice of initiation in Annex 2).[7] The complainant was the Committee of the Cotton and Allied Textile Industries of the EC ["Eurocoton"]. This organisation is the EC federation of national producers' associations of cotton textile products. The complaint[8] in the Bed Linen I proceeding is attached as Annex 3.

2.4 It appears that Eurocoton had polled support for its complaint by consulting its national

3. The second Bed linen proceeding

2.6 The complainant Eurocoton brought a new complaint that was formally submitted on 30 July 1996, *i.e.* twenty days after the termination of Bed linen I.[11] The European Commission initiated an anti-dumping proceeding on the basis of this new complaint on 13 September 1996 [hereinafter: "Bed linen II"].[12] The Indian industry again co-operated massively: most exporters made themselves known, accounting for well over 80 per cent of total exports.[13]

2.7 In the Bed linen II proceeding, the European Commission decided to first take a sample from among the Indian exporters, and to determine the dumping margin for the co-operating exporters on the basis of a weighted average of this sample. As in the Bed linen I proceeding, Indian exporters were represented by the C9d to fi6 .7391 xtil, aE

Annex 11). On 1 October the European Community provided written answers to part of the questions raised by India (Annex 12).

2.12 Although the EC noted in its letter of 1 October 1998 that a second round was necessary for replying to the remainder of India's questions, it proved excessively difficult for the EC to agree to a second round within a reasonable time. Ultimately, after considerable delay, the EC could agree to a second round of consultations on 15 April 1999 (verbatim report drafted by the Indian delegation attached as Annex 13).

2.13 The legal representatives of Texprocil again requested access to the non-confidential file in April 1999, but this was refused in May 1999.[19]

2.14 On 29 June the European Community provided further written answers to part of the questions raised by India (Annex 14).

III. CLAIMS RELATED TO THE DUMPING DETERMINATION AND THE EXPLANATION THEREOF2.14

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-	Yes
-	Yes
-	Yes

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3.5 On 27 September 1996 the legal representatives of Texprocil submitted further information from the companies regarding the sample.[22] The relevant attachments from the various companies were as follows:

> *"No 15 Madhu Industries . . .*
> *1. Turnover . . . for export to the community . . . is Rs 24,46,30,080 and Kgs 9,02,989 (detail statement enclosed).*
> *2. The Turnover . . . of bedlinen sold on the domestic market . . . is NIL."*
>
> *"No 16 Standard Mills . . .*
> *I. Turnover . . . of bedlinen sold for export to the community . . . Kgs 71090, Value Lac Rs. 260.7*
> *II. The turnover of bedlinen sold on the domestic market . . . Kgs 87000, Value Lac Rs 249.92"*
>
> *"No 27 Omkar Exports . . .*
> *6. . . .turnover of . . . bed linen exported to the EC . . . Kgs 915321, Rupees 20,54,47,090*
> *7. . . .turnover of . . . bed linen sold in India . . .: NIL"*
>
> *"No 64 Prakash Cotton . . .*
> *1. . . . . turnover . . . for export to the Community . . . Rs 4274.84 Lacs and Qty 17.260 Lacs Kgs. . . .*
> *2. . . . turnover . . . of bedlinen sold on domestic market . . .: NIL"*
>
> *"No 73 Bombay Dyeing . . .*
> *5. . . . turnover of bed linen to the EC: 748 metric tonnes, Rs 150.8 Millions*
> *6. turnover of cotton type bed linen sold in India; 465 metric tonnes, Rs 100.6 Millions"*

3.6 On 30 September 1996 Texprocil's legal representatives submitted a letter witg's legalahurther i ed).

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less than 0.25 per cent of our total turnover of around Indian Rs.1,200 million, and hence our turnover for Cotton Bed Linen in the Domestic market will be less than Indian Rs.3.00 million. . . ."

3.8 On the basis of the above information the EC proposed a sample on 8 October 1996 (Annex 19). The European Commission's letter stated the following:

"As it has already been discussed during our meeting of 1 October 1996 the following criteria should be taken into account in the selection of the sample:

1. size of company with regard to export sales to the EU;
2. size of company with regard to domestic sales;
3. stages of production performed by the company.

On the basis of the above criteria the Commission is proposing the following companies to be included in the sample:

(1) Prakash Cotton Mills Ltd;
(2) Madhu Industries Ltd;
(3) Jindal Worldwide Ltd;
(4) Anglo French Textiles;
(5) The Bombay Dyeing & Manufacturing Co. Ltd.

As reserve companies the Commission is proposing Omkar Exports and Standard Industries Ltd.

> *". . . we do not consider it appropriate to include Standard Industries Ltd in the sample because of its minor export sales to the EU during the investigation period. Nevertheless we insist on maintaining this company in the reserve because of its significant domestic sales."*

3.12 The final sample thus selected included Prakash, Madhu, Omkar Exports ["Omkar"], Anglo-French

(19) For all the countries concerned, the selection of the sample was made in agreement with the representatives of the companies, associations and/or governments concerned.

(20) The companies selected in the sample and which fully cooperated with the investigation were attributed their own dumping margin and individual duty rate.

(21) The Commission also selected reserve companies which though having to reply to the questionnaire would only be investigated in the event that companies in the main sample would subsequently refuse to cooperate.

These companies were also informed that any anti-dumping duty on their exports would be calculated in accordance with the provisions of Article 9(6) of the basic Regulation unless

For the sole company with representative global domestic sales, this assessment revealed that five types of cotton-type bed linen exported to the Community had also been sold in representative quantities on the domestic market during the investigation period.

(25) The Commission subsequently examined whether the domestic sales of each of the five representative types of this company could be considered as being made in the ordinary course of trade pursuant to Article 2(4) of the basic Regulation.

It was found that the five types in question had been sold at a loss i.e. at prices below cost of production plus selling, general and administrative costs (hereafter 'SG& A'). Therefore, it was considered that these types were not sold in the ordinary course of trade and that the domestic prices did not provide an appropriate basis for establishing normal value.

(26) For all types sold for export to the Community by all companies normal value had, therefore, to be constructed in accordance with Article 2(3) of the basic Regulation.

The constructed value was determined by adding to the cost of production of the exported types of each company, a reasonable amount for SG&A and a reasonable amount for profit.

2. Since only one company had representative global domestic sales and the profitable domestic types represented less than 80 per cent but more than 10 per cent of total domestic sales, the amount for SG&A and profit used for the construction of normal value for all companies investigated were those respectively incurred and realised by this company, in accordance with Article 2(6) of the basic Regulation.

. . .

2. Export price

(37) In general, sales of cotton-type bed linen made by the exporters/producers on the Community market were made to independent customers. Consequently the export price was established by reference to the prices actually paid or payable in accordance with Article 2(8) of the basic Regulation.

. . .

3. Comparison

3. (39) For the purpose of ensuring a fair comparison between normal value and export price, due allowances in the form of adjustments were made where applicable and justified for differences affecting price e and 3tasic Regulation.

(40) The Indian exporter/producer with representative global domestic sales requested an adjustment to normal value of 5 per cent for differences in levels of trade based on the fact that export sales to distributors in the Community are made in much larger quantities than sales through three distinct sales channels on the domestic market (exclusive wholesalers for branded products, other wholesalers and industrial users).

As a result of this request, the Commission examined whether such an adjustment could be granted under Article 2(10) of the basic Regulation.

An adjustment for differences in quantities was not justified since no indication was found that distributors in the domestic market had benefited from discounts or rebates because of the larger quantities allegedly purchased by them.

An adjustment for differences in levels of trade could not be granted either, since the company concerned limited itself to refer to the different distribution channels in the domestic and export markets but failed to show that the alleged difference between the levels of trade of the export price and the normal value had affected price comparability as demonstrated by consistent and distinct differences in the functions and prices between the different levels of trade in the domestic market.

(41) The same company also requested an adjustment to normal value of 10 per cent for differences in brand promotion expenses on the basis that it was incurring excessive promotion expenses when selling to its exclusive domestic wholesalers which were not incurred in its exports to the Community. In order to evaluate whether such a difference in promotion expenses borne could have affected price comparability, the Commission looked at the total of SG&A incurred by this company with respect to domestic sales to exclusive wholesalers which bought only branded products and found that it was the same as that

agreed at the time of sale. In fact the investigation revealed that the delivery of the goods always took place after payment.

. . .

4. Dumping margins

(a) General methodology

(46) In general, weighted average constructed normal value by type was compared with weighted average export price by type.

. . .

(b) Methodology for groups of companies

(47) It has been the consistent practice of the Commission to consider related companies or companies belonging to the same group as one single entity and, therefore, to establish for all of them one single dumping margin. Indeed, calculating individual dumping margins might encourage circumvention of anti-dumping measures, thus rendering them ineffective, by enabling related producers to channel their exports to the Community through the company with the lowest individual dumping margin.

In accordance with this practice, related exporters/producers belonging to the same group were regarded as one single entity and attributed one single dumping margin. For exporters/producers belonging to a same group it was decided to first calculate a dumping margin per company. Then, a weighted average of these dumping margins was established and attributed to the group as a whole.

(c) Specific application

(48) The above methodology was applied to two Indian and two Pakistani groups of companies. However, with regard to both one Indian and one Pakistani group, the exports to the Community of one company of each group were considered minor and have not been taken into account in the calculations.

. . .

(d) Dumping margins for companies in the sample

(49) The comparison, as described under recital (39) and (46) to (48), showed the existence of dumping in respect of all companies which fully cooperated in the investigation. The provisional dumping margins expressed as a percentage of the cif import price at the Community frontier are the following:

India

— Anglo French Textiles,	*27.3 %,*
— The Bombay Dyeing Manufacturing Co., Ltd,	*9.4 %,*
— Nowrosjee Wadia Sons Ltd,	*9.4 %,*
— Madhu Industries Ltd,	*19.5 %,*

— Madhu International, 19.5 %,
— Omkar Exports, 16.5 %,
— Prakash Cotton Mills Ltd, 3.9 %;
. . .

(e) Dumping margin for cooperating companies not in the sample

(50) Cooperating companies not selected in the sample (see recitals (17) and (21)) were attributed the average dumping margin of the companies in the sample, weighted on the basis of their export turnover to the Community. In accordance with Article 9 (6) of the basic Regulation, when calculating this average dumping margin de minimis margins established have been disregarded. Expressed as a percentage of the cif import price at the Community frontier, these provisional dumping margins are the following:

— India 13.6 per cent,
. . .

(f) Dumping margin for non-cooperating companies

(51) For non cooperating companies a dumping margin was determined on the basis of the facts available in accordance with Article 18 of the basic Regulation. Since the level of cooperation was high, it was considered appropriate to set the dumping margin for non cooperating companies in each country concerned at the level of the highest dumping margin established for a company in each sample because it would constitute a bonus for non-cooperation to assume that the dumping margin attributable to exporters/producers which did not make themselves known is lower than the highest found for a cooperating exporter/producer.

These provisional dumping margins expressed as a percentage of the cif import price at the Community frontier, are the following:
— India 27.3 per cent,
. . .

(130) In all but one case, the undercutting margins calculated as a percentage of free-at-the-Community-frontier price were higher than the respective dumping margins established for exports in the sample and there was therefore, in accordance with the lesser duty rule as set out in Article 7 (2) of the basic Regulation, no need to establish injury elimination levels based on the difference between the export price and the cost of production of the Community producers plus a minimum amount of profit required to ensure the viability of the Community industry.

However, in the case of one exporter the undercutting margin was slightly lower than the respective dumping margin and therefore, in order to calculate the amount of duty, an injury elimination level was established by comparing the export prices to the result of adding to the Community cost of production a very conservative profit margin of 5 per cent on turnover. The injury elimination level thus established was higher than the dumping margin. Therefore, in all cases, the provisional duties, for exporters in the sample, should be limited to the dumping margins . . .”

3.15 The EC also provided company-specific disclosures[28], the relevant excerpts of which are quoted hereunder.

3.16 For Bombay Dyeing (and its related company Nowrosjee Wadia) the relevant part of the disclosure reads as follows:

> *"Although Bombay Dyeing had representative global domestic sales of the product concerned, it had no representative domestic sales made in the ordinary course of trade during the investigation period (see section C.1.(a) of the Disclosure Document)* [corresponding to recital (23) of the provisional Regulation]. *Its related company Nowrosjee Wadia had no domestic sales at all. Normal value had, therefore, to be constructed for each type of bed linen exported to the EU during the investigation period for both companies in accordance with Article 2(3) of Regulation (EC) No 384/96.*
>
> . . .
>
> *2. NORMAL VALUE*
>
> *As indicated in section C.1.(a) of the Disclosure Document, the five representative domestic types of Bombay Dyeing (D14, D22, D36, D37, D51) were sold in the domestic market at a loss. Consequently, constructed values have been calculated for all export types reported in the ECSALUR listings of both companies.*
>
> *= cost of production (COP) of exported types plus selling, general and administrative expenses (SG&A) incurred in domestic sales plus profit realized on domestic sales.*
>
> **COST OF PRODUCTION: use of COP as given in ECCOP - Annex III I.2.f . . .*
>
> **SG&A: the amount for SG&A used was based on the average SG&A expenses incurred by Bombay Dyeing on its global domestic bed linen sales during the investigation period and it is 10.39 per cent on turnover (see attached summary of DMPROFIT - Annex III 1.2.g).*
>
> **PROFIT: the profit margin used was the weighted average profit margin realized by the same company on its global domestic sales of profitable sales of bed linen and it is 18.65 per cent on turnover (see attached summary of DMPROFIT - Annex III 1.2.g.) . . .*
>
> *NORMAL VALUE = COP/(1-0.2904) = COP/0.7096*
>
> *ALLOWANCES on Normal Value:*
> *actual packing cost*
>
> *REMARKS:*
>
> *As explained in section C.3 of the Disclosure Document, Bombay Dyeing failed to justify the adjustments claimed on Normal Value for level of trade, brand promotion and credit costs . . ."*

[28] Attached as Annex 24.

3.17 For the other four companies in India, the relevant part of the disclosure are reproduced hereunder.

3.18 For Prakash:

"NORMAL VALUE: Constructed value (no domestic sales of the product under investigation)

= cost of production (COP) of exported types plus a reasonable amount for selling, general and administrative expenses (SG&A) and a reasonable amount for profit.

**COST OF PRODUCTION: Use of COP as given in Exhibits 8 . . .*

**SGA+PROFIT: the amount for SG&A and profit used is 29.04 per cent on turnover . . .*

NORMAL VALUE = COP/(1-(29.04%)) = COP/(1-0.2904) = COP/0.7096 . . ."

3.19 For Omkar Exports:

"NORMAL VALUE: Constructed value (no domestic sales of the product under investigation)

= cost of production (COP) of exported types plus a reasonable amount for selling, general and administrative expenses (SG&A) and a reasonable amount for profit.

**COST OF PRODUCTION: Use of COP as given in Exhibit 5A of the on-the-spot investigation (statement showing COP per set)*

**SGA+PROFIT: the amount for SG&A and profit used is 29.04 per cent on turnover*

NORMAL VALUE = COP/(1-(29.04%)) = COP/(1-0.2904) = COP/0.7096 . . ."

3.20 For Madhu Industries:

"NORMAL VALUE: Constructed value (no domestic sales of the product under investigation)

= cost of production (COP) of exported types plus a reasonable amount for selling, general and administrative expenses (SG&A) and a reasonable amount for profit.

**COST OF PRODUCTION: Use of COP as given in Exhibit 3 of the on-the-spot investigation . . .*

**SGA+PROFIT: the amount for SG&A and profit used is 29.04 per cent on turnover*

NORMAL VALUE = COP/(1-(29.04%)) = COP/(1-0.2904) = COP/0.7096 . . ."

3.21 And for Anglo French:

"The company had domestic sales of the product concerned during the investigation period but they were not considered representative (2.10 per cent of sales volume to the Community). Normal value had, therefore, to be constructed for each type of bed linen exported to the EU

during the investigation period in accordance with Article 2(3) of Regulation (EC) No 384/96.

Constructed normal value = cost of production (COP) of exported types plus a reasonable amount for selling, general and administrative expenses (SG&A) and a reasonable amount for profit.

COST OF PRODUCTION: *Use of COP as given in ECCOP.XLS file*

SGA+PROFIT: *the amount for SG&A and profit used is 29.04 per cent on turnover . . .*

CONSTRUCTED NORMAL VALUE = COP/(1-(29.04%)) = COP/(1-0.2904) = COP/0.7096"

3.22 In response to these disclosures, a number of companies submitted comments. Anglo-French and Madhu submitted among others the following comments.

3.23 Anglo-French:[29]

"We note that since our domestic sales of the product concerned for the investigation period was only 2.10 per cent of sales volume to the Community, the same was not considered representative. Hence, normal value was constructed for each type of Bed linen exported to the European Union. In so constructed normal value [sic], *we note with regret that extremely high Selling, General and Administrative expenses and a margin of profit of 29.04 per cent on turnover has been added to our cost of production!*

The Selling, General and Administrative expenses of 10.39 per cent on sales price is based on global calculations for dissimilar products sold in the domestic market by one of the Indian producers, presumably Bombay Dyeing, who sell their products through chain stores and under specific Brand/Trade names. In fact, Bombay Dyeing is the only Textile Company in India which sell the product concerned through specific chain stores and under specific Brand/Trade names created by vigorous administrative and promotional efforts for over a period of more than 4 decades. In fact, on account of this, Bombay Dyeing would have incurred huge advertisement and other costs which are not at all required by any other Producer for marketing products concerned in India. Further, since the exports are also made to traders without any Brand names, it is unreasonable and unjust to add these additional costs of S, G and A to the cost of production. This will lead to unfair and unjust comparisons.

The Commission Services have also in construction of normal values added a very high percentage of profit margin of 18.65 per cent alleged to be reasonable, earned presumably by Bombay Dyeing on some of its dissimilar domestic products, sold under Brand names to its chain shops. [Article C(1)(a) of disclosure document clearly demonstrates that Bombay Dyeing had only five (5) types which were representative and all of them were not sold in the normal course of trade, and as such disregarded for the purpose of calculation of profit]. We would respectfully submit that such a high margin of profit is not only abnormal, unjust and unimaginable, but also non-existent in the Textile Industry and can be attributed only to a high realisation of a Brand name by the specific Indian producer marketing products through chain stores. Therefore, it is prayed that the additional realisation on account of Brand/Trade

[29] Annex 25.

names by the relevant Indian producer may be discounted to a reasonable level as specified in Article 2(6)(c) of the basic regulations [sic].

We would also like to re-emphasize that if such profits are existent in the domestic market for the product concerned, there would have been no need to export the goods at a profit margin of even less than five percent (5 per cent).

The Commission Services have the responsibility to ensure vide provisions of Article 2(6)(c) that profit margins established shall not exceed the normally realised profit margins incurred by other exporters or producers on sales of the product of the same category in the domestic market of the Country of origin."

3.24 Madhu submitted the following comments to the provisional disclosure:[30]

"(I) <u>NORMAL VALUE:</u>

(A) In construction of normal values very high percentage of S.G. and A. of 10.39 per cent on sales price has been added which is based on global calculations for dis-similar products sold in domestic market by one of the Indian producer presumably Bombay Dyeing who sell their products through chain store and under specific brands/trade name. In fact on account of these two factors Bombay Dyeing is the only textile company in India which sells the

3.25 Texprocil and the companies also filed responses to these disclosures through their legal representatives. Relevant excerpts are as follows:

3.26 Comments made on behalf of Texprocil:[31]

Name Company	*Overall*	*Same category domestic*
Anglo-French	*-14.99%*	*5.49%*
Bombay Dyeing	*4.66%*	*12.13%*

Anglo-French	*165.42%*
Madhu	*159.46%*
Omkar	*131.82%*
Prakash	*201.04%*

2.4 The profit determined is three times higher than the average profit determined for the other countries under investigation. As an alternative it is suggested that the Commission Services apply the w.a. profit margin determined for the other countries

Our client wishes to draw attention to the fact that the profit which is determined reasonable for the other countries under investigation is completely different than the "reasonable" profit determined for India. For comparison purposes we reproduce the profits that are considered "reasonable" in the case of the three other countries under investigation:

Country	*Profit*
Egypt:	*5.8*
Pakistan:	*7.4*
EC:	*5*
Average:	*6.06*

Thus, these facts clearly show that it cannot be reasonably be maintained that 18.64 per cent could be considered to constitute a "reasonable" profit in the sense of the basic Regulation. Indeed, no textile producer in the world would ever make a profit of 18.64 per cent. The current approach is therefore devoid of commercial reality and as shown above in fact violates an essential requirement of the basic Regulation.

It is therefore respectfully requested that the Commission Services seriously reconsider the exorbitant profit that has been applied. Instead, it is suggested that as a reasonable alternative, the average profit of 6.06 per cent be applied. This would also be in accordance with Article 2(6)(c), since 6.06 per cent does not exceed the profit realized in the same general category of profits [7.04%]."

3.27 Texprocil's legal representatives submitted the following comments on behalf of the company Anglo-French:[33]

"2. Dumping Margin

It is respectfully requested that the Commission Services take into account the fact that Anglo-French is a state-owned enterprise. This has important consequences for the amount of profit that is deemed "reasonable" to be added to COP in order to arrive at the constructed normal value.

2.1 The current profit margin that has been applied to Anglo-French cannot be considered "reasonable" for a State-owned enterprise operating in the Textile sector

When determining the "reasonable" profit margin it is respectfully requested that the Commission Services take into account that Anglo-French is a fully state-owned company perhaps the only one dealing in product concerned. It is not a private enterprise and the

[33] Annex 28.

primary aim of Anglo-French is not to make profits. Anglo-French has a social function. Its

considered "reasonable". 18.65 per cent is more than three times as high as the profit for the three other entities under investigation. Moreover, it should be pointed out that the "profit normally realized . . . on sales of products of the same general category in the domestic market" is 12.13 per cent [see P/L]. Again, this latter profit sharply contrasts with the 18.65 per cent determined to be reasonable by the Commission Services. It is respectfully requested that not only the letter, but also the spirit and structure of the law be applied when determining a "reasonable" profit margin. It is clear that it could never have been the intention of the legislator that excessive profits are determined, resulting from special circumstances on the domestic market [see above]. The current application of the 80-10 rule to all three channels has resulted in a highly artificial profit margin which is devoid from commercial reality.

. . .

3.d. Level of Trade

As for the statement that an allowance for level of trade could not be granted in view of the fact that this, compounded with the other allowances, would exceed the total SGA expenses would be somewhat unfair in view of the specific nature of a level of trade allowance. Level of trade can clearly be a factor in the difference in profit level incurred on domestic and export. We refer to the Ring binder mechanism proceeding where this fact was recognized and the level of trade allowance was linked to and quantified on the basis of the profit. On this basis, and in view of the excessive domestic profit that has been determined for Bombay Dyeing, an

than the 3.5 per cent profit which is normally realized. Such irrealistic and unreasonable profit addition is due to a blind application of Article 2(6)(a), without any consideration being given to the spirit and structure of the law, most notably Articles 2(3) and Article 2(6)(c).

Article 2(3) mandates that in a situation where the normal value is constructed, "a reasonable amount for . . . profits" [emphasis added] should be added. While Article 2(3) itself does not define the concept of reasonable, it is clear that Article 2(6)(c) explicitly provides that a profit which is established under a reasonable method "shall not exceed the profit normally realized . . . in the same general category in the domestic market." No product could therefore be more reasonable than a profit which is in line with the overall profit of the P/L of the company itself. In the case of our client this is 3.5 per cent."

3.32 Hearings were held on 18 July 1997 during which the above arguments were explained orally.

3.33 In response to the above-cited comments submitted in writing and during the hearing, the Commission Services provided replies in the definitive disclosure documents of 3 October 1997.[38] With respect to the text of the general disclosure we refer to the definitive Regulation[39] which contains—as far as the dumping determination is concerned—the same text. With respect to the company-specific disclosures, the relevant excerpt is similar for each of the five sample companies:

"Please find set out below the essential elements that will assist you in understanding the dumping calculations we have made in this case . . . These explanations will complement the remarks contained in the general disclosure document . . .

2. Normal value

No changes.

. . .

— *SGA*
No changes.
— *Profit*
No changes . . ."

3.34 On 13 October 1997 all companies submitted final disclosure comments.[40] From these

—3.27 Tj 36 0 TD -0.0087 Tc -0.0474 Tw (Te conce Tj 41 tober his caing calculations w(m(SGA)d
3.34

3.35 As far as this issue is concerned, the Commission Services in their reply of 17 October 1997 to Bombay Dyeing (Annex 39) merely referred to the definitive disclosure documents. Except for a correction for certain selling expenses previously not granted, the Commission Services made no changes to the dumping margin calculations.[41]

3.36 In the definitive Regulation[42] the EC provided the following comments on the issue:

"D. DUMPING

1. Normal value

(a) Methodology for the construction of normal value

. . .

(d) Domestic profit margin

(18) All Indian exporting producers contested the use of the actual profit margin realized by one Indian company on its representative profitable domestic sales in the construction of normal value for other Indian companies. They argued that this profit margin is exceptionally high because, to a great extent, it relates to domestic sales of branded products and that since export sales always concerned non-branded products, such domestic sales do not permit a proper comparison within the terms of Article 2(3) of the basic Regulation. Four of these exporting producers also argued that this profit is not calculated by reference to the weighted average profits of other exporters or producers as provided for in Article 2(6)(a) of the basic Regulation, but corresponds to only one exporting producer. It was further claimed in this respect that, in order to ensure that the amount for profits used is reasonable, the profits realised on sales of products of the same general category in India should in any event not be exceeded.

It should be noted that the profit margin used in constructing normal value corresponds to the weighted average profit realized on domestic sales of profitable types of branded and non-branded products by the Indian company concerned and that, had this claim been accepted, this would have been to the disadvantage of the producers, the profit margin used being lower than the profit margin realized by the same company solely on its domestic sales of non-branded products.

With regard to the use of the profit margin of only one company, it should be recalled that the investigation has been restricted to a sample of exporting producers in accordance with Article 17 of the basic Regulation and that the vast majority of the cooperating Indian companies are export oriented companies with no domestic sales of the like product. The Commission selected for the sample five Indian exporting producers two of which had declared at the time of the selection that they had made domestic sales of the like product. However, as indicated in recital 23 of the provisional Regulation, the investigation revealed that only one had representative domestic sales of the like product during the investigation period. Moreover, the reference in Article 2(6)(a) of the basic Regulation to a weighted

[41] See also recital (22) of the Regulation imposing definitive measures. As an example, the letter of the Commission Services of 17 October 1997 (reference 092870) to Prakash is attached as Annex 40.

[42] Please refer to Annex 9.

(23) This Indian company further challenged the Commission's refusal to grant an adjustment to normal value for credit costs.

As explained in recital 44 of the provisional Regulation, this claim had to be rejected given that the delivery of all goods sold in the domestic market by the company concerned took place only after payment. Thus, since the seller did not pass on to the buyer the use or the possession of the goods in question until the time of payment, it cannot be argued that there was any credit granted by the seller.

. . .

4. Dumping margins

(a) General methodology

(28) The representatives of the Indian and the Egyptian cooperating exporting producers, which were not included in the sample and, therefore, were not investigated, argued that the dumping margins established for investigated state-owned companies should not be taken into account when calculating the dumping margins to be allocated to private-owned companies not investigated.

As already explained above, the Commission cannot treat differently state and privately owned companies where all companies are operating in free market conditions. Therefore, the claim cannot be accepted and the provisions of recitals 46 to 48 of the provisional Regulation are confirmed.

dumping margin of the companies in the sample, weighted on the basis of their export turnover to the Community. In accordance with Article 9 (6) of the basic Regulation, when calculating this average dumping margin de minimis margins established have been disregarded. Expressed as a percentage of the CIF import price at the Community frontier, these definitive dumping margins are as follows:

India 11.6 per cent

. . .

(d) Dumping margin for non-cooperating companies

(31) For non-cooperating companies a dumping margin was determined on the basis of the facts available in accordance with Article 18 of the basic Regulation. Since the level of cooperation was high, it was considered appropriate to set the dumping margin for non-cooperating companies in each country concerned at the level of the highest dumping margin established for a company in each sample because it would constitute a bonus for non-cooperation to assume that the dumping margin to be allocated to exporting producers which did not make themselves known is lower than that found for a cooperating exporting producer.

These definitive dumping margins expressed as a percentage of the CIF import price at the Community frontier, are the following:

India 24.7 per cent . . ."

Articles 2, 2.2, and 2.2.2 were also discussed in detail during the first round of consultations, of which the following is an excerpt:[43]

"[EC]: On the issue of reasonableness of profit, indeed Article 2 speaks about a 'reasonable' amount of SGA and profits. Later on, in Article 2.2.2, the Agreement refers to this 2.2. If there are no actual data, then three options are given. Any of these options is an interpretation of 'reasonable' in 2.2 . . .

Bhargava: . . . Article 2.2.2(ii) excludes the possibility of using one company's data, since it requires a 'weighted average', therewith presuming at least two companies. This is to avoid a determination strongly coloured by the peculiarities of one single company. The EC had all the necessary information to use any other method.

[The EC] replies that there are several points in this presentation. . . . he cannot agree that Article 2.2 overrides 2.2.2. Rather, the concept of "reasonable" is explained in 2.2.2.

. . .

It is EC practice to follow in Article 2(6) of the basic Regulation as much as possible the product concerned, but there is no formal sequence in 2(6). The fact that the word 'exporters' in 2(6) is in plural does not necessarily mean that you need at least two companies.

[43] The verbatim report on the discussions during the first round of consultations is attached as Annex 11.

. . .

[EC]: We consider all three options in 2.2.2 reasonable. It depends, however, on the circumstances. The EC considered in this case that Article 2.2.2(ii) was the most reasonable.

. . .

Mr Seth: On the questions concerning the sequencing in 2.2.2 we reserve our rights.

[EC]: In principle all options are reasonable unless there is any factor rendering them unreasonable. This was not the case here . . ."

3.37 In its letter of 1 October 1998[44] the EC further answers pertaining to and relevant in the context of Articles 2, 2.2., and 2.2.2:

"Question 48

Would the EC agree that it is necessary to establish per Article 2.2 that the amounts for SGA and profit applied in the constructed value are reasonable?

It is evident that Article 2.2 of the WTO Anti-Dumping Agreement (the Agreement) requires that the investigating authorities establish reasonable amounts of selling, general and administrative costs (SGA), and profits, for use in all constructions of normal value.

Questions 49 to 57 and 61 to 71

Concerning the methodology to be used to establish the amounts of SGA and profits for constructing normal value.

For discussion in a new round of oral consultations.

Questions 58 to 60 and 72 to 74

Concerning the treatment of exporters' claims concerning the level of profit used in the construction of normal value.

Recitals (23) to (26) of Regulation (EC) No 1069/97 imposing a provisional anti-dumping duty specify which provisions of Regulation (EC) 384/96 (the Basic Regulation)—and thereby the WTO Anti-dumping Agreement—have been followed.

Recital (18) of Regulation (EC) No 2398/97 imposing a definitive anti-dumping duty replies to all claims raised by the Indian exporters in the course of the administrative procedure with regard to the profit used in the construction of the normal value."

3.38 Discussion on the subject also took place during the second round of consultations:[45]

[44] Please refer to Annex 12.

[45] The verbatim report on the discussions during the second round of consultations is attached as Annex 13.

" . . . Mr Seth: I will now turn to questions 49-57 and 61-71. As you will recall, these questions concerned the concept of "reasonable" profit in the context of Article 2.2 and 2.2.2. The EC in its letter of 1 October 1998 referred to a second round of consultations, during which it would reply to the questions 49-57 and 61-71 raised by India. We are at your disposal now.

[EC]: We are talking about alternative methods that the [Agreement] provides. Any of these methods are reasonable as long as the methods are stable and the elements for their application are present. 2.2.2(iii) only gives an alternative to 2.2.2 chapeau and (i)/(ii). So there are three methods plus an alternative in 2.2.2(iii). There is no preference between methods (i)-(iii). . . .

. . .

Mr Seth: Concerning us [question 50] there was a failure to check whether the result of 2.2.2(ii) was reasonable and that is inconsistent with 2.2.

[EC]: Our response is that the profit established was reasonable.

Mr Seth: Would the EC agree that Article 2.2.2(iii) suggesting that to apply a profit which does not exceed the profit normally realized by other exporters or producers on sales of the same general category of products is a reasonable method? [question 51]

[EC]: The use of any method is reasonable. That does answer your question. Even in this case it was reasonable. The WTO Agreement entitles a Member to develop a method that as long as it is followed consistently it is reasonable.

Mr Seth: Thank you. Would the EC agree that a profit applied in the constructed normal value which is three times higher than profits normally realized by other exporters or producers on sales of products of the same general category in the domestic market is not reasonable in the sense of Article 2.2.2(iii)?

[EC]: I just reiterate that the EC has developed a method such as existed in your case. We have followed the method in your case and we follow it. We do not change the method when the profit is very low and we also do not change it when the profit is very high.
. . .

4. Mr Seth: I refer to questions 60 and 61. Would the Community agree that the application of SGA and profits of one producer only is not allowed under the text of 2.2.2(ii) which mandates that a weighted average be used of exporters or producers.

[EC]: Is your position that the Agreement does not permit the use of the profit and SGA of one company?

Mr Seth: In Article 2.2.2(ii) it talks of the weighted average of companies.

[EC]: This is a very interesting interpretation. We do not read it like that.

. . ."

3.39 In its letter of 29 June 1999[46] the EC further provided the following answers in the context of Article 2.2.2:

> ***"Questions 49 to 57 and 61 to 71***
>
> ***Concerning the methodology to be used to establish the amounts of SGA and profits for constructing normal value.***
>
> *The answers repeat recitals (23) through (26) of the Regulation imposing provisional measures."*
>
> ***Questions 58 to 60 and 72 to 74***
>
> *Recitals (23) to (26) of the provisional duty Regulation specify which provisions of the basic Regulation have been followed and therefore the Community consider that its methodology has been justified and recital (18) of the definitive duty Regulation replies to all claims raised by the Indian exporters in the course of the administrative procedure with regard to the profit used in the construction of the normal value.*
>
> *As already mentioned above, the findings of the investigation, which relied on the responses to the questionnaires and the information obtained during the on-spot verifications of the Community investigators, showed that only one of the five companies selected in the sample had representative domestic sales of the like product. Domestic sales of that company were made through three channels: a) to exclusive wholesalers -- branded products, b) to other wholesalers -- non-branded products and c) to industrial users such as hotels, hospitals etc. -- non-branded products. The average profit margin realized by the company in question on profitable types of non-branded products in the domestic market was 39 per cent higher than the overall average profit realized on profitable branded and non-branded types of the like product in the same market. It should be noted that had the Community followed the request of the company itself and constructed normal value using the SG&A and profit realized only on non-branded products, instead of the overall SG&A and profit which it actually used, the normal value and consequently the dumping margin would have been higher than that calculated by the Community."*[47]

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or the low volume of the sales in the domestic market of the exporting country[48]*, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits . . .*

> *2.2.2 For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:*
>
> . . .
>
> > *(ii) the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;"*

3.41 The 'corresponding'[49] provisions in the basic EC Anti-Dumping Regulation are Articles 2(3) and 2(6), which provide that:

> *"2(3) When there are no or insufficient sales of the like product in the ordinary course of trade, or where because of the particular market situation such sales do not permit a proper comparison, the normal value of the like product shall be calculated on the basis of the cost of production in the country of origin plus a reasonable amount for selling, general and administrative costs and for profits, or on the basis of export prices, in the ordinary course of trade, to an appropriate third country, provided that those prices are representative.*
> . . .
>
> *2(6). The amounts for selling, for general and administrative costs and for profits shall be based on actual data pertaining to production and sales, in the ordinary course of trade, of the like product, by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:*
>
> > *(a) the weighted average of the actual amounts determined for 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;"*

3.42 The last paragraph of Recital (18) of the Regulation imposing definitive measures makes clear that the EC in fact applied Article 2(6)(a) of its domestic legislation:

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[48] Footnote in original: Sales of the like product destined for consumption in the domestic market of the exporting country shall normally be considered a sufficient quantity for the determination of the normal value if such sales constitute 5 per cent or more of the sales of the product under consideration to the importing Member, provided that a lower ratio should be acceptable where the evidence demonstrates that domestic sales at such lower ratio are nonetheless of sufficient magnitude to provide for a proper comparison.

[49] This is not to say that the obligations laid down in Article 2(6) are identical to those of Article 2.2.2 of the ADA.

3.54 As noted above, Article 2.2.2(ii) sets forth that, when amounts for SG&A and profits cannot

. . .

(ii) the weighted average of the actual <u>amounts</u> incurred and realized by other exporters or producers subject to investigation in respect of production and sales of

3.69 Indeed, this very case shows how the EC's logic perverts the text of Article 2.2.2(ii): The

meaningless. It is recalled that Anglo-French itself had stated at the moment of the sample selection that:[57]

> *"1) For the period . . . we have exported 9,02,467 kgs of Cotton bed Linen to the European Community and the total invoice value of this quantity is Indian Rs 161.11 million.*
> *2) With respect to sales of Cotton Bed Linen in the Domestic market for the period . . . we wish to bring your kind attention that we are selling Bed Linen qualities only in the Export market, and that the value of Bed Linen sold in the domestic market will be less than 0.25 per cent of our total turnover of around Indian Rs.1,200 million, and hence our turnover for Cotton Bed Linen in the Domestic market will be less than Indian Rs.3.00 million. . . ."*

3.74 It was therefore abundantly clear from this moment (30 September 1996) that Anglo-French with Rs 3 million worth of domestic sales, and Rs 161.11 worth of export sales, would not have representative domestic sales in the sense that the 5 per cent threshold would not be met [it was only (3 ÷ 161.11) * 100 = 1.86%]. It was in fact also made clear in Anglo-French' questionnaire responses that the company did not have sufficient domestic sales.

3.75 It is further recalled that the company Standard Industries, which Texprocil at the time of the sample selection insisted upon having included in the sample, did have sufficient representative domestic sales (as declared at the time of sample selection).[58] However, the Commission refused to include Standard.

3.76 Moreover, during the investigation nothing would have prevented the EC to investigate one more company *with* representative domestic sales, namely Standard Industries. The questionnaire response of this company was readily available for investigation because of its selection in the reserve sample.[59]

3.77 The insinuation in recital (18) that it was the fault of the Indian exporters that there were not sufficient exporters with representative domestic sales in the main sample and that the EC somehow tried to select the main sample with sufficient domestic sales is therefore not borne out by the facts.[60]

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[57] Please refer to the declaration by Anglo-French attached in Annex 18.

[58] It is clear from the fact description that on two occasions in the final stage of the sample selection process Texprocil requested, in writing, to have Standard included in the sample. The Commission could plainly know from Standard's declaration that it was willing to be sampled that the company had sufficient domestic sales. This declaration, submitted well before the sample was negotiated, is attached as Annex 45. See also Annex 16.

[59] The fact that additional companies are sometimes included into the main sample and investigated is for example witnessed by the EC anti-dumping proceeding concerning Flat pallets of wood originating in Poland (published in Official Journal of the EC (year 1997) L-series Number 150 page 4, Regulation imposing provisional duties, at recitals (12) and (13)):

"(12) One Polish exporter selected for the sample did not reply to the questionnaire. Another Polish exporter, which did not produce pallets and did not sell on the domestic market, replied to the questionnaire; however its suppliers, whose cooperation was indispensable for establishing normal value, refused to cooperate. Accordingly, the Commission had to disregard the information submitted by the exporter concerned.

(13) In these circumstances, the Commission considered it appropriate to add to the initial sample two or more producers, in order to reinforce the representative of the sample, both in quantitative terms and in relation to the conditions of the Polish domestic market for pallets. . . ."

[60] Indeed, in this respect recital (18) contradicts the statement contained in the EC letter of 11 October 1996 (reference 060644; Annex 22) where it is stated that: *" . . . we insist on maintaining this company [Standard] in the reserve because of its significant domestic sales."* If it was so clear to the EC that Standard had significant domestic sales, and the Indian side insisted on having Standard in the main sample,

any event, it follows from the argument above that it is not relevant for Article 2.2.2 whether the C knew at the time of sample selection whether there was only one company with sufficient mestic sales.

2 The second argument of the first claim relating to Article 2.2.2: even within the application of Article 2.2.2(ii), the EC has acted inconsistent with the provision. Instead of using 'the actual amounts incurred and realised' by other producers or exporters the EC has used amounts for SG&A and profits that were restricted to sales in the 'ordinary course of trade'

78 The application by the EC of Article 2.2.2(ii) in Bed Linen II constitutes paramount consistency with the methodology set forth therein with respect to the calculation of amounts for G&A and profits. It is recalled that the relevant part of Article 2.2.2(ii) provides that the amounts r SG&A and profits shall be based on: *" . . . the actual amounts incurred and realized by other oducers or exporters. . . "* (Emphasis added). However, the EC did in fact not apply *"the actual nounts incurred and realized by other producers or exporters"*. Rather, the EC has resorted to plying amounts for SG&A and profits in the ordinary course of trade only. A summary table ustrates the difference:[61]

Item	The actual amounts *incurred and realized*:	Amounts in the ordinary course of trade:
SG&A	10.39%	10.39%
Actual profit amounts incurred as a % of turnover	*12.09%*	
Profit % pertaining to sales in the ordinary course of trade		*18.65%*
Total	22.48%	29.04%75 re f 81.75 4057,5 4a re f 229.5 417

3.81 In other words, the amounts of SG&A and profits for those producers for whom the method of the chapeau of Article 2.2.2 is followed, are merely transplanted' to Article 2.2.2(ii), since this was the amount that had been 'determined' under Article 2.2.2 chapeau. In doing so, there is failure to recognize that 'the actual amounts incurred and realized' by other producers in Article 2.2.2(ii) is in fact different from the 'amounts determined' in the chapeau of Article 2.2.2. *In casu*, this has lead to an overstatement of (29.04 per cent (amount determined) - 22.48 per cent (amount incurred and realized)) = 6.56 per cent.[64] Clearly, such EC application of Article 2.2.2(ii) would be incorrect since the factual deviation from the actual amounts incurred and realized, as mandated, is massive.

3.82 A second possibility would be that the EC has wrongly interjected within the provision of Article 2.2.2(ii) the requirement of the chapeau in that SG&A and profits shall be calculated based on sales 'in the ordinary course of trade'. The EC would therefore have only included profitable sales with respect to its calculation under Article 2.2.2(ii). While the method for calculating SG&A and profits in the chapeau of Article 2.2.2 does indeed include the restriction that SG&A and profits shall be based on data pertaining to sales 'in the ordinary course of trade', this requirement is excluded in the method contained in Article 2.2.2(ii). Indeed, Article 2.2.2(ii) makes no reference to any requirement that the amounts incurred and realized be restricted to those in the 'ordinary course of trade' only.

3.83 In order to agree with such EC's interpretation of Article 2.2.2(ii), *i.e.* that SG&A and profits under 2.2.2(ii) only includes amounts incurred or realized 'in the ordinary course of trade', it would be necessary to find that the wording of Article 2.2.2(ii) implicitly refers back to and incorporates the reference to 'ordinary course of trade' in the chapeau of Article 2.2.2. However, such an approach is demonstrably inconsistent with the express wording of Article 2.2.2(ii). The chapeau of Article 2.2.2 and Article 2.2.2(ii) provide that:

> *"2.2.2 [T]he amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:*
>
> . . .
>
> *(ii) the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin"*

3.84 The first part of the first sentence of Article 2.2.2 defines the subject of what is to be calculated; namely *". . . the amounts for administrative, selling and general costs and for profits . . ."* The second part of the first sentence, introduced by the clause *". . . shall be based on . . ."* then provides the specific method by which the SG&A and profits shall be calculated under the chapeau of Article 2.2.2.

3.85 It is important to note that the word *"amounts"* in the chapeau refers only to the amounts for SG&A and profit; this word does not refer to amounts for SG&A and profits *". . . in the ordinary course of trade"*. Rather, the first sentence of the chapeau of Article 2.2.2 stipulates that, for the purposes of the method detailed there, the 'amounts' for SG&A and profits shall be 'based on' (actual

[64] In other words, the amounts that were 'incurred and realized' were overstated in the calculations by almost one-third: (6.56÷22.48)x100=29.18% of overstatement.

data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation). In other words, the basis, or factors which are to be used in order to arrive at the amounts for SG&A and profits under the specific method detailed in the chapeau are *"actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation."*

3.86 Websters' New Collegiate Dictionary defines the word 'basis' as: "Foundation. Something on which something else is constructed or established" (emphasis added). Similarly, the word 'base' is defined as "Foundation. The bottom of something considered as its support."[65] In other words, the "amounts for SGA and profits" constitute, in the context of the chapeau of Article 2.2.2 and sub-paragraph (ii), by definition 'something else' i.e., a value or amount that is conceptually distinct from the 'foundations' or 'basis' upon which it is constructed or established. The amounts for SG&A and profits is what is to be established; the "actual data . . . in the ordinary course of trade . . . investigation" is (one of) the means to establish it.

3.87 Therefore, when the second sentence of the chapeau of Article 2.2.2 states that when *"such amounts"* cannot be determined on the basis of the chapeau of Article 2.2.2, then the method in

3.90 Consequently, there is no basis for inferring a requirement under Article 2.2.2(ii) that only profitable sales shall be taken into account for the purposes of calculating SG&A and profits under the methodology provided therein.

3.91 This interpretation is further confirmed by specifically contrasting the wording of the method provided in the chapeau against the wording of the method contained in Article 2.2.2(ii). Under the method in Article 2.2.2 chapeau, SG&A and profits shall be calculated *". . . based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation . . ."* (emphasis added). Under the method in Article 2.2.2(ii) on the other hand, SG&A and profits shall be based on *"the weighted average of the actual amounts incurred or realized by other producers or exporters subject to investigation . . ."* (emphasis added). Article 2.2.2(ii) clearly stipulates that the data which is to be taken into account under this method are the weighted average of *". . . the actual amounts incurred and realized . . ."*

3.92 The context in which the word *"actual"* is used in this paragraph is important. The *Concise Oxford dictionary* defines the word *"actual"* as *"existing in fact; real (often as distinct from ideal)."* (Emphasis added). Likewise, *Websters' New Collegiate Dictionary* defines *"actual"* as *"Existing in fact . . . and not merely potentially."*[66]

3.93 In other words, if one refers to the *actual* amounts (for SG&A and profit), one is expressly referring to the complete amounts which in fact exist; nothing more and nothing less. It follows that this formulation expressly excludes any qualification or limitation of the amounts for SG&A and profit which are to be included in the calculation under this method (provided that these amounts are generated in respect of production and sales of the like product *etc*.). Consequently, the use of the word 'actual' in this context is intended to specifically clarify that it is the complete amounts which are to be taken into account under this method, as opposed to amounts which have been artificially qualified or limited in some way.

3.94 The wording of Article 2.2.2(ii) should be contrasted with the wording of the chapeau of Article 2.2.2. The word *"actual"* in this paragraph is used in an entirely different context. Article

4.3 The third argument of the first claim relating to Article 2.2.2: By switching the order of preference contained in Article 2.2.2 the EC has acted inconsistently with that Article

3.97 The EC has, instead of using the (available) alternative that Article 2.2.2(i) provides, used the alternative provided in Article 2.2.2(ii). It is recalled that Article 2.2.2 provides for four possible SG&A and profit calculation methods in Article 2.2 situations:

1. Actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation (Article 2.2.2 chapeau);

2. Actual amounts incurred and re

first option of the chapeau, or the second option of 2.2.2(i) which, respectively, have a direct or indirect link with the producer concerned.

3.100 Therefore, on the basis of the wording of Article 2.2.2 as well as a systemic interpretation of the concept of dumping and the ADA, the GOI believes that Article 2.2.2 establishes a preference for use of producer-specific data.

3.101 It is noted, however, that the EC basic Regulation turns around methods 2 and 3 and, to that extent, does not follow the order of the ADA. Thus, Article 2(6) of Regulation 384/96 of the EC domestic legislation provides as follows:

> *"The amounts for selling, for general and administrative costs and for profits shall be based on actual data pertaining to production and sales, in the ordinary course of trade, of the like product, by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:*
> *(a)*

> *" . . . the reference in Article 2(6)(a) of the basic Regulation to a weighted average amount for profits determined for other exporters or producers does not exclude that such amount can be determined by reference to a weighted average of transactions and/or product types of a single exporter or producer. Consequently, it is not considered justified to establish the amount for profits in accordance with Article 2(6)(b) or 2(6)(c) of the basic Regulation, as claimed by the Indian companies concerned."*

3.104 The EC therefore did not even consider which option would be most reasonable, but only posited that Article 2(6)(a) applied and that for that reason Articles 2(6)(b) or (c) could not apply. The fact that Article 2(6)(b) could indeed have been applied is for example illustrated by the situation of (*inter alia*) Prakash Cotton Mills, which had domestic sales of other products in the same general category on the domestic market.[69] This is the first indication that the EC considers the order laid down in Article 2(6) of the basic Regulation, which differs from the order of the ADA, as mandatory. Incidentally, the EC method also led to the most disadvantageous result possible for the Indian industry.

3.105 It should further be noted that it has also been confirmed by case law of the European Court of Justice that the order in which the three alternatives must be considered is the order in which they are presented in the provision.[70] In fact, one may argue that where the European Court of Justice considers that the order of the Regulation is of a mandatory nature, the order of the ADA contains the same imperative character.

3.106 Finally, as far as the EC's domestic legislation is concerned, it is noted that recent EC literature on the subject confirms that in practice the order as set out in the Regulation is followed.[71] While there may therefore not be a *de jure* preference (apart from the Court judgements mentioned), there is certainly a practice which exists *de facto* as witnessed by the Bed Linen II proceeding. This *de facto* preference as established by the EC therefore establishes an inconsiestt4iestt4ie1European i by essed by th

"12.2 Public notice shall be given of any preliminary or final determination, whether affirmative or negative . . . of the termination of a definitive anti-dumping duty. Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities . . .

12.2.1 A public notice of the imposition of provisional measures shall set forth, or otherwise

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 . . .”

6.2 Legal arguments relating to the claims relating to Article 12.2.2

3.114 The third claim is that the EC has acted inconsistently with Article 12.2.2 by failing to sufficiently explain why and how it applied Article 2.2.2 in the definitive determination.

3.115 As noted in section III.A.1, Indian exporters made very detailed arguments on these issues. Nevertheless, in the definitive Regulation the EC’s explanations of these arguments was little more than the statement in recital (18) that:

“Moreover, the reference in Article 2 (6) (a) of the basic Regulation to a weighted average amount for profits determined for other exporters or producers, does not exclude that such amount can be determined by reference to a weighted average of transactions and/or product types of a single exporter or producer. Consequently, it is not considered justified to establish the amount for profits in accordance with Article 2(6)(b) or 2(6)(c) of the basic Regulation, as claimed by the Indian companies concerned.”

3.116 This ‘justification’ for applying 2(6)(a) (corresponding to Article 2.2.2(ii)) was little more

function: the *"amount for administrative, selling and general costs and for profits"* in 2.2 are explained in 2.2.2, not the *"reasonable amount for administrative, selling and general costs and for profits"*. The 'reasonable' test in 2.2 is thus an over-arching requirement in addition to the requirements of 2.2.2, rather than a rule, concretized by Article 2.2.2. This is also in accordance with the plain meaning of Article 2.2 and the structure of the Article.

3.128 The next question then becomes what *"reasonable"* in 2.2 means. It cannot be a procedural requirement: the possible procedures for determining SG&A and profits are elaborated in 2.2.2. It follows that *"reasonable"* must be interpreted as a substantive requirement: whatever method under Article 2.2.2 is used, Article 2.2 requires that the result of the method used must be *"reasonable"*.

3.129 Contrary to what might be expected, the ADA does not at first sight appear to contain any explicit definition of the word 'reasonable'. However, upon closer reading of the three alternative options contained in Article 2.2.2, the third option does in fact contain an implicit definition of the notion of 'reasonable':

> *"(iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin."*

3.130 Thus, the text suggests that while any other method may be used to establish SG&A and profits, any such method may not lead to an addition of a profit that exceeds profits normally realised by other exporters or producers. In other words, if the profit under option three exceeds the profit that is normally realised by other exporters or producers on sales of products of the same general category in the domestic market, the method is not considered reasonable.

3.131 Accordingly, for a method—and therefore a profit—to be reasonable, it should not exceed profit normally realised by other exporters or producers (on sales of products of the same general category in the domestic market of the country of origin).

3.132 Nothing in the text of Article 2 would appear to suggest that this criterion for reasonableness as defined in the third option does not apply with respect to the rest of Article 2. Indeed, failing any indication to the contrary, the criterion in option (iii) is the only guideline as to the notion of 'reasonable' contained in Article 2.2 of the ADA. The third option refers not to a specific method but instead to a general, abstract, open-ended category of *"any other reasonable method."* It is therefore clear that the words that follow in the third option are intended to define reasonableness in terms of a general criterion which all reasonable methods must fulfil. Thus the wording of the third option expressly defines a reasonable method as one which does not result in excess profits as defined above.[72]

[72] This conclusion fits with the structure of Article 2.2.2. As noted earlier, Article 2.2.2 contains four alternative methods for determining SG&A and profits (namely, the normal method in the chapeau and the three alternative methods in sub-paragraphs (i)-(iii). Whatever one's views on the order of these alternatives, it seems evident from the wording that the method laid down in sub-paragraph (iii) is a residual one, so to speak, one of last recourse if all other methods fail. This would—apart from its place at the bottom of the provision—follow from the words *"any other"*. The ADA thus provides three reasonably accurately described methods for determining SG&A and profits, plus the residual 'any other' method of the third sub-paragraph. Contrary to the first three methods, sub-paragraph (iii) does not so much lay down the procedure to be used, but rather constrains the result. Since the term

3.133 As noted, there seem to be no further indications in the text of the ADA which elaborate on the notion of 'reasonable.' As far as the literature on the subject is concerned one may note the observation of one internationally recognised scholar with respect to Article 2:4 of the 1979 Anti-Dumping Code: "*international obligations [mandate] . . . that a realistic method be used to compute the constructed cost and prices based on constructive cost.*"[73]

from exporters and Texprocil[76], the EC did not sufficiently explain in the public notice, or make available through separate a report, why it considered the uniquely established and exceptionally high profit margin 'reasonable'.

3.145 As noted in section III.A.1 above, following the provisional Regulation and provisional disclosure the Indian exporters made extensive arguments on the interpretation of 'reasonable'. Although the EC in recital (18) noted the issue of the interpretation of 'reasonable', it never replied to the claims by Indian exporters that the profit and SG&A determined were not reasonable as per Article 2(3) of the basic Regulation (Article 2.2 of the ADA). This is all the more serious in view of the very tangible impact of this issue on the dumping margins. The EC therewith acted inconsistently with Article 12.2.2.

B. CLAIM 7: ARTICLE 2.4.2: ZEROING OF NEGATIVE DUMPING AMOUNTS

3.146 Summary: the EC acted inconsistent with Article 2.4.2 by zeroing negative dumping amounts on a per-type basis (**claim 7**).

1. Facts

3.147 First, reference is made to the facts described above in section III.A, above. The following facts may be added to this description. It is recalled that during the first round of consultations, the following question was asked:[77]

> *"114. Would the EC indicate what the basis under the WTO Anti-Dumping Agreement is for the practice of per-type zeroing when weighted average normal values are compared to weighted average export prices as per Article 2.4.2? (In other words, why does the EC apply inter-type zeroing?)"*

3.148 In response, the EC answered at the time:

> *"[EC]: The basis for such practice is the requirement that prices be 'comparable'. We compare therefore, within one like product, on a type-by-type basis. Why zeroing? Because if we would not zero negative amounts, the requirement that we compare like with like would not be respected."*

3.149 During the second round of consultations this matter was again discussed in detail.[78]

3.150 In its letter of 29 June 1998[79] the EC provided the following answer with respect to question 114 regarding Article 2.4.2:

> *"**Question 114***
>
> ***Would the EC indicate what the basis under the WTO Anti-Dumping Agreement is for the practice of per-type zeroing when weighted average normal values are compared to weighted average export prices as per Article 2.4.2? (In other words, why does the EC apply inter-type zeroing?)***

[76] Please refer to section III.A.1, above.
[77] See Annex 11.
[78] For the verbatim report please refer to Annex 13.
[79] Annex 14.

It should be noted that the methodology described in recital (46) of the provisional duty Regulation for the calculation of dumping margins, i.e. weighted average constructed normal value by type compared to weighted average export price by type, was never disputed during the administrative procedure. Article 2 (11) of the basic Regulation, which deals with this aspect, is clearly restricted to sales within a particular type -- that does not address how the results found for each type are averaged which is dealt with in Article 2 (12). The latter is more a question of how findings are imposed in the form of measures of duties [sic] and in this case the Community as per consistent practice imposed an average rate of dumping to cover all types with non-dumped types given a zero margin for the quantity concerned."

2. The relevant part of the text of article 2.4.2

3.151 It is recalled that Article 2.4.2 of the ADA provides that:

" . . . the existence of margins of dumping during the investigation phase shall normally 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 by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison."

3. Claim relating to Article 2.4.2

3.152 Inconsistently with Article 2.4.2, the EC zeroed negative dumping incurred for certain types when comparing the overall weighted average per-type normal values with per-type weighted average export prices.

3.153 It appears that Article 2.4.2 provides for three possibilities to establish a dumping margin:

1. A comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions;

2. A comparison of normal value and export prices on a transaction-to-transaction basis; or

3. A normal value established on a weighted average basis may be compared to prices of individual export transactions

3.154 In the provisional Regulation the EC stated that *"(46) In general, weighted average constructed normal value by type was compared with weighted average export price by type."*

All six other dumping margins for India did not exceed 17 per cent. Clearly.75 l16 normal value.7/ea cpTw ( ) Tj 243

3.156 It appears therefore unquestionable that in its calculations of the dumping margins, the EC had decided to apply the 'first option' of establishing a dumping margin as per Article 2.4.2 which is to establish *" . . . a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions."*

3.157 As noted in the claim above, it is submitted that the EC has not *de facto* made such a comparison. Instead, it has zeroed the 'negative dumping' which was found for certain models. This has led to overstatement of the dumping margins for four companies. For one company this has even led the EC to find dumping where dumping did not exist. More precisely, the overstatement of the actual dumping margins has been as follows:

Name	CIF Value of Exports	Actual Dumping *Result*	Actual DM Percentage	Dumping Amount as per EC	EC DM Percentage
Anglo-French	126,464,037	30,820,812	24.37%	31,287,342	24.74%
Bombay Dyeing	100,924,637	5,612,587	5.56%	7,842,226	7.77%
Madhu	183,063,049	30,898,430	16.87%	31,169,522	17.03%
Omkar	212,877,521	28,025,198	13.16%	30,328,190	14.25%
Prakash	314,529,134	-1,328,119	-0.42%, *i.e.* 0	8,412,131	2.67%

Source: Based on Data provided in Disclosure documents

3.158 How this overstatement came about may be illustrated by the details of the calculations of Prakash:

	Data			
PRODUCT CONTROL NUMBER	Sum of CIF VALUE IN CURRENCY OF EXPORTING COUNTRY	Sum of DUMPING *RESULT*	DUMPING AMOUNT AS PER EC	%
1	54,595,034.24	2,444,661.168	2,444,661.17	4.48%
2	28,379,349.81	-840,871.6374	0.00	0.00%
3	35,119,956.8	787,797.5404	787,797.54	2.24%
4	26,940,135.47	-1,923,730.158	0.00	0.00%
5	21,859,280.04	-977,723.0105	0.00	0.00%
6	19,426,021.26	2,132,781.439	2,132,781.44	10.98%
7	15,915,117.53	-255,135.296	0.00	0.00%
8	14,604,200.8	156,272.4031	156,272.40	1.07%
9	12,526,247.49	225,785.7921	225,785.79	1.80%
10	10,064,340.52	391,620.1423	391,620.14	3.89%
11	9,195,177.3	-2,114,764.402	0.00	0.00%
12	7,182,757.11	1,195,525.219	1,195,525.22	16.64%
13	6,578,793.64	-921,095.2336	0.00	0.00%
[redacted]				
15	7,355,982.32	435,593.6285	435,593.63	5.92%
16	7,968,378.95	-903,413.7129	0.00	0.00%
17	6,127,736.67	-691,408.4469	0.00	0.00%
18	4,812,847.04	-239,001.1542	0.00	0.00%
19	6,543,607.06	-567,224.405	0.00	0.00%
22	3,552,510.28	-188,257.2337	0.00	0.00%
25	4,164,049.29	-188,257.		

3.167 Clearly, for establishing an average, there is no justification to exclude certain amounts. The definition of 'average' clearly relates to the total of given amounts and not to a number of given amounts from where a selection can then be made as to which ones are to be averaged.

3.168 This

4.3 In its provisional Regulation the EC made a determination on Community industry and injury which for the convenience of the Panel is quoted here *in toto*:

> *"**E. COMMUNITY INDUSTRY***
>
> ***1. Definition of the Community industry***
>
> *(52) After elimination from the list of companies included in the complaint of seven of them found not to be complainants, the Commission found that the remaining companies represented a major proportion of Community production of bed linen and satisfied the requirements of Article 5(4) of the basic Regulation.*
>
> *After initiation of the proceeding, a number of organizations representing exporters and importers of bed linen from the countries concerned alleged that several of the producers which made up the Community industry were also importing the dumped product from the countries subject to the proceeding. In these circumstances, the Commission re-examined whether, in the light of the provisions of Article 4(1)(a) of the basic Regulation, these companies should be excluded from 'the Community industry'.*
>
> *(53) For the purposes of carrying out this re-examination, and in accordance with consistent practice of the Community institutions, it appeared appropriate to determine whether those companies were primarily producers in the Community with an additional activity based on imports and merely supplementing their Community production, in order to be able to offer a complete range of products, or whether they were importers with relatively limited additional production in the Community.*
>
> *(54) In all but one case, companies alleged to be importing bed linen from the countries concerned were among those selected in the sample of Community producers (see recitals (58) to (61)). The Commission was therefore able to examine the extent of these imports during the course of its on-the-spot verification visits. For all but one of these sampled companies, the investigation showed that the imports of dumped products from the countries concerned had accounted for less than 10 per cent of the turnover of the companies in question in the period examined. It is therefore the opinion of the Commission that these companies were not shielded from the effects of dumped imports and that for the purposes of Article 4 of the basic Regulation these companies may be considered along with the other cooperating producers, as belonging to the Community industry.*
>
> *In the case of the one other sampled company, it was found that a higher proportion of its bed linen sales in the investigation period were of Pakistani origin and also that only a minor part of its sales were of its own production. It appeared in addition that the company's future activity was likely to be further focused on imports. This company, whose core interests were*

should, therefore, be retained in the definition of the Community industry. In any event, this issue has no substantial influence on the question of the representativity of the Community industry.

(56) Three other companies were eliminated. In one case the company was found no longer to produce bed linen. In two other cases the companies did not respond to the requests for information which were addressed, via Eurocoton and the national associations, to those complainants which were not selected in the sample of Community producers, in order to obtain information on the Community industry as a whole.

(57) The remaining 35 companies, which cooperated with the enquiry and are located in France, Germany, Italy, Spain, Portugal, Austria and Finland, represented a major proportion of total Community production in the investigation period. These companies were therefore deemed to make up the Community industry under the terms of Article 4 (1) of the basic Regulation.

2. Sampling

(58) Because of the number of companies in the Community industry it was decided to resort to sampling, in accordance with Article 17 of the basic Regulation.

(59) 27 of the 35 companies, representing 96.7 per cent of Community industry production and 32.5 per cent of total Community production in 1995, (the latest figures available at the time of sample selection) were situated in Germany, Italy, France and Portugal.

(60) As a general rule, Community producers sell a large proportion of their bed linen production in their own Member State, in part because of differences between Member States in standard products and sizes. This is true of Germany, France and Italy which are both the largest producers of bed linen in the Community and very important importers. The producers in these Member States were therefore clear candidates for assessing the impact of the imports on the Community industry.

Producers in Portugal, for their part, sell a large proportion of their production in other Member States and represent about one third of the production of complainant companies. Even though Portugal is not a significant importer, therefore, it was decided that the effect of the imports on the producers there should be assessed and that Portugal should be represented in the sample.

(61) In consultation with the complainant Eurocoton an initial list of 19 companies was arrived at (eight from France, six from Germany, four from Italy and one from Portugal).

In the course of the enquiry one of these companies was eliminated from the sample for failing to cooperate with the enquiry. As a result of this exclusion, and of the exclusion of the other company under Article 4(1)(a) of the basic Regulation (see recital (54)), in the following injury analysis information given for 'sampled producers` is based on information supplied by the remaining 17 producers which represented 20,7 per cent of total Community production and 61.6 per cent of the production of the Community industry. They included the largest Community industry companies in Germany, Italy and Portugal, and also smaller producers. The Commission therefore considered this sample to be representative of the Community industry.

F. INJURY

1. Collection of data

(62) Data for the examination of injury caused to the Community industry was collected and analysed at three different levels, as follows:

— *at the level of the entire Community (EU-15), for trends concerning production, consumption in the Community, imports, exports and market share. Data was obtained from Eurocoton and from recognized industry sources, notably the CITH (Centre d'Information Textile et Habillement) which produces a series of production figures across the Community for the whole of textile category 20. This category is very slightly broader than the definition of the product concerned in the present proceeding. However, the difference is very slight, as the extra products it includes are of very minor significance,*

— *at the level of the Community industry, as defined above, for trends concerning production, sales by value and employment,*

— *at the level of the sampled Community producers, for the factors mentioned above and also for trends concerning prices and profitability.*

2. Consumption

(63) Community consumption of the product concerned (as measured by production plus imports minus exports) decreased from 200 000 tonnes in 1992 to 186 000 tonnes in the investigation period, a decrease of 7 per cent.

3. Cumulative assessment of the effects of the dumped imports

(64) The Commission considered, in the light of Article 3(4) of the basic Regulation, whether cumulative assessment of injury caused by the three exporting countries was justified.

(65) With regard to the conditions laid down in Article 3(4)(a) the margin of dumping established in relation to the imports from each country is more than the minimis and the volume of imports from each country is not negligible. In this respect India and Pakistan are both subject to quotas on their exports of bed linen to the Community. Both countries used these quotas in full (at least 98 per cent) in each of the 1993, 1994 and 1995 quota years and increased the effective quotas by transferring quota allocation from other categories. In addition, it appears that in 1995, India exported to the Community a volume of bed linen 20 per cent higher than the amount licensed for the 1995 quota year.

All three exporting countries involved in this proceeding increased their exports of the product concerned between 1992 and the investigation period. The largest exporter, Pakistan, increased its exports by volume by 6per cent, and the second largest, India, increased its exports by 56 per cent. Exports from Egypt, which are not subject to quotas, rose by 282 per cent between 1992 and the investigation period though remained well below the other two countries.

In accordance with the terms of Article 3(4)(b), the conditions of competition between imported products, and between imported products and the like Community products, were analysed. It was found that the imports compete directly with each other and with the like

It was also found that the products were often sold alongside each other, for example appearing on the same page of mail order catalogues without any indication of origin. In any event, no quality differences could be established.

The Commission therefore considered that there were no reasons not to compare the prices of products corresponding in size, weaving construction and finish, as envisaged in recital (69) above.

(72) Certain exporters also claimed that the imported and Community products were sold through different sales channels and were not therefore in competition. They alleged that while the exporters sold to large hypermarket chains, mail order companies etc, in particular for lower-priced 'promotion' sales, the European producers concentrated on branded goods sold through specialists or department stores etc.

On examination it was found that the mix of sales channels did indeed differ to the Community producers and for importers, and indeed differed between Community producers. However, large purchasers such as hypermarkets and mail order companies were also important to the majority of the sampled Community producers, and were sometimes their dominant clients. It was also found that selling to these clients for promotional sales was an important part of this output. It was therefore held that prices of imported and Community-produced goods could be compared.

(73) The Commission examined how quantities and prices of the imports concerned and of the sampled Community producers varied by sales channel. The results varied between Member States. In France and Germany, for example, Community producers made more than 80 per cent of their sales directly to retailers, and small quantities at relatively high prices to wholesalers and distributors. Imports were divided between retail and wholesalers and some exporters sold exclusively to wholesalers. In these circumstances the Commission considered that a comparison of prices by sales channel would not be appropriate: the prices of Community producers to wholesalers and distributors could not be considered to be representative ones with which the prices of imports sold in higher volumes could be compared.

(74) The comparison was therefore made between average prices of the imports, expressed duty paid cif Community frontier, and average ex- works prices of the Community producers for each reference product. The prices of the Community producers were adjusted downwards by a margin calculated to give the average price through the cheapest sales channel (eg. discount stores in Germany, hypermarkets in France). The resulting price was further adjusted to take account of importers' costs.

(75) Certain exporters observed that some product types (notably a particular quality called seersucker, and white (bleached) products which are often destined for use by institutions such as hotels and hospitals) were important in their exports but were not represented among the reference products. They claimed that this showed that the products they exported to the Community and the products sold by Community producers were not in competition with each other, that a valid undercutting analysis could not be carried out or that these types should be excluded from any measures imposed.

(76) The Commission considered these arguments but concluded that a difference of product mix did not invalidate the finding that there was competition between the products sold by the

exporters and the products sold by Community producers. The Commission found that the concentration by Community producers on other products was a reflection of the level of competition from the dumped imports, and decided that the analysis undertaken according to the methodology set out above was a valid measure of the degree of price undercutting practised by the exporters.

(77) The reference products used for the undercutting analysis, which in effect represent a product sample, were found to be represented among the Community sales of all the sampled exporters from the countries concerned except one Egyptian company, with a variable degree of importance among the rest. Where the degree of representativity was particularly low, the Commission examined the prices of other products (or a per kilo basis) to check that those used for the undercutting analysis were in line with the prices of the rest of their sales to the Community.

(78) The Egyptian company whose exports to the Community contained no reference products

Indeed, in the course of its investigation the Commission acquired evidence of 29 companies other than the Community industry which ceased or reduced bedlinen production in the Community between 1992 and the investigation period. It is estimated that total loss of production amounted to at least 10,000 tonnes per annum.

The sales, employment and profits of companies which have since disappeared are not included in the aggregated data for the Community industry, thus artificially improving the apparent trends for the survivors.

(b) Sales by volume

(86) The Commission examined the development in average prices achieved by the sampled Community producers for the defined reference products between 1993 and the investigation period, using a constant product mix of the reference products. This showed that prices, in index terms, fell from 100 in 1993 to 97.6 in 1994, recovering to 98.3 in 1995 and 99.2 in the

(92) The Commission took into account all the economic indicators mentioned above in determining whether or not the Community industry was suffering material injury. Account was taken of the fact that the number of companies making up the Community industry was reduced in comparison with the start of the injury investigation period. The production, sales, employment and profits of companies which have since disappeared are not included in the aggregated data for the Community industry, thus improving the apparent trends for the survivors.

(93) The Commission noted the decline in the total production and market share of Community producers. This background demonstrates the difficult conditions in which the remaining Community industry was operating. The fact that these surviving companies were able to maintain production and market share should not detract from the assessment of the overall situation. Above all, the remaining Community industry suffered declining and inadequate profitability, as further evidenced by prices which had not been able to reflect increases in the costs of raw cotton or to keep pace with inflation in prices of consumer goods.

(94) Accordingly the Commission reached the view that the Community industry had suffered material injury.

G. CAUSATION

1. Introduction

(95) The Commission examined the volume and prices of the dumped products from the exporting countries concerned and their consequent impact on the situation of the Community industry. As part of this examination the Commission also examined the effects of other factors in order to ensure that these effects were not incorrectly attributed to the dumped imports. This examination had to take into account the existence of quotas, which might have limited the potential for growth in sales on the Community market by the countries concerned and other third countries.

2. Effects of the dumped imports from the countries concerned

(96) The investigation of the Community industry showed as the main injury indicator the unsatisfactory development of sales prices and the consequent declining profitability. It was also established that the dumped imports were sold at prices which significantly undercut those of the Community producers and in substantial and increasing quantities, reaching 25 per cent market share in the investigation period.

(97) In order to assess the full impact of the dumped imports, it should be noted that the market for bed linen is characterised by product substitutability and transparency. Large retailers were found to sell the imported products and the Community-produced products alongside each other, without the ultimate consumer being informed of the product's origin. The transparency of the market was found not to be significantly affected by the differences in standard products among Member States: several sampled exporters in the countries concerned sold products in three or more Member States, in each case adapting their production to supply the standard products of the territory concerned. In view of the price sensitivity of the large purchasers it can be concluded that the consistently low prices of the

imports concerned, coupled with their substantial and increasing market share (see recitals (67) to (80)), have applied continuous downward pressure on prices on the Community market.

(98) It was observed among sampled producers that they had been obliged increasingly to shift production and sales to high value niche markets in order to maintain production and sales levels. The undercutting calculation provided evidence that this shift was caused by the imports concerned. Undercutting margins were lower in the lower value qualities, indicating that the imports significantly influence price levels in this market segment and have forced down Community producers' prices. Where higher value items were imported the undercutting margins were higher, indicating that imports of these qualities were not yet at sufficient volume to bring down Community prices to the same extent.

It is worth noting that the Commission has received indications from importers, from Community producers and from suppliers of textile machinery to the exporting countries to the effect that exporters in the countries concerned are increasingly moving to higher value items.

(99) Since price suppression and consequent decreasing profitability to inadequate levels were the main indicators on which the Commission's finding of injury was based, and in view of the coincidence in time between the deterioration of the situation of the Community industry and the significant increase of the dumped imports, it can be concluded that there was a direct causal link between these imports and the material injury found.

3. Effects of other factors

(a) Imports from third countries

(100) Imports from other third countries not covered by this proceeding fell between 1992 and the investigation period, both in absolute terms (from 41 600 tonnes to 35 800 tonnes) and in terms of market share (from 20.8 per cent in 1992, considerably above the total of the countries concerned in this proceeding, to 19.3 per cent in the investigation period, considerably below). These imports originate in a wide range of third countries outside the countries concerned by this investigation. The most significant in terms of volume was, with its 1995 market share, Turkey (3.6 per cent). However Eurostat statistics show that imports from Turkey declined between 1992 and 1995 and were imported at prices significantly above those of the countries concerned by this investigation. Countries with prices comparable to those of the countries concerned by this investigation include Romania, Slovakia and Estonia. However, their combined market share of 2.8 per cent in 1995 is just over 10 per cent of the combined share of the countries concerned by this investigation.

(101) It follows from the foregoing that imports from countries not concerned which undercut the Community industry's prices could also have contributed to the injury suffered by the Community industry. However, the Commission considered that the link between the dumped imports and the injury to the Community industry was sufficiently clear and direct as to consider that injury from these other sources, which had only a small market share, had not been wrongly attributed in the analysis. In this respect, there was shown to be a reasonable coincidence in timing between, on the one hand, the degree of the effects of low prices and rising volumes of the dumped imports and, on the other, the material injury attributed to the dumped imports.

Pakistan, Egypt, China, Indonesia and Turkey, important sources of supply of this product were imported into the Community at dumped prices which would have provided these producers with an unfair advantage over the Community industry in the present proceeding. It cannot therefore be ruled out that distorted competition from this source contributed to the situation of the Community industry.

(108) Nevertheless it should be noted that the production and market share of the non-complainant producers have fallen between 1992 and the investigation period. Indeed the fall in production across the Community has been due to reduction by the non-complainants rather than by complainants. Since the imports concerned have increased over this timescale, the Commission decided that competition by non- complainants did not invalidate the conclusion that the imports concerned caused the injury observed.

4. Conclusion on causation

(109) As has been shown above, there is a direct causal link between the increased volume and the price effect of the dumped imports and the material injury suffered by the Community industry. The direct link in this case is demonstrated by the existence of heavy undercutting which can reasonably explain the significant increase in market share of the dumped imports from 16.9 per cent in 1992 to 25.1 per cent in the investigation period and the corresponding negative consequences on volumes and prices of sales of Community producers. In terms of volumes, Community producers' market share decreased from 62.2 per cent in 1992 to 55.6 per cent in the investigation period. This fall was not reflected at the level of individual producers of the Community industry because they obtained sufficient benefit from the demise of other Community producers to keep their sales volume relatively stable. However, as far as the prices of the dumped imports are concerned, they have had an evident impact on the sampled producers, may of them being SMEs, whose profitability has fallen from 3.6 per cent to 1.6 per cent. In this respect, the Commission noted that such a situation can cause particular difficulty for SMEs given their lack of resources and the reluctance of banks to finance any losses.

(110) The consequent impact of the low-priced dumped imports has to be considered at two levels. Firstly, they have resulted in the exit of a significant number of firms with a considerable number of jobs lost. This is an on-going proc.75 con TD -0.10e T.1275 Tbe6ulty ee reasona conslted it suchitability has n onlsolen flrocrys respect, thj 0 -25.5 TD -0.12630 Tc 0 T1.8327 (conshiside

the Community industry. However, even the combined effect of these other factors could not break the direct causal link established since it can reasonably be concluded that the Community industry could, in the absence of the dumped imports, have adapted to these other

share, any relatively positive development of the complaining producers must be seen as threatened in the absence of anti-dumping measures." (Emphasis added)

4.6 During the first round of consultations, India raised its concern that imports other than dumped imports had been taken into account for the assessment of injury:[81]

"Mr Seth: Several provisions in Article 3 of the Agreement require that injury caused by dumped imports be determined. Article 3.1 requires that

'[a] determination of injury . . . shall . . . involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.'

Similarly, Articles 3.2, 3.4, 3.5, 3.6 and 3.7 refer to 'dumped imports' as opposed to 'all imports of the product concerned'. The European Community has in two different ways included non-dumped imports in its determination and this affects each and all of these provisions.

. . . it is clear from the disclosure documents that the EC in its injury determination implicitly considers all Indian exports to the EC during the investigation period to have been dumped, even though the case handlers in the dumping team have ascertained that not all Indian exports during the investigation period (1 July 1995 to 30 June 1996) were dumped.

India believes that, for these two reasons, the EC has determined injury and causality inconsistently with Articles 3.1, 3.2, 3.4 and 3.5.

. . .

[EC]: You recognise that this is normal practice. I cannot deny there is an assumption element. We make the dumping calculation over the like product. On this basis we found that the dumping determination covered all imports during the IP. We compensated for this by using WA-to-WA comparison in the dumping margins.

Mr Seth observes that no such compensation takes place due to the zeroing practice . . . "

4.7 During the second round of consultations the matter was raised again:[82]

"Mr Seth: I'll move on to a slightly different aspect now. Did the EC agree that it assumed for the injury analysis that all imports from India were dumped?

[EC]: Yes. This responds to your questions 19 to 24. Article 2.1 requires that dumping is established for a 'product'. On this basis, we put dumping results of types in an average form. Thus, the result is an average."

4.8 In its letter of 29 June 1999[83], the EC provided the following written answers:

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[81] The verbatim report of this first round is attached as Annex 11.
[82] The verbatim report of the second round is attached as Annex 13.
[83] Annex 14.

"Questions 19 to 24

Concerning dumped imports as opposed to all imports in the injury and causality determinations

In this case, the Community calculated dumping for the like product as a whole.

Dumping was investigated for a period of 1 year prior to the initiation of the proceeding. For injury, data was also examined for the investigation period though some factors were addressed for a longer period mainly to enable trends to be established."

2. EC practice

4.9 In EC practice, the injury determination consists of two elements. An injury [underselling (or sometimes undercutting)] margin is calculated per investigated exporter.[84] In Bed linen II the investigation period ["IP"] covered the period from 1 July 1995 to 30 June 1996.[85] This underselling margin is calculated over the investigation period.

4.10 Second, the investigating authorities make an assessment of the total imports and prices, and of the state of the domestic industry (the determinations required by Articles 3.1 through 3.6 ADA, inclusive). The remainder of this claim concentrates on the second determination, and notably on Article 3.1.

4.11 For the determination of the volume of *"dumped"* imports, the EC implicitly considers all Indian exports to the EC during the investigation to have been dumped. This is standard practice: *"The injury analysis concerning the examination of the volume and price effects of the dumped imports will also take into consideration imports with no or de minimis dumping margins . . . "*[86]

3. Claims

4.12 Several claims flow from the facts as described above.

4.13 First, India considers the EC determination to automatically assume that all imports of bed linen from India during the investigation period were dumped to lead to a finding inconsistent with Article 3.1.

4.14 Second, in the provisional Regulation the EC has insufficiently explained the basis for its consideration of all imports of bed linen from India as being *"dumped"*. (If the EC has not taken account of non-dumped imports, this is not evident from the provisional Regulation and the provisional disclosure document.) Consequently, the EC acted inconsistently with Article 12.2.1 of the ADA.

4.15 Third, in the definitive Regulation the EC has insufficiently explained the basis for its consideration of all imports of bed linen from India as being *"dumped"*. (If the EC has not taken account of non-dumped imports, this is not evident from the definitive Regulation and the definitive disclosure document.) Consequently, the EC acted inconsistently with Article 12.2.2 of the ADA.

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[84] On the basis of this, the sample injury margin and the residual injury margin are determined.

[85] Provisional Regulation at recital (9).

[86] See in this respect Müller, Khan, Neumann, *EC Anti-Dumping Law—A Commentary on Regulation 384/96*, Wiley (1998) at 189.

4. Claim 8: inconsistency with Article 3.1

4.1 The text of Article 3.1

4.16 Articles 3.1, 3.2, 3.4, 3.5, and 3.6 of the ADA require that injury caused by *"dumped"* imports be determined:

> *"Determination of Injury*[1]
>
> *3.1 A determination of injury for purposes of Article VI of GATT 1994 shall . . . involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.*
>
> *3.2 With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree . . .*
>
> *3.4 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 . . .*
>
> *3.5 It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include inter alia the volume and prices of imports not sold at dumping prices*
>
> *3.6 The effect of the dumped imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers' sales and profits. If such separate identification of that production is not possible, the effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.*
>
> . . .
>
> *Footnote 1. Under this Agreement the term 'injury' shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article."*

(Emphasis added)

4.17 First, throughout Article 3 the language is consistent: the injury to the domestic industry must have been caused by *"dumped imports"*.

"4. Volume and market share of dumped imports (Annex 3)

Dumped imports from the three countries concerned increased from 33,825 tonnes in 1992 to

period

imports of the product concerned from all companies for the purposes of Article 3.1. If the EC had not made the errors in the dumping calculation noted in Part III of this submission, this would have been directly relevant for the situation of at least the company Prakash.

4.34 Last, the conceptual consequence of the EC's practice should be considered in its extreme application: if just one model out of a hundred models under investigation causes a weighted average dumping margin slightly over the *de minimis* threshold, dumping will be found overall and all imports will be considered dumped for the injury analysis.

4.35 India considers that the failure of the EC to examine dumped transactions only for the purpose

4.38 If the EC took account for the purposes of Article 3 in any way of only the dumped imports, there is nothing in the published Regulations or the non-confidential file to show for it. The volume and market share of *"dumped imports"* would seem to be a matter of vital importance to any injury determination. Under these circumstances, the EC can hardly claim that the provisional Regulation or the provisional disclosure explained *"in sufficient detail the findings and conclusions reached on all issues of fact and law considered material"*. Nor can it claim that these documents properly explained the *"considerations relevant to the injury determination as set out in Article 3"*.

4.39 For the above reasons India considers that the EC, even if it did consider only the impact of the *"dumped imports"* for the purpose of Article 3, acted inconsistently with Article 12.2.1.

6. Claim 10: inconsistency with Article 12.2.2

6.1 The text492 Tw (forrA1Li4ered material") Tj 5 TD - Tc 0.3 3

If such information has been provided in the confidential questionnaire responses of the EC sample, it has not been summarised in non-confidential form and should be left without consideration by the Commission . . .

4.11 Wages

No information whatsoever has been provided in the non-confidential version of the

4.48 In the definitive disclosure document and definitive Regulation the EC confirmed its provisional assessment of the factors and indices having a bearing on the state of the domestic industry (recitals (40)-(42)), again without further mentioning or explaining the following factors and indices:

— productivity;
— return on investments;
— capacity and capacity utilisation;
— factors affecting domestic prices;
— actual and potential negative effects on cash flow;
— inventories;
— wages;
— growth; and
— investments.

4.49

*"**Ouestion 45***

Would the EC agree that it did not discuss or consider the following injury factors listed in Article 3.4?
— 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, wages, growth, ability to raise capital or investments.

It is the general practice of the European Community to consider all possible injury factors. In this proceeding, the following injury indicators were considered particularly relevant for the purpose of assessing injury to the Community industry:

(a) -Production	*-recital (81) of provisional duty Regulation*
(b) -sales by volume	*-recital (82)*
(c) -sales by value	*-recital (83)*
(d) -market share	*-recital (84) and (85)*
(e) -price development	*-recital (86) to (88)*
(f) -profitability	*-recital (89) and (90)*
(g) -employment	*-recital (91)*

In recitals (93) to (94) of the provisional duty Regulation as well as in recital (40) of the definitive duty Regulation, it was concluded that the decisive injury indicators which led to the conclusion of material injury suffered by the Community industry were its declining and inadequate profitability, price suppression and the low level of its sales prices in the Community market."

4.51 The EC therefore clearly acknowledged that it did not discuss all Article 3.4 factors. Despite this acknowledgement in its answer to question 45, the EC in its letter

2. Claims

4.52 Three claims flow from the facts described above.

4.53 First, the EC's failure to evaluate all relevant economic factors and indices having a bearing on the state of the industry is inconsistent with Article 3.4 of the ADA.

4.54 Second, even if the EC did make an evaluation of all factors and indices having a bearing on the state of the industry, it failed to properly explain this in a sufficiently detailed manner in the provisional Regulation or in the provisional disclosure document. This is inconsistent with Article 12.2.1.

4.55 Third, even if the EC did make an evaluation of all factors and indices having a bearing on the state of the industry, it failed to properly explain this in a sufficiently detailed manner in the definitive Regulation or in the definitive disclosure document. This is inconsistent with Article 12.2.2.

3. Claim 11: inconsistency with Article 3.4

3.1 The text of Article 3.4

4.56 It is recalled that Article 3.4 provides as follows:

> *"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 utilization 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."* (Emphasis added)

4.57 The first key word would seem to be *"shall"*. In the words of the Appellate Body:[100]

> *"The chapeau of Article 5.5 clearly states that the schedule in the body of that provision is mandatory. The word used in the chapeau is 'shall', not 'may'. There is no qualifying language, and there is no language that permits any method other than that set out in the schedule in Article 5.5 as a basis for the calculation of additional duties."*

4.58 There is no reason why this logic would be any different in the context of Article 3.4 of the ADA.[101] 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 *"evaluation"* implies an assessment or weighing of these factors: in Korea—

[100] European Communities—Measures affecting the importation of certain poultry products, AB-1998-3, WT/DS69/AB/R of 13 July 1998 at § 165.

[101] It is noted that the interpretative standard in Article 17.6(ii), last sentence only comes into play if the interpretation *"in accordance with customary rules of interpretation of public international law"* would lead to more than one result.

Anti-dumping duties on imports of polyacetal resins[102] the Panel noted (in the context of the 1979 Anti-Dumping Code) that:

> *"While the relative weight to be accorded to each of [the] factors [in Article 3.3 of the 1979 Anti-Dumping Code] depended upon the circumstances of each particular case, the overall context of an analysis of the specific factors mentioned in Article 3:3 was that of 'an evaluation of all relevant economic factors and indices having a bearing on the state of the industry' . . ."*

4.59 In order for this assessment or weighing to lead to a correct result, it is by necessity imperative that all relevant factors and indices are considered.

4.60 The word *"all"* is given further meaning by the word *"including"*. It follows from this term that at a minimum the factors and indices listed in the remainder of the sentence must be considered (evaluated). The last sentence adds that there may in fact be additional factors and indices which, if relevant to the state of the domestic industry, should also be evaluated; but this does not mean that the factors and indices explicitly mentioned in the first sentence should not all be evaluated.[103]

3.2 Legal arguments relating to the claim relating to Article 3.4

4.61 There are two issues involved.

4.62 First, the wording of Article 3.4 is not specific to the ADA. Similar or identical wording featured in Article 3.3 of the 1979 Anti-Dumping Code[104], Article 6(3) of the 1979 Agreement on interpretation and application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade[105]; and in Article 15.4 of the Agreement on Subsidies and Countervailing Measures.[106]

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[102] Korea—Anti-dumping duties on imports of polyacetal resins from the United States, Report of the

4.63 In the context of these Agreements there has been consistent Panel jurisprudence on the necessity to examine 'all' relevant factors and indices. In Brazil—countervailing duties on milk the Panel made such an analysis:[107]

> *"333. The Panel noted that the list of factors mentioned in Article 6:3 in this*

4.65 In the context of Article 3.3 of the 1979 Anti-Dumping Code the Panel in United States—Salmon noted that:[109]

> *"an essential element of a review of whether a determination of material injury was in conformity with Article 3 was an examination of whether the factors set forth in Articles 3:2 and 3:3 had been properly considered by the investigating authorities."*

4.66 This was also

> *enumerated injury factors in detail. In United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*[114]*, the Panel criticised the US for providing inconsistent and inadequate information. The Panel in United States – Measure Affecting Woven Wool Shirts and Blouses from India stated*[115] *that, "[a]t a minimum, the importing Member must be able to demonstrate that it has considered the relevance or otherwise of each of the factors listed […]". Since the United States examined only eight out of eleven listed factors, while some of the information provided by the United States was either incomplete, vague or imprecise, the Panel ruled that the requirements of Article 6.3 of the Agreement on Textiles and Clothing had not been respected.*[116]
>
> *5.218 The European Communities argues that even though the wording of Article 6.3 of the Agreement on Textiles and Clothing is slightly different from Article 4.2(a) of the Agreement on Safeguards, both provisions nevertheless contain a list of injury factors which must be evaluated properly by the investigating authority. Therefore, in accordance with the rationale stated in the above-mentioned Panel Reports, the European Communities submits that, at a minimum, a "serious injury" determination under the Agreement on Safeguards must demonstrate that the relevance or otherwise of each of the factors listed in Article 4.2(a) of the Agreement on Safeguards was considered. The European Communities further submits that that provision requires each injury factor to be properly analysed. All listed factors have to be investigated completely and in full. The result of the analysis cannot be inconsistent, inadequate, incomplete, vague or imprecise. Therefore, in the EC view, if Argentina investigates five separate sectors of the footwear industry, but fails – as mentioned earlier – to investigate import trends, market share, profits and losses and employment for each market segment, it violates its obligations under the Agreement on Safeguards."* [Emphasis in original and emphasis added]

4.68 Even though the wording of Article 4.2(a) of the Agreement on Safeguards is slightly different from Article 3.4 ADA, both provisions nevertheless contain a list of injury factors which must be evaluated properly by the investigating authority. *All* listed factors have to be investigated completely and in full. The result of the analysis cannot be inconsistent, inadequate, incomplete, vague or imprecise.

4.69 It is recalled that the Panel agreed with this argument:[117]

> *"8.123 We note, first, that the text of Article 4.2(a) of the Safeguards Agreement explicitly requires the evaluation of "all relevant factors", in particular those listed in that article. Second, Article 6.4 of the ATC*[118] *contains no such express requirement and recognises that*

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share, exports, wages, employment, domestic prices, profits and investments; none of which, either alone or combined with other factors, can necessarily give decisive guidance." (emphasis added)."

[114] [Footnote 210 in original]: *"Panel Report on 'United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear', WT/DS24/R, 8 November 1996, at paragraph 7.45."*

[115] [Footnote 211 in original]: *"See Panel Report on 'United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India', 6 January 1997, WT/DS33/R, at paragraph 7.26."*

[116] [Footnote 212 in original]: *"Idem, at paragraph 7.51."*

[117] Argentina—Safeguard Measures on Imports of Footwear, Report of the Panel adopted on 25 June 1999, WT/DS121/R.

[118] [Footnote 510 in original]: *"Article 6.4 of the ATC: "… The Member or Members to whom serious damage, or actual threat thereof … is attributed, shall be determined on the basis of a sharp and substantial increase in imports, actual or imminent, from such a Member or Members individually, and on the basis of the level of imports as compared with imports from other commercial transaction; none of these factors, either alone or combined with other factors, can necessarily give decisive guidance. …"."*

> *"none of these factors … can necessarily give decisive guidance. Nonetheless, the panels on United States - Underwear and United States - Shirts and Blouses ruled that each and every injury factor mentioned in Article 6.4 of the ATC has to be considered by the national authority. With regard to the obligation to evaluate "all relevant factors" we consider these past panel reports relevant. Consequently, in accordance with the text of the Safeguards Agreement and past practice, we consider that an evaluation of all factors listed in Article 4.2(a) is required."* [Emphasis added]

It is further recalled that the Appellate Body confirmed the view of the Panel on this issue:[119]

> *"136. We agree with the Panel's interpretation that Article 4.2(a) of the Agreement on Safeguards requires a demonstration that the competent authorities evaluated, at a minimum, each of the factors listed in Article 4.2(a) as well as all other factors that are relevant to the situation of the industry concerned."*

4.70 It is further recalled that the EC raised the same argument, and the Panel was of the same

> *relevance or otherwise of each of the factors listed [...]".*[123] *Since the United States did not examine eight of these factors in the context of the particular industry without giving any explanation for not doing so, the requirements of Article 6 of the Agreement on Textiles and Clothing were not respected.*[124]
>
> *4.298 Even though the wording of Article 6.3 of the Agreement on Textiles and Clothing is slightly different from Article 4.2 (a) of the Agreement on Safeguards, both provisions nevertheless contain a list of injury factors which shall be evaluated by the investigating authority. Therefore, in accordance with the rationale stated in the above Panel reports, the European Communities submit that, at a minimum, a serious injury determination under the Agreement on Safeguards must demonstrate that the relevance or otherwise of each of the factors listed in Article 4.2(a) of the Agreement on Safeguards was considered. The European Communities would further submit that that provision requires each injury factor to be properly analysed unless it is explained for what reason the injury factor may be disregarded."*

The Panel agreed:

> *"7.58 . . . In assessing the serious injury to the whole domestic industry, . . . all factors listed in Article 4.2 must be addressed. . . ."*

The Appellate Body did not overturn this view.

4.71 The interpretative standard in Article 17.6(ii), last sentence does not come into play since the interpretation of the ordinary meaning to be given to the terms of Article 3.4 in their context and in the light of its object and purpose leaves no doubt on their interpretation.

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4.73 The investigating authorities thus failed to make a proper evaluation of all relevant economic factors and indices[126], and consequently acted inconsistently with Article 3.4 of the ADA.

4.74 Second, without prejudice to the argument presented above, it is recalled that the Indian exporters had made specific arguments relating to the available information on

— capacity and capacity utilisation;
— cash flow;
— inventories;
— wages;
— growth; and
— investments.

4.75 Admittedly, in view of the paucity of the non-confidential summaries made available by the complainants, it was not possible for Indian exporters to make a meaningful analysis of these factors. Nonetheless, India believes that the failure of the sampled domestic industry producers to provide meaningful non-confidential summaries of the data concerning these factors cannot shield the investigating authorities from their obligations under Article 3.4. It would rather seem that, in view of the failure of the domestic industry to provide meaningful non-confidential data on these factors, the investigating authorities had, if anything, an additional responsibility to investigate and evaluate these matters. Otherwise it would be very easy for a domestic industry to manipulate an injury determination by providing information only on negative factors and not on positive factors.

4.76

4.2 Legal arguments relating to the claims relating to Article 12.2.1

4.78 As stated, the European Commission is the only entity having access to all facts relating to the initiation. Article 12 fulfils in this context a crucial rôle to ensure a certain degree of transparency.[127]

4.79 If the EC took account of productivity, return on investments, capacity and capacity utilisation, factors affecting domestic prices, actual and potential negative effects on cash flow, inventories, wages, growth, and investments, there is nothing in the published Regulations, the disclosure documents or elsewhere to attest to it.

4.80 First, it would seem that the Article 3.4 determination, which is required under Article 3.1, letter (b) of the ADA, is by definition an issue *"of fact and law considered material"* as implied by Article 12.2.

4.81 Second, in any event, the determination required by Article 3.4 would be (an important) part of the *"considerations relevant to the injury determination as set out in Article 3"* as intended by Article 12.2.1(iv). The wording of Article 12.2.1 is mandatory (*"shall . . . contain in particular"*).

4.82

investments, capacity and capacity utilisation, factors affecting domestic prices, actual and potential negative effects on cash flow, inventories, wages, growth, and investments, the infringement of Article 12.2.1 noted in the second claim is by the same token an infringement of Article 12.2.2.

4.86 Moreover, in view of the arguments made by the Indian exporters the EC was under an additional obligation to provide explanations on the evaluation of these factors and indices (*"as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers"*). Its failure to do so implies in itself an inconsistency with Article 12.2.2.

6. Claim 14: inconsistency with Article 6

4.87 To the extent that the EC were to argue that it has fulfilled its obligations under Article 12, the Indian exporters were not aware of this. Accordingly the EC has, in addition to acting contrary to Article 12, also acted inconsistently with the right of defence, as set forth in Article 6 of the ADA.

6.1 The text of Article 6

4.88 It is recalled that the relevant parts of Article 6 require that:

> *Article 6: Evidence*
>
> *6.2 Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests.*
>
> . . .
>
> *6.4 The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.*
>
> . . .
>
> *6.9 The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests."*

6.2 Legal Arguments pertaining to Article 6

4.89 In view of the failure of the EC to disclose to the Indian exporters *that* and *how* it has in fact considered all factors in Article 3.4, it has also acted inconsistently with Article 6.2, 6.4, and 6.9.

4.90 Article 6.2 requires that throughout the investigation all interested parties shall have a full opportunity for the defence of their interest. To the extent that information on numerous relevant factors in Article 3.4 were never divulged, this has not been the case and the EC has acted inconsistently with Article 6.1.

4.91 Article 6.4 requires that the authorities shall provide the opportunity to see all information that is relevant. This has never happened in view of the absence on information on numerous relevant factors in Article 3.4.

4.92 Article 6.9 requires that interested parties shall be informed of the essential facts under consideration. Clearly this has never happened with respect to numerous relevant factors mentioned in Article 3.4.

C. ARTICLE 3.4: THE EC FAILED TO MAKE A CONSISTENT DETERMINATION OF THE STATE OF THE 'DOMESTIC INDUSTRY'

4.93 **Claim 15**: The EC has chosen a sample from the domestic industry, but did not consistently base its injury determination on this sample. In addition, the EC has explicitly determined that the domestic industry consists of 35 companies, but relied in its injury determination on companies outside this group in order to determine injury. Last, the EC chose to rely on different 'levels' of industry for different injury indices without any apparent reason other than goal-oriented 'picking and choosing' of injury. For each of these three reasons the EC acted inconsistently with Article 3.4. Moreover, the claim that the sample was representative is mathematically incorrect and therefore inconsistent with Article 6.10 (**claim 16**).
The EC further failed to properly explain its reasoning, and consequently acted inconsistently with Article 12.2.1 (**claim 17**) and 12.2.2 (**claim 18**).

1. Facts

4.94 It is recalled that under EC law, the 'domestic industry' is defined by reference to the standing determination. The relevant provisions are Articles 4(1) and 5(4) of the EC basic anti-dumping Regulation:

> Article 4(1): *"For the purposes of this Regulation, the term 'Community industry' shall be interpreted as referring to the Community producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion, as defined in Article 5(4), of the total Community production of those products, except that: . . ."*
>
> Article 5(4): *"An investigation shall not be initiated pursuant to paragraph 1 unless it has been determined, on the basis of an examination as to the degree of support for, or opposition to, the complaint expressed by Community producers of the like product, that the complaint has been made by or on behalf of the Community industry. The complaint shall be considered to have been made by or on behalf of the Community industry if it is supported by those Community producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the Community industry expressing either support for or opposition to the complaint. However, no investigation shall be initiated when Community producers expressly supporting the complaint account for less than 25 per cent of total production of the like product produced by the Community industry."* (Emphasis added)

4.95 Apart from the emphasised text, the provisions seem materially similar to the Articles 4.1 and 5.4 of the ADA. It follows (and has not been and could not be denied) that the concept of 'Community industry' in EC law for all practical purposes corresponds to that of 'domestic industry' in the ADA.

producers in these Member States were therefore clear candidates for assessing the impact of the imports on the Community industry.

Producers in Portugal, for their part, sell a large proportion of their production in other Member States and represent about one third of the production of complainant companies. Even though Portugal is not a significant importer, therefore, it was decided that the effect of the imports on the producers there should be assessed and that Portugal should be represented in the sample.

(61) In consultation with the complainant Eurocoton an initial list of 19 companies was arrived at (eight from France, six from Germany, four from Italy and one from Portugal).

In the course of the enquiry one of these companies was eliminated from the sample for failing to cooperate with the enquiry. As a result of this exclusion, and of the exclusion of the other company under Article 4(1)(a) of the basic Regulation (see recital (54)), in the following injury analysis information given for 'sampled producers' is based on information supplied by the remaining 17 producers which represented 20.7 per cent of total Community production and 61.6 per cent of the production of the Community industry. They included the largest Community industry companies in Germany, Italy and Portugal, and also smaller producers. The Commission therefore considered this sample to be representative of the Community industry."

4.102 Subsequently, the provisional Regulation set out that

"(62) Data for the examination of injury caused to the Community industry was collected and analysed at three different levels, as follows:

— *at the level of the entire Community (EU-15), for trends concerning production, consumption in the Community, imports, exports and market share. Data was obtained from Eurocoton and from recognized industry sources, notably the CITH (Centre d'Information Textile et Habillement) which produces a series of production figures across the Community for the whole of textile category 20. This category is very slightly broader than the definition of the product concerned in the present proceeding. However, the difference is very slight, as the extra products it includes are of very minor significance,*

— *at the level of the Community industry, as defined above, for trends concerning production, sales by value and employment,*

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

4.103 The provisional Regulation then sets out the determination on the state of the domestic industry:

*"**(a) Production***

(81) Total output of bed linen <u>by producers in the Community</u> fell by 9.6 per cent from 138,400 tonnes in 1992 to 125,100 tonnes in the investigation period. This fall in production arose essentially through the closure of enterprises or their cessation of bed linen production

within the Community (see recital (91) below). It should also be noted that total exports by Community producers have increased by 50 per cent, from 14,027 tonnes in 1992 to 21,756 in the investigation period. Without this export performance, Community bed linen production would have suffered further than the figures given above.

The pattern observed for total Community production was not replicated at the level of the 35 producers of the Community industry, whose production rose by 8.7 per cent from 39,370 tonnes in 1992 to 42,781 tonnes in the investigation period. The Commission concluded that the Community industry represented those companies which were strong enough to survive the competition from dumped imports and which to a certain extent had benefited from the demise of those which had not so survived.

Indeed, in the course of its investigation the Commission acquired evidence of 29 companies other than the Community industry which ceased or reduced bedlinen production in the Community between 1992 and the investigation period. It is estimated that total loss of production amounted to at least 10,000 tonnes per annum.

The sales, employment and profits of companies which have since disappeared are not se60.75 r5 506

market share (from 77.8 per cent in 1992 to 72.0 per cent in the investigation period), while the Community industry as a whole and sampled producers gained market share, from 22.4 per cent to 25.1 per cent and from 14.7 per cent to 16.0 per cent respectively.

(e) Price development

(86) The Commission examined the development in average prices achieved by the sampled Community producers for the defined reference products between 1993 and the investigation period, using a constant product mix of the reference products . . .

(87) The development in average prices per kilogram of the sampled producers was also measured. This measure showed an average price development from 100 in 1992 to 97.8 in 1993 to 103.2 in the investigation period. The fact that this measure has developed more positively than prices for the defined reference products further reflects the fact the sampled producers have been forced to move into niche markets and away from high volume, mass market products.

. . .

(f) Profitability

(89) The profitability of the sampled companies declined by more than 50 per cent between 1992 and the investigation period, from a figure of 3.6 per cent to 1.6 per cent of sales . . .

(90) It should be recalled again that the sampled companies are among those which have been able to survive the competition of dumped imports. It should also be noted that the industry in question is not capital intensive and that it contains a large number of SMEs, which means that any move into loss-making can lead to immediate exit rather than remaining in business waiting for better times. This is why the companies that are left are those that are profitable or, as in this case, only just profitable.

(g) Employment

(91) Direct employment by the 35 companies of the Community industry on the product concerned declined by 5.3 per cent between 1992 and the investigation period, from around 7,000 jobs to 6, 700.

In analysing data on the Community industry, account should be taken of the 29 companies other than the Community industry which ceased or reduced bed linen production in the Community between 1992 and the investigation period (see recital (81)). The associated job losses numbered over 2,400.

(h) Conclusion on injury

(92) The Commission took into account all the economic indicators mentioned above in determining whether or not the Community industry was suffering material injury. Account was taken of the fact that the number of companies making up the Community industry was reduced in comparison with the start of the injury investigation period. The production, sales, employment and profits of companies which have since disappeared are not included in the

aggregated data for the Community industry, thus improving the apparent trends for the survivors.

(93) The Commission noted the decline in the total production and market share of Community producers. This background demonstrates the difficult conditions in which the remaining Community industry was operating. The fact that these surviving companies were able to maintain production and market share should not detract from the assessment of the overall situation. Above all, the remaining Community industry suffered declining and inadequate profitability, as further evidenced by prices which had not been able to reflect increases in the costs of raw cotton or to keep pace with inflation in prices of consumer goods.

(94) Accordingly the Commission reached the view that the Community industry had suffered material injury.

G. CAUSATION

. . .

2. Effects of the dumped imports from the countries concerned

(96) The investigation of the Community industry showed as the main injury indicator the unsatisfactory development of sales prices and the consequent declining profitability. It was also established that the dumped imports were sold at prices which significantly undercut those of the Community producers . . .

(98) It was observed among sampled producers that they had been obliged increasingly to shift production and sales to high value niche markets in order to maintain production and sales levels . . .

(99) Since price suppression and consequent decreasing profitability to inadequate levels were the main indicators on which the Commission's finding of injury was based, and in view of the coincidence in time between the deterioration of the situation of the Community industry and the significant increase of the dumped imports, it can be concluded that there was a direct causal link between these imports and the material injury found.

. . .

(105) It is clear that the decline in consumption between 1992 and the investigation period has contributed to the situation of the Community industry. However, the fall did not affect all operators equally. During this period the total volume of sales by Community producers fell by an amount 50 per cent higher than the total fall in consumption. While sales by the Community industry have remained relatively stable, benefiting from the disappearance of other Community producers, the dumped imports from the countries concerned increased by 48 per cent. Imports from other third countries decreased by 14 per cent. Because total sales by Community producers fell by 50 per cent more than the total fall in consumption and sales by other imports declined, it can be concluded that increased dumped imports through severe price undercutting gained at least one third of the sales volumes lost by Community producers. This clearly constitutes a cause of material injury not attributable to the decline in consumption . . .

(d) Competition from non-complainant producers in the Community

(107) The Community industry represents only a part of total Community production. It should therefore be examined whether competition from other producers within the Community affects the situation of the Community industry. Other producers of bed linen are known to include, in particular, a large number of 'converters', i.e. producers who make bed linen from grey cloth woven elsewhere, whereas the Community industry consists largely of integrated producers who weave most or all of their own grey cloth. As has been found, on a

—

In summary, the Commission cannot make a legally valid injury determination including other companies than those constituting the Community industry as defined in Recital 57 of the provisional duties Regulation."

4.105 Texprocil then argued that the available data on the state of the 'Community industry' (domestic industry) clearly did not point toward injury. These arguments were repeated during the second injury hearing and in the second post-hearing brief[133] of 17 July 1997 (Annex 55).

4.106 In the definitive disclosure document (Annex 56) the EC made the following comments on the issue:

"3. Situation of the Community industry

Exporters from all the exporting countries claimed that the Commission's analysis of injury was defective in that it referred to data concerning total Community production of bed linen in assessing the situation of the Community industry. They claimed in particular that information concerning companies not included in the definition of the Community industry or which no longer produce bed linen cannot be used to construe a finding of material injury.

The Commission services examined these claims carefully. It should however be remarked 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.

The Commission services nevertheless consider that data concerning total Community production of bed linen provide indicators of the conditions in which the Community industry was operating during the period considered. The suggestion that such data cannot be used ignores the nature of the industry under consideration. In capital- intensive sectors with high

4.107 In their comments on the definitive disclosure, the Indian exporters again argued that the EC's determination of the state of the domestic industry relied on companies outside the domestic industry, inconsistently with Article 3:

> *"4.2.1 Multi-layered injury determination*
>
> *Texprocil argued during its second hearing and in its comments on the provisional disclosure that the Commission is obliged to determine whether the Community industry has suffered injury. It was argued that, apart from the question whether the Commission should take account of the 66 per cent of EC producers who explicitly are not part of the Community industry, the Commission, by taking recourse to sampling, was obliged to base its determination on the results found for the sample. In the definitive disclosure the Commission apparently did not quite understand the argument and merely noted that:* [quote from definitive disclosure document]
>
> *This ignores several relevant factors. First, an injury determination is a legal assessment. The European Community agreed in the GATT/WTO context to certain rules giving guidance as to how such assessment must be made.*
>
> *The EC producers can be distinguished in the following groups:*
> *(1) the Community industry, which represent (roughly) 34 per cent or less of existing producers;*
> *(2) other EC producers, who represent over 66 per cent of EC production;*
> *(3) producers who have disappeared before the IP.*
>
> *The argument made by Texprocil was that the Commission cannot legally base its injury determination on data including group (2). Moreover, the Commission's reliance on the 'disappearance' of group (3) companies does not explain why over 66 per cent, i.e., well over two-thirds of still existing producers, does not support this proceeding.*
>
> *Last, there is another falsifying factor. As the Commission will undoubtedly know, the EC textile industry has gone through a major restructurization process in the past years. This involved, among others, the merger of many smaller companies in more viable units.*
>
> *If, four years ago, company A was purchased by company B, the Commission's logic seems to be as follows: company A has disappeared, which is a sign of injury, notwithstanding the fact that company B has expanded its production. Such 'logic', however, does not withstand scrutiny.*
>
> *Texprocil notes that the Commission, apart from the observation on pages 13-14 of the disclosure documents, has not further addressed the legal concerns of the Indian exporters.*
>
> *It is submitted that this creative and highly original manner of explaining away the natural consolidation processes in the EC textile industry is not supported by letter or spirit of Articles 3 and 4 of the WTO Anti-Dumping Agreement. Texprocil regrets that the Commission's three-level injury determination could create the unfortunate impression of a 'pick-and-choose' injury assessment. In order to avoid any such impression, the Commission is again invited to explain its position vis-à-vis Texprocil's arguments in a meaningful manner, in accordance with Article 12 of the WTO Anti-Dumping Agreement."*

4.108 In the definitive Regulation the EC changed the statements in the definitive disclosure document somewhat:

> ***"E. COMMUNITY INDUSTRY***
>
> . . .
>
> *(34) . . . the finding that the 35 complainant companies represent a major proportion of total Community production within the meaning of Article 5(4) of the basic Regulation and that they therefore constitute the Community industry within the meaning of Article 4(1) of the basic Regulation is confirmed.*
>
> ***F. INJURY***
>
> . . .
>
> ***3. Situation of the Community industry***
>
> *(40) Exporters from all the exporting countries claimed that the Commission's analysis of injury was defective in that it referred to the significant decline in total Community production of bed linen in assessing the situation of the Community industry. They claimed in particular that information concerning companies not included in the definition of the Community industry or which no longer produce bed linen cannot be used to construe a finding of material injury.*
>
> *These claims were examined carefully. It should however be remarked 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.*
>
> *(41) In the assessment of injury pursuant to Article 3 of the basic Regulation, the Community institutions have to assess the economic situation of the Community industry. This assessment usually covers the analysis of a time period of four to five years as in the present case ('assessment period`). Such an assessment is commonly based on an analysis of the complaining industry and not necessarily on companies accounting for the totality of Community production on the ground that the situation of a major proportion of the Community production is representative for its totality. Such an assessment, however, also has to take into account the structure and the nature of the industry under consideration. In the present case this industry is characterized by a high number of operators, in many cases small- and medium-sized companies, and by the fact that it is a sector with relatively low barriers to exit. The latter is mainly due to the fact that machinery can be sold or used for other products relatively simply. This has the effect that material injury is likely to manifest itself through the exit of economic operators within the assessment period.*
>
> *Consequently, to limit the assessment of injury only to companies which are still operational at the end of the assessment period (i.e. at the time of the lodging of the complaint) and thus able actively to support a complaint would mean that any injury caused to companies which have closed down before this point in time would go unconsidered in the analysis. Furthermore, it should be noted that this distortion could even be aggravated as the surviving complaining companies of the Community industry may have benefited, possibly only*

normal that, when we sample the EC industry, not all data can be obtained from the sample. Therefore, we do not see any incompatibility.

[The Indian delegation] clarifies the issue: this is factually not quite correct. For example, in Rec. 82 of the provisional Regulation the EC clearly seems to rely for other injury factors than market share on the producers not part of the domestic industry.

[EC]: No single factor is decisive. Some factors are not clearly negative. In such cases we have provided additional explanations by comparing with other competitors. This should not be confused with making an injury determination for extra-domestic industry companies. Admittedly, the Regulation is not a literary masterpiece.

. . .

2.3 The European Community acted inconsistently with Article 3.1 of the Agreement by not respecting the result of the EC sample

Mr Seth: There is another issue pertaining to the 'layered' injury determination.

On the EC side, the Commission selected a sample of 17 companies from the 35 companies making up the 'domestic industry'. It is noted that, as far as India is aware, the EC sample has been selected by the European Commission investigators in collaboration with and with the approval of the complainant, Eurocoton. It may be expected that the sample thus reflects the companies where the Commission is most likely to find data suggesting injury. In this sense, the sample is likely to be skewed and to present a more negative picture of the domestic industry than the domestic industry as a whole.

. . .

While it is acknowledged that the European Community is not obliged to sample the Community industry, it appears that, if the European Community investigators decide to limit their investigation of Indian exporters by taking recourse to sampling in accordance with Article 6.10 of the Agreement, and the result of such sample is applied to all other co-operating Indian exporters, then the result of the domestic industry sample must equally be fully applied to the whole domestic industry. Disregard of EC sample data in favour for more 'favourable' data of another group of EC producers would imply that 'the authorities' establishment of the facts'

The injury assessment has been made for the domestic (Community) industry only. In order to put this assessment into the adequate economic framework, as specified in recital (62) of the provisional duty Regulation, data was collected and analysed at the level of the entire Community, the level of the Community industry and at the level of the sampled Community producers depending on the economic indicators concerned.

Question 29

As far as the question concerning the positive developments in market share is concerned, as is rightly pointed out in your question 46 and Article 3.2 of the Agreement, one or several injury factors cannot necessarily give decisive guidance in the determination of injury.

. . .

Ouestion 34

4.116 As noted above, 'domestic industry' is defined in Article 4.1 as:

> *"the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products."*[135]

4.117 As noted earlier in this submission[136], there have been and are provisions in GATT/WTO law with similar or identical wording to that of Article 3.4. In the context of those provisions, the concept of "*domestic industry"* has been scrutinized by GATT panels on prior occasions. Notably, in United States—Definition of industry concerning wine and grape products, in the context of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade:[137]

> *". . . the Panel held the view that Article VI of the GATT and the corresponding Code provision should, because they permitted action of a non-m.f.5licatieg6atuT 7ohavewi*

4.120 Quite apart from the fact that the text of Articles 3.4 and 4.1 is crystal clear, these statements are perfectly correct and do not allow for any expansive interpretation of the 'domestic industry'.

3.2 Legal arguments relating to the claims relating to Article 3.4

4.121 Within the context of the 'domestic industry' issue, there are three main arguments why the EC acted inconsistently with Article 3.4. First, the EC did rely on companies outside the domestic industry in order to find injury (section 3.2.1 of this claim). Second, the EC, once it selected a sample from among the domestic industry, was not entitled to subsequently deviate from that sample in order to find injury (section 3.2.2). Third, the EC has at no point indicated or made clear why exactly it relied on which industry level for each injury factor (section 3.2.3).

3.2.1 The EC did in fact rely on companies outside the domestic industry to find injury

4.122 It transpires from the EC's replies given during and after the oral consultations that it considers that injury was in fact determined for the 'domestic industry' and that it did not rely on companies outside the domestic industry to find injury (see, for example, the written reply to question 29). This, however, is not corroborated by a careful analysis of the EC's published provisional determination (which was confirmed by the definitive Regulation). All further references in this sub-section are to the provisional Regulation, as quoted above in section 1. Notably, India would like to draw attention to the following five points:

4.123 a. Production. If the EC did not rely on the production data for the EU-15 producers[141], the first sub-paragraph of recital (81) is, to put it mildly, pointless. Moreover, that sub-paragraph refers to recitals

will have to weigh these factors. The metaphor springing to mind is that of a weighing scale, where the factors and indices concerning the domestic industry are weighted. Some factors will be negative and draw the scales toward an injury finding. Some other factors will be positive, and may militate towards a no-injury finding. Thus, in the final analysis not all factors will have to point towards injury, as long as, objectively seen, the investigating authorities could reasonably conclude that on the whole material injury existed and was caused by the *"dumped imports"*. That would imply that, in order to make an objective appraisal of the different injury factors, the determinations on each of these factors must have been relevant, objective, and in conformity with the ADA. On balance, the evaluation should point toward injury or no-injury, whereby no single factor will necessarily be decisive. However, what the EC did in recital (81) is to use the 'injury' allegedly and unprovably suffered by non-domestic industry producers to somehow 'justify' or 'support' the injury finding as far as production data are concerned. The image that evokes is of weighing scales where, besides the product to be weighed, the grocer performing the weighing secretly pushes a scale with his finger.

4.127 It is further noted that the production increase of 8.7 per cent for the domestic industry mentioned in the second paragraph of recital (81)[143] hardly counts as a factor indicating injury, in view of the substantial consumption decrease during the same period. Thus, it becomes clear that the Commission included non-complaining producers in order to find a decline in output.

4.128 The EC further noted that:

> *"the Community industry represented those companies which were strong enough to survive the competition from dumped imports and which to a certain extent had benefited from the demise of those which had not so survived."*

4.129 It would seem that every time one Community producer took over the activities of another, the Commission counted one disappeared company (attributed to dumped imports), whatever the reason for the take-over, and whatever the consequences for total production. In the climate of re-organisation of the textile industry in the EC in the beginning of the 1990s, this premise is, to use a charitable word, dubi88etiesj 0 -25.5 Tf 0.0625 Tc 0 Tw (4.1) Tj 13.5 0 TD -0.37530296 Tc 0.3171 Tw (5u75 res-

> *"In recital (82) of the provisional duties Regulation, the Community has defined the framework of the Community market as far as the total sales volume of the product under investigation is concerned.*
>
> *As far as the injury analysis is concerned, the Community has considered the sales volume pertaining to the sample of complaining Community producers . . ."*

4.132 This, however, does not seem to correspond with the text of the Regulation: recital (92) clearly notes that

> *"[t]he Commission took into account all the economic indicators mentioned above in determining whether or not the Community industry was suffering material injury. Account was taken of the fact that the number of companies making up the Community industry was reduced in comparison with the start of the injury investigation period. The production, sales, employment and profits of companies which have since disappeared are not included in the aggregated data for the Community industry, thus improving the apparent trends for the survivors."* (Emphasis added)

4.133 In other words, the Commission did base itself on *"all"* the economic factors *"above"*, *i.e.*, also on the first paragraph of recital (82). *"All"* the economic factors *"above"* thus implies that the Commission did base itself on the EU-15 production data. Again, this would appear to contradict the reply to question 29. Moreover, in view of the close linkage between market share data and sales data, the reply is—to put it diplomatically—unlikely.

4.134 c. Market share. Recital (84) gives information on market share by volume, which may be summarised as follows: the market share of the EU-15 producers allegedly fell, while the market share of the domestic producers increased. The Commission notes that *"[t]he reason why the market share of survivors has slightly increased is that they have taken over some of the 6317.2 ncontradict the*

4.137 d. Employment. In recital (91) the Commission noted that

> *"[i]n analysing data on the Community industry, account should be taken of the 29 companies other than the Community industry which ceased or reduced bed linen production in the Community between 1992 and the investigation period . . . The associated job losses numbered over 2 400."*

4.138 Recital (41) of the definitive duties Regulation further dealt with this issue:

> *"to limit the assessment of injury only to companies which are still operational at the end of the assessment period (i.e. at the time of the lodging of the complaint) and thus able actively to support a complaint would mean that any injury caused to companies which have closed down before this point in time would go unconsidered in the analysis."*

4.139 The question is begged how the EC can know that these companies would have been complainants and thus part of the Community industry if they still had existed at the time of the complaint. Even in the Commission's determination, only 34% of EU-15 production existing at the time of the complaint supported the complainant and thus were included in the domestic industry. The Commission's gratuitous and full inclusion of companies that disappeared well before the investigation period for the determination of employment factors clearly implies the inclusion of companies outside the 35 that make up the domestic industry. Furthermore, how can the Commission, without any evidence whatsoever, attribute such disappearance to imports that occurred in years with respect to which dumping was never established?

4.140 e. Allegedly disappeared companies. Recital (105) is noted:

specially mentions production, sales, employment and profits. Of these four factors, three (production, sales and employment) were clearly based on EU-15 data.

4.144 The provisional Regulation, and consequently the definitive Regulation confirming it, is thus vitiated by an inconsistency with Article 3.4 of the ADA.

3.2.2 The EC, once it selected a sample from among the domestic industry, was not entitled to subsequently deviate from that sample in order to find injury

4.145 India takes no issue with the EC's right to resort to sampling of the domestic industry for the injury determination. This would seem evident if Articles 6.10 and 6.11 are read together:

4.148 The treatment of the Indian sample contrasts with that accorded the EC sample. First, unlike the Indian sample, the European Commission obtained the agreement from the industry concerned for the EC sample. Then, the EC did not stick to the results of the sample, but rather made a determination of the state of the industry where for some factors it relied on the sample, but for many others not. For a number of factors, sample data are not even mentioned, even though such data would normally be available to the investigating authorities in the confidential versions of the questionnaire responses of the sample. It transpires from the determination that the EC especially did not rely on the sample for those factors where the data for the domestic industry or the EU-15 producers pointed to 'more injury' than the data for the sample.

4.149 In India's view, the EC was free to make its determination of the state of the domestic industry by resorting to sampling of the domestic industry. However, when it decided to do so, it should have relied on the results for that sample, and not reverted to other levels of industry when these were better suited for an injury determination.

4.150 Indeed, the EC's failure to stick to the results of the sample, especially when compared with the rigorous and mechanical application of the results of the Indian sample to India, cannot be considered an 'unbiased and objective' evaluation of the factors and indices listed in Article 3.4, within the meaning of Article 17.6(i). It follows that the EC's determination of the state of the domestic industry is inconsistent with Article 3.4 of the ADA.

3.2.3 The EC has at no point indicated or made clear why exactly it relied on which industry level for each injury factor

4.151 The provisional determination in the relevant part may be summarised as follows:

Recital	Factor or index	Industry level	Tendency
(81)	Production	EU-15 Domestic industry	Decrease of 9.6% Increase of 8.7%
(82)	Sales by volume	EU-15 Sample	Decrease of 17% Decrease of 1.5%
(83)	Sales by value	Domestic industry Sample	Increase of 4.2% Increase of 1.7%
(84)	Market share by volume	EU-15 Sample	Decrease from 62.2 to 55.6% Increase from 10.7 to 11.3%
(85)	Market share by value	EU-15 Domestic industry Sample	Decrease from 77.8 to 72% Increase from 22.4 to 25.1% Increase from 14.7 to 16%
(86)-(88)	Price development	EU-15 Sample	Decrease of 0.8% Increase of 3.2%
(89)-(90)	Profitability	Sample	Decrease from 3.6 to 1.6%
(91)	Employment	Domestic industry	Decrease of 5.3%

4.152 Even if the EC's replies to India's questions 28-32 on the 'levels of industry'[149] issue would be correct (*quod non*) this does not explain on what basis the EC took which factor as predominant. The EC did not indicate why it failed to even mention production by the sample; sales (volume) by the domestic industry; the market share (volume) of the domestic industry; employment of the sample; or failed to provide any information or indications on the price developments and profitability situation of the domestic industry.

4.153 There is no apparent logic as to why the EC mentioned which industry level with which injury factor. For example, why did the Commission base its conclusions for sales by volume on data concerning EC-15 production and the sample, while data on sales by value were based on the Community industry and sampled producers? Why is there no indication of the market share by volume for the domestic industry?

[149] The term 'industry level' is used merely as shorthand for the three levels of industry investigated by the EC, naus levels of industryg whichUd the samp-0.8ated by

4.154 The Commission has in its written answer No 32 relied on Article 3.2 of the Agreement, which provides that *"[n]o one or several of these factors can necessarily give decisive guidance".* This is true. But it cannot mean that the EC, when making an injury determination, can 'pick and choose' for each factor in Article 3.4, without providing any reasonable basis thereof, which industry level it will rely on to arrive at an injury finding.

4.155 The EC's failure to indicate any basis on which it determined which element should be appropriately considered at which level, implies that the evaluation of the factors and indices was not unbiased and objective. Consequently, this determination is inconsistent with Article 3.4 of the ADA.

4.156 In summary, for the reasons indicated in IV.C.3.2.1, IV.C.3.2.2 and IV.C.3.2.3 the EC acted inconsistently with Article 3.4.

4.157 As an additional observation India notes that these infringements are not 'repaired' by the special rule of interpretation laid down in the second sentence of Article 17.6(ii). That rule only comes into play where the provisions of the Agreement allow for more than one interpretation. That, however, is not an issue in this case.

4. Claim 16: Inconsistency with Articles 6.10 and 6.11

4.1 The text of Articles 6.10 and 6.11

4.158 The relevant of Article 6.10 and 6.11 provides in the relevant part that:

> *" . . . In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at special Article7 India r to 06he Agreeunw (2 11h As eTisnforma.764ucts by uoul0.28vAs egC.) .26 Tw (" .*

defines as an 'interested party' among others, 'a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.' This implies that the sample must be chosen from the 'producer[s] of the like product in the importing Member' (sampling of associations is not at play here).

4.161 Whatever the exact meaning of 'statistically valid', it would seem certain that it excludes the possibility of taking a sample from *only* producers supporting the application. The EC sample was therefore statistically not valid and the injury determination based on it, vitiated by errors of facts and law. India believes that the EC has acted inconsistently with Article 6.10 and 6.11.

5. Claim 17: inconsistency with Article 12.2.1

5.1 The text of Article 12.2.1

4.162 It is recalled that Articles 12.2 and 12.2.1 of the ADA provide in relevant part as follows:

> *"12.2 Public notice shall be given of any preliminary or final determination, whether affirmative or negative . . . Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities . . .*
>
> *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 . . .*
> *(iv) considerations relevant to the injury determination as set out in Article 3;*
> *(v) the main reasons leading to the determination."*

5.2 Legal arguments relating to the claims relating to Article 12.2.1

4.163 Earlier in this submission, the argument was already made in the context of Article 12.2.1 that India should be able to rely on the published determinations and disclosure documents to ascertain what the basis was for the EC's determinations.[150] This is equally true in the context of the issue here. There are three issues here:

4.164 First, if the EC did not rely on companies outside the domestic industry in order to determine injury, it did not explain this clearly in the provisional disclosure document or in the provisional Regulation.

4.165 Second, the EC failed to explain why for many injury factors it did not rely on the sample which it had selected in agreement with the complainant, but reverted to the domestic industry or the EU-15 producers instead.

4.166 Third, the EC has at no point indicated or made clear why it relied on which industry level for each injury factor. If there was any logical or proper motive behind this choice, it has not been made known to the Indian exporters.

[150] See section IV.A.5.2, above.

4.167 Fourth, the EC has at no point explained why it considered the selected sample representative (statistically valid).

4.168 In view of the importance of these issues for the Article 3.4 determination, India believes that the EC failed to explain *"in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities"* as required by Article 12.2 of the ADA. Moreover, the EC's provisional Regulation and the provisional disclosure document thus do not contain *"sufficiently detailed explanations for the preliminary determination on injury"* as required by Article 12.2.1.

4.169 Additionally, during Texprocil's first injury hearing and in the subsequent post-hearing brief filed by Texprocil[151], detailed comments were made on behalf of the Indian exporters on, e.g., production data and employment data for the sample. However, the EC did not mention or comment on the production and employment data for the sample. It follows that the EC failed to *"refer to the matters of fact and law which have led to arguments being accepted or rejected"* as required by Article 12.2.1.

4.170 In summary, the EC acted inconsistently with Article 12.2.1 of the ADA.

6. Claim 18: inconsistency with Article 12.2.2

6.1 The text of Article 12.2.2

4.171 Article 12.2.2 provides in relevant part that:

> *"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 . . . 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 . . . 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 . . ."* (Emphasis added)

6.2 Legal arguments relating to the claims relating to Article 12.2.2

4.172 Reference is made to section IV.C.5.2, above. The three issues which were mentioned there were similarly present during the definitive stage:

4.173 First, if the EC did not rely on companies outside the domestic industry in order to determine injury, it did not explain this clearly in the definitive disclosure document or in the definitive Regulation.

4.174 Secondinf6n9 Tc 0.e(Regu4ae4i2sf2i2056xij 5eih1 Tj 42 0 1 prserte6hy on)940.5r11.25 TbwiTD162.166

4.175 Third, the EC has at no point indicated or made clear why it relied on which industry level for each injury factor. If there was any logical or proper motive behind this choice, it has not been made known to the Indian exporters.

4.176 Fourth, the EC has never explained, made clear or indicated why it considered the sample that was drawn representative.

4.177 India therefore believes that the EC failed to explain *"the matters of fact and law and reasons which have led to the imposition of final measures"*. It further failed to properly explain the *"information described in subparagraph 2.1"*; and failed to provide *"the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters"*. In each case, it acted inconsistently with Article 12.2.2 of the ADA.

D. ARTICLES 3.4 AND 3.5:

Spinnerel und Weberelen ZELL-SCHÖNAU AG *Teichstrasse 4* *7863 ZELL*	*Stopped bed linen production*
TOTAL	*1.312 jobs*

GREECE

June 1992 *PIRAIKI - PATRAIKI S.A*	*234 losses estimated in the bed linen production.*

During the year 1992, 5 other companies had to reduce their operations with, as a result, the loss of about 2,730 jobs.

1995 *FILIATES Textiles*	*n.a.*

FRANCE

1990 *HERITIERS DE GEORGES PERRIN*	*20 jobs*
R.N.V.T.	*33 jobs*
SOLAXEN	*45 jobs*
(approx. 1.094 tons of production lost in bed linen)	
1991 *ETS. GERMAIN FRERES*	*17 jobs*
TISSAGE ET FILATURE D'AUCHEL	*43 jobs*
HERITIERS GEORGES PERRIN	*33 jobs*
(approx. 1.348 tons of production lost in bed linen)	
1992 *WALTER SEITZ PRODUCTION* *SONEP S.A. in Baisieux (makers-up)* *BRUNER VILLENBACHER in Cernay (makers-up)*	*38 jobs*
1993 *CLAEYS et Fils in Houplines (makers-up)* *DESFONGES OLIVIER in Marcq en Baroeul (makers-up)* *CANONNE in Saint-Aubert (makers-up)* *SOMACO in Riorges (weavers)* *WALTER-SEITZ (weavers)*	

1988/1991
8 finishing and simple making-up mills of the COATS VIYELLA HOME FURMSHING Group (among which 5 in HEMMING) - about 600 job losses.

PORTUGAL

1991	
About 702 job losses in	
different activity reductions.	*}*
	}
1992	*} TOTAL: 1.365 jobs*
COELIMA : restructuring with 663 job losses	*}*

BELGIUM

N.V. SOLINTEX
Kortrijksestraat 387 - PB 134
B - 8500 KORTRIJK

This company first closed down the weaving mill, becoming a converter and later had to stop also this unprofitable activity.
Production tonnage lost : 1.300 tons
179 job losses" (Emphasis in original)

4.180 The Indian exporters argued from the beginning of the proceeding that their exports of bed linen to the EC had not caused injury. Such arguments were made in the submission on injury[153],

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Community between 1992 and the investigation period. It is estimated that total loss of production amounted to at least 10,000 tonnes per annum.

The sales, employment and profits of companies which have since disappeared are not included in the aggregated data for the Community industry, thus artificially improving the

industry. The direct link in this case is demonstrated by the existence of heavy undercutting which can reasonably explain the significant increase in market share of the dumped imports from 16.9 per cent in 1992 to 25.1 per cent in the investigation period and the corresponding negative consequences on volumes and prices of sales of Community producers. In terms of volumes, Community producers' market share decreased from 62.2 per cent in 1992 to 55.6 per cent in the investigation period. This fall was not reflected at the level of individual producers of the Community industry because they obtained sufficient benefit from the demise of other Community producers to keep their sales volume relatively stable. However, as far as the prices of the dumped imports are concerned, they have had an evident impact on the sampled producers, may of them being SMEs, whose profitability has fallen from 3.6 per cent to 1.6 per cent. In this respect, the Commission noted that such a situation can cause particular difficulty for SMEs given their lack of resources and the reluctance of banks to

barriers to exit. The latter is mainly due to the fact that machinery can be sold or used for other products relatively simply. This has the effect that material injury is likely to manifest itself through the exit of economic operators within the assessment period.

Consequently, to limit the assessment of injury only to companies which are still operational at the end of the assessment period (i.e. at the time of the lodging of the complaint) and thus able actively to support a complaint would mean that any injury caused to companies which have closed down before this point in time would go unconsidered in the analysis. Furthermore, it should be noted that this distortion could even be aggravated as the surviving complaining companies of the Community industry may have benefited, possibly only temporarily, from the disappearance of other companies, causing their positive development to be overestimated.

In the present case, it should be noted that 29 companies of the bed linen industry have closed down or ceased production: that is to say, that a substantial number of companies have ceased operation. Furthermore, given the substantial price undercutting established, the strong increase in the volumes of the imports concerned and their consequent rise in market share, any relatively positive development of the complaining producers must be seen as threatened in the absence of anti-dumping measures." (Emphasis added)

4.184 During the consultations, India raised its concern that imports other than dumped imports had been taken into account for the assessment of injury:[156]

"Mr Seth: Several provisions in Article 3 of the Agreement require that injury caused by dumped imports be determined. Article 3.1 requires that

'[a] determination of injury . . . shall . . . involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.'

Similarly, Articles 3.2, 3.4, 3.5, 3.6 and 3.7 refer to 'dumped imports' as opposed to 'all imports of the product concerned'. The European Community has . . . included non-dumped imports in its determination and this affects each and all of these provisions.

. . ."

4.185 During the second round of consultations the matter was raised again [see Annex 13].

2. EC practice

4.186 In EC practi

investigation period. In the Bed linen II proceeding this period lasted from 1992 up to the end of the investigation period.[158]

4.188 The EC implicitly considers all Indian exports to the EC during the investigation to have been dumped. This is standard practice: *"The injury analysis concerning the examination of the volume and price effects of the dumped imports will also take into consideration imports with no or de minimis dumping margins . . ."*[159]

4.189 The EC further assumes that all imports of the like product in the years immediately preceding the investigation period were dumped. This also appears to be standard practice:

> *"[The Indian delegation] clarifies that India takes no issue with the EC practice to look at a longer period. India's problem is that the EC seems to automatically assume when assessing the impact of 'dumped imports' on the domestic industry that all imports in the preceding years are considered as dumped. Our second problem is that there were a number of product types exported from India during the investigation period which were clearly not dumped. The EC could not automatically without explanation consider these as dumped.*
>
> *[EC]: You recognise that this is normal practice. I cannot deny there is an assumption element. We make the dumping over the like product. On this basis we found that the dumping determination covered all imports during the IP. We compensated for this by using WA-to-WA comparison in the dumping margins."*

4.190 During the second round of consultations, the EC explained the 'logic' behind this practice:

> *"[EC]: The investigation showed that there was dumping and injury for exactly the same twelve-month period. Of course, a longer period was used to compare data. This is a safeguard for the parties involved, because you then have a proper picture."*

4.191 In effect, however, the EC considers the whole period starting in 1992 and ending with the investigation period, and essentially looked at the differences between the situation in 1992 and the IP. Rather than putting the data on the situation of the domestic industry in the IP relief, the determination on the state of the EC industry is made for the whole period 1992-IP.

4.192 In this context it is illustrative that in recital (92) of the provisional Regulation the EC refers to this period as the *"injury investigation period"*, implying that the determination on the Community industry was made over the period 1992-IP rather than over the IP.

3. Claims

4.193 Several claims follow from the facts as described above.[160]

4.194 First, India believes that the EC practice to automatically consider as *"dumped"* all imports of bed linen from India in the years preceding the investigation period, is inconsistent with Article 3.4.
4.195 Second, India believes that the same set of facts also leads to a causality finding inconsistent with Article 3.5.

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[158] Ibid.
[159] Müller, Khan, Neumann, *EC Anti-Dumping Law—A Commentary on Regulation 384/96* at 189.
[160] Claims pertaining to other issues involving Article 3.4 are discussed in sections IV.B and IV.C, respectively.

4.196 Third, in the provisional Regulation the EC has insufficiently explained the basis for its finding that imports of bed linen from India 'caused' material injury to the domestic industry. This is inconsistent with Article 12.2.1.

4.197 Fourth, in the definitive Regulation the EC has insufficiently explained the basis for its finding that imports of bed linen from India *"caused"* material injury to the domestic industry. This is inconsistent with Article 12.2.2.

4. Claim 19: inconsistency with Article 3.4

4.1 The text of Article 3.4

4.198 Articles 3.1 to 3.5 of the ADA require that injury caused by dumped imports be determined. Article 3.4 provides in relevant part that:

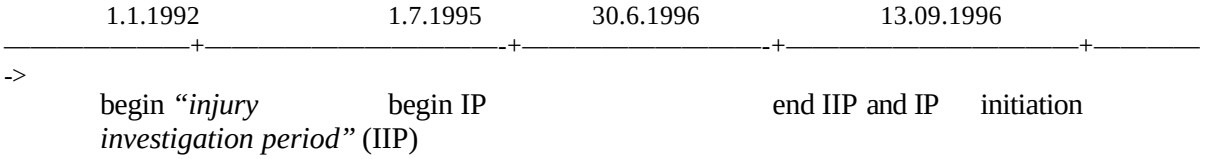
> *"The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including . . ."* (Emphasis added)

4.199

4.203 However, in the clear language of the Agreement as interpreted in accordance with the customary rules of interpretation of public international law *"dumped imports"* would seem to mean *"dumped imports"*, and *not "dumped and non-dumped imports of the like product"*. The issue of the second sentence of Article 17.6(ii) therefore does not arise in this context.

4.2 Legal arguments relating to the claims relating to Article 3.4

4.204 For the convenience of the Panel, the time flow of the events relevant for this claim is set out as follows:



4.205 From the outset it must be made clear that no issue is taken with the practice of the EC to consider the years immediately preceding the investigating period. Indeed, in order to make a meaningful injury and causality determination, it will be necessary for the EC to do so.

4.206 This is not the same thing as making one assessment for the whole *"injury investigation period"*. For example, the allegations contained in Annex 2 of the complaint (quoted above) virtually all concerned companies which (as far as India can discern) terminated business or laid off staff in the period 1988 up to the investigation period. It is not excluded that such allegations may have a certain role in the context of prima facie evidence and the standard of Article 5.2.[161] However, even if proven true, they would not be evidence of injury caused by *"dumped imports"* (*i.e.*, by imports taking place during the investigation period of 1 July 1995 to 30 June 1996.

4.207 In the injury determination the EC at several instances puts great emphasis on companies allegedly disappeared from the EC market in the period 1992-IP. Recital (81) of the provisional Regulation mentions:

> *"evidence of 29 companies other than the Community industry which ceased or reduced bedlinen production in the Community between 1992 and the investigation period. It is estimated that total loss of production amounted to at least 10,000 tonnes per annum."*

4.208 The closest thing to 'evidence' (if such a distinguished word may be used) in the non-confidential file indicative of this statement were precisely the allegations contained in Annex 2 of the complaint, and one letter from Eurocoton with further unproven allegations.[162] The Commission subsequently noted that:

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[161] This statement is not intended as recognising in any way that these allegations were correct, factually true, or in any way relevant.

[162] If the companies allegedly affected before 1992 as well as the pure weavers are discounted, this leaves the following list of companies in the complaint that allegedly went (partially or totally) out of business:

1. Erba AG; 2. Spinnerei und Weberei Pfersee; 3. Carl HECKING GmbH & Co; 4. Arnold KOCK GmbH & Co; 5. Spinnerei und Webereien Zell-Schönau AG; 6. Piraiki-Patraiki S.A.; 7. Filiates Textiles; 8. Walter Seitz Production; 9. Sonep S.A. in Baisieux (makers-up); 10. Bruner Villenbacher in Cernay (makers-up); 11. Claeys et Fils in Houplines (makers-up); 12. Desfonges Olivier in Marcq en Baroeul (makers-up); 13. Canonne in Saint-Aubert (makers-up); 14. Cede SARL in Vitry-le-François (makers-up); 15. Harle in Tergnier (makers-up); 16. MDT Develotte in La Baule (converters); 17. Savoir Faire Textile (converters); 18. Customagic in Halluin (converters); 19. Cusini Tommaso; 20. Saponaro; 21. Rossi Simeone; 22. Carminati; 23.

> *"[t]he sales, employment and profits of companies which have since disappeared are not included in the aggregated data for the Community industry, thus artificially improving the apparent trends for the survivors."*

4.209 This particular statement, if it is at all intelligible, would appear to imply that the Commission has taken account of these 29 companies when making the evaluation of the state of the domestic industry. This is very clear in recital (91) of the provisional Regulation:

> *". . . In analysing data on the Community industry, account should be taken of the 29 companies other than the Community industry which ceased or reduced bed linen production in the Community between 1992 and the investigation period (see recital (81)). The associated job losses numbered over 2 400."* (Emphasis added)

4.210 And in recital (92) ("*Conclusion on injury*"

4.214 The EC seems to assume without further comment that less companies implies less production.[164] No further evidence has been provided that the alleged demise of these 29 companies did in fact imply in each case a reduction of production.

4.215 The injury determination should not have taken account of injury allegedly caused by Indian

4.220 India believes on this basis that the EC acted inconsistently with Article 3.5 by automatically considering all imports of bed linen from India in the period 1992-30 June 1995 as *"dumped"*.

6. Claim 21: inconsistency with Article 12.2.1

6.1 The text of Article 12.2.1

4.221 Article 12.2.1 was already discussed in the context of India's claim concerning Article 3.1.

6.2 Legal arguments relating to the claims relating to Article 12.2.1

4.222 It is recalled that in anti-dumping proceedings the investigating authorities have a very dominant position as far as knowledge of the facts is concerned. This is even more so in the EC, where the European Commission is the only entity having access to all facts relating to the initiation. Only the EC authorities know what 29 companies were intended in the Regulation.

4.223 Article 12 fulfils in this context a crucial rôle to ensure a certain degree of transparency. In this context the *dictum* of the Panel in Korea—Anti-dumping duties on imports of polyacetal resins from the United States is recalled:[165]

> *"In the view of the Panel, the purpose of this provision would be frustrated if in a dispute settlement proceeding . . . a Party were allowed to defend a challenged . . . determination by reference to alleged reasons for such determination which were not part of a public statement of reasons accompanying that determination . . ."*

4.224 India may rely on the published Regulations and the disclosure documents to reflect the EC's determinations accurately.

4.225 There are two arguments why the EC failed to properly explain its determination.

4.226 First, if the EC for the purposes of Articles 3.4 and 3.5 made its determination of material injury

by these companies in 1991 when the dumped imports concerned were 30 per cent lower than in the investigation period. It is also below profit levels achieved by importers, which explains why certain producers have ceased production and switched to importing."

4.229 There has never been any determination or even allegation that imports of bed linen from India in 1991 were *"dumped"* as defined in Article 2.1 of the ADA. Consequently, this statement is suggestive but totally unproven, and does not meet the standards laid down in Article 12.2.1.

7. Claim 22: inconsistency with Article 12.2.2

7.1

It is further alleged that the volume and prices of the imported products have, among other consequences, had a negative impact on the quantities sold and the prices charged by the Community producers, resulting in substantial adverse effects on employment and the financial situation of the Community industry."

5.5 It may be noted that at no point in the notice of initiation (or indeed, in the published Regulations or elsewhere) did the EC as much as mention that there had been a Bed linen I proceeding. Similarly, the complaint leading to the Bed linen II proceeding[169] conveniently 'forgot' that an anti-dumping proceeding covering the same product and largely the same countries on the basis of a complaint by the same entity had been terminated only twenty days before.

5.6 In their first submission on injury (Annex 50) the Indian exporters expressed their concerns on the issue of prima facie evidence and the compatibility of the initiation with Article 5:

*"1.2 The Commission should have taken into account **all** available evidence when deciding on the initiation of the proceeding*

Eurocoton appears to consider that the obligations under Articles 5.2, 5.3 and 5.8 of the Agreement are fulfilled if the Commission allegations on dumping and injury in the complaint [sic]. *Such a view, if shared by the Commission, seems formalistic and contrary to letter and spirit of the Agreement.*

A logical and literal reading of [Articles 5.2, 5.3 and 5.8 of the ADA] *leads to the following conclusions:*

1. The complainant must adduce evidence of (inter alia) injury in its complaint. This evidence should relate to the matters summed up in points (i) through (iv) of Article 5.2. However, it is not necessary that the evidence in the complaint be 'court-proof'; it must be, so to speak, prima facie evidence.

2. The purpose of Articles 5.2, 5.3 and 5.8 is to avoid frivolous complaints. The Commission is under an obligation, before the initiation of the proceeding, to investigate whether the facts alleged are more than '[s]imple assertion, unsubstantiated by relevant evidence.'

In order to avoid unnecessary harassment of exporters, it is mandatory that such investigation takes place by the Commission, before the initiation.

3. If the Commission is informed by some other source than the complaint of facts related to the injury question, it must take these into account: Article 5.3 provides that '[t]he authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation.'

Article 5.8 adds in relevant part that '[a]n application . . . shall be rejected . . . as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case.' If, in other words, the

[169] The non-confidential summary thereof was made available in the non-confidential file at the time of initiation. No other relevant evidence on the alleged injury was made available in the non-confidential file during the time of initiation.

Commission is satisfied, either before or during the proceeding, that there is no factual basis to pursue the matter, it may not continue the initiation or pursuit of the proceeding. Article 5.8 does not specify that the Commission should only take into account such evidence as has been presented in the complaint; on the contrary, if the Commission has obtained information from other sources, it is under an obligation to take this into account.

4. This means that, in such cases, the evidence requirement for the complaint logically is a relative one: if strong counter evidence exists, the evidence in the complaint becomes 'simple assertion, unsubstantiated by relevant evidence', if the Commission does not further check it before the initiation.

The question now arises, whether in the present case counter evidence or indications existed, which obliged the Commission to check the allegations in the complaint. Texprocil is convinced that such counter evidence was indeed available.

On 25 January 1994 the Commission initiated an anti-dumping proceeding concerning bed linen from India, Pakistan, Thailand and Turkey. The complaint had been submitted by Eu4 en sue EanTexpd thd84 9pon iiis51.7929 Tw (This means thafrom Innonsporounsnce wovers, lmern;or

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2. <u>The complaint does not contain prima facie evidence of dumping and injury caused thereby</u>

. . .

The complaint has been based on little more than unsubstantiated allegations. First, the complainant notes that '[i]t is worth noting that these countries have access to domestically grown raw cotton . . .' This, however, ignores that Indian producers have suffered from an acute shortage of raw cotton through much of 1995, as is well-known.

Second, the non-confidential version of the complaint merely alleged price details in the 'dumping calculation', without giving any evidence. Since the complainant alleges that it has obtained its information from publicly available sources, there is no reason why no non-confidential version thereof (photocopies of the pages, etc., concerned) has been provided. Failure to do so makes the statements concerning the alleged dumping little more than 'simple assertion, <u>unsubstantiated by relevant evidence</u>.'

Alternatively, in the event Eurocoton did submit such information in the confidential version of the complaint, Texprocil considers that this should have been ignored by the Commission in accordance with Article 19 of the basic anti-dumping Regulation.

In order to avoid unnecessary harassment of exporters, it is mandatory that such investigation takes place by the Commission, before the initiation.

3. *If the Commission is informed by some other source than the complaint of facts related to the injury question, it must take these into account: Article 5.3 provides that '[t]he authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation.'*

Article 5.8 adds in relevant part that '[a]n application . . . shall be rejected . . . as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case.' If, in other words, the Commission is satisfied, either before or during the proceeding, that there is no factual basis to pursue the matter, it may not continue the initiation or pursuit of the proceeding. Article 5.8 does not specify that the Commission should only take into account of such evidence as has been presented in the complaint; on the contrary, if the Commission has obtained information from other sources, it is under an

these circumstances, the Commission was under an obligation to carefully check, ***before*** *initiating the second proceeding, whether there was any serious evidence of injury (as opposed to mere assertions in the second complaint).*

There is no evidence in either the notice of initiation or the non-confidential file showing that the Commission did in fact make this a priori check. It follows that the Commission violated Articles 5.2, 5.3 and 5.8 of the Agreement as well as Articles 5(2) j° 5(3) and 5(7) of the basic anti-dumping Regulation. Texprocil therefore respectfully requests the Commission to terminate this proceeding since it is tainted with a procedural error which cannot be repaired retroactively.

1.3 The complaint does not contain prima facie evidence of dumping and injury caused thereby

Article 5.2 of the Agreement provides in relevant part that a complaint must contain prima facie evidence on, inter alia, dumping and injury.

The complaint has been based on little more than unsubstantiated allegations. First, the complainant notes that '[i]t is worth noting that these countries have access to domestically grown raw cotton . . .' This, however, ignores that Indian producers have suffered from an acute shortage of raw cotton through much of 1995, as is well-known.

Second, the non-confidential version of the complaint merely alleged price details in the 'dumping calculation', without giving any evidence. Since the complainant alleges that it has obtained its information from publicly available sources, there is no reason why no non-confidential version thereof (photocopies of the pages, etc., concerned) has been provided. Failure to do so makes the statements concerning the alleged dumping little more than 'simple assertion, unsubstantiated by relevant evidence.'

Alternatively, in the event Eurocoton did submit such information in the confidential version of the complaint, Texprocil considers that this should have been ignored by the Commission in accordance with Article 19 of the basic anti-dumping Regulation.

It follows that, apart from the violation of Article 5.2 of the Agreement in the context of the previous proceeding, that provision is also violated since no prima facie evidence has been submitted in the complaint."
(Emphasis in original, footnotes omitted)

5.8 Again, the Indian exporters received no reply to any of these arguments from the European Commission. The provisional Regulation contained merely a curt standard formula[171] stating that:

"The proceeding was initiated as a result of a complaint lodged on 30 July 1996 by the Committee of the Cotton and allied Textile Industries of the European Communities (Eurocoton), on behalf of Community producers representing a major proportion of Community production of cotton-type bed linen. The complaint contained evidence of dumping of the said product and of material injury resulting therefrom, which was considered sufficient to justify the initiation of a proceeding."[172]

[171] That this formula is included as a matter of standard reply can be seen if the examples of EC determinations from the period 1996-1998 are compared. Fifteen such examples are attached as Annex 73.

[172] Provisional Regulation at recital (2); emphasis added.

3. Claim 23

5.21 Last, it follows from the words

dumping duties on imports of polyacetal resins from the United States provides useful guidance on the necessity of transparency:[178]

> *"[t]he legal question raised by the references made by Korea to statements in the transcript of the KTC's meeting was . . . whether the Panel could properly review the injury determination of the KTC by reference to considerations in the transcript which were not included or referred to in the public statement of reasons given by the Korean authorities at the time of imposition of the anti-dumping duties . . .*
>
> *In the view of the Panel, effective review . . . of an injury determination . . . required an adequate explanation by the investigating authorities of how they had considered and evaluated the evidence with regard to the factors provided for in that article. Interpreted in conjunction with Article 8:5, such an explanation had to be provided in a public notice . . . This provision served the important purpose of transparency by requiring duly motivated public decisions as the basis for the imposition of anti-dumping duties. In the view of the Panel, the purpose of this provision would be frustrated if in a dispute settlement proceeding . . . a Party were allowed to defend a challenged . . . determination by reference to alleged reasons for such determination which were not part of a public statement of reasons accompanying that determination . . . Furthermore, for a Panel to review a determination by reference to considerations not actually reflected in a public statement of reasons accompanying such determination would also be inconsistent with the requirements of an orderly and efficient conduct of the dispute settlement process . . .*
>
> *Korea had also argued that, since the transcript was part of the administrative record of this investigation, the Panel was under an obligation to consider it. However, the question of whether the transcript was part of the administrative record of the investigation was not decisive of whether the Panel was bound to take account of the transcript for purposes of reviewing the reasons upon which the KTC had based its determination. The task of the Panel was to review the consistency with the Agreement of the KTC's injury determination in Decision 91-6, not the administrative record upon which that determination was based. While an examination of elements of the administrative record might be appropriate in order for a Panel to determine whether certain findings of fact made by investigating authorities were based on positive evidence of record, it was only the public notice issued pursuant to Article 8:5, not the administrative record per se, which was relevant as a statement of reasons. In the case before the Panel, Korea had relied on the transcript not to provide evidence in support of specific statements of a factual nature in the KTC's injury determination but to further explain the reasons for that determination."* (Emphasis added)

5.27 These principles are of no less value in the Bed linen II proceeding. If the EC would have made a prima facie examination of the allegations on the state of the domestic industry contained in the complaint, it would be up to the EC to notify this, either in a published notice or through a report made available to the Indian exporters separately. The EC did neither, and India may thus rely on this failure to conclude that, inconsistent with that provision, in fact no examination required by Article 5.3 was carried out.

5.28 Second, immediately before the initiation, the investigating authorities did have more information at their disposal than merely the complaint. Notably but not exclusively, the European Commission could not have been unaware of the fact that an anti-dumping proceeding concerning the

[178] Korea—Anti-dumping duties on imports of polyacetal resins from the United States, ADP/92 of 2 April 1993 at §§ 199-213.

same product scope and, to a large extent, the same targeted countries, on the basis of a complaint by the same complainant had been terminated only twenty days before the submission of the complaint. The investigating authorities could not have been unaware that in that proceeding, which ran during most of the investigation period of the Bed linen II proceeding, co-operation by EC producers was absolutely minimal.[179]

5.29 That the first proceeding was formally terminated because the complaint was withdrawn, is besides the point—as the investigating authorities know or could know, that the complaint was only withdrawn after it transpired that it would be impossible to make an injury finding since the EC industry largely refused to co-operate.

5.30 It follows that, at least during the period starting on 25 January 1994 (initiation of the first proceeding) up to the date of termination (10 July 1996), there was a strong indication that the EC industry might not be considered injured since it even refused to support an initiated anti-dumping proceeding.[180] The allegations of the EC industry in the second complaint largely covered the period during which that same industry refused to co-operate. While it is granted that this is not in itself a fool-proof indication that no injury could exist, it is at least a strong indication which would have warranted a further examination before the initiation of the Bed linen II proceeding.

5.31 India believes that, under these circumstances, the EC could not initiate the Bed linen II anti-dumping proceeding without examining the prima facie evidence. By failing to do so, the EC acted inconsistently with Article 5.3 of the ADA.

4. Claim 24: inconsistency with Article 12.2.1

4.1 The text of Article 12.2.1

5.32 It is recalled that Articles 12.2 and 12.2.1 of the ADA provide in relevant part as follows:

> *"12.2 Public notice shall be given of any preliminary or final determination, whether affirmative or negative . . . Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities . . .*
>
> *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;*

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[179] This is evident from the non-confidential file (or rather, the lack of non-confidential questionnaire responses submitted by the EC industry).

[180] It may be noted that the notice of initiation of the Bed linen I proceeding provided that:

"If the required information and argumentation is not received in adequate form within the time limit specified above, the Community authorities may make preliminary or final findings on the basis of the facts available in accordance with Article 7 (7) (b) of Regulation (EEC) No 2423/88."

(OJ (1994) C 21/9, attached as Annex 2).

(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;
(iv) considerations relevant to the injury determination as set out in Article 3;
(v) the main reasons leading to the determination."
(Emphasis added)

5.33 First, it is noted that *"determination"* in sub-paragraph (v) is in singular, in contrast to the *"preliminary determinations"* in the chapeau of the provision. That would suggest that *"determination"* in sub-paragraph (v) should not be read as *"preliminary determinations on dumping and injury"*; had that been the intention of the drafters, then they would have used the plural form in sub-paragraph (v) as well.

5.34 It would seem that *"determination"* in sub-paragraph (v) refers to *"preliminary or final determination"* in Article 12.2. In other words, under Article 12.2.1 the investigating authorities must set out in the provisional and definitive Regulations *"the main reasons leading"* to *"the preliminary or final determination"*.

5.35 Logically, sub-paragraph (v) does not (only) aim at the dumping determination and the injury determination. If this were different, then the sub-paragraph would add nothing to sub-paragraphs (iii) and (iv) of the same provision. That would imply that sub-paragraph, in such an interpretation, would be without meaning. In this context the *ut res magis valeat quam pereat* principle is recalled, which the Appellate Body defined as follows: *"[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."*[181]

5.36 It would follow that sub-paragraph (v) aims (at least) at those determinations which are essential for the investigating authorities in order to impose anti-dumping measures. That includes the determination required under Article 5.3.

5.37 In this context it is further noted that—following the notice of initiation—the provisional Regulation (and the disclosure document issued around the same time) is the first document in which the EC authorities could have explained their position on Article 5.3, and where the exporters had expected to receive a reply to the arguments raised by them in this respect. If the investigating authorities would not be under any obligation to explain their Article 5.3 determination at the time of the imposition of provisional anti-dumping measures, it would impair the effective possibilities for exporting countries to raise such issues under Article 17.4, second sentence.[182]

5.38 Second, the word *"and"* in the chapeau of 12.2.1 must be noted between *"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"*. In other words, the limitation to preliminary determinations on dumping and injury would not appear to be applicable to the second part *"shall refer to the matters of fact and law which have led to arguments being*

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[181] United States—Standards for Reformulated and Conventional Gasoline, AB–1996/1 of 29 April 1996, section IV. See further *Yearbook of the International Law Commission* (1966), Vol. II at 219:

"When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted."

[182] *"When a provisional measure has a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7, that Member may also refer such matter to the DSB."*

5. Claim 25: inconsistency with Article 12.2.2

5.1 The text of Article 12.2.2

5.45 The text of Article 12.2.2 differs somewhat from that of Article 12.2.1:

> *"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."* (Emphasis added)

5.2 Legal arguments relating to the claims relating to Article 12.2.2

5.46 Even if the EC did not agree with the Indian exporters, it was still obliged to provide in the definitive Regulation *"the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers".*

5.47 As noted in the facts' description above, the EC did not react to the comments made by the Indian exporters in connection with Article 5.3. The EC thus failed to explain its definitive finding consistently with Article 12.2.2.

B. ARTICLE 5.4: THE INVESTIGATING AUTHORITIES FAILED TO MAKE A STANDING DETERMINATION IN CONFORMITY WITH ARTICLE 5.4

5.48 Summary: the EC acted inconsistently with Article 5.4 of the ADA by not making a proper standing determination before the anti-dumping proceeding was initiated (**claim 26**).
Even though detailed arguments were presented by the Indian exporters on these issues, the EC failed to properly explain its reasoning, and consequently acted inconsistently with Article 12.2.1 (**claim 27**) Inei5 to Article 120.375 Tc93WIT6aims re Tw (claim) Tj 228Tc 0.91(1375 T9rtTY1) T5ith Article 12.2.2.

20. Fränkische Bettwarenfabrik GmbH;

Belgium (1 company):

21. Uco NV-Huishoudlinnen;

France (10 companies):

22. Ets Fremaux
23. Ets Hacot et Colombier
24. Hacot (Joseph et Cie)
25. Jalla SA-Nieppe
26. Mulliez Freres SA au Longeron
27. Vanderschooten
28. Valrupt
29. Ets Claude
30. Ets Bera
31. Ets Gisele le Chayoux;

Italy (5 companies):

32. Bassetti SpA
33. Bossi SpA
34. Gabel Industria Tessile SpA
35. Valman Srl
36. Zucchi SpA;

Spain (3 companies):

37. Estebanell y Pahisa SA
38. Hilados y Tejidos Puignero SA
39. Textil Cano Segura (Texca Sesa);

Finland (4 companies):

40. Finlayson Sisustustekstiili Oy
41. Finnpile Oy
42. Marimekko Oy
43. Reikälevy Oy;

Austria (no companies):

44. Vereinigung Textilindustrie (Austrian Textile Industry Association)

5.52 The last entity, Vereinigung Textilindustrie, is not a producer itself but merely the association of Austrian producers.

5.53 The notice of initiation with which the anti-dumping proceeding was initiated[186] noted on the issue of standing only that:

[186] Please refer to Annex 7.

5.56 Well over two months after the submission of this brief (or nearly four months after the initiation), Texprocil's legal representatives were granted access to the non-confidential file at the Commission's unit dealing with complaints (letter from the European Commission attached as Annex 58). One day later the standing file was inspected (contents of that file attached as Annex 59). The time flow of the events can thus be summarized as follows:

5.57 That file consisted of declarations of support for the complaint emanating from the following entities:[190]

Portugal:

1. Lameirinho-Industria Textil, SA;
2. Incotex-Ind. E com. De Texteis, LDA;
3. Foncar-Org. Ind. Comercial Textil, SA;
4. Coelima-Industrias Texteis, SA;
5. Antonio de Almeida & Filhos, LDA;

Germany:

6. Bierbaum Textilwerke GmbH & Co. KG;
7. Günter Meckenholt Weberei und Ausrüstung GmbH;
8. Hch. Kettelhack GmbH & Co.;
9. Erbelle GmbH;
10. Luxorette Haustextilien GmbH;
11. Wilh. Wülfing GmbH & Co. KG;
12. Curt Bauer GmbH;
13. Estella Ateliers (Fränkische Bettwarenfabrik GmbH);
14. Irisette GmbH;
15. Damino GmbH;
16. RZ Dyckhoff GmbH;

France:

17. Syndicat Général de l'Industrie Cotonnière Française (*General syndicate of the French Cotton Industry*), allegedly on behalf of:
    — a company indicated as *"K.F."*;
18. Fédération française de l'Industry Cotonnière (*French Federation of the Cotton Industry)*, allegedly on behalf of:
    — Ets Claude,
    — Jalla SA-Nieppe,

[190] The European Commission later made a letter available from the Spanish Asociacion de impresarios textiles de la Comunidad Valenciana (ATEVAL) to Eurocoton, alleging that five more Spanish companies *"do not explicitly oppose"* the proceeding (Annex 79). This letter to Eurocoton is dated 18 September 1996 (*i.e.*, five days after the initiation). There is no indication when it was submitted to the EC.

— Hacot (Joseph et Cie),
— Ets Hacot et Colombier,
— Ets Fremaux,
— Vanderschooten,
— Mulliez Freres SA au Longeron,
— Ets Bera;

Italy:

19. Bossi SpA;
20. Zucchi SpA;
21. Gabel Industria Tessile SpA;
22. Valman Srl;
23. Bassetti SpA;

Spain:

24. Asociacion Industrial Textil de Proceso Algodonero (*Industrial Association of Cotton Process Textile*), allegedly on behalf of:
— Estebanell y Pahisa SA,
— Hilados y Tejidos Puignero SA,
— Textil Cano Segura (Texca Sesa);

Austria:

25. Vereinigung Textilindustrie (*Austrian Textile Industry Association*), apparently on behalf of itself. It did, however, provide information on the total production of two of its members;

Finland:

26. Reikälevy Oy;
27. Marimekko Oy;
28. Finlayson Sisustustekstiili Oy.

5.58 Although the above declarations had clearly been faxed the fax headers had unfortunately been removed from all of them.

5.59 The non-confidential standing file further contained the statutes of Eurocoton, but not the statutes of its national member associations.

5.60 The Commission did not argue and has never argued that Texprocil had 'missed' declarations of support in the non-confidential file.

5.61 On 13 January 1997 Texprocil had a hearing on procedural, injury and miscellaneous issues. During this hearing, Texprocil explained its concerns in great detail. Notably, Texprocil argued that the mere allegation by a producers' association could not, in its view, replace the standing determination of Article 5.4. Subsequent to the hearing, the post-hearing brief of 6 February 1997[192] set out in writing the arguments made by Texprocil during the hearing. Notably, Texprocil argued in

[192] Annex 54.

that submission several points of relevance to the standing determination, which are briefly summarised as follows:

— First, the declaration of Reikalevy Oy of Finland, made available over two months after the date of initiation, is undated and consequently ought to be left aside as evidence that it had come forth as supporting the complaint before the proceeding was initiated;

— Moreover, the Commission had provided no evidence whatsoever that it had made before initiating the proceeding a determination of total EC production of bed linen (which determination is logically necessary in order to perform the 25% test in Article 5.4);

— Texprocil further repeated its argument that Article 5.4 *"clearly refers to producers and not to producers' associations"*. Texprocil believed that producers associations did not have the

proportion of total Community production in the investigation period. These companies were therefore deemed to make up the Community industry under the terms of Article 4(1) of the basic Regulation." (footnotes omitted)

5.63 The Commission did not further address Texprocil's concerns beyond these remarks. Specifically, the Commission did not address the questions:

— whether undated declarations made available nearly four months after the initiation could serve as evidence that the company concerned had indicated its support for the complaint *before* initiation;

— whether producers' associations had the right to support a complaint in their own name;

— whether producers' associations have the right to support a complaint on behalf of producers, but without providing evidence that they have checked with such producers;

— whether the complainants mentioned by Texprocil were producers or rather converters using outward processing arrangements in Asia or Central Europe.

5.64 Texprocil filed comments on the provisional disclosure and the provisional Regulation.[195] It also had a second hearing at the Commission.[196]

accounted for 10 per cent of the turnover in bed linen of the companies in question, rather than 10 per cent of total company turnover.

. . .

In conclusion, the Commission services confirm both the finding that the 35 complainant companies constitute the Community industry within the meaning of Article 4(1) of the Basic Regulation and the sampling methodology applied."

5.66 Texprocil filed comments on the definitive disclosure.[198] At this occasion it again brought forward its concerns as to the standing determination, concerns which had not been allayed by the text of the definitive disclosure document.

5.67 The definitive Regulation repeated the wording of the definitive disclosure document in largely similar terms, with the exception of the second paragraph quoted above:

"(32) . . .

However, in response to the provisional measures only two non-complainant Community producers, which originally expressed no opinion to the Commission on the complaint, expressed opposition to the duties. The combined production of these two producers was less than one-third of the total production of the complainants. Throughout the proceeding, therefore, the complainants represented considerably more than 50 per cent of the collective output of those producers expressing either support for or opposition to the complaint."

5.68 For the remainder Texprocil's comments did not evoke any further response or reply from the EC side.

5.69 The matter of standing was taken up and discussed at great length during both rounds of consultations between India and the EC. During the first round of consultations the Indian delegation made a major effort in trying to understand how exactly the EC had proceeded in its standing determination. For this purpose, India submitted a list of detailed questions to the EC delegation.[199] The questions with relevance to the standing determination are numbers 1-13. The spokesman for the EC made the following observations:[200]

"[EC]: the EC will of course try to provide a detailed answer, but will have to get back to the file. In this case the complaint was lodged by Eurocoton, representing national associations. The EC was reasonably satisfied by the voting within Eurocoton. We will go through your points and will give you a precise answer . . .

[T]he EC will answer question 4 later. As far as question 5 is concerned, it is his personal view that it depends on the voting rules of the association. [The EC] is confident the Commission checked these rules at the time . . .

[The EC] refers to the footnote to Article 5.4. He adds that, by the time of the injury assessment, the EC should be certain of standing. Excluding a company can only happen after the opening of the investigation.

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[198] Attached as Annex 60.
[199] Attached as Annex 10.
[200] Verbatim report attached as Annex 11.

. . .

Mr Seth: Third, one company –the Finnish company Reikälevy Oy-- submitted a declaration of support which was undated. This means that, by the time the Indian exporters got access to the non-confidential standing file, which was months after the initiation, they could not ascertain when the declaration was filed. This leads to our following question:

6. Does the EC agree that undated declaration of support made available in the public file some four months after the initiation cannot be considered as valid evidence in accordance with Article 5.4 that the company expressed its support before the proceeding was initiated?

[EC]: I do not agree. I do not exclude that company. The internal rules of the association to which this company belongs may make this matter irrelevant. . . . We used the data of output on basis of the data obtained from the associations. The role played by the associations is on behalf of the producers by virtue of their internal rules. . . [The EC] replies re question 11 that India is entitled to information enabling her to satisfy that the standing determination has been duly made before initiation. On question 12 he says he thinks that such information was provided, but he will check this. On question 13, he would not deny this.

The EC adds that it would appear from the wording of the Regulation that the standing determination was made before initiation. This follows from the word 're-examination'. The concerns of India, which are matters of fact and law, have been fully addressed."[201]

5.70 The European Commission promised to provide a written definitive reply to India's questions within reasonable time. Such reply was received on 1 October 1998. The combined reply to questions 1-18 was: *"For discussion in a new round of oral consultations."*

5.71 During the second round of consultations the Indian delegation requested the EC to provide a definitive answer to its queries. The EC's spokesman replied as follows:[202]

"[EC]: I will set out our answer in one response. Standing rules must be met prior to the initiation. We established that there was standing. We asked associations and companies, who provided us with evidence that approximately 35 or 34 percent of the Community producers supported the proceeding. We did not consider it necessary to obtain further support since we already met the criteria.

As to our standing practice: either the associations or companies can come forth. The associations can do it since they are acting on behalf of their members. Clearly, in case of large numbers of companies it is not practical to obtain the support from each single company. I note further that the Agreement itself allows sampling . . . All I can say about the timing is that it was before the initiation. The names of the companies are named in the complaint. There was obviously a process of contacts, but this went on before the initiation.

[T]he support from these companies was deduced from a combination of association and individual declarations. We think this is a reasonable process to establish support.

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[201] As an explanatory note on the voting within Eurocoton, as is evident from the statutes of this organisation, its members are producers associations. In other words, it would seem that the EC argued here that they relied on the support from producers' associations.

[202] Please refer to the verbatim report of the second round of consultations, attached as Annex 13.

Mr Seth: You think that an association declaration can represent its members?

[EC]: Yes. A representative can act on behalf of companies."

5.72 India received during the second round of consultations finally a sheet confirming which were the seven companies listed in recital (52), and which were the 35 companies constituting the Community industry (domestic industry). This sheet is attached as Annex 61.

2. Commission practice

5.73 Contrary to some other jurisdictions such as Australia, Canada and the United States, the EC does not describe in its published determinations or elsewhere how it goes about determining standing

5.7 such(C

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5.77 During the consultations, two different replies were given by the EC. During the first round, the EC stressed that Eurocoton had determined the support for the complaint among its member associations. The only 'evidence' made available in the non-confidential file was the statement in the complaint itself.

5.78 During the second round of consultations, the EC appeared to indicate that it had checked standing by relying on the declarations in the non-confidential file. Although this point was raised at every occasion, the EC has never denied or contradicted that some of these declarations were made by producers' associations. Indeed, as noted above, the EC clarified during the second round of consultations that *"either the associations or companies can come forth. The associations can do it since they are acting on behalf of their members."* The EC delegation likened the submission of support by a producers' association to the representation of companies by lawyers.

3. Claims

5.79 Three claims flow from the events and facts described above.

5.80 First, the EC acted inconsistently with Article 5.4 of the ADA by not making a proper standing determination before the anti-dumping proceeding was initiated.

5.81 Second, the EC acted inconsistently with Article 12.2.1 of the ADA by failing to explain its provisional determination on standing, even though Texprocil had made very elaborate arguments on this matter.

5.82 Third, the EC acted inconsistently with Article 12.2.2 by failing to provide in either the definitive Regulation or elsewhere the matters of fact and reasons which have led the EC to reject Texprocil's arguments and claims.

4. Claim 26: inconsistency with Article 5.4

4.1 The text of Article 5.4

5.83 Before proceeding with the analysis of the arguments, an analysis of the obligations contained in Article 5.4 of the ADA would seem in order. Article 5.4 of the ADA provides as follows:

> *"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.*
>
> ---
>
> *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."[205]

5.84 Article 5.4 lays down a number of clear rules on how the investigating authorities must determine whether standing exists.

5.85 As a first note, Article 5.4 essentially lays down two tests which may be paraphrased as follows:

— a test whether at least 25 per cent of domestic producers expressly support the complaint [hereinafter: "25 per cent test"]; and

— a test whether at least 50 per cent of all producers who made themselves known to the investigating authorities support the complaint [hereinafter: "50 per cent test"].

No issue is taken in this proceeding with the 50 per cent test.

5.86 Article 5.4 lays down very clear procedural requirements. First, it notes that *"[a]n investigation shall not be initiated"* unless the authorities have *"determined"* representativeness (also referred to as standing determination). India believes that the word *"shall"* has an imperative element.[206] It does not permit an interpretation as 'should', 'could' or 'may'. Second, the word *"determined"* would seem to require an explicit determination.

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[205] For easy reference, we recall also the text of Article 5(4) of the basic Regulation:

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

[206] In this context India recalls the Appellate Body's dictum in EC-Measures affecting the importation of certain poultry products, Appellate Body report 1998/3, WT/DS69/AB/R of 13 July 1998, at § 165:

"In our view, the ordinary meaning of the text of Article 5.5 is clear. The chapeau of Article 5.5 clearly states that the schedule in the body of that provision is mandatory. The word used in the chapeau is 'shall', not 'may'. There is no qualifying language, and there is no language that permits any method other than that set out in the schedule in Article 5.5 as a basis for the calculation of additional duties. Likewise, Article 5.5 clearly identifies the c.i.f. import price of the shipment as the sole element to be compared with the trigger price in the calculation of the additional duties. Article 5.5 stipulates that the amount of additional duties 'shall be set' on the basis of the comparison of the c.i.f. import price of the shipment concerned with the trigger price. Thus, the ordinary meaning the complaint at setal12 supvefor, or shipment . . . Tla,aint has le963s 'shal9 mplrice j 0 -12 5roducer,aint ha,he

5.87 Second, it is evident that the determination must be made by the investigating authorities (*"unless the authorities have determined"*).

5.88 Third, Article 5.4 indicates how a determination of representativeness is to be made: *". . . on the basis of an examination of the degree of support for, or opposition to, the application expressed by domestic producers of the like product"*. This requires foremost an examination. The determination is to be made *following* this examination. This follows from the words *"on the basis of"* in *"have determined, on the basis of an examination"*.

5.89 Fourth, the examination must be made of *"the degree of support for, or opposition to, the application expressed"*. The support or opposition must have been *"expressed"*. This implies, in other words, a deliberate act on behalf of the entity whose support is examined (the footnote to Article 5.4 is discussed below).

5.90 Fifth, Article 5.4 contains clear language *whose* support is to be taken into account: *"the degree of support for, or opposition to, the application expressed by domestic producers of the like product . . ."* The only entities whose support counts are domestic producers.[207] In this context the difference in language may be noted within the first sentence of Article 5.4: in order to determine whether the application has been filed *"by or on behalf of"* the domestic industry, an examination of the support or opposition expressed by domestic producers is required.[208] In other words, Article 5.4 foresees two actions from the side of the industry:

1) the filing of the complaint, which may be done by any entity; and

2) the expression of the support for the complaint, which must come from *"the domestic producers of the like product"*.

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[207] It is true that the footnote to Article 5.4 provides that: *"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."*

This, however, deals with a situation not found in the EC but rather with the specific domestic legislation of another WTO Member. This would consequently not seem to be relevant for the *Bed linen II* case.

[208] [illegible]

These two actions may take place at the same point in time. For example, if a complaint is issued *"by"* companies clearly accounting for more than one-quarter of the total of EC producers, the EC authorities could reasonably conclude that the 25 per cent test is met.[209] That factual situation, however, did not occur in the Bed linen II proceeding.

5.91 The provision does not preclude that an entity other than a producer files a complaint *"on behalf of"* the domestic industry—but in such a situation an examination of the support or opposition expressed by domestic *producers* nevertheless remains called for. Indeed, although it is possible that the complete domestic industry supports an anti-dumping proceeding (a situation which will normally mostly occur in cases where the number of domestic producers is very limited), in most anti-dumping proceedings the entity filing the complaint will not itself constitute the complete domestic industry. At least in EC practice, most anti-dumping complaints tend to be filed by trade organisations, (allegedly) on behalf of the domestic industry. The second and third sentences of Article 5.4 deal with the concept *"by or on behalf of the domestic industry"* by providing for the 50% test and the 25%, respectively. In both cases, the support for the complaint must come from domestic producers rather than from trade organisations or other entities not producing the like product.

5.92 Also, it is not argued in this context that a written declaration is the only method allowed by

4.2 Legal arguments relating to the claims relating to Article 5.4

5.93 India has a number of arguments why the determination of representativeness made by the EC does not meet the requirements laid down in Article 5.4, as analysed above.

5.94 First, it appears from the file that the EC has accepted a statement from at least one producers' association (the Austrian association Vereinigung Textilindustrie) that it supported the complaint in its own name, and has added the production volume of the members of this association to that of the complainants. Indeed, it is not certain whether the 25% test would still be met if the output of the members of the Austrian association were deducted.

5.95 If there has been any further check of the veracity of this statement, no record of it has been made available. The only response by the EC on the concerns raised by Texprocil in this regard was

investigating authorities before the initiation of the proceeding.[214],[215] This concerns the French and Spanish producers' association declarations, and the (alleged) expressed support of the following companies:

France:

— Ets Claude,
— Jalla SA-Nieppe,
— Hacot (Joseph et Cie),
— Ets Hacot et Colombier,
— Ets Fremaux,
— Vanderschooten,
— Mulliez Freres SA au Longeron,
— Ets Bera;

Spain:

— Estebanell y Pahisa SA,
— Hilados y Tejidos

> *"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."*

5.103 As a factual matter, it is noted that during the administrative proceeding the EC authorities have never argued that this footnote was applied in the Bed linen II proceeding. Only during the second round of consultations the EC delegation referred to it briefly, apparently as an indication that the EC's practice in the Bed linen II proceeding might be covered by it.

5.104 In this respect it must be noted that the footnote refers to "*statistically valid sampling techniques"*. Quite apart from no evidence being on file of any sampling technique ever having been used by the EC for the determination of representativeness, it would seem that a sample taken from

imposition of provisional anti-dumping measures, it would impair the effective possibilities for exporting countries to raise such issues under Article 17.4, second sentence.[219]

5.111 Second, the word *"and"* in the chapeau of 12.2.1 must be noted between *"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"*. In other words, the limitation to preliminary determinations on dumping and injury would not appear to be applicable to the second part *"shall refer to the matters of fact and law which have led to arguments being accepted or rejected"*. As argued above, Article 12.2.1 as a whole, and especially in view of its sub-paragraph (v), does apply to the standing determination as well. A correct reading of Article 12.2.1 would thus seem to be that the provisional Regulation (or some other disclosed provisional document) must refer to *the matters of fact and law which have led to arguments being accepted or rejected"* in the context of standing as well.

5.2 Legal arguments relating to the claims relating to Article 12.2.1

5.112 In anti-dumping proceedings the investigating authorities have a very dominant position as far as knowledge of the facts is concerned. This is even more so in the EC, where the European Commission is the only entity having access to all facts relating to standing. Article 12 fulfils in this context a crucial rôle to ensure a certain degree of transparency. In this context the *dictum* of the Panel in Korea—Anti-dumping duties on imports of polyacetal resins from the United States is of relevance:[220]

> *"In the view of the Panel, the purpose of this provision would be frustrated if in a dispute settlement proceeding . . . a Party were allowed to defend a challenged . . . determination by reference to alleged reasons for such determination which were not part of a public statement of reasons accompanying that determination . . ."*

5.113 In the provisional Regulation imposing anti-dumping duties on Indian bed linen the

which have led to arguments being accepted or rejected" or that the provisional Regulation or the provisional disclosure contained *"the main reasons leading to the determination"*.

5.116 In summary, India believes that neither in the provisional Regulation nor in any other document made available to the Indian exporters around the time of the provisional anti-dumping measures the EC met the standards laid down in Article 12.2.1.

6. Claim 28: inconsistency with Article 12.2.2

6.1 The text of Article 12.2.2

5.117 The text of Article 12.2.2 differs somewhat from that of Article 12.2.1:

> *"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."*

6.2 Legal arguments relating to the claims relating to Article 12.2.2

5.118 Even if the EC did not agree with the Indian exporters, it was still obliged to provide in the definitive Regulation *"the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers"*.

5.119 As noted in the facts' description above, the EC did react on issues raised in the connection with the scope of the domestic industry.

5.120 However, even though the Indian exporters again filed arguments in response to the provisional disclosure and the provisional Regulation, there was absolutely no reaction to or even a denial of the arguments and claims made by Indian exporters in connection with Article 5.4. The EC thus failed to explain its definitive finding consistently with Article 12.2.2.

VI. CLAIMS RELATING TO INDIA'S STATUS AS A DEVELOPING COUNTRY

A. ARTICLE 15: THE INVESTIGATING AUTHORITIES FAILED TO CONSIDER POSSIBILITIES OF A CONSTRUCTIVE REMEDY EVEN THOUGH INDIAN EXPORTERS HAD STRESSED THE IMPORTANCE OF THE BED LINEN INDUSTRY TO INDIA

6.1 Summary: the EC acted inconsistently with Article 15 of the ADA by not exploring possibilities of a constructive remedy and by not even reacting to arguments from Indian exporters pertaining to Article 15 (**claim 29**).
Even though detailed arguments were presented by the Indian exporters on these issues, the EC failed to properly explain its reasoning, and consequently acted inconsistently with Article 12.2.1 (**claim 30**) and 12.2.2 (**claim 31**).

6.5 In its comments to the provisional disclosure, Texprocil therefore reminded the EC:[223]

> *"Texprocil recalls for the record its arguments concerning India's status as a developing country as presented to the Commission. Texprocil notes that both in the disclosure document and in the provisional duties Regulation the Commission has failed to address these issues."*

6.6 The EC was similarly reminded during the second injury hearing and in the second post-hearing brief.[224]

6.7 Nevertheless, the definitive disclosure document and the definitive Regulation also failed to even mention India's status as a developing country, let alone make any determination or any consideration on the issue of Article 15. The EC again failed to contact the Indian exporters or the Indian government to explore the possibilities of constructive remedies.

6.8 During the first round of consultations India raised the issue and the following discussion took place:

> *"Mr Seth: The words 'must be given' in Article 15 would seem to be mandatory. While Article 15 does not per se require the EC to make special concessions to developing countries such as India in each case, it does lay down an obligation at least to consider ('special regard') the 'special situation of developing country Members'. It is accepted that such special regard does not affect the calculation of dumping and injury per se. Nevertheless, the words 'when considering' would imply that the EC, after having determined that dumping and injury caused thereby are present, must make a separate determination on the effects of anti-dumping measures to India's situation as a developing country.*
>
> . . .
>
> *[EC]: The EC is convinced that special regard has been given. . . ."*

6.9 The EC did not elaborate on its . . tŏokd impc 0.1104 j 35.:0 TD -0.0013 TcD -0.1181 Tc 0.0556 Tw (: T
does not affg per se. Neverthel 0 ti6. TD -0.131 Tc 0.9685 Tw (15 doe
the 'special situation of developing country Members'. l regard

*"**Question 115***

Can the EC indicate where in the provisional or definitive Regulations it has considered giving special regard to the special situation of India as a developing country Member?

It was pointed out that while specific concessions made to Indian firms in view of their location in a developing country were not spelled out in the published Regulations, the firms concerned were granted special treatment in a number of ways. The preparation of simplified questionnaires for exporters, the acceptance of responses beyond the stated deadline and consequent granting of co-operator status, and the individual treatment of newcomers despite the case having been based on sampling, are all examples of special consideration.

Last but not least, discussions on undertaking [sic] took place and this has to be considered as complying with obligations even if these did not result in measures in the form of undertakings."

2. Claims

6.12 Three claims flow from the events and facts described above.

6.13 First, the EC acted inconsistently with Article 15 by failing to explore possibilities of constructive remedies before imposing anti-dumping duties, even though India had clearly argued that the textile industry, and with it the bed linen industry, is of essential interest to the Indian economy.

6.14 Second, the EC acted inconsistently with Article 12.2.1 of the ADA by failing to indicate in the provisional Regulation or in any other report made available to the Indian exporters at the time of the imposition of provisional measures why it refused any constructive remedy based on Article 15, or how it responded to its obligations under the second sentence of Article 15.

6.15 Third, the EC acted inconsistently with Article 12.2.2 of the ADA by failing to indicate in the definitive Regulation or in any other report made available to the Indian exporters at the time of the imposition of definitive measures why it refused any constructive remedy based on Article 15, or how it responded to its obligations under the second sentence of Article 15.

3. Claim 29: inconsistency with Article 15

3.1 The text of Article 15

6.16 Article 15 provides that:

"It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members."

6.17 Article 15 provides for two different issues:

language. The logic of the Appellate Body, developed in the context of another covered agreement, similarly applies here:

> *"The word used . . . is 'shall', not 'may'. There is no qualifying language, and there is no language that permits any method other than that set out in the schedule in Article 5.5 as a basis for the calculation of additional duties."*

6.25 It follows that the second sentence, when regarded in the context of the Agreement, lays down clear obligations. First, there must *ipso facto* be a determination (or assessment) whether the essential interests of the developing country concerned may be involved. This determination must have been made *"before applying anti-dumping duties"*, *i.e.*, after a determination of dumping and injury caused thereby have been made, but before the imposition of (provisional) anti-dumping duties.

6.26 Then the investigating authorities are required to explore possibilities of constructive remedies *"provided for by this Agreement"*. These last words would seem to indicate that the remedy may consist of, among others, the non-imposition of anti-dumping measures, or an undertaking.

6.27 As to the timing of the 'exploration of possibilities of constructive remedies', these *"shall"* be explored *"before applying anti-dumping duties"*. In the EC context this means before provisional anti-dumping duties are imposed.

3.2 Legal arguments relating to the claims relating to Article 15

6.28 The first issue is whether the EC did in fact give special regard to India, and whether this alleged special treatment—even if factually correct—is relevant under Article 15 (section 3.2.1). The next issue is what the EC should have done under Article 15 (3.2.2).

3.2.1 The alleged special treatment granted by the EC

6.29 During the two rounds of consultations between India and the EC, the latter pointed to the following issues it believed to be applications of Article 15:

(a) the questionnaires used were allegedly more simple than those used in other proceedings;

(b) the EC was supposedly more flexible with India when accepting submissions outside the deadline;

(c) a special newcomers' provision was adopted in the definitive Regulation allowing newcomers to obtain the sample duty even though such a newcomers' provision is not foreseen in the EC basic anti-dumping Regulation;

(d) handloom products were excluded from the scope of anti-dumping duties.

6.30 (a) the questionnaires used: the questionnaire for exporters used in the Bed linen II proceeding is attached as Annex 63. It can be seen that it is *mutatis mutandis* similar to a recent questionnaire used for anti-dumping proceedings against OECD Members (Hungary, Poland, Mexico; see Annex 64). It can also be seen that it is very similar to a questionnaire as used against Taiwan (see Annex 65), clearly a very developed country. Although there are some minor differences between the

countries. This is easily demonstrated by comparing the Bed linen II questionnaire with the other questionnaires mentioned. Indeed, if one compares the questionnaire for *Bed Linen* with one used in a recent proceeding against Taiwan (Annex 66), it would appear that in fact the latter one is more straightforward, and not *vice versa*. In summary, the EC's argument is factually incorrect.

6.31 Even if the EC's reply during the consultations were factually true, it would be an interpretation that is, to put it mildly, surprising in view of the EC's argumentation before the Cotton yarn panel:[228]

> *"The EC argued that any obligation contained in the first sentence of Article 13 only arose at the time of consideration of imposition of measures. The word 'measures' clearly limited the obligation to the stage following conclusion of an investigation. Article 10 of the Agreement referred to 'Provisional measures'. The first sentence of Article 10:1 confirmed that the obligation under Article 13 only arose after an investigation. Article 10:2 defined what provisional measures could consist of."*

6.32 Moreover, the Panel in EC—Cotton yarn essentially followed the interpretation propagated by India in this case:

> *"585. The Panel was of the view that Article 1 of the Agreement provided the context for Article 13. Article 1 provided that anti-dumping duties could not be applied prior to determination of dumping, material injury and a causal link between the two. In addition, the words 'where they would affect the essential interests of developing countries' establish the condition under which this obligation becomes operative. Clearly this condition could only be ascertained subsequent to the determination of the amount of the anti-dumping duty to be applied in order to know whether the imposition of the anti-dumping duty would affect the essential interests of developing countries. This made clear that the second sentence of Article 13 gave rise to an obligation to consider the possibility of adopting constructive remedies after determination of dumping, material injury and a causal link between the two."*

6.33 India believes the reasoning of the Cotton yarn Panel on the timing aspect to be convincing. In other words, Article 15 does not have regard to treatment during the determination of dumping and injury, but rather comes into play once the investigating authorities have determined that dumping and injury exist. Logically, the issue of allegedly 'simplified' questionnaires could not even arise under Article 15, since the questionnaires are issued and replied to before dumping can be determined.

6.34 (b) alleged flexibility with deadlines: To begin with, India is not aware of any (special) flexibility with deadlines in the Bed linen proceeding, and the Commission's statements during the consultations thus appear to be factually incorrect.

6.35

> *"[a]s the deadline relating to sampling provided for in the notice of initiation has already passed and the companies to be included in the sample have been both selected and informed"*[229]

6.36 Although India acknowledges the right of the investigating authorities to ignore information submitted after reasonable deadlines, by the same token it is noted that the EC, by availing of this right, cannot claim it has shown special consideration for the Indian companies concerned.

6.37 The sampled companies requested an extension of the deadline on the basis of Article 6.1.1 because the companies had shown good cause and such an extension was practicable for the investigation authorities. The extension was not granted because the companies concerned are located in a developing country (relevant correspondence attached as Annex 68) but on the condition that the companies would make an effort to submit the questionnaire responses as soon as possible. As far as India is aware, all sampled companies submitted their questionnaire responses within the—revised—deadline. It is thus hard to see how the investigating authorities in the Bed linen II proceeding would have been more flexible, and clear that the EC's claims that it was exceptionally flexible with deadlines is not borne out by the factual situation.

6.38 Moreover, similarly to the point argued under *(a)*, even if the EC's argument would be factually correct (*quod non*), it would be irrelevant since the issue of deadlines arises only before dumping is

> *". . . the unavailability of both Article 11(3) and (4) could lead to injustices. In order to deal with such situation, the Council adopted an amendment to a regulation imposing definitive anti-dumping duties in a case where sampling had been used, the effect of which is to allow the regulation to be amended after the Commission has verified the applicant's newcomer status, so as to add the newcomer to the list of parties subject to the average duty."*[232]

6.41 Moreover, the special newcomer clause is not only used in cases of developing countries. For example, a similar provision was used in *Flat wooden pallets from Poland* (where the provisional Regulation was even especially amended for it after its adoption)[233] and—in a slightly different form—in *Farmed Atlantic salmon from Norway*.[234] The Commission's reply would thus seem to be factually incorrect—unless Norway qualifies as a developing country.

6.42 (d) handloom products: the argument that the exclusion of handloom was based on developing country considerations is factually incorrect and not supported by the published definitive determination:

> ***"B. PRODUCT UNDER CONSIDERATION AND LIKE PRODUCT***
>
> ***1. Requests for exclusion from the proceeding***
>
> . . .
>
> *(7) As regards the request to exclude handloom products, while the use of different production methods is not in itself a reason relevant to the definition of the like product, it was found that handloom items had physical characteristics different from those of other bed linen, notably through a less regular and looser weave. This difference led to a different consumer perception of handloom products which was reinforced by the fact that handloom products are often sold through particular sales channels such as charity shops which are not available to Community producers.*
>
> *Consequently it was concluded that handloom products should be excluded from the scope of the proceeding and, therefore, these products should be exempted from the payment of the*

extent that an undertaking would have been a possibility of a constructive remedy. Logically, it follows that in accordance with Article 8.5, an undertaking (or any other constructive remedy provided by the ADA) should have been suggested by the EC authorities before the imposition of provisional anti-dumping duties, or at least, that the EC should have investigated the possibilities for such constructive remedy. However, there is nothing on file suggesting that the EC authorities even remotely considered, investigated or explored an undertaking or any other constructive remedy at the time.

6.52 It is noted here that the Indian exporters, after the provisional anti-dumping measures were imposed, did in fact sound out the Commission Services on their willingness to negotiate an undertaking.[238] The Commission's immediate reaction was negative, in view of the large number of product types.[239] No serious discussion ever took place on the subject of the organisation or feasibility of an undertaking, nor was such discussion ever initiated, promoted, or stimulated by the EC authorities. In view of this reaction, the Indian exporters abandoned their efforts to work out an undertaking proposal.

6.53 It follows that the EC, by patently failing to explore the possibilities for a constructive remedy provided by the ADA before imposing provisional anti-dumping measures, and/or by even failing to make any determination whether the Indian bed linen industry was an essential interest to India, acted inconsistently with Article 15 of the ADA.

4. Claim 30: inconsistency with Article 12.2.1

4.1 The text of Article 12.2.1

6.54 It is recalled that Articles 12.2 and 12.2.1 of the ADA provide in relevant part as follows:

"*12.2 Public notice shall be given of any preliminary or final determination, whether*

4.2 Legal arguments relating to the claims relating to Article 12.2.1

6.56 The EC has nowhere in the provisional Regulation or elsewhere in the file referred to or commented on its obligations under Article 15. The EC either did not consider its obligations under Article 15 material, or failed to explain in any detail its findings and conclusions thereon.

6.57 Although the Indian exporters made arguments on the issue of Article 15, the obl9-50.25 gations under WT/DS145 2813 -50.25 TD 5.75 T972WT/DS145j 24.75 127, or faTc 0 T772

there either should have been none, or only very moderate ones. All dumping margins for India except one[241] can be fully attributed to the excessive and for Bed Linen completely unreasonable profit margin of over 18 per cent that was used in the constructed normal values.[242] The high dumping margins led to anti-dumping duties up to 24.7 per cent for the sampled companies and 24.7 per cent for non-co-operating companies.

B. REQUESTS

7.3 For the above reasons India respectfully requests the Panel to:

1) find that the EC has acted inconsistently with the ADA as per the claims above and which can be summarised as follows:

- The initiation of the proceeding against Bed Linen from India by the EC is inconsistent with Articles 5.3 and 5.4 of the ADA;

- The initiation of the proceeding against Bed Linen from India by the EC is inconsistent with Article 12.1 of the ADA;

- The EC neither initiated nor conducted its anti-dumping proceeding against Bed Linen from India in accordance with the provisions of the ADA

2) Recommend that the EC bring Regulation No 2398/97 of 28 November 1997 imposing a definitive anti-dumping duty on imports of cotton-type bed linen originating in, *inter alia*, India into conformity with the ADA and GATT 1994; and

3) Suggest that, in the light of the numerous outcome-decisive violations of the ADA, the EC immediately repeal the Regulation imposing definitive anti-dumping duties and refund anti-dumping duties paid thus far.

ANNEX 1-2

REQUEST FOR A PRELIMINARY RULING BY INDIA

(11 April 2000)

India herewith respectfully requests a preliminary ruling of the Panel with respect to certain purported documentary evidence provided by the European Communities (EC) in its First Written Submission. India refers to Exhibit EC-4 of the submission of EC: the document titled ***"Summary of declarations of support (per country) to industry complaint in EC anti-dumping proceeding."***

India wishes to note, for the record, that this document has never been made available to India, or otherwise referred to, at any stage prior to this point in time. In particular, the EC has never mentioned or referred to this document during the course of the anti-dumping investigation, nor during the consultation phase preceding the request for establishment of the present Panel.

India recalls that the standing has been a central issue throughout the anti-dumping investigation leading to the imposition of anti-dumping duties on cotton-type bed linen from India, and later, during this dispute settlement proceeding. At each stage the Indian exporters, and later the Indian Government, have requested clarifications from the EC as to how the standing requirements of the Anti-Dumping Agreement (ADA) had been met. Despite this, the EC has never before produced Exhibit EC-4, nor made any reference to its existence, nor produced the "*number of exchanges in the process of verification of standing*" to which footnote 1 of Exhibit EC-4 refers. In addition, Exhibit EC-4 appears to contradict some of the (written) information provided by the EC in the course of the administrative proceeding and in the context of this dispute settlement proceeding.

For these reasons, India respectfully requests that the exact status of Exhibit EC-4 be established, namely: when it was finalized, for what purpose. In the light of the above, India considers that it has good cause, in accordance with paragraph 13, to request this preliminary ruling at this stage.

have been a surprise for the EC and directly follows from claim 15. Claim 16 forms part of the context of the provisions that have been violated.[1] Moreover, India does not consider that the EC's rights of defense to have been infringed at all. In this regard India also refers to the ruling of the Appellate Body in the proceeding concerning Korean Safeguard measures on Dairy products[2] at 131: The EC has in the present case not demonstrated that its ability to defend itself in the course of the Panel proceedings has been prejudiced. On the contrary, the EC has had ample time and opportunity to respond to this claim, especially since the alleged inconsistencies were pointed out in detail during the consultation process;

1.3.2 As far as claim 14 is concerned, it is clarified that this claim forms part of an argument in support of claim 13 and addresses a further aspect of the matter.[3] It is recalled that claim 13 was explicitly mentioned in paragraph 15 of the request for the establishment of the Panel;

2. "That India's claim regarding Article 3.4 is dismissed because India has failed to clearly identify this issue in the request for the establishment of the Panel in violation of Article 6.2 DSU"

2.1 India rejects the suggestion of the EC that India has failed to clearly identify a "claim" under Article 3.4 in its request for the establishment of the Panel. India assumes that in light of paragraph 11 of the EC's submission, the EC is in paragraph 46 only referring to claim 19. *I.e.*, India assumes that the EC is not referring to India's claims 11 and 15. If that were the case, India would strongly object to such contentions since these claims were clearly identified in paragraphs 15 and 14, respectively, of the request for the establishment of the Panel.

2.2 As far as India's claim 19 itself is concerned, this claim was clearly identified in paragraph 13 of the request for the establishment of the Panel. Paragraph 13 of the request for the establishment of the Panel clearly mentions *"Contrary to the wording of Article 3 [and especially Article 3.5] of the ADA . . ."*. Clearly, the reference to Article 3 includes Article 3.4. The word 'especially' does not exclude other sub-paragraphs of the Article, which are also at issue for the claim in question. India also refers to the Appellate Body Report in *Bananas*,[4] which held that it is sufficient to mention Articles [for example, Article 3]. It is therefore not necessary to cite each paragraph or sub-paragraph, or each claim thereunder, of an Article.

2.3 Moreover, India also refers to the ruling of the Appellate Body in the proceeding concerning Korean Safeguard measures on Dairy products[5] at 131. In this ruling the criterion was espoused whether it had been demonstrated that the ability to defend itself in the course of the Panel proceedings had been prejudiced. Since the EC itself has commented in substance and in detail on claim 19 in its section V.12, paragraphs 343 through 350, the EC has in fact explicitly demonstrated that its rights of defense have *not* been prejudiced.

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[1] Panel Report in *United States – Anti-Dumping Act of 1916*, 31 March 2000, WT/DS136/R at 6.22 through 6.28. At the very least, claim 16 forms part of an argument in support of the specific claim mentioned in paragraph 14 of the request for the establishment of the Panel and addresses a different aspect of the matter.

[2] Appellate Body Report in Korea – Definitive Safeguard Measure On Imports Of Certain Dairy Products, 14 December 1999, WT/DS98/AB/R.

[3] *See also* Panel Report in *United States – Anti-Dumping Act of 1916*, 31 March 2000, WT/DS136/R at 6.22 through 6.28.

[4] Appellate Body Report in EC – Regime for the Importation, Sale, and Distribution of Bananas, 9 September 1997, WT/DS27/AB/R.

[5] Appellate Body Report in Korea – Definitive Safeguard Measure On Imports Of Certain Dairy Products, 14 December 1999, WT/DS98/AB/R.

3. "That India's Claims 2, 5, 8 (in part), 9, 11 (in part), 12, 15 (in part), 17, 19 (in part), 21, 24, 27, 29 (in part), and 30 are excluded from the scope of the proceedings."

3.1 As a preliminary remark India notes that while it has made certain arguments regarding the provisional Regulation it has always been clear that the definitive Regulation is the specific 'measure' at issue [see paragraph 2 of First Submission of India]. The fact that the definitive Regulation is the measure at issue does not limit the nature of arguments and claims that can be made. India notes that the EC posits in footnote 9 that *"in accordance with EC law and practice, aspects of the text of the provisional regulation are adopted by references in the definitive regulation. In so far as there is any difference between the texts of the two regulations, that of the definitive regulation prevails."* India shares this view and as there is agreement between the parties, this view automatically entails that aspects of the provisional regulation can be challenged in the context of the definitive regulation:

- Therefore, India does not seek a ruling from the Panel on claims 2, 5, 9, 12, 17, 21, 24, 27, and 30, it being understood that the EC's view expressed in footnote 9 entails that aspects of provisional Regulation endorsed at the definitive stage, can be challenged in the context of the definitive Regulation;

- India strongly disagrees to exclude claim 11 [even in part]. The claim itself clearly only relates to the Definitive Regulation [although the text of India's first submission may include discussion of aspects of the Provisional Regulation where there is no difference between the Definitive and Provisional Regulation]. As pointed out by the EC in its footnote 9, the text of the Provisional Regulation is endorsed in the Definitive Regulation and is therefore not different at the definitive stage. The *arguments* may still relate to the Provisional Regulation since the claim itself is clearly directed at the definitive measures. Finally, and in any event, as the AB noted in *Guatemala-Cement "This requirement to identify a specific anti-dumping measure at issue in a panel request in no way limits the nature of the claims that may be brought concerning alleged nullification or impairment of benefits or the impeding of the achievement of any objective in a dispute under the Anti-Dumping Agreement.";*[6]

- India strongly disagrees to drop claim 15 [even in part] for the same reasons mentioned directly above [India's response to EC's request for preliminary ruling on claim 11];

- India agrees not to seek a ruling on claim 8 as regards the infringement of Article 3.6;

- India does not agree to exclude claim 19: As mentioned under point 2 above, paragraph 13 of the request for the establishment of the Panel clearly identifies Article 3 and this also includes Article 3.4.

- India does certainly not agree to exclude claim 29. Claim 29 relates to the EC's obligations towards developing country Members and was clearly identified in the request for the establishment of the Panel. India deplores that even at this stage the EC is trying to evade its obligations towards developing country members, as unfortunately also happened throughout the entire administrative proceeding. Article 15 is important to India and to all developing countries. The fact that arguments in the context of claim 29 may relate to the provisional measures as far as the timing element is concerned does not mean that aspects of the provisional measure cannot be challenged in the context of the definitive measure. Claim 29 is therefore maintained;

[6] Appellate Body Report in Guatemala – Anti-Dumping Investigation Regarding Portland Cement From Mexico, 2 November 1998, WT/DS60/AB/R.

4. "That the verbatim reports of the consultations submitted as evidence by India are inadmissible and will be disregarded"

4.1 As a preliminary observation India stresses the absolute accuracy of the verbatim reports which were drafted by two authors taking notes and were subsequently proof-read by members of the Indian delegation present during the consultation process. These reports are therefore neither unreliable nor pointless at all. Indeed, most aspects of the consultation process as recorded in the reports can also be found back in the written answers of the EC. While it is perhaps unusual to present verbatim reports as an Exhibit in a First Submission, India was left with no other choice: the reports bear witness to the lack of respect on the part of the EC for the basic objective of the consultation process, which is to seek an amicable solution. India therefore disagrees with the EC's requested ruling number 4.

5. "That the document submitted by India as Annex 49 is not part of these proceedings"

5.1 India disagrees. The EC's position would imply that documents that were not published could not serve as evidence, even though they were communicated to interested parties and formed the basis for EC determinations;

5.2 Secondly, India notes that ex point 3 of the working procedures, all information submitted to the panel shall be kept confidential. Point 3 also provides that nothing shall preclude a party to a dispute from disclosing statements of its own position to the public, which in fact has not happened in this case;

5.3 Last, the allegation of breach of confidentiality is not at issue because the document submitted by India as Exhibit 49 is submitted with the explicit written approval of the producer concerned [see India Exhibit-81]his case;

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ANNEX 1-4

ORAL STATEMENT AND CONCLUDING REMARKS OF INDIA

FIRST MEETING OF THE PANEL

(10-11 May 2000)

CONTENTS

Preliminary Rulings Requested by EC

India refers to its written answers as provided last Friday, 5 May 2000 which set out its position in detail.

Nevertheless, India welcomes this opportunity to briefly comment on the EC preliminary rulings requested by EC. India has noticed that at most points in time, rather than replying to the substance of arguments raised, the EC side-tracks into generalizations and deviates attention from the core of India's arguments.

As an example of this side-tracking, India would like to highlight the example of Article 1. EC has requested a dismissal of India's claim under Article 1. However, it is India's view that this Article lays down a general principle as indicated by its title. It obligates Members to conduct anti-dumping investigations in accordance with the provisions of the ADA and to apply AD measures in accordance with GATT Article VI. Even if this Article were not specifically mentioned in an anti-dumping panel request, violation of any ADA provision automatically constitutes a breach of this Article as well. In this light, the EC's argument is moot.

Other examples concern Articles 2, 3.4, 6, and 15, each alone and in conjunction with Article 12. The EC is not entering into a specific debate, as it had ample opportunity to do, but rather trying to avoid the issues.

Detailed arguments on these Articles and their respective claims will be set forth in India's first Oral Statement as regards substantive matters.

Preliminary Ruling Requested by India

India first of all objects to the assertion that its claim is inadmissible. India is not merely expressing its lack of understanding. Instead, India has posed two specific queries as regards the status of the document Exhibit EC-4:

determination, which were never included in the non-confidential file in the first place. In view of the above, the EC must clarify the following:

What is the status of the document? In case the document only summarizes ["recapitulative table"] the level of support for the complaint amongst the producers then why are there no details concerning the production output of each producer, which presumably formed the basis for the country-wise sub-totals?

When was Exhibit EC-4 finalized [date] and for what purpose.

Substantive Issues

I. INTRODUCTION

1. India wishes to extend its sincere appreciation to you all for the difficult task ahead. Some of the claims in the case before you are complicated and may require much of your time and efforts in the coming months. Others are relatively straightforward. We offer you our full co-operation.

2. In the course of this oral statement, we will summarize and explain our claims. We will also orally present a first rebuttal of the arguments made by the EC in its first submission to the Panel.

3.

II. BACKGROUND OF THE CASE

6. Allow us to recall, Mr Chairman, that the matter under dispute was in fact the second anti-dumping proceeding targeting *Bed Linen* from India. The first *Bed Linen* proceeding had to be terminated due to lack of co-operation on the part of the EC producers. In fact, this second *Bed Linen* proceeding may also be viewed from the larger perspective of four other cases brought by the European trade association *Eurocoton* , all of which were terminated due to defects of some sort which surfaced during these respective proceedings. These cases are commonly referred to as: *Synthetic Fabrics, Cotton Fabrics, Unbleached Cotton Fabrics I,* and *Unbleached Cotton Fabrics II*. India firmly believes 0 Tj 24.756rnsecond35.75 60TD /F2 11.25 Tf -0.1194 Tc14.5041 7989Bed

29. To the extent that it is suggested that Article 6 should be considered in the determination of standing, India rejects these suggestions. Article 6 explicitly deals with issues *'throughout'* the investigation, *i.e.* explicitly after the standing determination has been made and after the proceeding has been initiated. At issue here however is what the authorities must do *prior to the initiation of the proceeding*.

IV. DUMPING

30. Let us now turn to dumping issues: As regards the dumping calculation India recalls that there are three Articles that are at the core of the dumping claims: Article 2.2, Article 2.2.2 (ii), and Article 2.4.2.

1. Article 2.2: The profit must be *'reasonable'* (Claim 4)

31. At the heart of the claim as regards Article 2.2 is the question whether the principle of 'reasonable' is an over-arching requirement, instructing the whole of Article 2.2, or whether any profit determined in accordance with the further specifics of Article 2.2.2 is *in se* reasonable?

32. India is strongly convinced that a profit arrived at under the methods foreseen under Article 2.2.2 is *not*

"*incurred and realized* on Bed Linen", and 18.65 per cent "*determined* on profitable sales only of Bed Linen". Now that the EC argues that this 18.65 per cent profit of Bombay Dyeing was perfectly representative [paragraph 190], it may be recalled that the quantity of its profitable sales was *only half* of its total domestic sales [page 374 India Exhibit-24].

38. Indeed, the EC even states that there is "nothing to suggest that other companies selling in India could not have obtained profits similar to those of Bombay Dyeing" [Point 190]. India points out that it was the EC itself which refused to include Standard Industries, which along with Bombay Dyeing was the largest seller on the domestic market, in the main sample [paragraphs 3.9, 3.10, 3.11, 3.12, and 3.13 of India's first submission]. From the very beginning India's suggestions in this regard were not taken into account.

39. Moreover, to suggest that the inclusion of data of another producer would have had little effect [again paragraph 190] is not borne out by the facts. As the EC knows, Bombay Dyeing and Standard Industries were the largest sellers on the domestic market [see India's first submission paragraph 3.3]. Since the EC failed to investigate Standard Industries, its potential impact is unknown.

40. India recalls one important precedent from the Panel Report on Audio Tapes in Cassettes. In that report the Panel held at paragraph 393 that it "did not consider that an amount for profit was by definition reasonable simply because [it met the relevant criteria]".[8] Although that Panel Report was not adopted at the time, India nevertheless considers its logic instructive and convincing.

41. Finally, India recalls the EC's own observations in paragraphs 135 through 152, most explicitly 152. In these paragraphs the EC suggests and stresses that the basic principle stems from the *chapeau* of Article 2.2 [paragraph 152] and that Article 2.2 seeks to avoid outcomes that would be distorted [paragraph 145]. Clearly, when the EC considers that the *chapeau* should override the sub-paragraphs for the 'ordinary course of trade' principle, it cannot suddenly take a different view when it comes to the notion of 'reasonable' which is at least as basic as the former.

2. Article 2.2.2: Incorrect application (Claim 1)

42. In relation to Article 2.2.2 there are three arguments that have been put forward:

- The text of Article 2.2.2 (ii) itself is evidently in the triple plural: weighted average, amounts, and exporters or producers;
- The text of Article 2.2.2 (ii) itself mandates the use of amounts "incurred and realized" and not amounts "determined";
- Option (ii) follows option (i).

43. As regards the first argument of this claim India does not deny that, in general terms, words in the plural could sometimes contain references to the singular as well. In this connection India has never meant to defy common sense. However, India believes that the text of Article 2.2.2(ii) is very explicit in referring to a *triple plural.* Moreover, in the current case the interpretation of Article 2.2.2(ii) allowing the use of one peculiar producer has led to a result which clearly is

[8] Copy of relevant part attached as India Exhibit-81.

"unreasonable" both in terms of Article 32 of the Vienna Convention, as well as in terms of the hierarchically superior Article 2.2.

44. India also wonders how it is possible that a result arrived at under a method categorized under option (ii) could be reasonable when, if the same calculation method would have been used but categorized under option (iii), the result would have been considered illegal [because it exceeds normally realized profits of all other producers].

45. As far as the second argument concerning amounts "incurred and realized" are concerned, India first of all objects to the suggestion that it has not considered the context, object and purpose of the provision [EC paragraph 135]. However, it is clear from the Vienna Convention that the terms of a treaty in its ordinary meaning are the first source of interpretation. India has therefore rightfully considered the text of the provision.

46. Indeed, to improperly graft the concept of "ordinary course of trade" onto Article 2.2.2 (ii) has several flaws as a matter of treaty interpretation:

- First the initial sentence of Article 2.2.2 chapeau explicitly includes the concept "ordinary course of trade." This first sentence of this *chapeau*

realized"] instead of 18.65 per cent, the dumping margins could in similar vein be expected to have been approximately 6.56 per cent lower, as follows:

Anglo-French:	18.1 per cent;
Bombay Dyeing:	7.7 per cent [not affected];
Madhu:	10.4 per cent;
Omkar:	7.6 per cent;
Prakash:	Nil.

50. Clearly the above result would have been more 'reasonable' than the current *"bizarre"* [see EC recital 144] dumping margins which resulted from the imputed 18.65 per cent profit.

51. In sum, it would appear that the EC has acted contrary to Article 2.2.2 on the above counts.

3. Article 2.4.2: Incorrect interpretation of all weighted average export transactions; main rule and exceptions cannot be mixed (Claim 7)

52. India reiterates its concern that allowing the offset within models but not between models contradicts the plain meaning of Article 2.4.2. The EC's interpretation disregards the word 'all' in the context of 'all comparable export transactions.' 'All' is apparently taken to mean by EC practice only the transactions that are dumped, not those transactions involving models that are not dumped.

53. Moreover, India respectfully submits that the alternative option contained in Article 2.4.2 allows the authorities to compare a weighted average normal value with individual export prices, in case of a 'pattern of export prices.' Such pattern could exist, for example, in a case where three models would appear very much dumped while two would appear very much non-dumped. However, in the view of India, the ADA does not allow the mixing of the main rule and the invocation of the exceptions. Either the main rule is applied or the exceptions are invoked on the basis of an explicit finding of existence of a pattern of export prices.

54. As far as Article 2.4.2 is concerned, India considers the arguments of the EC unconvincing. The fact remains that no genuine 'weighted average' on the export side is being effectuated: while 54. normal value is always considered at the 'weighted average' level, the 'export prices' are sometime2ch Tf -0.3916 a

calculation, but the operation of Article 2.4.2 which is the Article towards India's claim is directed. The fact that a sampling duty could under certain specific circumstances be higher by the exclusion of zero or *de minimis* dumping margins is not at issue. No claims have been raised with respect to Article 9.4. Indeed, as the EC points out in the first sentence of paragraph 209: "The process of determining a (single) dumping duty from these margins is a separate one, which does not fall within the express terms of Article 2.4.2.".

V. INJURY

1. Article 3.1: Failure to examine only dumped transactions (Claim 8)

59. India considers that the failure of the EC to examine dumped transactions only for the purpose of the injury determination in the Bed Linen II proceeding is inconsistent with Articles 3.1, 3.2, 3.4, 3.5 of the ADA.

60. India first of all objects to the suggestion by the EC that India's interpretation has *"moved beyond complexity into confusion"* [paragraph 221]. In this connection it is unfortunate that the EC is quoting selectively from the Vienna Convention: There is a real question here stemming from the discernible plain meaning of the language of the Article: the words "dumped imports" have been referred fifteen times in Article 3 alone.

61. If the EC authorities find that some imports are dumped and others are not, then they must distinguish between the two while making the injury determination. In this connection India disagrees with the statement that *"it is not possible to isolate the effects of individual transactions in a single product market. The market situation is determined by the overall impact imports"* [*sic*, recital 227]. Based on the detailed dumping calculations it must have been clear to the EC how much of the Indian exports had been dumped.

62. India further disagrees with the suggestion that the ASCM contains a parallel provision in this context [paragraph 231]. Dumping is by its nature company-specific and can therefore clearly differ between companies within a country while subsidies stem across the board from the Government. [This is not to say that for other purposes there could not be parallels between the ASCM and the ADA].

63. In short, allowing some *"dumped"* imports to taint all imports from a company and, indeed, a country skews, the fundamental injury analysis of Article 3. The core analysis of Article 3.1 and 3.2 requires the assessment of the volume and price impact of *"dumped"* imports only.

2. Article 3.4: Failure to evaluate all factors (Claim 11)

64. The EC failed to evaluate all injury factors mentioned in Article 3.4 of the ADA for its determination on the state of the domestic industry. Particularly, the EC did not evaluate the following twelve [of eighteen] factors:

- Productivity;
- Return on investments;
- Utilization of capacity;
- Factors affecting domestic prices;

exhaustive. The EC observes in paragraph 265 that *"to insist that the listed factors must be evaluated in all circumstances, would be to require the evaluation of a factor that has already been found to be irrelevant, which is nonsense"*. However, this reasoning is illogical: how can investigating authorities determine that a factor is not relevant if it is not examined/evaluated? How can interested parties know that the authority has evaluated such factors, if nothing is published. In EC's logic, investigating authorities should first determine on which relevant factors/indices they will rely upon,

- The EC explicitly determined that the domestic industry consisted of 35 companies [the complainants according to the EC], but relied in its injury determination on companies outside this group of 35;

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84. Second, the statements contained in paragraphs 346 through 350 contradict and try to explain away the EC's very own injury analysis as published in the Official Journal. In this connection India refers for example to recitals (91) and (92) of the Provisional Regulation, maintained in recitals (40) and (41) of the Definitive Regulation. The statements now made by the EC in its first submission, alleging for example that India's arguments are "misplaced" [paragraph 348], are completely contradicted by the published statements in the Official Journal.

6. Article 3.5: No consideration of other factors (Claim 20)

85. India believes that the EC acted inconsistently with Article 3.5 by automatically considering all imports of [illegible] as 29685.

91. India regrets that the EC has completely and blatantly ignored its obligations under Article 15. The issue does not only affect India, but all developing country members alike, all of whom are 15.Ind4158ue c

determining, though we don't know, how what it considered 'relevant,' and then evaluating only those relevant factors- while at the same time continuing to affirm that it examined *all* listed injury factors.

Mr. Chairman, unfortunately, this is not an exhaustive list. EC appears to have carried this approach throughout the present proceeding.

Mr. Chairman, we sincerely believe that justice was neither done, nor seen to be done in this case. The ADA spells out the obligations which the investigating authority must adhere to, obligations which are designed to provide fairness, equity and transparency, obligations which are designed to protect the trade interests of developing countries. Unfortunately EC failed to meet its obligations. We ask the Panel to so find and to ensure that justice is finally done.