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

Report of the Panel

The report of the Panel on *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 30 October 2000 pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/160/Rev.1). Members are reminded that, in accordance with the DSU, only parties to the dispute may appeal a panel report. An appeal shall be limited to issues of law covered in the Panel Report and legal interpretations developed by the Panel. There shall be no *ex parte* communications with the Panel or Appellate Body concerning matters under consideration by the Panel or Appellate Body.

Note by the Secretariat: This Panel Report shall be adopted by the Dispute Settlement Body (DSB) within 60 days after the date of its circulation unless a party to the dispute decides to appeal or the DSB decides by consensus not to adopt the report. If the Panel Report is appealed to the Appellate Body, it shall not be considered for adoption by the DSB until after the completion of the appeal. Information on the current status of the Panel Report is available from the WTO Secretariat.

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

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I INTRODUCTION

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

1.2 On 7 September 1999, pursuant to Article XXIII:2 of GATT 1994, Article 6 of the DSU and Article 17 of the AD Agreement, India requested the establishment of a panel to examine the matter.[3]

1.3 At its meeting on 27 October 1999, the Dispute Settlement Body ("DSB") established a Panel in accordance with India's request.[4] At that meeting, the parties to the dispute also agreed that the Panel should have standard terms of reference. The terms of reference are, therefore, the following:

> "To examine, in the light of the relevant provisions of the covered agreements cited by India in document WT/DS141/3, the matter referred to the DSB by India in document WT/DS141/3, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements".

1.4 On 12 January 2000, India requested the Director-General to determine the composition of the Panel, pursuant to paragraph 7 of Article 8 of the DSU. This paragraph provides:

> "If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request."

1.5 The Director-General composed the Panel as follows:

Chairman: Dr. Dariusz Rosati

Members: Ms Marta Lemme
Mr. Paul O'Connor

1.6 Egypt, Japan and the United States reserved their rights to participate in the panel proceedings as third parties.

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[1] WT/DS141/1.
[2] WT/DS141/2.
[3] WT/DS141/3.
[4] WT/DS141/4.

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

II FACTUAL ASPECTS

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

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

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

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

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

2.6 The European Communities established normal value based on constructed value for all investigated Indian producers. One company, Bombay Dyeing, was found to have representative domestic sales of cotton-type bed linen taken as a whole. Five types comparable to those exported to the European Communities were sold in representative quantities on the domestic market. Those five types were found not to be sold in the ordinary course of trade. Therefore, constructed values were calculated for all the types sold by Bombay Dyeing. For the other investigated Indian producers, the information for SG&A and profit used in the constructed normal value was that of Bombay Dyeing. Export price was established by reference to the prices actually paid or payable in the EC market. The weighted average constructed normal value by type was compared with weighted average export price by type for the investigated Indian producers, and a dumping margin was calculated for each such producer.

2.7 The complaint listed companies that produced bed linen in the European Communities. The European Communities excluded certain complainant companies. The 35 remaining companies were found to represent a major proportion of total Community production of bed linen in the investigation period and were, therefore, deemed to make up the Community industry.

2.8 Due to the number of companies in the Community industry, the European Communities established a sample. This sample comprised 17 of the 35 companies in the Community industry, representing 20.7% of total Community production and 61.6% of the production of the Community industry. The European Communities found that the Community industry suffered declining and inadequate profitability and price depression and, accordingly, reached the conclusion that the Community industry had suffered material injury. The European Communities found a direct causal link between the increased volume and the price effects of the dumped imports and the material injury

[5] Exhibit India-6. The other countries whose exporters of cotton-type bed linen were subject to the application for investigation and imposition of anti-dumping duties were Egypt and Pakistan.

[6] Exhibit India-7.

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

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

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

2.11 Notice of the final affirmative determination was published on 28 November 1997. Injury margins were determined to be above the level of dumping margins in all cases, and therefore definitive anti-dumping duties in the amount of the dumping margins determined, ranging from 2.6% to 24.7%, depending on the exporter in question, were imposed on imports of cotton-type bed linen originating in India.[9] Certain handloom products were exempted from the application of the definitive duties, provided a certificate of handloom origin in the required form was provided. Provisional duties were not definitively collected.

III PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. INDIA

3.1 India requests that the Panel find that, by imposing final anti-dumping duties on imports of cotton-type bed-linen from India, the European Communities violated Articles 2.2, 2.2.2, 2.4.2, 3.1, 3.4, 3.5, 6, 6.10, 6.11, 5.3, 5.4, 15, and 12.2.1 and 12.2.2. India makes 31 separate claims with respect to these asserted violations, as follows:

- Claim 1: Inconsistency with Article 2.2.2, by resorting to the option laid down in Article 2.2.2(ii) and by misapplying that option;

- Claim 4: Inconsistency with Article 2.2, by applying the profit amount determined for Bombay Dyeing in calculating constructed value for other producers, even though that amount was clearly not "reasonable";

- Claim 7: Inconsistency with Article 2.4.2, by zeroing negative dumping amounts in calculating dumping margins;

- Claim 8: Inconsistency with Article 3.1, by assuming that all imports of the product concerned during the investigation period were dumped;

- Claim 11: Inconsistency with Article 3.4, by failing to consider all injury factors mentioned in that provision for the determination of the state of the domestic industry;

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[7] Commission Regulation No. 1069/97, Exhibit India-8 ("Provisional Regulation").
[8] Exhibit India-33.
[9] Council Regulation No. 2398/97, Exhibit India-9 ("Definitive Regulation").

- Claim 14: Inconsistency with Article 6, insofar as the European Communities would argue that it did in fact consider all factors in Article 3.4, by failing to disclose or make public findings thereon, which violates the rights of defence contained in Article 6.
- Claim 15: Inconsistency with Article 3.4, by relying in the injury determination on companies outside the domestic industry, by not consistently basing the injury determination on the chosen sample and by relying on different "levels" of industry for different injury indices;

- Claim 16: Inconsistency with Articles 6.10 and 6.11, by selecting a sample of the domestic industry that was not representative;

- Claim 19: Inconsistency with Article 3.4, by taking account of injury allegedly caused by imports before the investigation period, which imports were not determined to be dumped;

- Claim 20: Inconsistency with Article 3.5, by taking account of injury allegedly caused by imports before the investigation period, which imports were not determined to be dumped;

- Claim 23: Inconsistency with Article 5.3, by failing to examine the allegations in the complaint and by failing to take into account information available at the time of initiation pointing to lack of material injury caused by dumped imports;

- Claim 26: Inconsistency with Article 5.4, by failing to properly examine the representativeness of the complainant and/or by failing to make a proper determination on representativeness as required by that provision;

- Claim 29: Inconsistency with Article 15, by failing to explore possibilities of constructive remedies before imposing anti-dumping duties;

3.2 India's claims 2, 5, 9, 12, 17, 21, 24, 27, and 30 assert inconsistency with Article 12.2.1 by failing properly to explain, in the Provisional Regulation, the European Communities' reasoning regarding matters raised in claims 1, 4, 8, 11, 16, 20, 23, 26, and 29, respectively.

3.3 India's claims 3, 6, 10, 13, 18, 22, 25, 28, and 31 assert inconsistency with Article 12.2.2 by failing properly to explain, in the Definitive Regulation, the European Communities' reasoning regarding matters raised in claims 1, 4, 8, 11, 16, 20, 23, 26, and 29, respectively.

3.4 India argues that, in so doing, the European Communities has nullified and impaired benefits accruing to India under the WTO Agreement.

3.5 India further requests that the Panel recommend that the European Communities bring its measures into conformity with its WTO obligations and that the European Communities immediately repeal the Regulation imposing definitive anti-dumping duties and refund anti-dumping duties paid thus far.

3.6 India also requests that the Panel issue the following preliminary ruling:

1. With respect to certain documentary evidence provided by the European Communities in Exhibit EC-4, India notes that this document was never made available to it, or otherwise referred to, at any stage prior to this point in time. India indicates that 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, despite which the European Communities has never before

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

B. EUROPEAN COMMUNITIES

3.7 The European Communities requests the Panel to reject the requests for recommendations made by India.

3.8 In its first submission, the European Communities requests that the Panel issue the following preliminary rulings:

1. The European Communities objects to the inclusion in India's first written submission of claims that were not mentioned in its Panel request. These include claims that the European Communities has acted inconsistently with the following provisions of the AD Agreement: Article 1; Article 3.4, as regards the allegation that the European Communities assumed that imports before the period of investigation were dumped (claim 19); Article 3.6 (claim 8); Articles 6.2, 6.4 and 6.9 (claim 14); and Articles 6.10 and 6.11 (claim 16).

2. The European Communities submits that India's claims concerning alleged defects in the Provisional Regulation are beyond the Panel's jurisdiction because (i) Article 17.4 defines the circumstances in which a provisional measure may be referred to the DSB and India has not contended that the Provisional Regulation fulfils the requirements of that provision and (ii) India's claims regarding the Provisional Regulation are moot as the Regulation expired in November 1997 and no anti-dumping duties were collected under it. The European Communities requests that the Panel exclude these claims from the scope of these proceedings (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).

3. The European Communities requests the Panel to rule that the verbatim reports of the consultations submitted as evidence by India are inadmissible and will be disregarded.

4. The European Communities requests the Panel to rule that the document submitted by India as Exhibit India-49 is not part of these proceedings, because it is apparently a dumping calculation made by the EC authorities in the course of another investigation. The European Communities condemns the breach of confidentiality and indicates that it is not prepared to comment on the substance of the document.

3.9 In addition to its request for a preliminary ruling regarding the Panel's terms of reference, the European Communities also argued that claim 29 is largely outside the Panel's terms of reference because the Panel request referred to EC behaviour before the Provisional Regulation.

IV ARGUMENTS OF THE PARTIES

4.1 With the agreement of the parties, the Panel has decided that, in lieu of the traditional descriptive part of the Panel report setting forth the arguments of the parties, the parties' submissions will be annexed in full to the Panel report. Accordingly, the parties' first and second written submissions and oral statements, along with their written responses to questions, are attached at **Annex 1** (India) and **Annex 2** (the European Communities). The written submissions, oral statements and responses to questions of the third parties are attached at **Annex 3**.

V INTERIM REVIEW

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

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

VI FINDINGS

A. REQUESTS FOR PRELIMINARY RULINGS

6.1 In its first written submission, the European Communities requested preliminary rulings with respect to (i) the scope of the claims before us, (ii) certain evidence concerning the consultations presented by India in its first submission, and (iii) certain evidence from a different anti-dumping investigation presented by India in its first submission. India subsequently made a preliminary request with respect to certain evidence presented by the European Communities in its first submission. The parties provided written responses to each others' requests for preliminary rulings prior to our first meeting, and further arguments were made at that meeting. At the close of the first meeting, we ruled orally on the European Communities' request to dismiss India's claims under Article 6 of the AD Agreement, and transmitted a written version of our oral ruling to the parties. We also ruled on the status of an unsolicited amicus curiae submission,[10] and set forth our position regarding certain of the requests for preliminary rulings on which we did not rule. The discussion below sets forth our rulings, with additional clarification, on requests for preliminary rulings disposed of at the first meeting, and disposes of the remaining requests for preliminary rulings in this dispute.

1. EC request

(a) Scope of the claims before the Panel

(i) Parties' arguments

6.2 With regard to the scope of the claims before the Panel, the EC requests, on two bases, a ruling that certain of India's claims are not properly before the Panel.

6.3 First, the European Communities argues that certain of the claims pursued by India in its first written submission were not mentioned in the request for establishment, either because there is no reference to the provision of the AD Agreement allegedly violated or the measure to which the claim is addressed is not before the Panel, or because the basis for the claim is different in the request from that presented in the first submission, and thus is not clearly identified in the request. The European

[10] On Tuesday, 9 May 2000, the day before our first meeting with the parties, the Panel received an unsolicited *amicus curiae* brief in support of the complaint by India in this dispute, submitted on behalf of the Foreign Trade Association by Dr. Konrad Neundörfer. We made copies available to the parties for comment. No party made any substantive comments regarding that submission. We did not find it necessary to take the submission into account in reaching our decision in this dispute.

Communities asserts that the following were not mentioned in the Panel request and are therefore not within the scope of the Panel's terms of reference:

> claims that the European Communities acted inconsistently with the following provisions of the Anti-dumping Agreement:
>
> > Article 1 (Para. 7.3 of India's first submission);
> >
> > Article 3.4, as regards the allegation that the European Communities assumed that imports before the Investigation Period were dumped (Claim 19);
> >
> > Article 3.6 (Claim 8);
> >
> > Article 6.2, 6.4 and 6.9 (Claim 14); and
> >
> > Article 6.10 and 6.11 (Claim 16).
>
> India's contention (paras. 3.106 to 3.107 of India's first submission) that the EC Basic Regulation (Exhibit India-1) is inconsistent with Article 2.2.2 of the Anti-dumping Agreement.

6.4 With regard to these claims, the European Communities argues that it is well established in the WTO that a complainant Member may not introduce a claim during the course of panel proceedings that is not mentioned or referred to in the terms of reference. In this case, the terms of reference are standard terms of reference, referring to the Panel the "matter" set forth in India's request for establishment. The European Communities asserts that the request for establishment in this case does not contain, explicitly or by reference, any mention of the claims set forth above. Regarding Article 1, Article 3.6, and Article 6, the relevant provisions of the AD Agreement are not even mentioned in the request. Regarding Article 3.4, a different claim is set out in the request for establishment than is pursued in India's first submission. Regarding the alleged inconsistency of the EC legislation with Article 2.2.2 of the AD Agreement, the European Communities asserts that the measure at issue in this dispute is the European Communities' final anti-dumping duties, and not the EC Regulation. In addition, the European Communities contends that it has been prejudiced by India's failure to clearly state which of the multiple obligations set forth in the asserted provisions of the AD Agreement have allegedly been violated.

6.5 With regard to Article 1 of the AD Agreement, India acknowledges in its written response that it made no separate claims under that provision. In India's view, Article 1 is a general provision, and a finding of violation of Article 1 of the AD Agreement "automatically follows" from the inconsistencies with the other Articles. India considers that Article 1 of the AD Agreement need not be mentioned separately since the European Communities' rights of defense were not prejudiced.

6.6 With regard to Article 3.6 of the AD Agreement, India asserts that, since it included all of Article 3 of the AD Agreement in its request for establishment, Article 3.6 of that Agreement is within the terms of reference. However, India states that, in a spirit of co-operation, it does not seek a ruling on Article 3.6.

6.7 With regard to the claims under Article 6 of the AD Agreement, India objects to the request that they be dismissed. India maintains that it was clear throughout the dispute settlement process, including the request for consultations, the discussions, and the written questions during the consultations, that India was concerned with the European Communities' actions as regards Article 6 of the AD Agreement. Thus, India maintains, the European Communities could not have been surprised by the claims in this regard (claims 14 and 16), and had not been prejudiced in its ability to

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

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

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

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

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

(ii) Findings

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

[11] India's claims 2, 5, 9, 12, 17, 21, 24, 27, and 30 generally assert inconsistency on the part of the European Communities with Article 12.2.1 by failing properly to explain, in the Provisional Regulation, the legal and evidentiary basis for and analysis underlying elements of the European Communities' decision which are challenged by India.

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

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

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

6.14 India acknowledged, at our first meeting, that Article 6 of the AD Agreement did not appear on the face of its request for establishment, characterizing this as an inadvertent omission. India argued, however, that its claims under that Article should nonetheless be allowed, asserting that the European Communities sustained no prejudice to its ability to defend its interests as a result of the omission of Article 6 of the AD Agreement from the request for establishment. In support of this contention, India points out that its claims with respect to Article 6 were clearly set out in its first submission, and that Article 6 of the AD Agreement was mentioned in the request for consultations and was actually discussed during the consultations.

6.15 In our view, a failure to state a claim in even the most minimal sense, by listing the treaty Articles alleged to be violated, cannot be cured by reference to subsequent submissions. In this regard, we note the statement of the Appellate Body in *EC-Bananas*:

> "Article 6.2 of the DSU requires that the *claims*, but not the *arguments*, must all be specified sufficiently in the request for the establishment of a panel in order to allow the defending party and any third parties to know the legal basis of the complaint. If a *claim* is not specified in the request for the establishment of a panel, then a faulty request cannot be subsequently "cured" by a complaining party's argumentation in its first written submission to the panel or in any other submission or statement made later in the panel proceeding". [14]

Thus, the fact that India may have fully elucidated its position with respect to alleged violations of Article 6 of the AD Agreement in its first written submission to the Panel avails it nothing as a legal matter. Failure to even mention in the request for establishment the treaty Article alleged to have been violated in our view constitutes failure to state a claim at all.

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[12] *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products ("Korea - Dairy Safeguard")*, Appellate Body Report, WT/DS98/AB/R, adopted 12 January 2000, para. 124 (emphasis added).

[13] *Id.*

[14] *European Communities - Regime for the Importation, Sale and Distribution of Bananas ("EC - Bananas")*, Appellate Body Report, WT/DS27/AB/R, adopted 25 September 1997, para. 143.

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

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

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

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

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

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

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

> group in order to determine injury. In both cases, separately, the European Communities acted inconsistently with Article 3.4. The European Communities' failure to explain its determination properly is inconsistent with Article 12.2.
>
> 15. The European Communities failed to consider all injury factors mentioned in Article 3.4 of the ADA for its determination on the state of the domestic industry, including productivity, return on investments, utilisation of capacity, the magnitude of the margin of dumping, cash flow, inventories, wages, growth, ability to raise capital or investments. The European Communities thus acted inconsistently with Article 3.4. As far as the European Communities 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.
>
> 16. The European Communities failed to make an unbiased and objective analysis of the development of market share of the domestic industry and insufficiently explained its position, as required by Article 3.4 of the ADA. As far as the European Communities would argue that it did in fact make such analysis, it has insufficiently explained it, and thus acted inconsistently with Article 12.2."[15]

6.22 The European Communities argues that India's Claim 19, as set forth and argued in India's first submission, relates to a different question than that specified in the request for establishment - the question of whether the European Communities included in its examination of injury the impact of imports that were not dumped. In the European Communities' view, this claim cannot reasonably be identified from the request for establishment as a claim under Article 3.4. Therefore, the European Communities argues, India's request for establishment does not present the problem addressed in claim 19 as set out in the first written submission clearly and is thus not within the Panel's terms of reference. The European Communities raises no objections with respect to the other Indian claims under Article 3.4 (Claims 11 and 15).

6.23 We note that in paragraph 13 of the request for establishment, India does seem to have made a claim about the consideration of all imports as dumped under Article 3.5 of the AD Agreement:

> "13. Contrary to the wording of Article 3 and especially Article 3.5 of the ADA, the European Communities automatically and without any further explanation assumed that *all* imports of the product concerned during the years immediately preceding the investigation period were dumped. Consequently, the causality finding between imports from India and the alleged injury caused to the domestic industry is tainted and inconsistent with Article 3.5. The European Communities' failure to explain this determination properly is inconsistent with Article 12.2."[16]

India has identified and argued this claim as claim 20 in the first written submission, and the European Communities has no objection to this claim.

6.24 However, it is not clear from the face of the request for establishment that India made any claim with respect to the consideration of all imports as dumped **under Article 3.4** of the AD Agreement, as opposed to Article 3.5 of that Agreement. Therefore, we must look more closely into the matter to determine whether India's request for establishment provides "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" in this regard, and therefore

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[15] WT/DS141/3.
[16] *Id.*

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

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

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

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

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

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

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

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

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

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

6.29 Thus, we conclude that, in the particular circumstances of this case, the lack of sufficient clarity in the request for establishment concerning India's claim 19 that challenges the consideration of all imports as dumped in the injury analysis under Article 3.4 was not prejudicial to either the European Communities or third parties. We therefore deny the European Communities' request to dismiss this aspect of claim 19. Of course, this is without prejudice to our substantive decision on this claim, which is addressed further below.

(b) Evidence regarding the substance of the consultations

(i) Parties' arguments

6.30 The European Communities also objects to the inclusion by India in its submission of reports of the consultations between the parties prior to the establishment of the Panel. The European Communities argues that these were drafted by India, without the European Communities' endorsement, are inaccurate and intrinsically unreliable, and are not evidence that can properly be submitted to the Panel.

6.31 In its response on this point, India stressed the "absolute accuracy of the verbatim reports" it had prepared and on which it relied in its first submission. India acknowledged that it was unusual to present such reports, but maintained that it was obliged to do so as these reports bore witness to the European Communities' lack of respect for the basic objective of the consultation process, to seek an amicable solution

(ii) Findings

6.32 At the outset, we note that India appears to acknowledge that there is nothing new or substantive in the reports of the substance of the consultations that is not otherwise before the Panel. India states that it is relying on the reports of the consultations as bearing "witness to the lack of respect on the part of the European Communities for the basic objective of the consultation process, which is to seek an amicable solution." This latter assertion is without relevance to either the issues in dispute (which do not relate to the adequacy of the consultations) or the question whether the evidence regarding the consultations should be considered by the Panel. Thus, it seems that the evidence concerning the consultations is at best unnecessary, and may be irrelevant. That said, however, merely because the evidence is unnecessary or irrelevant does not require us to exclude it.

6.33 A panel is obligated by Article 11 of the DSU to conduct "an objective assessment of the matter before it". The Panel in *Australia-Automotive Leather* observed that:

> "Any evidentiary rulings we make must, therefore, be consistent with this obligation. In our view, a decision to limit the facts and arguments that the United States may present during the course of this proceeding to those set forth in the request for consultations would make it difficult, if not impossible, for us to fulfill our obligation to conduct an "objective assessment" of the matter before us."[20]

Similarly in this case, we consider that it is not necessary to limit the facts and arguments India may present, even if we might consider those facts or arguments to be irrelevant or not probative on the issues before us. In our view, there is a significant and substantive difference between questions concerning the admissibility of evidence, and the weight to be accorded evidence in making our decisions. That is, we may choose to allow parties to present evidence, but subsequently not consider that evidence, because it is not relevant or necessary to our determinations or is not probative on the issues before it. In our view, there is little to be gained by expending our time and effort in ruling on points of "admissibility" of evidence *vel non*.

6.34 In addition, we note that, under Article 13.2 of the DSU, Panels have a general right to seek information "from any relevant source". In this context, we consider that, as a general rule, panels have wide latitude in admitting evidence in WTO dispute settlement. The DSU contains no rule that might restrict the forms of evidence that panels may consider. Moreover, international tribunals are generally free to admit and evaluate evidence of every kind, and to ascribe to it the weight that they see fit. As one legal scholar has noted:

> "The inherent flexibility of the international procedure, and its tendency to be free from technical rules of evidence applied in municipal law, provide the "evidence" with a wider scope in international proceedings . . . . Generally speaking, international tribunals have not committed themselves to the restrictive rules of evidence in municipal law. They have found it justified to receive every kind and form of evidence, and have attached to them the probative value they deserve under the circumstances of a given case".[21]

It has clearly been held in the WTO that information obtained in consultations may be presented in subsequent panel proceedings.[22]

6.35 There is nothing to be accomplished by limiting the evidence in this dispute by granting the European Communities' request, and we therefore deny it. Moreover, we note that we have not relied on the evidence concerning the consultations in making our decisions in this dispute. We therefore consider that the accuracy of India's representations as to what happened in the consultations is not relevant to our decision and we reach no conclusions in that regard.

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[20] *Australia - Subsidies Provided to Producers and Exporters of Automotive Leather,* Panel Report, WT/DS126/R, adopted 16 June 1999, para. 9.25.

[21] Kazazi, Mojtaba, *Burden of Proof and Related Issues – A Study of Evidence Before International Tribunals*, Malanczuk, Peter, ed., Kluwer Law International, The Hague, pp. 180, 184.

[22] *Korea - Taxes on Alcoholic Beverages,* Panel Report, WT/DS75/R–WT/DS84/R, adopted 17 February 1999, para. 10.23 (issue not raised on appeal). This is unlike the situation before many international tribunals, which often refuse to admit evidence obtained during settlement negotiations between the parties to a dispute. The circumstances of such settlement negotiations are clearly different from WTO dispute settlement consultations, which are, as the Appellate Body has noted, part of the means by which facts are clarified before a panel proceeding.

(c) Evidence containing confidential information from a different investigation

(i) Parties' arguments

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

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

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

(ii) Findings

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

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

[23] Exhibit India-81.

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

2. India request

(a) Parties' arguments

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

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

(b) Findings

6.43 Article 17.5(ii) of the AD Agreement provides that a panel shall consider a dispute under the AD Agreement "based upon: . . . the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member". It does not require, however, that a panel consider those facts exclusively in the format in which they were originally available to the investigating authority. Indeed, the very purpose of the submissions of the parties to the Panel is to marshal the relevant facts in an organized and comprehensible fashion in support of their arguments and to elucidate the parties' positions. Based on our review of the information that was before the European Communities at the time it made its decision, in particular that presented by India in its Exhibits, the parties' extensive argument regarding this evidence, and our findings with respect to India's claim under Article 5.4, we conclude that the Exhibit in question does not contain new evidence. Thus, we conclude that the form of the document, (*i.e.*, a new document) does not preclude us from considering its substance, which comprises facts made available to the investigating authority during the investigation. There is in our view no basis for excluding the document from consideration in this proceeding, and we therefore deny India's request.

B. BURDEN OF PROOF AND STANDARD OF REVIEW

6.44 In reviewing the European Communities' final measure imposing anti-dumping duties, which is the measure at issue in this dispute, we keep in mind the applicable principles concerning the burden of proof, and the standard of review in disputes involving anti-dumping proceedings. In WTO dispute settlement proceedings, the burden of proof with respect to a particular claim or defense rests with the party that asserts such claim or defence.[25] The burden of proof is "a procedural concept which speaks to the fair and orderly management and disposition of a dispute".[26] In the context of the present dispute, which is concerned with the assessment of the WTO consistency of a definitive anti-

[24] India has made no claims concerning alleged inconsistent application of EC law.

[25] *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, Appellate Body Report, WT/DS33/AB/R, adopted 23 May 1997, p. 14.

[26] *Canada - Measures Affecting the Export of Civilian Aircraft*, Appellate Body Report, WT/DS70/AB/R, adopted 20 August 1999, para. 198.

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

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

> "(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;"

Assuming that we conclude that the establishment of the facts with regard to a particular claim in this case was proper, we then may consider whether, based on the evidence before the EC investigating authorities at the time of the determination, an unbiased and objective investigating authority evaluating that evidence could have reached the conclusions that the EC investigating authorities reached on the matter in question.[28]

6.46 With respect to questions of the interpretation of the AD Agreement, Article 17.6(ii) provides:

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

Thus, in considering those aspects of the European Communities' determination which stand or fall depending on the interpretation of the AD Agreement itself rather than or in addition to the analysis of facts, we first interpret the provisions the AD Agreement. As the Appellate Body has repeatedly stated, Panels are to consider the interpretation of the WTO Agreements, including the AD Agreement, in accordance with the principles set out in the *Vienna Convention on the Law of Treaties* (*Vienna Convention*). Thus, we look to the ordinary meaning of the provision in question, in its context, and in light of its object and purpose. Finally, we may consider the preparatory work (the negotiating history) of the provision, should this be necessary or appropriate in light of the conclusions we reach based on the text of the provision. We then evaluate whether the European

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[27] *European Communities – Measures Concerning Meat and Meat Products* (*"EC – Hormones"*), Appellate Body Report, WT/DS26/AB/R–WT/DS48/AB/R, adopted 13 February 1998, para. 104.

[28] We note that this is the same standard as that applied by the Panel in *Mexico - HFCS*, which, in considering whether the Mexican investigating authorities had acted consistently with Article 5.3 in determining that there was sufficient evidence to justify inititaion, stated: "Our approach in this dispute will … be to examine whether the evidence before SECOFI at the time it initiated the investigation was such that an unbiased and objective investigating authority evaluating that evidence could properly have determined that sufficient evidence of dumping, injury and causal link existed to justify initiation." *Mexico - HFCS,* Panel Report, para. 7.95.

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

6.47 Finally, we note that, as a general matter, the object of a panel's review of a final anti-dumping measure focuses on the final determination of the investigating authority, in this case, the European Communities' Definitive Regulation (Exhibit India-9). However, it is clear to us, and the European Communities has confirmed, that in EC practice the Definitive Regulation does not stand alone as the final determination. Rather, the European Communities reaches many of its conclusions in the preliminary phase of the investigative process, and announces those decisions in the Provisional Regulation (Exhibit India-8). Unless there is a change in the substance of such decisions during the final phase of the investigative process, these decisions are often simply confirmed in the Definitive Regulation, without repeating the underlying analysis and facts in detail, although there may be additional facts or explanation given. Thus, to the extent we seek to understand the European Communities' analysis and explanation concerning any given element of its final determination in order to evaluate India's claims, we consider it appropriate to look to both the Provisional Regulation and the Definitive Regulation to inform ourselves as to the substance of the challenged decision.

C. CLAIMS UNDER ARTICLE 2

6.48 The European Communities, in its investigation, relied on constructed normal value, *i.e.*, it established the normal value on the basis of the cost of production plus a reasonable amount for administrative, selling and general costs (hereinafter "SG&A") and for profits. India does not challenge this decision on the part of the EC authorities. India does, however, challenge aspects of the European Communities' methodology for calculating the constructed normal value. In addition, India argues that the "zeroing" methodology the European Communities applied in comparing normal value and export price to calculate the dumping margins is inconsistent with the requirements of the AD Agreement.

1. Claim under Article 2.2.2 – determination of amount for profit (claim number 1)

(a) Article 2.2.2 - order of options

(i) Parties' arguments

6.49 Articles 2.2.2(i)-(iii) set forth three separate bases for deriving the amount of SG&A expenses and profit to be used in a constructed value calculation. India argues that the European Communities applied Article 2.2.2(ii), which was not available to the European Communities, instead of Article 2.2.2(i), which was available, and that this action violates the spirit and structure of Articles 2.2.2 and 2.2. India contends that the text of the AD Agreement reveals a gradually declining scale in the order of options as far as the relation with the producer is concerned. The first alternative, set out in the chapeau of Article 2.2.2, is the "actual dumping situation" and the fourth option (Article 2.2.2(iii)) is the "most alternative" method. Recourse to the options provided for in Articles 2.2.2(ii) and (iii) would normally deprive an exporter not only of the possibility of verifying the calculation of his own dumping margin, at least in the EC system, but also of the possibility of preventing dumping, because he would never know whether he is dumping in the first place. Therefore, India argues, those provisions are ranked such that their use is less available than Articles 2.2.2 and 2.2.2(i). It is India's position that, on the basis of the wording of Article 2.2.2, as well as the concept of dumping, Article 2.2.2 establishes a preference for the use of producer-specific data.

6.50 India points out that the EC legislation – Article 2(6) of Regulation 384/96 – in fact lists the options for determining the amounts for SG&A and for profit identified in Article 2.2 of the AD Agreement in a different order than they appear in the Agreement. This would appear to suggest, according to India, that the European Communities implicitly does not consider the order of options to be relevant. The European Communities did not even consider which option would be most reasonable, but simply applied Article 2(6)(a). India believes that, in fact, Article 2(6)(c) could have been applied, pointing to the situation of at least one company which had domestic sales of other products in the same general category in the domestic market. In India's view, the European Communities apparently considers the order in which options are set out in Article 2(6) of its Regulation as mandatory. Further, India notes that case law from the European Court of Justice confirms that the order of the Regulation is of a mandatory nature and recent EC literature on the subject confirms that the order set out in the Regulation is followed in practice. India considers that the *de facto* order of preference established by the European Communities is inconsistent with the order of preference established by the AD Agreement as applied in the bed linen proceeding.[29]

6.51 The European Communities disagrees with India's interpretation finding a priority of Article 2.2.2(i) over Article 2.2.2(ii). The European Communities maintains that the ordinary meaning of the text of Article 2.2.2 does not indicate any priority between the three options. The three sub-paragraphs contain no wording indicating that one is to be applied in preference to another, nor is any preference inherent in the nature of the three options, or at least of the first two. Consequently, following from the correct interpretation of Article 2.2.2, Members have complete discretion to choose between the options. Moreover, the European Communities contends that, while the particular exporter or producer is no doubt an important element in the calculation of normal value, so is the particular product. In fact, from an economic point of view, the commonality of products is more important than that of producer, because market forces operate most strongly between products of the same kind. Thus option (ii) is at least as economically realistic as option (i).

6.52 The European Communities notes that India draws attention to certain disadvantages for the exporter/producer of using option (ii) or (iii). The implication of this argument, to the European Communities, is that the drafters would have sought to avoid such disadvantages. Protecting the interests of the exporter/producer is arguably one of the purposes implicit in the AD Agreement, but others are equally plausible. For instance, compared to option (ii), the use of option (i) would involve much greater investigative effort, with consequent inconvenience and delays for all concerned. In contrast, the data relevant to option (ii) would already be in the hands of the investigating authorities. The European Communities believes that it would be more in accordance with the object and purpose of the AD Agreement to conclude that the text leaves Members free to decide whether to give priority to option (i) or option (ii).[30]

6.53 The United States, as third party to the dispute, submits that the text of Article 2.2.2 is not hierarchical with respect to alternative methods for computing SG&A and profit. Dumping is both a producer-specific and product-specific determination; therefore, the chapeau of Article 2.2.2 expresses a clear preference for the use of actual data of the producer or exporter under investigation, for sales of the like product in the ordinary course of trade. When the method of the chapeau of Article 2.2.2 cannot be applied, any of the three alternatives that follow may be applied instead. Notably, it is permissible to infer both from the presence of an explicit hierarchy between the chapeau and the three alternatives that follow, and from the absence of such a hierarchy among the three

[29] India has not made a claim regarding the Regulation itself, only its application in this case.

[30] In this regard, the European Communities notes that India addresses the drafting of Article 2(6) of the European Communities' Basic Regulation, in particular, the fact that options (i) and (ii) are set out in the opposite order as that in the AD Agreement. As noted above, India has not made a claim regarding the Regulation itself, and we make no ruling on its consistency with the AD Agreement.

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

(ii) Findings

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

6.55 Article 2.1 of the AD Agreement articulates the general requirement for price comparison to determine the existence of dumping. It stipulates:

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

6.56 Article 2.2 provides:

> "When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country[2], 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.
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>
> [2]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."

6.57 Thus, Article 2.2 of the AD Agreement provides that, in certain circumstances, the margin of dumping can be determined using a constructed normal value, comprising "the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits". Article 2.2.2 then sets forth how investigating authorities shall arrive at the amounts for SG&A and for profits to be used in the calculation of this constructed normal value. It states:

> "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:

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

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

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

6.58 The chapeau and paragraphs (i) and (ii) of Article 2.2.2 thus outline specific methods available to the investigating authorities to arrive at the amounts for SG&A and for profits to be used in the calculation of constructed normal value, and paragraph (iii) allows for the use of any other reasonable method. The chapeau of Article 2.2.2 requires the use of the profit margin from like product sales in the ordinary course of trade in the home market in calculating constructed normal value. When the amount cannot be determined on this basis, a Member may resort to an approach set out in paragraphs (i)-(iii).

6.59 Looking first at the text of Article 2.2.2, we see nothing that would indicate that there is a hierarchy among the methodological options listed in subparagraphs (i) to (iii). Of course, they are listed in a sequence, but this is an inherent characteristic of any list, and does not in and of itself entail any preference of one option over others. Moreover, we note that where the drafters intended an order of preference, the text clearly specifies it. Thus, Article 2.2.2 provides "When such amounts cannot be determined on this basis . . . ", an investigating authority may turn to subparagraphs (i) to (iii). There is no similar language regarding the subparts themselves. Had the drafters wished to indicate a hierarchy among the three options, surely they would have done so in a manner that made that hierarchy explicit. Certainly, we would have expected something more than simply a numbered listing. Thus, in context, it seems clear to us that the mere order in which the options appear in Article 2.2.2 has no preferential significance.

6.60 India's argument, that subparagraph (i) must be considered first, and that option (ii) can only be applied if option (i) cannot be applied, rests on implicit conclusions about the relative desirability of the three options in Article 2.2.2, and asks us to conclude that option (i) is, in all circumstances, preferable to option (ii). Paragraphs (i)-(iii) provide three alternative methods for calculating the profit amount, which, in our view, are intended to constitute close approximations of the general rule set out in the chapeau of Article 2.2.2. These approximations differ from the chapeau rule in that they relax, respectively, the reference to the like product, the reference to the exporter concerned, or both references, spelled out in that rule.[31] Thus, Article 2.2.2(i) allows the calculation of the profit amount on the basis of data for the exporter concerned, corresponding to *a general category of products*, including the like product. In turn, Article 2.2.2(ii) permits the calculation of the profit rate on the basis of the weighted average profit rate for *other investigated exporters*, corresponding to the like product itself. Finally, Article 2.2.2(iii) allows the use of any other method, as long as the resulting

[31] There is a question as to whether the methods outlined in Articles 2.2.2(i)-(iii) also relax the "ordinary course of trade" requirement present in Article 2.2.2. In fact, this is one of the questions at issue in this dispute (*See* section VI.C.1.(c)).

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

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

6.62 We therefore conclude that the order in which the three options are set out in Articles 2.2.2(i)-(iii) is without any hierarchical significance and that Members have complete discretion as to which of the three methodologies they use in their investigations. We thus find that the European Communities was not required by the AD Agreement to resort to option (i) before it could resort to option (ii) and it did not act inconsistently with Article 2.2.2 by using the latter option.

(b) Article 2.2.2(ii) – data from "other exporters or producers"

(i) Parties' arguments

6.63 India next claims that the European Communities misapplied Article 2.2.2(ii) of the AD Agreement by relying on data of one other producer as the amount for profits. India argues that the calculation method provided for in Article 2.2.2(ii) was not available to the European Communities, because the conditions for its application had not been met, pointing to the words "other exporters or producers" in that provision. India argues that the production and sales amounts of other exporters or producers are to be averaged, and that the production and sales amount of a single "other" exporter or producer cannot be used under Article 2.2.2(ii). In this regard, India adds that all definitions of the word "average" entail that the group set of which the average is to be calculated should consist of more than one unit. An average, by its very nature, cannot be inferred from a single variable. The fact that Article 2.2.2(ii) uses the words "weighted average", *i.e.*, an average that attributes statistical weight to each of the parameters being summarised into a single value, only stresses the fact that more than one factor needs to be taken into account. India asserts that "amounts" in Article 2.2.2(ii) refers to "the amounts for administrative, selling and general costs and for profits". It is, therefore, clearly the amounts for "administrative, selling and general costs and for profits" from "other producers or exporters" for which a "weighted average" needs to be established. However, the European Communities applied just one amount from one producer as the data to be used pursuant to Article 2.2.2(ii).

6.64 India considers that the logic underlying the European Communities' action perverts the text of Article 2.2.2(ii). The calculation of the constructed normal values for companies without domestic sales is coloured by factors unique to the single producer whose SG&A and profit amounts were used, thereby artificially finding dumping for all producers, where, in reality, none exists for most. It is precisely to avoid such extreme results, in India's view, that the Agreement requires that the weighted average of data for at least two exporters or producers be used. This rationale can be inferred from the principal rule of the chapeau of Article 2.2, namely that the amount for SG&A and profit be

[32] In fact, in order to come up with a benchmark, this method requires calculation of the weighted average profit rate for other investigated exporters, corresponding to the same general category of products.

[33] *See* Stewart, Terence P., ed., *The GATT Uruguay Round: A Negotiating History (1986-1992)*, Kluwer Law International, The Hague, pp. 171-190.

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

6.65 The European Communities disputes India's interpretation of Article 2.2.2(ii). The European Communities emphasises that the approach required by Article 31 of the *Vienna Convention* relies on the ordinary meaning of the words of the treaty in their context and in light of the treaty's object and purpose. The European Communities notes that India alleges that the word "average" requires consideration of more than one parameter. The European Communities does not agree that provisions containing the word "average" (or the words "weighted average") become inapplicable if the circumstances are such that the class of data that is to be "averaged" contains only one item. Article 2.4.2, for instance, uses the notion of "a weighted average normal value with a weighted average of prices of all comparable export transactions". There is no reason, for the European Communities, to think that the formula could not be applied if either side of the comparison contained only one sale. The European Communities further asserts that this interpretation of Article 2.2.2 entails focusing on the use of the word "amounts" rather than amount. The European Communities submits that the use of this word is more complex. Since the first sentence of the chapeau of Article 2.2.2 refers to an individual "exporter or producer", it would be surprising, in the opinion of the European Communities, if there were more than one amount for "administrative, selling and general costs" and one amount for "profits". Therefore, the word "amounts" most plausibly reflects the fact that there would be two amounts (one of each type) for each exporter or producer.

6.66 Regarding the use of the word "amounts" in Article 2.2.2(ii), the European Communities comments that the word is in the plural in two senses, first, as explained above with respect to Article 2.2.2, and, second, because in many cases there would be more than one other exporter or producer, as is also envisaged by the reference to "other exporters or producers". The European Communities submits, however, that, both in ordinary speech and in carefully drafted legal texts, a plural phrase is often used with the intention of including the case where there is only one such person or thing. Articles 4.1 and 17.4 of the AD Agreement use similar language. In the European Communities' view, it would be absurd to prevent the operation of such provisions merely because there was only one other producer or exporter. Nor does India explain why the normal usage of the phrase should not apply in this case. The European Communities adds that it is the phrase "other exporters or producers" in Article 2.2.2(ii) that is the central element, and the mention of "average" adds nothing to the use of the plural in the phrase "exporters or producers".

6.67 Finally, the European Communities submits that, when the words "other exporters or producers" are considered in light of the object and purpose of the AD Agreement, it becomes clear that the evident purpose of this part of the agreement is to secure data that are independent of the company in question, but are nevertheless limited to the sales of like products. There is no intrinsic reason why the use of data from a single firm could not achieve this goal.

6.68 The United States, as third party, argues that Article 2.2.2(ii) does not require a minimum number of companies to be used in calculating SG&A and profit amounts, and it neither forbids an investigating authority from using a single company for purposes of this calculation, nor requires it to use more than one company. The use of plural forms in this provision, without more, is not determinative of the issue.

(ii) Findings

6.69 Having concluded that the three options in Articles 2.2.2(i)-(iii) are not set out in preferential order, and that the European Communities therefore was entitled to resort to the methodology in Article 2.2.2(ii) the next issue before us is whether, as India argues, the European Communities was

precluded from applying the option set out in Article 2.2.2(ii) because that provision may not be applied in the situation where the data concerning amounts for profit and SG&A are available for only one other exporter or producer, as was the situation in this case. Otherwise put, is the existence of data for more than one other exporter or producer a necessary prerequisite for application of the approach set out in paragraph (ii)?

6.70 We first consider the language of Article 2.2.2(ii). India's argument has two principal elements – the use of the plural in the text of Article 2.2.2(ii), and the phrase "weighted average". With respect to the first element, the European Communities argues that a phrase in the plural form is often used, in general and in the AD Agreement, with the intention of including the case where there is only one such person or thing. We agree. The phrase "other exporters or producers" as a general matter, admits of an understanding where the plural form includes the singular case – the case where there is only one other producer or exporter. In both common speech and legal texts, it is accepted that the ordinary meaning of the plural form may include the singular case. Moreover, the focus of the options set out in Article 2.2.2 on the use of actual data suggests to us that such an understanding is permissible. The question we must consider is whether that is the meaning to be given to the phrase as used in Article 2.2.2(ii). As discussed above, Article 2.2.2(i) maintains the focus on the producer being investigated, but allows consideration of data concerning a broader range of products, while Article 2.2.2(ii) maintains the focus on the like product, but allows consideration of other producers or exporters. The third option, Article 2.2.2(iii) allows any other reasonable method, subject to a cap on the results. In this context, we do not consider that the reference to other producers or exporters in the plural necessarily must be understood to preclude resort to option (ii) in the case where there is only one other producer or exporter of the like product.

6.71 With respect to the second element, India argues that because a weighted average must be based on more than one data point, there must be more than one “other” producers' or exporters' data under consideration. However, we do not consider that the phrases “weighted average” and “other producers and exporters” constitute two separate requirements. Rather, we are of the opinion that the concept of weighted averaging is relevant only **when there is information from more than one other producer or exporter** available to be considered. In our view, the obligation to consider a weighted average of the information of other producers or exporters eliminates the possibility of a result-oriented or otherwise biased or discriminatory choice among available data. However, when the data available is from only one source, such a possibility does not arise. The interpretation argued by India would limit the analytical options available to investigating authorities for determination of the profit rate and SG&A in a constructed normal value in a manner we cannot see as mandated by the text.

6.72 In this regard, we consider informative other provisions which use the plural form, but are applicable in the singular case. For instance, Article 4.1 of the AD Agreement defines the domestic industry in terms of "domestic producers" in the plural. Yet we consider it indisputable that a single domestic producer may constitute the domestic industry under the AD Agreement, and that the provisions concerning domestic industry under Article 4 continue to apply in such a factual situation. Similarly, we note that Article 9.4(i) provides that the dumping duty applied to imports from producers/exporters not examined as part of a sample shall not exceed "the weighted average margin of dumping established with respect to the selected exporters or producers". We consider that this provision does not become inoperative if there is only one selected exporter or producer – rather, the dumping margin for that exporter or producer may be applied. In our view, these considerations lend support to an understanding of Article 2.2.2(ii) pursuant to which Members may apply the methodology in that provision even in a case where data is available for only one "other" exporter or producer. Thus, we conclude, based on our understanding of the text of the provision, that a Member is not precluded from employing the methodology set out in Article 2.2.2(ii) in a case where there is only one other producer or exporter.

6.73 We also consider that the negotiating history of Article 2.2.2 confirms our view that Article 2.2.2(ii) is not limited to the case where there is more than one "other" producer or exporter. There was no provision in the Tokyo Round Anti-Dumping Code corresponding to Article 2.2.2(ii). In the absence of guidance in this regard, it was the practice of some Members, notably the United States, to calculate profit and SG&A amounts in a constructed value on the basis of benchmarks established without reference to specific relevant information developed in the course of the investigation. This practice was strongly objected to by other Parties to the Tokyo Round Anti-Dumping Code, and was the subject of negotiations in the Uruguay Round leading to the adoption of Article 2.2.2, and its subparts, to provide guidance for the derivation of profit and SG&A amounts in constructed value calculations.[34] In our view, this background indicates that the provision is intended to ensure that actual data is used for determining the profit rate and SG&A in a constructed normal value, rather than arbitrarily determined amounts. That there is only one producer whose information is available for this use does not undermine this purpose. The requirement of a weighted average resolves the question of how to determine the appropriate amounts in a case where there is more than one investigated exporter whose actual data can be used. Thus, investigating authorities may not select a single producer as the source of the necessary information when information is available from more than one such producer, but must take a weighted average of the available information.

6.74 However, in this case, the European Communities did not arbitrarily pick one producer's data to use in its calculation. Rather, it was faced with the factual situation that there was only one producer whose data was available for the calculation under Article 2.2.2(ii). It is true that there was at least one other exporter which had domestic sales of the like product during the period of investigation. However, that producer was not in the sample on which the European Communities based its calculations in the dumping investigation. It might, in theory at least, have been possible for the EC investigating authorities to calculate a weighted average profit rate including that producer's information.[35] However, India has made no persuasive argument as to why, absent a conclusion that the sample was not properly selected[36], the European Communities should have been **obligated** to consider, in this aspect of its analysis, information for a company not part of the sample, and whose information was not considered otherwise. India argues that this producer was in the sample, but this is not factually correct. It was considered by the European Communities as being in the reserve sample, which is established in case the companies selected for the sample do not cooperate or provide usable information.[37] Information was gathered from companies in the reserve sample to be used if it became necessary, which did not happen. We therefore consider that, as a matter of fact, there was only one producer whose data was available for use under Article 2.2.2(ii).

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

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[34] *See* Stewart, Terence P., ed., *The GATT Uruguay Round: A Negotiating History (1986-1992)*, Kluwer Law International, The Hague, pp. 171-190.

[35] We note in this regard that the European Communities argues that the information for the producer in question would not have been considered in any event, as it had insufficient sales in the ordinary course of trade to allow its information to be used. Moreover, the European Communities suggests that the inclusion of data for that producer would have had little effect on the outcome.

[36] We note that India has made no claim concerning the sample relied upon by the European Communities.

[37] Provisional Regulation, Exhibit India-8, para. 21; Exhibit India-22.

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

(i) Parties' arguments

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

6.77 India notes that the definition of amounts for SG&A and profits in the first sentence of the chapeau includes the words "ordinary course of trade". In India's view, since those words appear after the words "based on", that requirement was clearly intended to form part of the basis or foundation for the specific method provided under the chapeau, but only for that method. Consequently, the words "such amounts" in the second sentence of the chapeau cannot logically be taken to refer back to SG&A and profits "in the ordinary course of trade", but instead only to SG&A and profits as a whole. India concludes that the word "amounts" used for the purposes of Article 2.2.2(ii) does not, therefore, include any requirement that the amounts be incurred or realised in the ordinary course of trade.

6.78 In the European Communities' view, the issue under Article 2.2.2(ii) is whether the EC authorities were entitled to limit the data they would consider for purposes of constructing the normal value. The excluded classes of data in this case were, in the case of SG&A, data from sales that were unrepresentative, and in the case of profits, data derived from sales that were unrepresentative and/or unprofitable. These classes, the European Communities points out, correspond to the concepts mentioned in the opening clauses of Article 2.2, which makes it clear that one object and purpose of this part of the AD Agreement is to avoid reliance on sales that fall into either of these categories. The European Communities argues that India is evidently suggesting that the drafters did not object to normal value being based on unprofitable or unrepresentative sales as long as that data came from other producers or exporters, which interpretation is not, in the European Communities' view, based on a proper application of the rules of treaty interpretation of Article 31 of the *Vienna Convention* and, even if it were, would lead to a result that was "manifestly absurd or unreasonable" and require resort to the interpretive principles in Article 32 of the *Vienna Convention*.

6.79 Finally, the European Communities asserts that the basic principle of the "ordinary course of trade" is expressed in Article 2.2. In fact, it is a two-part principle: data associated with sales that are unprofitable, or are unrepresentative, are not reliable. For reasons of consistency, the European Communities maintains that this principle applies to all provisions falling within Article 2.2, including Article 2.2.2(ii).

6.80 Egypt, as third party, alleges that costs calculated by the European Communities were not based on the records kept by the exporters or producers under investigation in the case of Egypt, as required by Article 2.2.1.1, nor were amounts for SG&A costs based on actual data submitted by the relevant exporters or producers, as required by Article 2.2.2.

6.81 Japan, as third party, argues that Article 2.2.2(ii) does not allow the exclusion of below-cost sales before determining the profit amount. Article 2.2.2(ii) refers to "the actual amounts incurred

and realised" and does not include any qualifications. According to Japan, if authorities choose this option, they must determine the weighted average of the actual profit margins reported by the exporters or producers in their accounting records or reflected in the price and cost of the transactions at issue. Article 2.2.2(ii) does not allow the authorities to modify these actual profit margins. Japan considers it improper to graft the concept of "ordinary course of trade" onto Article 2.2.2(ii). It sees the language of the first sentence of Article 2.2.2 as explicitly including the notion of "ordinary course of trade" but grammatically distinct from the second sentence that serves as the chapeau for the remainder of this provision. Japan notes the fact that the drafters were quite careful to insert the concept "ordinary course of trade" where they intended it to apply, and the decision not to include the concept in Article 2.2.2(ii) must, therefore, be given meaning when interpreting this language. Finally, Japan considers that an interpretation which allows the exclusion of below-cost sales would give no significance to the important distinction between the language of the option set out in Article 2.2.2 based on "actual data" and the language of the option set out in Article 2.2.2(ii) based on "actual amounts incurred and realised".

6.82 The United States, as third party, asserts that it is a permissible interpretation of Article 2.2.2(ii) to restrict consideration of "actual amounts incurred and realised" to those attributable to sales made in the ordinary course of trade. Such an application is not prohibited by the Agreement and would, in fact, be a more reasonable interpretation of the Agreement. There is no explicit requirement within Article 2.2.2(ii) determining whether sales not in the ordinary course of trade should be included or excluded from the calculation of SG&A and profit to be used to calculate the constructed value for other producers or exporters. Further, although Article 2.2.2(ii) does not explicitly provide for the exclusion of below-cost sales, Article 2.2.1 makes it clear that, when below-cost sales have been made, the authorities are under no obligation to consider them in the determination of normal value, provided that certain conditions have been met. Moreover, excluding sales not in the ordinary course of trade is consistent with the overall operation of Article 2 of the AD Agreement.

(ii) Findings

6.83 The last issue that we must address under Article 2.2.2 is whether the European Communities erred in its application of Article 2.2.2(ii). In particular, the question before us is whether the European Communities acted inconsistently with that provision in using production and sales amounts incurred and realised only on transactions that were not made below cost – that is, transactions it considered to be in the ordinary course of trade – instead of using all production and sales amounts incurred and realised. More specifically, may the principle, set out in Article 2.2 – that data associated with sales that are unprofitable are not reliable[38] – be applied to all provisions falling within Article 2.2?

6.84 Looking first at the text of Article 2.2.2(ii), we note that there is no reference to sales in the ordinary course of trade. Thus, we would agree with the view that exclusion of sales not in the ordinary course of trade is not mandated by that provision.[39] However, we do not understand the European Communities to be arguing that it was required to exclude those sales in its determination of

[38] Article 2.2 sets out the rule that data associated with unrepresentative sales are not reliable. A question similar to the one raised by India would be whether this principle carries to Article 2.2.2, given that only the "ordinary course of trade" rule is mentioned in Article 2.2.2. India does not, however, raise this issue, and we, therefore, need not and do not consider the question.

[39] Indeed, we note that although the chapeau of Article 2.2.2 indicates that such sales must not be considered in calculating profit under that provision, Article 2.2 merely provides that sales below the cost of production **may** be treated as not being in the ordinary course of trade. That is to say, even if the relevant criteria for consideration of sales below cost as sales not in the ordinary course of trade are satisfied, an investigating authority is not obligated to exclude those sales from its calculation of normal value except, apparently, in determining the amounts for profit and SG&A under the chapeau of Article 2.2.2.

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

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

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

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

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

(a) Parties' arguments

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

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

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

clearly not "reasonable". For India, Article 2.2.2 lays down how the "amounts for administrative, selling and general costs and for profits" are to be determined. It does not, however, explain how the **reasonable** amounts for SG&A and for profits are to be determined. For India, the word reasonable in Article 2.2 has a separate function, and the "reasonable" test of Article 2.2 is an independent, over-arching requirement in addition to the requirements of Article 2.2.2, rather than a rule concretised by Article 2.2.2. "Reasonable" must thus be interpreted as a substantive requirement: whatever method under Article 2.2.2 is used, Article 2.2 requires that the result must be "reasonable". Moreover, India argues that Article 2.2.2(iii) contains an implicit definition of the notion of "reasonable", which can be used to test the results reached under the methods set out in the chapeau and paragraphs (i) and (ii) of Article 2.2.2.

6.89 In respect of the specific factual situation in the bed linen proceeding, India recalls that some producers did have sales of other products in the same general category (textiles). The average same-category domestic profit rate of these other producers was 7.04% and the average overall profit rate of these other producers was 5.41%. The average profit rate for bed linen was found to be 6.1% for the other countries in the investigation, Egypt and Pakistan. India recalls that the reasonable profit rate imputed to the EC industry was 5%. Finally, India notes that the profit rate determined by the European Communities on the basis of the profitable sales of one Indian company, and applied in calculating normal value for all other Indian producers was 18.65% . It is evident, in India' view, that in comparison with all the other profit rates that were relevant in the context of the bed linen proceeding, the figure of 18.65% stands out as a complete anomaly and does not reflect the profits actually realised by bed linen producers inside and outside India. The figure is three times higher than the average profit rates determined for the other two countries involved in the investigation as well as that of the European Communities' own bed linen industry. India submits that, if the word reasonable is defined by reference to the criteria set out in the Article 2.2.2(iii), it is obvious that the profit rate established for other Indian producers is unreasonable.

6.90 The European Communities is of the view that the methods of calculating SG&A and profits that are set out in Articles 2.2.2(i)-(iii) provide for the determination of "a reasonable amount for administrative, selling and general costs and for profits". Those options represent, for the European Communities, particular and detailed formulations of what constitutes "reasonable" amounts. The European Communities also believes that the limitation set out in the third option – "provided that the amount for profit so established shall not exceed . . ." – applies only to the third option, and not to the other two. Had the drafters wished to apply this proviso to all the options, the European Communities submits they would have attached it to the chapeau of Article 2.2.2.

6.91 The European Communities rejects India's argument that option (iii) defines what is reasonable. Options (i) and (ii) are, in the European Communities' view, formulae that produce reasonable solutions. The European Communities further considers that it was obviously the intention of the drafters that the application of these formulae would always produce figures for SG&A and for profits that meet the standard of reasonability specified in the last sentence of the chapeau of Article 2.2. The words "any other reasonable method" in option (iii) clearly refer to *methods* other than those described in the preceding options (i) and (ii), which are in themselves reasonable and do not need to be qualified as such. The wording of these options at least implies that the results obtained through the application of options (i) and (ii) are presumed to satisfy the standard of reasonability. The relevant question, the European Communities proposes, would then be: What kind and weight of evidence would be required to overturn the presumption? The European Communities asserts that India has presented no relevant evidence to rebut the presumption that the results obtained through the application of option (ii) in the case were reasonable.

6.92 The European Communities suggests that the three options in Article 2.2.2 are intended to produce approximations of the amounts that would emerge from applying the formula in the chapeau, that is to say the SG&A and profits of a producer selling the like product in its own market. This, in

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

6.93 The United States, as third party, maintains that Articles 2.2 and 2.2.2 of the Agreement set forth the requirements for calculating profit when normal value is based on constructed value instead of prices. Article 2.2 provides, *inter alia,* for the addition to cost of production of a reasonable amount for profit. Article 2.2.2 then sets forth several explicit options for how a reasonable profit may be determined. The United States disagrees with the view that there is a limitation on the amount for constructed value profit. In the US view, no such limitation exists in the Agreement. With one exception – subpart (iii) – the methodologies in Article 2.2.2 limit *how* the authorities may determine the profit amount, *not the amount of the profit itself*. The "profit cap" in subpart (iii) is necessary to impose some limitations on "other" "reasonable" methodologies for determining profit not specifically articulated in the Agreement. Significantly, subpart (iii) *does not* expressly or implicitly impose a similar limitation upon the preferred profit methodology in the chapeau or the alternatives in subparts (i) or (ii).

(b) Findings

6.94 Having concluded that the European Communities could properly apply the option set out in Article 2.2.2(ii), and that it acted consistently with that provision in making its calculation on the basis of information for one other producer for its sales of the like product in the ordinary course of trade, the next issue before us is whether the results of a proper calculation under Article 2.2.2(ii) are subject to a separate test of "reasonability" before they may be used in constructing a normal value for other producers.

6.95 We first consider the text of the provision. The chapeau of Article 2.2.2 begins with the phrase "For the purpose of paragraph 2", and provides that the amounts for, *inter alia*, 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. The second sentence of Article 2.2.2 specifies that if the chapeau methodology cannot be used, these amounts "may be determined on the basis of" subparagraphs (i)-(iii). Article 2.2, which is referred to in the first sentence, establishes the basic principle that when a constructed value is used, it shall include, *inter alia*, a reasonable amount for profit.

6.96 The text thus indicates that the methodologies set out in Article 2.2.2 are outlined "for the purpose" of calculating a **reasonable** profit amount pursuant to Article 2.2. There is no specific language establishing a separate reasonability test, or indicating how such a test should be conducted. In these circumstances, we consider that there is no textual basis for such a requirement. Thus, the ordinary meaning of the text indicates that if one of the methods of Article 2.2.2 is properly applied, the results are by definition "reasonable" as required by Article 2.2.

6.97 Further, we note that Article 2.2.2(iii) provides for the use of "any **other** reasonable method", without specifying such method, subject to a cap, defined as "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". To us, the inclusion of a cap where the methodology is not defined indicates that

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

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

6.99 We note further that the methodology set out in the chapeau of Article 2.2.2, as well as those in subparagraphs (i) and (ii), rely on actual data from the books of the producer(s) or exporter(s) being used as sources. India, however, argues that even where the chapeau methodology is applied, which requires the use of actual data concerning the product under investigation sold by the producer being investigated, the results are subject to a separate test of reasonability.[42] To test for reasonability results arrived at through the use of **actual** data for the production of the like product by the producer/exporter being investigated does not, in our view, serve any meaningful purpose. Whatever the argument about the "reasonability" of a particular result – a 50% profit rate, for instance – if it is based on actual data and properly calculated, then that is the reality. An important object and purpose of Article 2.2.2, as discussed above, is to base the calculation of the profit amount on actual data. Similarly, while the methods set out in paragraphs (i) and (ii) are derivatives of the chapeau methodology, where actual data are used as required and the calculation is correct, the results obtained themselves reflect objective reality. Thus, the use of actual data itself ensures that subjective judgments about the reasonability of the results do not affect the calculation of constructed normal value. We consider that no purpose would be served by testing the results obtained under the chapeau and subparagraphs (i) and (ii) against some arbitrary or subjective standard of reasonability.

6.100 In this regard, we note that the standard of reasonability proposed by India – the Article 2.2.2(iii) profit cap – is, in our view, arbitrary in the context of the "reality" of the results obtained under paragraphs (i) and (ii). The other benchmarks suggested by India in respect of the specific factual situation in the bed linen proceeding seem equally arbitrary and subjective. India asserts that the average category domestic profit rate of other producers on the same category of goods was 7.04% and the average overall profit rate of these other producers was 5.41%. India also indicates that the average profit for bed linen producers in Egypt and Pakistan was determined to be 6.1% during the investigation. There is no objective basis we can discern for concluding that these amounts are more "reasonable" than the amount determined on the basis of the actual data. The only factor common to these figures is that they are all lower than 18.65%, the profit rate determined by the European Communities on the basis of the profitable sales of one Indian producer and applied in the construction of normal value for the other Indian companies.[43] India puts forth no reason as to why a "reasonable" profit rate in this case should be defined by reference to these data, except to emphasise the difference between the profit rate actually used and these suggested benchmark profit rates. Merely that these other profit rates are lower does not, in our opinion, make them more "reasonable" than the rate actually calculated and applied by the European Communities.

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[42] In response to a question from the Panel, India confirms that "[t]he criterion of reasonability, as laid down in Article 2.2, instructs the chapeau of Article 2.2.2 and its subparagraphs". Response of India to Question 1 from the Panel following the first meeting of the Panel, Annex1-6.

[43] We note in this context that India has **not** challenged the reasonability of this rate, calculated on the basis of the chapeau methodology, as applied to Bombay Dyeing itself, but only its use as the rate applied, pursuant to Article 2.2.2(ii) for other Indian producers.

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

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

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

(a) Parties' arguments

6.103 India argues that the European Communities acted inconsistently with Article 2.4.2 of the AD Agreement by zeroing "negative dumping" amounts for certain types of bed linen in calculating the overall weighted average dumping margin for the like product bed linen. According to India, the European Communities effectively averaged only within a model, and not between models, and thus did not compare a weighted average normal value to a weighted average of prices of all comparable export transactions, as required by Article 2.4.2 of the AD Agreement. In India's view, Article 2.4.2 provides for three possibilities to establish a dumping margin:

- A comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions;
- A comparison of normal value and export prices on a transaction-to-transaction basis; or
- A comparison of the normal value established on a weighted average basis to prices of individual export transactions (in certain specific cases).

[44] Indeed India appears to acknowledge that comparisons for individual product types within a single like product are appropriate in the context of an anti-dumping investigation, that the weighted average normal value and weighted average export price for each model at issue in this case were properly calculated by the European Communities, and that a fair comparison was made with respect to each product type considered.

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

6.104 In India's view, the practice of zeroing is not consistent with the requirement set forth in Article 2.4.2 that the comparison take into account the "weighted average of prices of all comparable export transactions". India asserts that this language precludes excluding certain amounts from the calculation simply because they showed "negative" dumping. India argues that, given the use of the words "weighted average" in Article 2.4.2 and the definition of the word "average", there is clearly no justification for excluding certain amounts in establishing an average. An "average" relates to the total of given amounts and not to a number of given amounts from which a selection can be made as to which ones are to be averaged. The use of the word "all" in Article 2.4.2 underlines this idea. And, finally, India posits that the practice of attributing a zero value to "negative dumping" for the eventual calculation of overall dumping margins is contrary to the concept of weighting and in fact distorts the process of actually weighting dumping margins. Moreover, India maintains that this EC method always will lead to a higher dumping margin compared to the method India asserts is envisaged by the AD Agreement. India acknowledges that in the situation where all models are dumped, the results would be the same, but argues that this situation did not occur in the bed linen case. However, India asserts that in this case, because all models in the bed linen proceeding were not dumped, the zeroing of "negative dumping" margins calculated for certain product types resulted in the overstatement of the dumping margins for four companies, and for one company a finding of dumping where dumping did not exist.

6.105 The European Communities maintains that its practice in calculating the dumping margin is consistent with the requirements of Article 2.4.2. In the European Communities' view, the practice of "zeroing" as applied in this case recognizes that the process of calculating dumping margins is directed at dumping, and therefore the European Communities' methodology focuses on those product types where dumping has been found. In the case of any product types for which there is no dumping (i.e. the margin is zero or less than zero ("negative dumping")), the European Communities treats this margin as zero. However, the types of products that are found to have margins less than zero (and which therefore are not being dumped), are nevertheless kept in the calculation (albeit at notional zero margins), on a weighted average basis, of the overall dumping margin for the like product, and thereby reduce the overall weighted average dumping margin determined for that product.

6.106 The European Communities focuses on the need to consider all "comparable" export transactions, which it asserts is done in its practice, which observes the principle of comparing weighted averages for those products that are comparable. Moreover, the European Communities argues, Article 2.4.2 refers to "the existence of margins of dumping", making clear that the process of comparing weighted averages will normally conclude with more than one dumping margin. However, the process of determining a single dumping margin, on which the collection of the duty is based, from these margins does not, in the European Communities' view, fall within the express terms of Article 2.4.2, but is left to the discretion of Members. The European Communities also disputes India's contention that its methodology will always lead to a higher dumping margin than would have been the case if "zeroing" had not taken place.

[45] India asserts that the European Communities does not always follow the practice of zeroing as applied in the bed linen proceeding, referring to a document disclosing the calculation in another EC anti-dumping proceeding. In that other case, India maintains that the "negative" dumping found for certain models was offset against the dumping found for other models which were dumped. We do not consider that the European Communities' practice in other investigations has any relevance to our decision here, as India has made no claim of discriminatory treatment in this dispute.

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

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

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

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

difference between normal value and export price simply means there is no dumping;, *i.e.*, the dumping margin for that product or group of transactions is zero. Thus, for such products with no dumping margins, the amount of dumping duties which the importing country is permitted to collect is properly considered to be zero. The United States argues than when the investigating authority calculates an overall, average rate of dumping, no provision of the AD Agreement requires that more credit be given for "negative dumping" amounts than if the dumping duties were to be collected on a product-specific basis, which it asserts would be the result if India's interpretation of Article 2.4.2 were accepted. The United States also argues that India's reading of Article 2.4.2 would fail to give meaning to the requirements of Article 2.4, which contemplate that comparisons be made at least on a product-specific basis in order to account for physical and other differences which affect price comparability. Finally, the United States notes that Article 2.4.2 was introduced to the AD Agreement during the Uruguay Round to address the concern of certain Members with the practice of some Members, including the European Communities and the United States, of comparing individual export price transactions to weighted-average normal values. Article 2.4.2 was included in the Agreement to provide that, except in the case of targeted dumping, margin calculations in an investigation would be made on a consistent basis, *i.e.*, weight-average to weight-average or transaction to transaction.[47] Thus, the United States asserts, the intent was to eliminate transaction-to-average comparisons in investigations, not to alter the manner in which authorities calculated overall margins after all appropriate comparisons were made.

(b) Findings

6.110 Article 2.4.2 of the AD Agreement provides:

> "Subject to the provisions governing fair comparison in [Article 2.4], 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."

6.111 As background, we note that Article 2.4 of the AD Agreement (which is not the subject of a claim by India in this dispute) provides, in pertinent part:

> "A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.[7] . . . ".

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[47] The United States cites, in this regard, Stewart, Terence P., ed., *The GATT Uruguay Round: A Negotiation History (1986-1992)*, Kluwer Law International, The Hague, pp. 155-61 (discussing the negotiations concerning, *inter alia*, weighted-average comparisons), and *EC - Anti-Dumping Duties on Audio Tapes and Cassettes Originating in Japan*, Panel Report, ADP/136, 28 April 1995 (unadopted), para. 348 (discussing the European Communities' prior practice of comparing individual export prices to a weighted average normal value).

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

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

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

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

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

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

The succeeding provisions of Article 2 of the AD Agreement, which is entitled "Determination of Dumping" set forth, in some detail, various information and methodologies to be used in the determination of whether dumping exists. Article 2.4.2 sets out the permissible bases for comparison of normal value and export price in order to establish the existence of margins of dumping. In light of Article 2.1 of the AD Agreement, we consider that the "margins of dumping" established under Article 2.4.2, based on the comparison methodologies set forth, must relate to the ultimate question being addressed: whether the product at issue is being dumped. Thus, in our view, a margin of dumping, that is, a determination that there is dumping, can only be established for the product at issue, and not for individual transactions concerning that product, or discrete models of that product.

6.115 We note also that Article 2.4.2 specifies that the weighted average normal value shall be compared with " a weighted average of prices of **all** comparable export transactions". In this case, the European Communities' calculation of the final weighted average dumping margin for the product did

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

6.116 We recognize that Article 2.4.2 does not, in so many words, prohibit "zeroing". However, this does not mean that the practice is permitted, if it produces results inconsistent with the obligations set forth in that Article, as we believe it does. We consider that the requirements of Article 2.4.2 must be understood to apply to the entire process of determining the existence of margins of dumping for the product, and that there is no "subsequent stage" which escapes entirely from the strictures of Article 2.4.2.

6.117 We do not mean to suggest that anything in Article 2.4.2 prohibits an investigating authority from undertaking multiple comparisons of weighted average normal value and a weighted average of prices of all comparable export transactions. To the contrary, we agree with the European Communities and India that Article 2.4.2 allows investigating authorities to make multiple comparisons on a model basis within the like product being investigated, as the European Communities did in this case. In this regard, we note the word comparable in Article 2.4.2. Read in light of the obligation in the Article 2.4 to make a fair comparison, the specific requirements to make comparisons at the same level of trade and at as nearly as possible at the same time, and the obligation to make due allowance for differences affecting price comparability, the use of the word comparable in Article 2.4.2 indicates to us that investigating authorities may insure comparability either by making necessary adjustments under Article 2.4, or by making comparisons for models which are, themselves, comparable. However, in arriving at a conclusion whether the product as a whole is being dumped, we consider that Article 2.4.2 obligates an investigating authority to make its determination in a way which fully accounts for the export prices on **all** comparable transactions. The European Communities' methodology, which focuses on those models which are, in its view, dumped, and takes less than full account of those models where the comparison results in a negative margin, does not accomplish this goal.

6.118 We note that the European Communities argues that Article 2.4.2 refers to the establishment of "the existence of margins of dumping" in the plural, asserting that it is thus clear that the process of comparing weighted averages will normally conclude with more than one dumping margin. As discussed above, however, we consider that a dumping margin is established for the **product** under investigation, and not for individual **models** being compared as the basis of the establishment of the dumping margin. Thus, in our view, the fact that Article 2.4.2 refers to the existence of margins of dumping in the plural is a general statement, taking account of the fact that, as is made clear in Articles 6.10 and 9 of the AD Agreement, individual dumping margins are determined for each producer or exporter under investigation, and for each product under investigation. While the comparisons required under Article 2.4.2 yield margins of price difference, these are not, properly speaking, margins of dumping to the extent that they relate to discrete models of or transactions concerning the product under investigation, rather than the product under investigation as a whole.

6.119 Based on the foregoing, we conclude that the European Communities acted inconsistently with Article 2.4.2 of the AD Agreement in establishing the existence of margins of dumping on the basis of a methodology which included zeroing negative price differences calculated for some models of bed linen.

D. CLAIMS UNDER ARTICLE 3

6.120 India's claims as to injury and causation raise multiple issues relating to the interpretation of several provisions of Article 3 – in particular, Articles 3.1, 3.4 and 3.5.[48] Although India has broken the issues down into multiple discrete claims and arguments, there are essentially three questions under Article 3 before us: 1) whether the European Communities violated its obligations under Articles 3.1, 3.4, and 3.5 by considering all imports from India (and Egypt and Pakistan) to be dumped in carrying out its analysis of injury caused by dumped imports (India's claims numbers 8, 19, and 20), 2) whether the European Communities violated its obligations under Article 3.4 by failing to evaluate "all relevant economic factors and indices having a bearing on the state of the industry", (India's claim number 11) and 3) whether the European Communities violated its obligations under Article 3.4 by considering information for various groups of EC producers in its analysis of the impact of dumped imports on the domestic industry (India's claim number 15).

1. Claims under Articles 3.1, 3.4, and 3.5 - consideration of all imports from India (and Egypt and Pakistan) as dumped in the analysis of injury caused by dumped imports (claims numbers 8, 19, and 20)

(a) Parties' arguments

6.121 India asserts that the European Communities assumed, for the purposes of the injury determination, that all imports of the product concerned during the investigation period (1 July 1995-30 June 1996) were dumped. In addition, India asserts that the European Communities assumed that imports during the entire period of the injury investigation (1 January 1992-30 June 1996), as well as imports prior to that period, were dumped. India asserts that, with respect to the first assumption, much of the bed linen exported from India during the investigation period was not, or should have been found not to be, dumped, and that with respect to the second assumption, there was no investigation covering those periods on the basis of which a finding of dumping could have been made, and thus imports before the period of the dumping investigation clearly can not be assumed to be dumped. In India's view, inclusion of non-dumped imports in the analysis of injury and causation is inconsistent with Articles 3.1, 3.2, 3.4, 3.5 and 3.6.[49]

6.122 India notes that the European Communities cumulated the volume of all imports from the three countries under investigation – Egypt, India and Pakistan – and not just the volume of imports that was the subject of dumped transactions. (Exhibits India-23 and India-52). India further asserts that if the European Communities had not zeroed, the imports from one company would have been found not to be dumped at all. This company accounted for 28.5% of the volume of Indian bed linen exports by sampled companies. Thus, India maintains that it is clear that the total amount of non-dumped imports accounted for more than one-third of India's exports. India asserts that, assuming the percentages of non-dumped imports from Egypt and Pakistan are of a similar order of magnitude, this

[48] In its response to the European Communities' request for preliminary rulings, India withdrew any putative claims under Article 3.6, a fact of which we have taken note, stating that we would issue no ruling on any such claim. See paragraph 6.18 above.

[49] As noted above, India withdrew its Article 3.6 claim in this regard. The Article 3.4 claim in this regard is the subject of the European Communities' preliminary objection based on failure to sufficiently identify the claim in the request for establishment, which we have denied. See paragraph 6.28 above. In addition, we note that while the parties have made reference to Article 3.2 in their arguments, India has made no claim in respect of that Article, and we therefore make no findings under Article 3.2 of the AD Agreement.

indicates that the total market share of dumped imports was overstated by more than a fifth. With respect to the imports during years prior to the dumping investigation period, India maintains that, as no finding of dumping was ever made for any imports during this period, it was incorrect for the European Communities to consider imports of bed linen from India in the years preceding the dumping investigation period as dumped.

6.123 India also maintains, with reference to Article 3.5 of the AD Agreement, that the European Communities failed to determine to what extent injuries caused by other factors (such as, for instance, contraction in demand or changes in consumption patterns) were responsible for the injury allegedly suffered by the domestic industry. Consequently, India argues that the establishment of the facts considered under Article 3.5 was not proper and/or the evaluation of those facts was not unbiased and objective. In particular, India argues that the term "dumped imports" in Article 3.5 has the same meaning as in Article 3.4. Consequently, in India's view, the European Communities acted inconsistently with Article 3.5 by automatically considering all imports of bed linen from India between 1992 and 30 June 1995 as dumped.

6.124 The European Communities considers that the term "dumped imports" as used in Article 3 of the AD Agreement includes all the imports of the product in question from the country that is found to be dumping, as opposed to only those transactions that are dumped, as suggested by India. For the European Communities, the interpretation of the term "dumped imports" proposed by India raises doubts because of its uncertainty. If each transaction is to be allocated to a dumped or non-dumped classification, there is no provision to cope with the situation where an exporter conceals the volume of dumping by varying the prices from one consignment to another, perhaps in collusion with the importer. There would need to be sub-categorisation by exporter in that case.

6.125 The European Communities cites Articles 2.1, 3.1 and 5.7of the AD Agreement as contextual support for its view that dumping and injury-causation issues are to be analysed on a product and country, rather than transaction, basis. Article 2.1, in the European Communities' view, makes clear that the *existence of* dumping is to be determined for a country at the level of the product under investigation, referred to as the "like product". While Article 2 allows, or may even require, that the product under investigation from a country be divided up by exporter and type in calculating the margin of dumping, the determination of dumping is still made for the product under investigation and the country. Further, the European Communities argues, Article 3.1 requires that a determination of injury caused by dumped imports has to be made for the domestic market for, and the domestic producers of, the like product. In the European Communities' view, it is not possible to isolate the effects of individual transactions in a single product market, and the market situation is determined by the overall impact of imports. The European Communities also maintains that Article 5.7 requires that "[t]he evidence of both dumping and injury shall be considered simultaneously (a) in the decision whether or not to initiate an investigation, and (b) thereafter, during the course of the investigation, starting on a date not later than the earliest date on which in accordance with the provisions of this Agreement provisional measures may be applied". Since injury has to be investigated before it is established which transactions are dumped, it is clear, to the European Communities, that the term "dumped products" used in connection with the injury provisions of Article 3 must refer to all imports of the product under investigation (although a finding of injury is of course conditional upon dumping being found).

6.126 Finally, the European Communities indicates that a consideration of the object and purpose of Article 3 supports its interpretation of the term "dumped imports". The European Communities states that the unlikelihood of Article 3 pursuing its object and purpose with the needlessly complex notion of "dumped imports" forwarded by India is reinforced by an examination of the first sentence of Article 3.2, which requires consideration whether there have been significant increases in dumped imports. In the European Communities' view, the AD Agreement evidently intends national authorities to gather information covering a lengthy period, since the investigation period used to

assess dumping (typically a year) would hardly be enough to assess trends in the volume of imports. Article 3.2 is manifestly for the benefit of exporters, according to the European Communities, because it sets conditions that must be satisfied before causation is established. Nevertheless, on India's interpretation, in order to apply this provision, the exporters would have to provide not just one, but several, years' price data in order to establish whether dumping was occurring throughout the longer period for which import volumes are considered. Far from benefiting exporters, such an interpretation would in many cases make this provision unworkable.

6.127 The European Communities rejects India's assertion that it assumed imports prior to the dumping investigation period to be dumped and found injury caused by those imports. The European Communities maintains that there is nothing in either the EC Regulation, or any other statement by EC authorities that expressly or implicitly supports the view that it reached such a conclusion. The European Communities maintains that imports in years preceding the dumping investigation period were examined in order to put the situation during that period into context. The phrase "injury investigation period" is used by the European Communities to refer to the longer period over which the condition of the industry is evaluated, but this does not imply dumping during that period.

6.128 In response to the Indian contention that the European Communities "at several instances puts great emphasis on companies allegedly disappeared from the EC market in the period 1992-POI", the European Communities draws attention to the statement in the Regulations 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 information on the contraction in the number of producers showed that what might otherwise have seemed a contradiction was in fact a realistic scenario. Otherwise put, the EC authorities found injury principally because of the domestic industry's reduced profitability and price suppression, and the data of the disappeared companies was relevant to explaining the improved position of the industry with regard to sales and market share.

6.129 Egypt submits that by failing to separate out dumped exports and those that were not dumped, the European Communities acted contrary to Articles 3.1, 3.2, 3.4, 3.5 and 3.6 of the AD Agreement. Egypt focuses on the use of the words "dumped imports" in Article 3.1. Moreover, Egypt argues, the European Communities failed to properly consider whether other factors could have caused the injury, as required by Article 3.5 of the AD Agreement.

6.130 Japan believes that the language "dumped imports" in various places in Article 3 means that the injury determination set forth in Article 3 must reflect the authorities' assessment of only "dumped imports", and not imports that were not found to have been "dumped". In Japan's view, if the authorities find that some imports were "dumped" and others were not, then they must distinguish between the two in making their injury determination. Japan asserts that this obligation extends to imports that are cumulated, as the investigating authority is obliged to make the injury determination only for the "dumped" portion of the cumulated imports. Allowing "dumped" imports to taint all imports from a company seriously skews the injury analysis required under Article 3.

6.131 The United States disagrees with the European Communities' reasoning that dumping is determined for countries, and therefore that it is entitled to consider all imports from a country found to be dumping as dumped imports for purposes of the injury investigation. However, the United States submits that, even assuming the European Communities did treat all subject imports during the injury assessment period as dumped, that treatment would have been consistent with the AD Agreement. The reasons supporting the European Communities' view that it acted consistently with the Agreement in treating all subject imports as dumped during the period of investigation similarly apply with respect to the treatment of subject imports during the portion of the injury

assessment period that was prior to the dumping investigation period.[50] In the United States' view, the requirements of the injury determination necessarily oblige Members to gather and consider information for a period longer than the period of the dumping investigation, in order to evaluate volume and price changes. This disparity of time periods has been an element of dumping investigations since long before the current AD Agreement was negotiated and came into effect. However, there is, in the United States' view, no reasonable way to eliminate this disparity, as it would not be meaningful to assess injury only over the period of the dumping investigation, and it would be unduly burdensome to investigating authorities and exporters to extend the period of the dumping investigation. The United States points out that in the *Salmon* cases[51] the United States had considered all imports during the injury investigation period to be dumped (and subsidised). The Panels reviewing that injury determination concluded that the United States had properly considered whether there had been a significant increase in the volume of dumped (and subsidised) imports under the Tokyo Round Anti-Dumping and Subsidies Codes. The relevant text of the AD Agreement is the same as that of the Tokyo Round Anti-Dumping Code.

(b) Findings

6.132 India's claim regarding the European Communities' treatment of all imports of the product concerned during the investigation period as dumped is primarily characterised as a claim of inconsistency with Article 3.1.

6.133 Article 3.1 states:

> "A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and 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."

Article 3.1, which requires consideration of the volume, price, and consequent impact of dumped imports on the domestic industry sets out the general requirements for a determination of injury, and the succeeding sections of Article 3 provide more specific guidance for such determinations. Articles 3.4 and 3.5 similarly require consideration of dumped imports.

6.134 There is no dispute between the parties as to the facts with respect to the consideration of imports as dumped during the period of the dumping investigation. The European Communities explicitly acknowledges that it considered all imports from the three countries investigated, India, Egypt and Pakistan, as dumped, and considered the volume and price effects of all imports from those countries during that period in evaluating whether injury was caused by dumped imports. India asserts that the European Communities was only entitled to consider as dumped imports in its injury analysis those imports attributable to specific transactions as to which dumping was actually found during the period of the dumping investigation.

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[50] The United States stated, in response to questions from the Panel, that its own practice is to exclude from the volume and price effects analysis imports from producers or exporters for which a finding of no dumping is made. These are considered in its injury investigation in the category of "non-dumped" imports, as are imports from third countries not subject to the investigation. However, while the United States clearly disputes the principle espoused by the European Communities that dumping is determined for countries, it does not assert that its own practice is required by the AD Agreement.

[51] *Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway* ("*Salmon - Anti-Dumping Duties*"), Panel Report, ADP/87, adopted 26 April 1994, BISD 41S/228; *Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway* ("*Salmon - Countervailing Duties*"), Panel Report, SCM/153, adopted 28 April 1994, BISD 41S/576.

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

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

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

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

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

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

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

inconsistent with the AD Agreement, with our own determination. In any event, we lack the necessary data to undertake such a calculation. Thus, while the treatment of imports attributable to producers or exporters found to **not** be dumping is an interesting question, it is not an issue before us and we reach no conclusions in this regard.

6.139 Our conclusion that investigating authorities may treat all imports from producers/exporters for which an affirmative determination of dumping is made as "dumped imports" for purposes of injury analysis under Article 3 is bolstered by our view that the interpretation proposed by India, which entails the conclusion that the phrase "dumped imports" refers **only** to those imports attributable to **transactions** in which export price is below normal value, would lead to an unworkable result in certain cases. One of the objects and purposes of the AD Agreement is to establish the conditions under which Members may impose anti-dumping duties in cases of injurious dumping. An interpretation which would, in many cases, make it impossible to assess one of the necessary elements, injury, is not consistent with that object and purpose.

6.140 An assessment of the volume, price effects, and consequent impact, only of imports attributable to transactions for which a positive margin was calculated would be, in many cases, impossible, or at least impracticable. Attempting to segregate individual transactions as to whether they were "dumped" or not, even assuming it could be done, would leave investigating authorities in a quandary in cases in which the dumping investigation is undertaken for a sample of companies or products. Such sampling is specifically provided for in the AD Agreement, yet it would not be possible, in such cases, accurately to determine the volume of imports attributable to "dumped" transactions.[53] Similarly, if dumping is determined on the basis of a comparison of weighted average normal value to weighted average export price, there would be no comparisons concerning individual transactions which could serve as the basis for segregating imports in "dumped" and "not-dumped" categories.

6.141 We note, in this context, the findings of the GATT Panels in the *Salmon* cases. While the specific issue raised here was neither raised nor addressed in that case, the Panel in *Salmon - Anti-Dumping Duties* was considering the question of whether the United States had properly determined that the imports caused material injury to the domestic industry "through the effects of dumping". The Panel found that this language, which is found in Article 3.5 of the AD Agreement, did not require that the volume, price, and impact "effects" to be considered be those of the dumping, but rather those of the dumped imports, that is, the "effects of the dumping" were equated by the Panel with "the effects of the dumped imports".[54] In that case, the "dumped imports" included all imports from all producers in the country without distinction by transactions. In our view, this conclusion is consistent with an interpretation of the phrase "dumped imports" as referring to all imports of the **product** from producers/exporters as to which an affirmative determination of dumping has been made.

6.142 We therefore conclude that the European Communities, having made an affirmative determination of dumping with respect to imports from all producers/exporters in this case, did not act inconsistently with Articles 3.1, 3.4, and 3.5 of the AD Agreement by considering all imports from India (and Egypt and Pakistan) in its evaluation of the volume, price effects, and consequent impact of dumped imports.

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[53] India's argument suggests that the proportion of imports attributable to dumped transactions for one producer or country could be applied to determine the volume of dumped imports for a different producer or country. We do not consider that such a practice would satisfy the general requirements of the AD Agreement for consideration of positive evidence and objective decision-making.

[54] *Salmon - Anti-Dumping Duties*, Panel Report, paras. 565-571; *Salmon - Countervailing Duties*, Panel Report, paras. 328-340 ("effects of the subsidy" and "effects of the subsidised imports").

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

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

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

(a) Parties' arguments

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

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

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

6.148 Second, the European Communities asserts that the factors listed in Article 3.4 are negative in character and, as such, were properly evaluated during the investigation. The European Communities stresses that the one feature that stands out in a close examination of the terms of Article 3.4 is that the listed factors are explicitly concerned with indications of injury, not the absence of injury. Of fifteen factors, only two are not qualified by the words "decline" or "negative effects". The opening clause of Article 3.4 – which speaks of the "*impact* of the dumped imports" – reinforces this interpretation of the listed factors. The purpose of the examination under Article 3.4 is to determine what is wrong with the domestic industry, not what is right with it. The European Communities does not wish to suggest that non-negative factors have no relevance. However, in the view of the European

[55] *See* First Submission of the European Communities, Annex 2-1, Table 4.

Communities, India seeks to establish that Article 3.4 requires investigating authorities to evaluate in an explicit fashion all the fifteen listed factors. However, the wording of Article 3.4 refers almost exclusively to negative factors and, consequently, according to the European Communities, what might be called the 'comprehensive evaluation' requirement, if it exists, applies only to such factors. Profits and prices were the two principal negative factors identified by the EC authorities in the bed linen proceeding, and these were thoroughly examined and evaluated.

6.149 Third, the European Communities puts forward various reasons for concluding that Article 3.4 does not require that every one of the listed factors need be evaluated in every investigation. The European Communities points to the use of the words "relevant" and "have a bearing on the state of the industry" in Article 3.4 as well as the last sentence of the provision, which states: "This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance." The European Communities also underlines the use of the word "including" and emphasises what it calls the "nature" of the list, explaining that it is "broken into parts by semicolons, and the word 'or' is used to indicate that not all of the factors need be considered". Not only do the factors differ in importance from case to case, but, for the European Communities, it is possible to deduce that certain of them are inherently likely to be more significant than others and that findings on some may make findings on others superfluous.

6.150 The European Communities argues that the obligation in Article 3.4 to consider injury factors does not exist in isolation and, in particular, account must be taken of Articles 6.13 and 6.14, which deal with the difficulties experienced by interested parties – particularly small companies – in supplying information requested and the need for a Member to proceed expeditiously in its investigation, respectively. In this context, aspects of the evaluation required by Article 3.4 may have to be limited in order to observe the spirit of Article 6.13. The European Communities posits that the decision on the limits to be set on the obligation in Article 3.4 is a matter of judgement that must be exercised by the investigating authorities.

6.151 Japan, as third party, asserts that the language of Article 3.4 requires all listed factors to be considered, and the list of factors is the minimum that must be evaluated by the investigating authorities. The degree of importance of each factor may vary from case to case, but all of the listed factors must be fully considered and evaluated in each case. Authorities may not exclude certain factors because they deem these to be irrelevant. Japan is of the opinion that this interpretation finds support in the change in the language of this provision over time. The change from the phrase "such as" in the comparable provision of the Tokyo Round Anti-Dumping Code to the word "including" in the AD Agreement underscores the interpretative significance of the word "including". Because "including" means "part of a whole", the factors after the word "including" must be viewed as a subset of a potentially larger group of factors that must be evaluated by the authorities. Had the drafters intended this list of factors to be a discretionary checklist from which authorities may pick and choose, they would not have changed the words "such as" to "including". The drafters would also have used language to more clearly provide that authorities could consider as many or as few of these factors as they wished.

6.152 The United States, as third party, takes the position that while, in light of Article 12.2, investigating authorities are not required in each case to make a specific finding on each enumerated factor in Articles 3.2 and 3.4, it should be discernible from the authorities' determination that they evaluated each of the enumerated factors. This objective may be achieved when a determination, through its demonstration of why the authorities relied on the specific factors they found to be material in the case, thereby discloses why other factors on which they do not make specific findings were accorded little weight. In the current case, however, the United States shares some of India's concerns about the inadequacy of the European Communities' findings, because the European Communities' specific findings on the factors it addressed do not elucidate why it did not give weight to factors it did not discuss. The United States does not agree with the European Communities'

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

(b) Findings

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

6.154 Article 3.4 provides:

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

The use of the phrase "shall include" in Article 3.4 strongly suggests to us that the evaluation of the listed factors in that provision is properly interpreted as mandatory in all cases. That is, in our view, the ordinary meaning of the provision is that the examination of the impact of dumped imports must include an evaluation of all the listed factors in Article 3.4.

6.155 The European Communities emphasises the use of the terms "relevant", "having a bearing on the state of the industry" and "including" in Article 3.4 in arguing that not all factors need be evaluated in all cases. We do not consider that these textual elements affect the conclusion that the ordinary meaning of Article 3.4 is properly understood as requiring the evaluation of all the listed factors in all cases. We note that the terms "relevant" and the phrase "having a bearing on the state of the industry" precede the introduction of the list of factors. In our view, the text of Article 3.4 indicates that the listed factors are *a priori* "relevant" factors "having a bearing on the state of the industry", and therefore must be evaluated in all cases.[56]

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[56] We note, in this regard, that the Panel in *Korea - Dairy Safeguard*, considered the language of Article 4.2 of the Agreement on Safeguards, which provides that, in making a determination of serious injury or threat thereof in a safeguard investigation, the investigating authority:

> "shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, …"

The Panel concluded that the text of this provision made it clear that:

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

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

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

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

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

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

[58] *Id.*

[59] Article 3.2 of the DSU directs panels to clarify the provisions of the covered agreements "in accordance with customary rules of interpretation of public international law", which are set out in Articles 31 and 32 of the *Vienna Convention*. *See, e.g.*, *Japan – Taxes on Alcoholic Beverages*, Appellate Body Report, WT/DS8/AB/R–WT/DS10/AB/R–WT/DS11/AB/R, adopted 1 November 1996, pp.10-12. Here, we look to negotiating history pursuant to Article 32 of the *Vienna Convention* in order to confirm the meaning resulting from the application of the general rule of interpretation in Article 31 of the *Vienna Convention*.

European Communities does not wish to suggest that non-negative factors have no relevance". On the contrary, the European Communities' comment that "[the] wording [of Article 3.4] refers almost exclusively to negative factors and, consequently, what might be called the 'comprehensive evaluation' requirement, if it exists, applies only to such factors" suggests that the European Communities believes that only factors indicating material injury to the industry must be evaluated. Such an interpretation of Article 3.4 clearly runs counter to the requirement to properly establish a factual basis in support of a well-reasoned and meaningful analysis of the state of the industry and a finding of injury as well as to the requirement of an unbiased and objective evaluation as provided for in Articles 3.1 and 17.6(i) of the AD Agreement.

6.159 Based on the foregoing, we conclude that **each** of the fifteen factors listed in Article 3.4 of the AD Agreement must be evaluated by the investigating authorities in each case in examining the impact of the dumped imports on the domestic industry concerned.

6.160 We note that our conclusion is the same as that reached by the Panel on *Mexico - HFCS* on this specific issue.[60] The Panel stated [61]:

> "The text of Article 3.4 is mandatory:
>
> '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 by *HFCS* panel)
>
> In our view, this language makes it clear that the listed factors in Article 3.4 must be considered in all cases. There may be other relevant economic factors in the circumstances of a particular case, consideration of which would also be required."

6.161 Turning to the question of the nature of the evaluation of each factor that is required, we note the views of the *Mexico-HFCS* panel on this question:[62]

> "But consideration of the Article 3.4 factors is required in every case, even though such consideration may lead the investigating authority to conclude that a particular factor is not probative in the circumstances of a particular industry or a particular case, and therefore is not relevant to the actual determination. Moreover, the consideration of each of the Article 3.4 factors must be apparent in the final determination of the investigating authority.[602]
>
> _____
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> [602]In this regard, we note the text of Article 12.2.2, which provides:
>
> '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 . . .'"

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[60] While that panel was examining the application of the requirements of Article 3.4 in a case involving "threat of material injury", we consider that its views on Article 3.4 are also relevant in this case, dealing with material injury.

[61] *Mexico - HFCS*, Panel Report, para. 7.128.

[62] *Id.*

6.162 In other words, while the authorities may determine that some factors are not relevant or do not weigh significantly in the decision, the authorities may not simply disregard such factors, but must explain their conclusion as to the lack of relevance or significance of such factors. We agree. Thus, we are of the view that every factor in Article 3.4 must be considered, and that the nature of this consideration, including whether the investigating authority considered the factor relevant in its analysis of the impact of dumped imports on the domestic industry, must be apparent in the final determination.

6.163 We now consider the implications of a ruling that consideration of each factor must be apparent in the final determination, and that the relevance or lack thereof of each factor must be explained. The European Communities objects to the concept of a "checklist" and argues that the relevance of some factors may be apparent early in the investigation. Even granting that the investigating authority may be aware early in the proceeding, or indeed from the outset, that a certain factor is not relevant to the examination of the impact of dumped imports on the domestic industry, it must nonetheless be possible for a panel, reviewing that determination, to be able to assess whether all of the Article 3.4 factors have been evaluated. We consider that an authority, in discussing why it found certain factors relevant, may at the same time make apparent why it did not deem other factors to be material and, thus, without following a checklist approach, make it possible for a reviewing panel to determine whether it complied with the requirements of Article 3.4. Thus, we conclude that, as long as the lack of relevance or materiality of the factors not central to the decision is at least implicitly apparent from the final determination, the Agreement's requirements are satisfied. While a checklist would perhaps increase an authority's and a panel's confidence that all factors were considered, we believe that it is not a required approach to decision-making under Article 3.4.

6.164 Having concluded that Article 3.4 requires an evaluation of all listed factors, which might result in a conclusion that some of the listed factors are not relevant to the examination of the impact of dumped imports on the domestic industry in the particular circumstances of the investigation at hand, and that the consideration of all the Article 3.4 factors must be apparent from the final determination, the question before us is whether the European Communities' determination is consistent with this obligation.

6.165 The European Communities submits that it evaluated the factors listed in Article 3.4 during the investigation. In paragraphs 81-91 of the Provisional Regulation,[63] the European Communities, under the heading "Situation of the Community industry", addresses the following factors: (a) production; (b) sales by volume; (c) sales by value; (d) market share; (e) price development; (f) profitability; and (g) employment. The other factors listed in Article 3.4 – productivity; return on investments; utilisation of capacity; the magnitude of the margin of dumping; cash flow; inventories; wages; growth; ability to raise capital or investments – are not even referred to in this section.

6.166 We further note that, in paragraph 62 of the Provisional Regulation, the European Communities states:

> "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 . . .
>
> - at the level of the Community industry . . . for trends concerning production, sales by value and employment.

[63] Exhibit India-8.

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

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

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

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

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

(a) Parties' arguments

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

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

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

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

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

6.173 In Egypt's view, there is no textual support in the AD Agreement for the approach adopted by the European Communities, which is incompatible with Article 3.1, as well as Articles 3.3, 3.4, 3.5 and 3.6, of the AD Agreement. These provisions require the European Communities to determine whether the domestic industry has suffered injury and do not permit an injury determination based on data relating to companies not belonging to the domestic industry. As an ancillary matter, Egypt states that the Commission, by ignoring the results of its own sample of the domestic industry, failed to make an unbiased and objective assessment of the facts and thus acted inconsistently with Article 6.10 in conjunction with Articles 3.4, 3.5 and 3.6. In Egypt's view, in assessing whether the domestic industry suffered material injury, the European Communities improperly considered both the Community industry and the total EC production, drawing conclusions regarding the situation of the Community industry on the basis of information concerning total EC production. Egypt submits that the evidence shows that the domestic industry was in a healthy state, and that in any event, the European Communities failed to take into account in its analysis the fact that consumption of the like product in the European Communities decreased over the relevant period.

6.174 In the United States' view, the parties' arguments on this issue miss an important underlying point. The United States is of the opinion that the European Communities, in applying its Regulation

[65] Provisional Regulation, Exhibit India-8, para. 62; *see* para. 6.166, *supra*.

on definition of the domestic industry, has defined the domestic industry in this case in a manner which violates Article 4 of the AD Agreement, and that therefore the entire injury analysis is based on a flawed premise. In the United States' view, the European Communities' position that Article 4.1 allows two equally valid options for defining the domestic industry - either producers as a whole, or producers of a major proportion of domestic production, is wrong. The United States believes that the second option is not a separate basis for defining industry, but is a provision which allows a determination to be made in situations where information for the industry as a whole is not available, so long as that information relates to producers of a major proportion of domestic production. The United States asserts that the European Communities' industry definition limited the domestic industry to those producers that came forward to affirmatively pursue the investigation, and thus was fundamentally skewed. A proper definition of the domestic industry under Article 4.1 would have required the European Communities to define the "domestic industry" as all EC producers of the like product, and obtain information from that universe of producers, or at least from a sample drawn from that universe of producers. Thus, with respect to India's claim that the European Communities acted impermissibly by considering some information concerning all EC producers, the United States, in contrast, believes that the European Communities acted inconsistently with the AD Agreement by *not* including all EC producers of bed linen in the domestic industry for the purposes of evaluating factors such as price and impact under Articles 3.1, 3.2, 3.4 and 3.5. Moreover, the United States argues that the European Communities' definition of domestic industry conflates the "domestic industry" definition of Article 4.1 with the standing determination under Article 5.4, and thus misconstrues the relationship between the two provisions. If Article 4.1 were intended to define the domestic industry as those producers who expressly supported the petition, an injury investigation would be mostly a *pro forma* exercise in which the authorities would simply check whether petitioning firms really were materially injured. Article 5.4 does not provide a basis for the creation of such a self-selecting industry and does not purport to define the term "a major proportion" as used in Article 4.1. The United States adds that Article 3.1 reflects that Article 4.1 establishes a preference for basing an injury determination on examination of the domestic producers as a whole. Further, Articles 3.4 and 3.5 specifically direct that an injury analysis shall concern "*the* domestic industry". These provisions accordingly do not contemplate that an authority will at its discretion use one industry definition in a determination examining injury and another definition in that determination for other purposes.

(b) Findings

6.175 We first note that the issue raised by the United States regarding the European Communities' interpretation of "domestic industry" is an interesting one, and raises questions regarding the proper application of that term in this case. However, India has made no claim under Article 4 of the AD Agreement in this dispute regarding the European Communities' definition of the domestic industry. Our analysis and finding relate only to the claim before us, whether having defined the Community industry as a group of 35 producers and resorted to a sample of those producers, the European Communities was precluded from considering information relating to producers not within that sample, or not within the Community industry. We express no opinion as to the correctness *vel non* of the European Communities' interpretation of Article 4 of the AD Agreement or its application in this case.

6.176 India's claim raises two related questions. First, we must consider whether the fact that the European Communities considered information for different groupings of producers of bed linen, the 17 producers in the sample, the 35 producers comprising the "Community industry", and all EC producers of bed linen, constitutes a violation of Article 3.4. The second question is whether, assuming that the consideration of different data sets with regard to analysis of the state of the domestic industry under Article 3.4 is permissible, the European Communities explained how its consideration of the information at the different levels supported its determination.

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

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

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

6.180 There is simply no basis in the AD Agreement for the first aspect of India's claim. Keeping in mind that India has made no claim regarding the constitution of the sample, and no claim regarding the definition of the domestic industry, the only basis for India's position is that the findings of the European Communities were not reached in an objective manner based on properly established facts. However, India has not challenged the facts themselves, but rather the European Communities' choices as to which facts, among those it had gathered, it would consider in evaluating the Article 3.4 factors. There may be inadequate explanation or analysis of those facts, which might constitute a violation of Article 12.2.2 or a failure adequately to evaluate the Article 3.4 factors. However, this does not answer the question whether consideration of evidence for domestic producers outside the selected sample **but within the domestic industry** constitutes, *ipso facto*, a violation of Article 3.4.

6.181 It is clear from the language of the AD Agreement, in particular Articles 3.1, 3.4, and 3.5, that the determination of injury has to be reached for the **domestic industry** that is the subject of the investigation. Article 3.4 specifically requires 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. . . " (emphasis added). In this case, the European Communities defined the domestic industry as 35 producers of the like product. In our

[66] We are somewhat at a loss to understand how the European Communities could find that companies listed in the complaint were nonetheless not complainants, but this is not a question to be resolved in this case.

[67] In EC proceedings, the "Community industry" is the domestic industry for purposes of the AD Agreement.

[68] Provisional Regulation, Exhibit India-8, para. 62.

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

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

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

E. CLAIMS UNDER ARTICLE 5

6.184 India makes two substantive claims under Article 5. First, India argues that the European Communities failed to examine the accuracy and adequacy of the allegations in the complaint before initiating the anti-dumping investigation, as required by Article 5.3 (claim number 23). Second, India argues that the European Communities failed to determine the standing of the domestic industry consistently with Article 5.4 (claim number 24). These claims are addressed below. The associated claims concerning the alleged failure of the European Communities to sufficiently explain its decision in the Definitive Regulation (claims 25 and 28) are addressed in section VI.G, below.

[69] Having found a violation of the AD Agreement in this regard, and having found a violation in the failure of the European Communities to evaluate all the Article 3.4 factors, we do not consider it necessary to consider questions regarding the European Communities' evaluation of information on Article 3.4 factors for the different groupings of producers.

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

(a) Parties' arguments

6.185 India asserts that the European Communities failed to comply with the obligation to "examine the accuracy and adequacy of the evidence in the application". India maintains there is no evidence on the record that such an examination was carried out prior to the initiation of the investigation. India argues that the available evidence from the first bed linen anti-dumping proceeding made such examination even more important in this case.[70] India asserts that it raised the issue of lack of sufficient evidence to initiate during the course of the proceeding, but received no response from the EC authorities beyond the bare statement in the Provisional Regulation that "the complaint contained evidence of dumping of the said product and of material injury resulting therefrom, which was considered sufficient to justify the initiation of a proceeding".[71]

6.186 India asserts that the investigating authorities did not "examine" the allegations in the complaint on the state of the domestic industry before initiating the anti-dumping investigation. In this regard, India points to the notice of initiation, which stated that:

> "The complainant alleges and has provided evidence that imports from Egypt, India and Pakistan have increased significantly in absolute terms and in terms of market share, during a period where the apparent consumption in the Community has decreased.
>
> 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. . . .
>
> Having determined, after consulting the Advisory Committee, that the complaint has been lodged by or on behalf of the Community industry and that there is sufficient evidence to justify the initiation of proceedings, the Commission has commenced an investigation pursuant to Article 5 of Regulation (EC) No 384/96." (Emphasis added by India)[72]

In India's view, these statements constitute an admission, in effect, that the EC authorities did not "examine" the evidence before deciding to initiate the investigation, since they refer only to the allegations of the complainant, and do not specifically refer to the examination by the authorities. India argues that the EC authorities "considered" the allegations in the complaint sufficient to justify initiation, but did not "examine the accuracy and adequacy of the evidence provided in the application".

6.187 India also argues that the EC authorities had more information at their disposal than merely the complaint, notably the facts related to the terminated first bed linen investigation. India acknowledges that the first bed linen investigation was terminated because the complaint was withdrawn, but argues that the authorities knew or could have known that the complaint was

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[70] In January 1994, the European Communities had initiated an anti-dumping investigation of bed linen from India, Pakistan, Thailand, and Turkey, based on an application filed by Eurocoton, the complainant in this investigation. The investigation was terminated, without any measures being imposed, in July 1996, following the withdrawal of the complaint.

[71] India acknowledged, in its response to Question 7 from the Panel following the first meeting, that it was not challenging the sufficiency of the application under Article 5.2 of the AD Agreement. Annex 1-6.

[72] Exhibit India-7.

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

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

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

6.190 The European Communities argues that Article 5.3 must be considered in light of Article 5.2 of the AD Agreement. The European Communities suggests that, taken together, these provisions suggest that evidence will be adequate if it covers the topics listed in Article 5.2, and will be accurate if it is sufficiently credible. Regarding the standard of proof required in making this decision, the European Communities argues that the Panel in *Mexico-HFCS* observed that it is less than that appropriate to a preliminary or final determination of dumping, but more than mere allegation or conjecture.[74] Furthermore, in regard to injury, the European Communities notes that that Panel concluded there is no need for the investigating authority "to have or consider information on all the Article 3.4 factors".[75]

6.191 The European Communities maintains that, in accordance with ordinary practice, the EC authorities examined the complaint in the light of the requirements of Articles 5.2 and 5.3 of the AD Agreement, and with the benefit of their considerable experience in dealing with such documents, and concluded that initiation was warranted, which was recorded in the Notice of Initiation. In the European Communities' view, this demonstrates that the authorities examined the information contained in the Complaint and found it sufficient. The European Communities interprets India as arguing that there must be something more on the record, and/or conveyed to the parties through publication or a report, demonstrating the process of "examination" of the evidence in the application and the conclusions based thereon. The European Communities rejects this suggestion, arguing that there is no such obligation under the WTO.

6.192 In this regard, the European Communities notes that India has not challenged the sufficiency of the notice of initiation, and refers to the views of the Panel in *Mexico-HFCS* in support of the

[73] First Submission of India, Annex 1-1, para. 5.20.
[74] *Mexico - HFCS*, para. 7.94.
[75] *Id*., para. 7.97.

position that a more detailed explanation of the decision to initiate and the determinations underlying that decision was not required by the AD Agreement:

> "In our view, Article 5.3 cannot be interpreted to require the investigating authority to issue an explanation of how it has resolved **all** underlying questions of fact at initiation. That is a requirement that arises at later stages of the proceeding, and is explicitly set forth in Article 12.2."[76]

6.193 The European Communities also argues that the information concerning the first bed linen investigation, while known to EC officials and considered, was not relevant to the decision to initiate the subject investigation. The first bed linen investigation concerned different exporters (Egypt was not subject to that investigation, while Thailand and Turkey were), and concerned a different investigation period. In any event, the European Communities notes that no substantive conclusions were made in that investigation, and in particular, there was no finding that there was no injury.

6.194 Egypt, as third party, is of the view that, contrary to the express wording of Article 5.3 of the AD Agreement, the European Communities failed to examine thoroughly the allegations in the complaint. In Egypt's view, the European Communities failed to take into account information available to it at the time of initiation pointing to lack of material injury caused by dumped imports, *i.e.*, information from the first bed linen investigation.

6.195 The United States, as third party, submits that Article 5.3 does not obligate the European Communities to consider a previously terminated, incomplete investigation against a different group of countries before initiating the investigation at issue here. The premise of each aspect of Articles 5.2 and 5.3 is that the information covered is "evidence". The chapeau of Article 5.2 specifies that "Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph." In this case, the United States does not believe that the earlier investigation must be considered "evidence" within the meaning of Articles 5.2 and 5.3. First, the earlier investigation was terminated based upon the withdrawal of the application without any final determination by the investigating authorities. Second, that earlier investigation, although it may have involved the same products, involved a different mix of countries. Finally, each bed linen investigation constituted a separate proceeding for which a separate record was established by the European Communities. The European Communities was obligated, consistent with the Agreement, to base its determination on its assessment of the facts of the matter which were before it. To the extent that it did so, and its decision was based on an unbiased and objective evaluation of the facts before it, consistent with the standard contained in Article 17.6(i), that decision should not be overturned.

(b) Findings

6.196 Article 5.3 of the AD Agreement provides:

> "The 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."

6.197 It seems clear, and India does not dispute, that in this case, there was evidence submitted to the EC authorities in the application, and that the application was sufficient under Article 5.2 of the AD Agreement. It is also clear, simply from the language of the EC notice of initiation (which India has not challenged), that the European Communities determined that there was sufficient evidence to justify the initiation. Moreover, the European Communities asserts that it did, in fact, take into

[76] *Id.*, para. 7.110.

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

6.198 India claims that the European Communities failed **to examine** the accuracy and adequacy of the evidence before initiating the investigation. Thus, we must determine what the parameters are of the requirement to "examine" the accuracy and adequacy of the evidence, and on what basis can it be assessed whether the necessary examination was carried out. It is difficult to see a basis on which a violation of Article 5.3 could be found based purely on the claim that the investigating authorities failed to examine the accuracy and adequacy of the evidence in the application unless we conclude that the text of Article 5.3 establishes a specific process requirement, that is, a requirement as to **how** the examination of the evidence must be conducted. Further, it is difficult to see a basis on which a violation of Article 5.3 could be found on the basis of India's claim unless we conclude that Article 5.3 establishes **how** the fact of and sufficiency of that examination must be made known, beyond the notice required by Article 12.1, which as noted is not at issue here. We can find no such requirements in the text of Article 5.3.[77] It is clear that Article 5.3 requires an investigating authority to examine the evidence, and that the examination has a purpose – to determine whether there is sufficient evidence to justify initiation of the investigation. However, Article 5.3 says nothing regarding the nature of the examination to be carried out. Nor does it say anything requiring an explanation of how that examination was carried out.

6.199 The only basis, in our view, on which a panel can determine whether a Member's investigating authority has examined the accuracy and adequacy of the information in the application is by reference to the determination that examination is in aid of - the determination whether there is sufficient evidence to justify initiation. That is, if the investigating authority properly determined that there was sufficient evidence to justify initiation, that determination can only have been made based on an examination of the accuracy and adequacy of the information in the application, and consideration of additional evidence (if any) before it.

6.200 However, in this case India has made no claim that the European Communities violated Article 5.3 of the AD Agreement by initiating this investigation without sufficient evidence to justify doing so. Even assuming that India had actually raised such a claim, India has failed to present a *prima facie* case that the European Communities erred in concluding that there was sufficient evidence to justify initiation. India has presented no arguments or evidence to support such a contention - rather, it has relied on the particular argument that the European Communities failed to examine the evidence. It is difficult to imagine how a defending Member might demonstrate that it has "examined" evidence in the face of India's allegations in this dispute, except by reference to the determination that there was sufficient evidence to justify initiation, which is not at issue before us.[78]

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[77] We note that Article 5.3 was recently considered by the Panel in *Mexico - HFCS*. In that case, an issue similar to that before us was addressed, concerning the obligation (if any) on the investigating authority to make specific determinations about factual issues involved in the initiation, based on the evidence in the application prior to initiation, and the obligation (if any) to make such determinations known to the parties. That Panel concluded that Article 5.3 did not itself establish any obligation to make, or to make known, a determination concerning issues underlying the decision to initiate. *Mexico - HFCS*, paras. 7.105 and 7.110. In our view, this lends support to our conclusion that there are no obligations in Article 5.3 regarding how the examination of the accuracy and adequacy of the evidence is to be undertaken, or explained.

[78] Moreover, India appears to be arguing that the European Communities failed to "examine" evidence outside the scope of the application, when it argues that the European Communities failed to consider the events concerning the first bed linen investigation. However, Article 5.3 specifically requires the investigating authority to examine the "accuracy and adequacy **of the evidence provided in the application**…". We note that India appears to misapprehend the decision of the Panel in *Guatemala - Cement*, which held that the obligation of the investigating authority under Article 5.3 goes beyond a determination that the requirements of Article 5.2 are satisfied. In that case, the Panel further found that an investigating authority may, **but is not obligated to**, seek out information beyond that in the application, and take such information into account in

In our view, it is clear from the mere fact that the EC investigating authorities initiated the investigation indicates that they examined the evidence in the application to determine that it was sufficient to justify initiation.

6.201 We therefore conclude that the European Communities did not violate Article 5.3 of the AD Agreement by failing to examine the accuracy and adequacy of the information in the application.

2. Claim under Article 5.4 - failure to properly establish industry support (claim number 26)

(a) Parties' arguments

6.202 India makes two principal arguments challenging the European Communities' standing determination, *i.e.*, the determination that the application was supported by producers accounting for at least 25 per cent of total EC production of the like product. First, India asserts that in assessing the level of support for the application filed by Eurocoton, the European Communities wrongly considered the support expressed by producers' associations on behalf of their members. In India's view, while it is possible for an association of producers to **file** a complaint, it is not permissible, under Article 5.4 of the AD Agreement, for the support of a producers' association to be **substituted** for support expressed by its members, the producers of the like product. Thus, in India's view, only the expressions of support by individual producers, and not those of producers' associations, may be considered in determining whether there is sufficient support for an application under Article 5.4 of the AD Agreement.

6.203 Second, India argues that the European Communities failed to examine the level of support prior to initiating the investigation. In this regard, India argues that the information in the non-confidential file, which India submitted as exhibits, and that submitted by the European Communities, concerning the expressions of support by individual producers of the like product, suggests that those expressions of support were not received prior to initiation. India relies in this regard on conflicts in the dates of the letters of support themselves, and the headers and footers imposed by sending and receiving fax machines, which were not evident on the copies of these documents in the non-confidential file. India acknowledges that, if the letters of support from individual producers were accepted as fact (which India maintains they are not), the necessary level of support would have existed, but maintains that the European Communities could not have made the standing examination before initiation, an error which can not be corrected after the fact. India asks the Panel to conclude that the documents submitted on the question of support do not show that the European Communities examined standing prior to initiation the investigation, and that the removal of the fax headers and the different "versions" of the letters of support would suggest that the European Communities is trying to conceal its mistake of not examining standing prior to initiation.

6.204 India also argues that the European Communities could not have determined standing prior to initiation based on the different numbers of producers which (a) are listed in the application as supporting the complaint (46), (b) actively expressed support for the application either directly or thorough producers association and were considered in the standing determination (38), and (c) were considered as the domestic industry (35). India argues that the decisions defining the 38 and 35 producer groups took place only after initiation, but that the European Communities relied on the

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determining whether there is sufficient evidence to justify initiation under Article 5.3 of the AD Agreement. *See Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico*, Panel Report, WT/DS60/R, adopted 25 November 1998, paras. 7.50-7.52. That is very different from the proposition suggested by India that the obligation to examine the accuracy and adequacy of information in the application is rendered "more acute" because an investigation of the same product from one of the same countries had recently been terminated. The obligation imposed on investigating authorities under Article 5.3 does not vary by virtue of the factual circumstances.

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

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

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

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

6.208 Egypt, as third party, argues that Eurocoton did not have the standing required under Article 5.4 of the AD Agreement to lodge a complaint. Egypt asserts that the investigation revealed that those Community producers who supported the complaint were in the minority, and that the proportion of production represented by the complainant producers is extremely low, 34 percent.

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[79] Exhibit India-59.

[80] In the European Communities' view, footnote 14 to Article 5.4, which allows trade unions to express support on behalf of their members, also undermines India's arguments.

[81] The European Communities cites, in this regard, the Panel Reports on *Salmon - Anti-Dumping Duties* and *Mexico - HFCS*.

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

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

(b) Findings

6.210 Article 5.4 of the AD Agreement provides:

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

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

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

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

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

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

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

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

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

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

6.216 As noted above, India bears the burden of coming forward with sufficient evidence to make a *prima facie* case that the European Communities failed to act consistently with its obligations under Article 5.4 to determine the necessary level of support prior to initiation. We presume that Members act in good faith in the context of dispute settlement proceedings, and are unwilling to assume possible malfeasance in the absence of evidence to that effect. We consider that the "doubts" which India has as to the European Communities' actions in this regard do not establish the necessary *prima facie* case in this context – the "evidence" of the fax headers relied on by India does not, in our view, constitute evidence of fraud sufficient to overcome the presumption of good faith. Moreover, we believe it is more probable that these inconsistencies in the photocopies are attributable to the photocopying itself, rather than to the perpetration of a massive fabrication of fax headers and footers by the EC investigating authority to hide a failure to make a determination of standing prior to initiation. We therefore do not consider it necessary to examine the originals of the documents in question.

6.217 We conclude that, as a matter of fact, the EC investigating authority had before it expressions of support from 38 producers of bed linen prior to initiation.[84] Some of those expressions of support were received from the individual producers directly, some were received from national producers associations. As noted above, counting only those submitted by individual producers directly to the EC investigating authority, that authority had before it expressions of support from producers accounting for more than the necessary 25 per cent of total EC production of bed linen. Having concluded that the European Communities' determination of standing does not violate Article 5.4 of the AD Agreement on the basis of the express support of individual producers, we do not consider it necessary to determine whether the European Communities could properly count the support of associations of producers.

6.218 We therefore conclude that the European Communities did not violate Article 5.4 of the AD Agreement by failing to make a proper determination of standing prior to initiation of the anti-dumping investigation at issue.

[84] India makes numerous references to the differences between the number of producers listed in the application, the number of producers expressing support, and the number of producers eventually found to comprise the domestic industry. While the import of its arguments in this regard is not entirely clear, we do not, in any event, consider these differences to have any significance for the issue before us, whether the producers expressing support accounted for the necessary minimum 25 per cent of total EC production of bed linen. It is in our view understandable that some companies listed in the application as producers of the like product may not subsequently specifically express support for the application. It is also understandable, in our view, that following initiation, the actual definition of the domestic industry may change, as a result of exclusions, such that the set of producers in the industry is not, in fact, the same as that considered in evaluating support. However, in this latter respect, we note that the question is not before us, as India has made no claim suggesting that standing somehow was lost or evaporated **after initiation**.

F. CLAIM UNDER ARTICLE 15 - FAILURE TO EXPLORE POSSIBILITIES OF CONSTRUCTIVE REMEDIES (CLAIM NUMBER 29)

1. Parties' arguments

6.219 India asserts that the European Communities acted inconsistently with Article 15 of the AD Agreement by not exploring possibilities of a constructive remedy prior to the imposition of anti-dumping duties (provisional or final) and by not reacting to detailed arguments from Indian exporters pertaining to Article 15. India maintains that, despite repeated and detailed arguments by the Indian parties stressing the importance of the bed linen and textile industries to India's economy, the European Communities failed to even mention India's status as a developing country, let alone consider or comment on possibilities of constructive remedies. India also pointed out that Texprocil, the Cotton Textiles Export Promotion Council of India, acting on behalf of Indian producers and exporters, had communicated to the European Communities its desire, and that of its members, to offer price undertakings. India charges that this offer was rejected by the European Communities without substantive consideration.

6.220 India asserts that the two sentences of Article 15 are separate and distinct, and that the first sentence does not impose any specific legal obligation, but simply expresses a preference that the special situation of developing countries should be an element to be weighted when making that evaluation. The second sentence, however, imposes a specific legal obligation to "explore possibilities". In India's view, this requires a determination (or assessment) whether the essential interests of the developing country concerned may be involved, to be made after a determination (preliminary or final) of dumping and injury caused thereby, but before the application of anti-dumping duties, including the imposition of provisional measures. Then (still before provisional measures are imposed) the investigating authorities are required to explore possibilities of constructive remedies "provided for by this Agreement". India suggests that the reference to remedies provided for by the AD Agreement indicates that such remedies may consist of, among others, the non-imposition of anti-dumping measures, or an undertaking. India rejects the notion that any procedural mechanisms, such as simplified questionnaires or extensions of time, can ever satisfy the requirements of the second sentence of Article 15.

6.221 The European Communities agrees that the second sentence of Article 15 imposes a legal obligation on Members. The European Communities further does not dispute that bedlinen producers are part of the textile industry, that this is an "essential interest" of India, and that anti-dumping duties would "affect" this interest. The European Communities asserts that its practice, when developing countries are involved in an anti-dumping investigation, is to give special consideration to the possibility of accepting undertakings from their exporters. However, the European Communities maintains that the difficulty that frequently arises in relation to undertakings, that of effective supervision, can also apply in the case of developing countries. In this case, the European Communities argues, the reason no undertaking was accepted was that none had been offered by the exporters within the time limits set by the EC Regulation. Under EC procedures, undertakings may be offered during the 10 day period following the disclosure of the confidential final dumping margin calculations for investigated producers. In this case, such disclosure was made on 3 October 1997. The European Communities asserts that these time limits are a reflection of those imposed by Article 5.10 of the AD Agreement, and the general obligation to manage investigations expeditiously (Article 6.14 of the AD Agreement).

6.222 The European Communities pointed out that the offer from Texprocil referred to by India was made on the last day, under the normal EC schedule, for acceptance of offers of undertakings, and was not in fact an offer of an undertaking by any producer, but merely an expression by the producers association Texprocil of intent to offer an undertaking. The European Communities asserts that its authorities waited nine days, but no further details concerning such offers was made, as Texprocil's

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

6.223 Egypt, as third party, argues that Article 15 of the AD Agreement obligated the European Communities to explore the possibilities of constructive remedies before applying anti-dumping duties, and that the European Communities failed to comply with this provision, as it did not suggest to the Egyptian exporters the possibility of, for instance, price undertakings. Egypt is of the view that Article 15 imposes a legal obligation on developed countries any time they contemplate imposing anti-dumping duties, and it is therefore up to those developed countries then to suggest to the developing countries involved whether or not they would be interested in offering price undertakings.

6.224 In response to a question from the Panel, Japan asserted that the requirements of Article 15 do not go beyond those of Article 8.3 of the AD Agreement, that the "constructive remedies under this Agreement" referred to in Article 15 would include price undertakings, and that Article 15 imposes no specific obligations on developed country Members.

6.225 The United States, as third party, submits that Article 15 of the AD Agreement, while it provides procedural safeguards, does not require any particular substantive outcome, or any specific accommodations to be made on the basis of developing country status. In the United States' view, the second sentence of Article 15 does not impose anything other than a procedural obligation to "explore" possibilities of constructive remedies. The word "explore" cannot fairly be read to imply an obligation to reach a particular substantive outcome; it merely requires consideration of these possibilities. The United States cites to the Tokyo Round Anti-Dumping Code Panel Report on *Cotton Yarn from Brazil* as support for this interpretation. The question then, according to the United States, is whether the European Communities explored the possibility of entering into such constructive remedies, which is a factual determination. The United States takes no position on whether the European Communities' actions were sufficient under Article 15. With regard to the timing of such exploration under Article 15, the United States asserts that the reference in Article 15 to "applying anti-dumping duties" relates to the actual imposition and collection of anti-dumping duties pursuant to Article 9 of the Agreement, which did not occur until the European Communities made its final determination of dumping and injury. The imposition of provisional measures, which may be provisional anti-dumping duties, is a separate and earlier step which is distinct from the application of anti-dumping duties themselves. Furthermore, if the "possibilities" to be explored include price undertakings, the United States maintains that this exploration can only occur after any provisional determination by the investigating authorities, in light of the language of Article 8.2 of the AD Agreement. In response to the Panel's questions, the United States observed that, in its view, the Article 15 and Article 8.3 obligations were complementary, and that the Article 15 obligation did not extend beyond the Article 8.3 obligation. In addition, the United States suggested that a developing country might be obligated to identify those instances in which its essential interests would be affected, so that the developed country Member considering the imposition of anti-dumping duties would know to consider possible constructive remedies before imposing duties.

2. Findings

6.226 Article 15 provides:

> "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."

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

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

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

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

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

[87] *Id.*

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

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

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

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

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

> "An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement." (footnote omitted).

In our view, this implies that the phrase "before applying anti-dumping duties" in Article 15 means before the application of definitive anti-dumping measures. Looking at the whole of the AD Agreement, we consider that the term "provisional measures" is consistently used where the intention is to refer to measures imposed before the end of the investigative process. Indeed, in our view, the AD Agreement clearly distinguishes between provisional measures and anti-dumping duties, which term consistently refers to definitive measures. We find no instance in the Agreement where the term "anti-dumping duties" is used in a context in which it can reasonably be understood to refer to provisional measures. Thus, in our view, the ordinary meaning of the term "anti-dumping duties" in Article 15 is clear – it refers to the imposition of definitive anti-dumping measures at the end of the investigative process.

6.232 Consideration of practical elements reinforces this conclusion. Provisional measures are based on a preliminary determination of dumping, injury, and causal link. While it is certainly permitted, and may be in a foreign producer's or exporter's interest to offer or enter into an undertaking at this stage of the proceeding, we do not consider that Article 15 can be understood to **require** developed country Members to explore the possibilities of price undertakings prior to imposition of provisional measures. In addition to the fact that such exploration may result in delay or distraction from the continuation of the investigation, in some cases, a price undertaking based on the preliminary determination of dumping could be subject to revision in light of the final determination of dumping. However, unlike a provisional duty or security, which must, under Article 10.3, be refunded or released in the event the final dumping margin is lower than the preliminarily calculated margin (as is frequently the case), a "provisional" price undertaking could not be retroactively revised. We do not consider that an interpretation of Article 15 which could, in some cases, have negative effects on the very parties it is intended to benefit, producers and exporters in developing countries, is required.

6.233 We consider next the term "explore", which is defined, inter alia, as "investigate; examine scrutinise".[91] In our view, while the exact parameters of the term are difficult to establish, the concept of "explore" clearly does not imply any particular outcome. We recall that Article 15 does not require that "constructive remedies" must be explored, but rather that the "possibilities" of such remedies must be explored, which further suggests that the exploration may conclude that no possibilities exist, or that no constructive remedies are possible, in the particular circumstances of a given case. Taken in its context, however, and in light of the object and purpose of Article 15, we do consider that the "exploration" of possibilities must be actively undertaken by the developed country authorities with a willingness to reach a positive outcome. Thus, in our view, Article 15 imposes no obligation to actually provide or accept any constructive remedy that may be identified and/or offered.[92] It does,

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

[92] We note that our interpretation of Article 15 in this regard is consistent with that of a GATT Panel which considered the predecessor of that provision, Article 13 of the Tokyo Round Anti-Dumping Code, which provision is substantively identical to present Article 15. That Panel found:

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

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

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

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

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

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

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> "The Panel noted that if the application of anti-dumping measures "would affect the essential interests of developing countries", the obligation that then arose was to explore the "possibilities" of "constructive remedies". **It was clear from the words "[p]ossibilities" and "explored" that the investigating authorities were not required to adopt constructive remedies merely because they were proposed.**" *EC - Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, Panel Report, ADP/137, adopted 30 October 1995, para. 584 (emphasis added).

[93] India's specific Article 12 claim with respect to the European Communities' determination in connection with Article 15 is addressed below.

[94] Response of the European Communities to Question 16 from the Panel following the second meeting, Annex 2-8. India has not disputed this statement by the European Communities.

of undertakings and the relevant deadline for offering undertakings, in this case 13 October 1997.[95] Following further communications between the Indian parties and counsel,[96] on 13 October 1997, counsel for Texprocil sent a telefax to the EC investigating authorities, communicating "the desire of . . . Texprocil and its Members to offer price undertakings" in the bed linen investigation.[97] The letter continued to note that Texprocil was "working on a detailed formula concerning the practical aspects of this offer", and indicated that the proposed formula implementing the practical details of the offer would be relayed "as soon as this has been worked out in detail". The letter expressed the hope that the offer "can be given due consideration especially in light of Article 15 of the WTO Agreement".[98] There were no further communications from the Indian parties to the EC authorities in this regard. On 14 October 1997, counsel for Texprocil informed the Texprocil representatives that the letter had been submitted, asked that the details of the formula for undertakings be sent at Texprocil's earliest convenience, and noting that the EC authorities had indicated that "Bed Linen was "too complicated a product for undertakings"".[99]

6.237 There was no response from the European Communities until a letter to counsel for Texprocil dated 22 October 1997. That response noted that the letter from counsel for Texprocil had reached the European Communities the last day of the period for offering undertakings, but that "no detailed offer of price undertakings has been made yet". The EC response noted that the investigation was to be concluded within 15 months of initiation under EC law (in this case, by 13 December 1997), and continued to state that the EC authorities would "not be in a position to consider any offer of undertakings which your client may be considering submitting at this stage."[100]

6.238 It is these facts which we must evaluate to determine whether the European Communities gave adequate consideration to, that is "explored" the possibility of entering into an undertaking with the Indian producers. As noted above, while the obligation is on the European Communities to explore possibilities, we do not consider that this entails acceptance of any particular offer that might be made. In this case, it is clear to us that no formal proposal of a price undertaking was made. However, in light of the expressed desire of the Indian producers to offer undertakings, we consider that the European Communities should have made some response upon receipt of the letter from counsel for Texprocil dated 13 October 1997. The rejection expressed in the European Communities' letter of 22 October 1997 does not, in our view, indicate that the possibility of an undertaking was explored, but rather that the possibility was rejected out of hand. We cannot conclude, based on these facts, that the European Communities explored the possibilities of constructive remedies prior to imposing anti-dumping duties. In our view, the European Communities simply did nothing different in this case, than it would have done in any other anti-dumping proceeding – there was no notice or information concerning the opportunities for exploration of possibilities of constructive remedies given to the Indian parties, nothing that would demonstrate that the European Communities actively undertook the obligation imposed by Article 15 of the AD Agreement. Pure passivity is not sufficient, in our view, to satisfy the obligation to "explore" possibilities of constructive remedies, particularly where the possibility of an undertaking has already been broached by the developing country concerned. Thus, we consider that the failure of the European Communities to respond in some fashion other than bare rejection, **particularly once the desire to offer undertakings had been communicated to it**, constituted a failure to "explore possibilities of constructive remedies", and therefore conclude that the European Communities failed to act consistently with its obligations under Article 15 of the AD Agreement.

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[95] Exhibit India-89.
[96] Exhibits India-90 and -91.
[97] Exhibit India-72.
[98] *Id.*
[99] Exhibit India-93.
[100] Exhibit India-72.

G. CLAIMS UNDER ARTICLE 12.2.2 (CLAIMS NUMBERS 3, 6, 10, 13, 18, 22, 25, 28, AND 31)

1. Parties' arguments

6.239 India argues, with respect to almost all of its substantive claims of violation of the AD Agreement, that the European Communities failed adequately to explain its decisions relating to those matters in the Definitive Regulation. India asserts that the Definitive Regulation does not set forth the European Communities' reasoning as to why it applied relevant provisions of its domestic legislation and the AD Agreement in the way it did, which in India's view is inconsistent with the requirements of the AD Agreement. India also argues that the European Communities failed adequately to explain its choices of methodology, analysis, and conclusions on questions of fact, and failed adequately to explain why it rejected arguments by the Indian exporters. India's claims under Article 12.2.2 of the AD Agreement correspond to its substantive claims as follows:

- Claim 3 – Insufficient notice with respect to Article 2.2.2 (Claim 1)
- Claim 6 – Insufficient notice with respect Article 2.2 (Claim 4)
- Claim 10 – Insufficient notice with respect Article 3.1 (Claim 8)
- Claim 13 – Insufficient notice with respect Article 3.4 (Claim 11)
- Claim 18 – Insufficient notice with respect Article 6.10 and 6.11 (Claim 16)
- Claim 22 – Insufficient notice with respect Article 3.5 (Claim 20)
- Claim 25 – Insufficient notice with respect Article 5.3 (Claim 23)
- Claim 28 – Insufficient notice with respect Article 5.4 (Claim 26)
- Claim 31 – Insufficient notice with respect Article 15 (Claim 29)

6.240 India sets out four bases for its claim 3, asserting insufficient notice of the European Communities' decisions and analysis under Article 2.2.2. First, India argues that the European Communities failed to provide a sufficient explanation of why it applied Article 2.2.2(ii) instead of Article 2.2.2(i). Second, India asserts that the European Communities failed to provide a sufficient explanation as to why it applied an option for which the requirements were not fulfilled. Third, India posits that the European Communities failed to explain why it considered only sales in the ordinary course of trade in deriving an amount for profit under Article 2.2.2(ii). Finally, India maintains that the European Communities failed to explain why it considered the profit rate it established to be reasonable under Articles 2.2.2(iii) and 2.2.

6.241 India also argues that, to the extent the European Communities may argue that it did not commit certain of the substantive violations alleged, and in particular to the extent the European Communities may argue that it did consider all the relevant economic factors under Article 3.4 (India's claim 13), the European Communities' notice is inconsistent with the requirements of Article 12.2.2. In India's view, any such consideration cannot be determined from that notice, which is thus insufficient. India argues that, apart from access to the non-confidential file of the investigation, the notice is the only basis for the Indian exporters to understand the facts on which the determination was based, and know the determination that was made, and thus must be complete in order to further the interest of transparency which underlies Article 12.2 as a whole.

6.242 Finally, India argues, based on the text of Article 12.2.2, that the notice of final determination must contain a detailed explanation of decisions taken and information considered in the context of initiation. This argument underlies India's claims25 and 28, which assert that the European Communities' Definitive Regulation is inconsistent with Article 12.2.2 because it does not explain the European Communities' examination of the information in the application under Article 5.3, and does not address the information and arguments made by the Indian exporters concerning the standing of the applicant under Article 5.4.

6.243 The European Communities posits, in general, that not every aspect of a final determination must be explained in the notice thereof. Rather, the European Communities asserts that only certain matters need to be set out in the final determination – those that are relevant to the final determination itself, and those that are not known to the parties without reference to the final determination, because, for example, they were discussed or addressed during earlier stages of the proceedings, or are well-known elements of the practice of the investigating authorities. The European Communities maintains that its Definitive Regulation (taken together with the Provisional Regulation where appropriate) adequately explains its final determination, the legal analysis and facts relied upon and the reasoning underlying its conclusions. In addition, the European Communities argues that to the extent India's arguments under Article 12.2.2 assert that the European Communities failed to explain why it acted in a manner that India considers inconsistent with the AD Agreement, there was nothing to explain, since the European Communities maintains that it committed no substantive violations.

6.244 Turning to the specific claims, the European Communities argues with regard to India's claim 3 that since the AD Agreement does not obligate a Member to explain its choice between the options listed in Article 2.2.2, there can be no obligation to provide notice of such an explanation. With regard to India's claim 6, the European Communities asserts that paragraphs 18 and 19 of the Definitive Regulation adequately address various arguments raised by the exporters concerning the determination of the profit rate for the constructed normal value. Moreover, the European Communities maintains that since it did not act inconsistently with the AD Agreement in the application of Article 2.2.2, no further explanation or justification of the European Communities' decisions is necessary. Finally, the European Communities asserts that Article 12.2.2 requires notice of decisions taken by the investigating authorities, while the European Communities' practice under Article 2.2.2 is a matter of policy, not a case-by-case decision. Similarly, with respect to India's claim 10, the European Communities argues that the European Communities' methodology in injury analysis is standard practice and, in the absence of any argument on the point by one of the interested parties to the investigation, the European Communities was not obligated to publish details of the methodology applied.

6.245 With respect to India's claim 13, the European Communities maintains that paragraphs 40 and 41 of the Definitive Regulation set forth a detailed account of the factors considered in the examination of injury, including those listed in Article 3.4 that were relevant to the determination. As regards the alleged failure to address "relevant arguments or claims made by the exporters", the European Communities maintains that the arguments of the exporters were not raised in the final phase of the investigation, but were directed at the original Complaint, and as such were not arguments relevant to the final decisions made by the EC authorities. Consequently, the Article 12.2.2 requirement to give reasons for their acceptance or rejection did not apply.

6.246 With respect to India's claim 22, the European Communities argues that the Definitive Regulation makes clear that employment was not a factor on which the European Communities relied in concluding that the domestic industry was suffering injury. Consequently, the exporters' argument on this point was not relevant, and therefore the European Communities was not required to address it. Moreover, the European Communities asserts that it did not regard imports prior to the investigation period as constituting "dumped imports". Consequently, it had no obligation to explain such a conclusion, which it did not reach, in the Definitive Regulation.

6.247 With respect to India's claims 25 and 28, the European Communities disputes India's interpretation of Article 12.2.2. The European Communities asserts that India's approach fails to take proper account of the structure of the Article. In the European Communities' view, Article 12 is straightforward – initiation issues are dealt with by paragraph 1, while paragraph 2 covers the measures adopted during and after the investigation (that is, provisional measures, definitive measures and undertakings). India's claim 25 asserts failure to explain matters arising under Article 5.3, concerning alleged failure to examine the evidence prior to initiation. The European Communities maintains that the Definitive Regulation addresses the issues of dumping and causation of injury at the end of the investigation and the imposition of final measures, as required by Article 12.2.2. In the European Communities' view, arguments regarding the initiation of the investigation and the determination of standing were not relevant to the final determination and definitive measure and, therefore, there was no obligation to include any discussion of them in the Definitive Regulation. The European Communities also asserts that the investigating authorities are under no obligation to review an initiation decision with benefit of hindsight and, thus, arguments directed to the initiation decision later in the investigation could never be relevant arguments that must be addressed in the notice of final determination. The European Communities makes similar arguments concerning the obligation to address only **relevant** arguments with respect to India's claim 28, asserting failure to address the determination of standing. The European Communities asserts that the arguments of the exporters which are allegedly not addressed in the Definitive Regulation were not relevant to the final determination described in that notice.

6.248 Finally, with respect to India's claim 31, the European Communities argues that its practice with respect to the obligations set forth in Article 15 is well-known to exporters, and therefore no further explanation was required. Moreover, the European Communities points out that, as India acknowledges, the matter was discussed with the exporters.

6.249 Egypt, as third party, argues that, even if the European Communities carried out the examination required by Article 5.3 of the Agreement, it failed to disclose this fact to the interested parties and, therefore, acted in breach of Articles 12.1 (an Article of which India has **not** alleged a violation) and 12.2 of the AD Agreement.

2. Findings

6.250 We will consider in turn each of India's claims under Article 12.2.2. Before doing so, we recall our conclusion that India has withdrawn its claims under Article 12.2.1 regarding the Provisional Regulation (India's claims 2, 5, 9, 12, 17, 21, 24, 27, and 30). Therefore, we have made no rulings concerning these claims. In addition, we note that India's claim 18 relates to its substantive claim 16, alleging a violation of Articles 6.10 and 6.11. We recall our conclusion that India's claims under Article 6, claims 14 and 16, are not within our terms of reference. In these circumstances, we consider it unnecessary and inappropriate to address India's claim 18.

6.251 Article 12 governs the contents of public notices issued in the course of anti-dumping investigations. It provides, in pertinent part:

> "12.2. Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 8, of the termination of such an undertaking, and 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. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein.

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

Claims 3 and 6

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

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

6.253 We also recall our conclusion that Article 2.2.2(ii) may be applied in a case where there are data concerning SG&A and profit for only one other exporter or producer.[102] We found, therefore, that the European Communities was not precluded from applying the methodology set out in that provision in this case and, therefore, did not act inconsistently with Article 2.2.2(ii) in this regard. India's argument in support of its claim under Article 12.2.2 presupposes an inconsistency with Article 2.2.2(ii), which we did not find. Since we did not find that the European Communities applied an option for which the requirements were not fulfilled, and the basis for its determination in this regard is clear from the final determination, we do not consider that the European Communities was required to give any further explanation in this regard.

6.254 We also recall our conclusion that an interpretation of Article 2.2.2(ii) under which sales not in the ordinary course of trade are excluded from the determination of the profit rate to be used in the calculation of a constructed normal value is permissible.[103] We found, therefore, that the European Communities did not err in its application of paragraph (ii) by using data only on transactions in the ordinary course of trade. We note, further, that the European Communities excluded data for sales not in the ordinary course of trade in accordance with Article 2(4) of its Regulation. In light of our finding in respect of the exclusion of data for sales not in the ordinary course of trade, the fact that the European Communities applied the customary methodology set forth in its legislation for the calculation of SG&A and profit rates, and the fact that its analysis in this regard is clear in its determination, we do not consider that the European Communities was required to explain its decision to derive profit on the basis of sales in the ordinary course of trade.

6.255 Finally, we recall our conclusion that Article 2.2.2(ii), when applied correctly, necessarily yields amounts for profits that are deemed "reasonable" for purposes of Article 2.2, and that the AD Agreement does not require consideration of a separate reasonability test in respect of results arrived at through the use of that methodology.[104] We found, therefore, that the European Communities did not act inconsistently with the requirements of Article 2.2 by not having applied such a test to the results that it obtained under Article 2.2.2(ii). Clearly, where there is no obligation for the European Communities to consider whether the profit established is reasonable on the basis of a separate test of reasonability – as we have found to be the case – there can be no obligation to explain a consideration that need not be undertaken.

6.256 The basis for the European Communities' application of and its analysis under Article 2.2.2 are apparent on the face of the Definitive Regulation, taken together with the Provisional Regulation as appropriate, and with reference to EC legislation. For the foregoing reasons, we find that India's claims 3 and 6, asserting that the European Communities failed to sufficiently explain why and how it applied Article 2.2.2 and that the European Communities failed to sufficiently explain why and how it applied Article 2.2, must both fail.

Claims 10 and 22

6.257 The next issue before us is whether, as India claims, the European Communities failed to explain its consideration of all imports from India during the period of investigation (Claim 10) as well as in the years prior to the period of investigation, *i.e.*, 1 January 1992-30 June 1995 (Claim 22). We recall our conclusion that the phrase "dumped imports" refers to all imports of the **product** from exporters/producers as to which an affirmative determination of dumping has been made.[105] We found, therefore, that the European Communities, having made an affirmative determination of dumping with respect to imports from all producers/exporters in this case, did not act inconsistently

[102] *See* paras. 6.69-6.75, *supra*.
[103] *See* paras. 6.83-6.87, *supra*.
[104] *See* paras. 6.94-6.101, *supra*.
[105] *See* paras. 6.132-6.142, *supra*.

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

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

Claim 13

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

Claims 25 and 28

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

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

particularly the case with respect to elements which are not within the scope of the information to be disclosed in the notice of initiation itself.[108] We do not believe that Article 12.2.2 requires a Member to explain, in the notice of final determination, aspects of its decision to initiate the investigation in the first place. We find, therefore, that India's claims under Article 12.2.2 regarding the European Communities' examination of the evidence in the application under Article 5.3 and its determination of industry support under Article 5.4 must fail.

Claim 31

6.261 Finally, we turn to India's claim that the European Communities failed to explain its consideration of the Indian exporters' arguments concerning Article 15 of the AD Agreement. In light of our finding of inconsistency with Article 15,[109] we find it neither necessary nor appropriate to address this claim. As discussed above in connection with India's claim 13, we consider that where there is a violation of the substantive requirement, the question of whether the notice is sufficient under Article 12.2.2 is immaterial. We therefore make no findings on claim 31.

VII CONCLUSIONS AND RECOMMENDATION

7.1 In light of the findings above, we conclude that the European Communities did not act inconsistently with its obligations under Articles 2.2, 2.2.2, 3.1, 3.4, 3.5, 5.3, 5.4, and 12.2.2 of the AD Agreement in:

(a) calculating the amount for profit in constructing normal value (India's claims 1 and 4),

(b) considering all imports from India (and Egypt and Pakistan) as dumped in the analysis of injury caused by dumped imports (India's claims 8, 19, and 20),

(c) considering information for producers comprising the domestic industry but not among the sampled producers in analyzing the state of the industry (India's claim 15, in part),

(d) examining the accuracy and adequacy of the evidence prior to initiation (India's claim 23),

(e) establishing industry support for the application (India's claim 26), and

(f) providing public notice of its final determination (India's claims 3, 6, 10, 22, 25 and 28).

7.2 In light of the findings above, we conclude that the European Communities acted inconsistently with its obligations under Articles 2.4.2, 3.4, and 15 of the AD Agreement in:

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

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

[108] We note, in this regard, the decision of the Panel in *Mexico - HFCS* concerning the scope of the information required in a notice of initiation.

[109] *See* paras. 6.226-6.238, *supra*.

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

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

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

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

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

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

7.4 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent the European Communities has acted inconsistently with the provisions of the AD Agreement, it has nullified or impaired benefits accruing to India under that Agreement.

7.5 We recommend that the Dispute Settlement Body request the European Communities to bring its measure into conformity with its obligations under the AD Agreement.