

ANNEX E**QUESTIONS AND ANSWERS**

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ANNEX E-1

INDIA'S ANSWERS TO THE PANEL'S QUESTIONS

23 September 2002

To India:

India is pleased to answer the questions of the Panel. India will first recall the questions of the Panel in *italics* after which it will present its answers in regular font.

1. A. India argues that regulations 160/2002 and 696/2002 were measures taken to comply, but since they were adopted after the August deadline, they were taken after the expiry of the reasonable period of time. Does India therefore consider that the Panel must ignore these regulations in its analysis? Or does India consider that the Panel should somehow fault the EC for taking these measures after the expiry of the period of the reasonable period of time? Or does India consider that the Panel should do both?

Reply

India would not wish to instruct the Panel what it should or should not do. Basically, India only considers that the Panel has standard terms of reference where its task is described:

"To examine, in the light of the relevant provisions of the covered agreements cited by India in document WT/DS141/13/Rev.1, the matter referred by India to the DSB in that document, 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

India recalls that Regulations 1644/2001, 160/2002 and 696/2002 all constitute "the matter referred by India to the DSB" in the document WT/DS141/13/Rev.1. In this regard India cannot imagine to suggest that "the Panel must ignore [Regulations 160/2002 and 696/2002] in its analysis". Indeed, nowhere in its written submissions and oral statements has India suggested something similar. India expects that the Panel will comply with Article 11 of the DSU and objectively assess the matter before it.

In this connection, India notes that the analysis that the Panel is required to undertake pursuant to WT/DS141/13/Rev.1 is of a dual nature. India requested the Panel to find both that:

- "(a) By failing to withdraw the measures found to be inconsistent with the Anti-Dumping Agreement and to bring its measures into conformity with its obligations under the Anti-Dumping Agreement, the EC has failed to comply with the DSB recommendations and rulings in this dispute; and
- (b) The re-determination, as amended, and the subsequent actions as identified above are inconsistent with the above provisions of the Anti-Dumping Agreement and the DSU."

¹*European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India—Recourse by India to Article 21.5 of the DSU*, Constitution of the Panel established, Note by the Secretariat, WTO document WT/DS141/14 of 2 July 2002.

It is indispensable to examine Regulations 1644/2001, 160/2002 and 696/2002 under both claims. Since the claims are different, their analysis will also be different. Thus, under the claim that the EC has not complied within the reasonable period of time the relevant fact is that Regulations 160/2002 and 696/2002 were taken after the expiration of the reasonable period of time and therefore *ex definitione* are not capable of remedying inconsistencies contained in Regulation 1644/2001. Under the second claim the relevant fact is the substantive inconsistency of the Regulations 160/2002 and 696/2002 *per se* (as well as of Regulation 1644/2001) with the covered agreements.

Furthermore, nowhere in its written submissions and oral statements has India suggested that the EC should be faulted for "taking ... measures [to comply] after the expiry of the period of the reasonable period of time". India requests the Panel to find that the EC has failed to comply with the DSB ruling *within* the reasonable period of time irrespective of what the EC has or has not done after the expiry of the reasonable period of time. The fact that the EC has undertaken measures, albeit unsuccessful, in order to repair inconsistencies of Regulation 1644/2001 with *inter alia* Articles 5.7, 3.1, 3.4 and 3.5 of the ADA proves that Regulation 1644/2001 *per se* fails to satisfy the requirements of those provisions. The fault of the EC under claim (a) is, therefore, that it failed to comply within the reasonable period of time, but not that it has done something afterwards.

Summing up, India's answer to questions one and three is No. As for the second question India submits that the EC should be faulted not for taking measures after the expiration of reasonable period of time, but rather for failure to take them within the reasonable period of time.

1.B. If the Panel were to conclude that regulation 1644/2001 is the only measure taken to comply, is there any basis for the Panel to consider regulation 696/2002 in this proceeding?

Reply

India recalls once again the following finding of the panel in *Australia–Salmon* (21.5):

"Two benchmarks apply when defining our terms of reference. First, Article 21.5 of the DSU pursuant to which this Panel was established. Second, our specific terms of reference set out in document WT/DS18/15, a document that refers, in turn, to the matter and relevant provisions of the covered agreements referred to by Canada in its request for this Panel (document WT/DS18/14)."²

On the basis of this logic if the Panel in the present case finds that Regulation 1644/2001 is the only measure taken to comply, it will effectively state that regulations 160/2002 and 696/2002 are outside of its terms of reference pursuant to Article 21.5. That in turn means that the Panel would have to "amend" its terms of reference as set out in WT/DS141/13/Rev.1 in order exclude regulations 160/2002 and 696/2002 that were explicitly mentioned in WT/DS141/13/Rev.1. India does not see how these terms of reference could be amended. However, if the terms of reference are somehow amended, then India would not see any basis for the Panel to consider Regulation 696/2002 in this proceeding.

2. We recall that India raised a claim under Article 3.5 of the ADA during the original panel's proceedings. However, India made no arguments concerning the adequacy or lack thereof of the EC's analysis of "other factors" causing injury and non-attribution. In the original report, at para 6.144, the Panel concluded "we consider that India has failed to present a prima facie case in this regard". On what basis do you consider that it is appropriate for an Article 21.5 panel to rule on

²Panel Report, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada* ("Australia – Salmon (Article 21.5 – Canada)"), WT/DS18/RW, adopted 20 March 2000, para. 7.10.

a claim that could have been addressed in the original proceedings, but regarding which no arguments were made, and no ruling was made? Please explain in detail, in particular with respect to the assertion that there was no reason for the EC to reconsider this aspect of its original determination, since there was no finding of violation in this respect.

Reply

India is pleased to answer this question "in detail".

First of all, India notes that it is not for India to tell the Panel what is appropriate for it do and what is not. The Panel has standard terms of reference that describe its task:

"To examine, in the light of the relevant provisions of the covered agreements cited by India in document WT/DS141/13/Rev.1, the matter referred by India to the DSB in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."³

India recalls that its claim under Article 3.5 is part of "the matter referred by India to the DSB" in the document WT/DS141/13/Rev.1. Taking into account the fact that Article 21.5 does not limit the terms of reference of a 21.5 Panel, India submits that there is no legal basis for such Panel to exclude from its terms of reference "a claim that could have been addressed in the original proceedings, but regarding which no arguments were made, and no ruling was made". India recalls the finding of the Panel in *Australia–Salmon (21.5)*:

"The reference to "disagreement as to the ... consistency with a covered agreement" of certain measures, implies that an Article 21.5 compliance Panel can potentially examine the consistency of a measure taken to comply with a DSB recommendation or ruling in the light of any provision of any of the covered agreements. Article 21.5 is not limited to consistency of certain measures with the DSB recommendations and rulings adopted as a result of the original dispute; nor to consistency with those covered agreements or specific provisions thereof that fell within the mandate of the original Panel; nor to consistency with specific WTO provisions under which the original Panel found violations. If the intention behind this provision of the DSU had been to limit the mandate of Article 21.5 compliance Panels in any of these ways, the text would have specified such limitation. The text, however, refers generally to "consistency with a covered agreement"."⁴ (underlining in the original)

In this regard, India expects that the Panel will comply with Article 11 of the DSU and objectively assess the matter before it.

As regards the assertion that there was no reason for the EC to reconsider certain aspects of its original determination, since there was no finding of violation in that regard, India would like to make the following comments.

First, it is not correct to state that since the DSB ruling was silent on the issue, there is no reason for a complying Member to reconsider this aspect of original determination. The duty to comply in good

³*European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India– Recourse by India to Article 21.5 of the DSU*, Constitution of the Panel established, Note by the Secretariat, WTO document WT/DS141/14 of 2 July 2002.

⁴Panel Report, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada* ("Australia – Salmon (Article 21.5 – Canada)"), WT/DS18/RW, adopted 20 March 2000, para. 7.10, subpara. 9.

faith with the WTO Agreement cannot be presumed to exist only in case when there is a respective DSB ruling. The Panel in *Australia-Salmon (21.5)* has closed the door to any doubts in this regard:

"We recall that even assuming that no finding of discrimination under Articles 2.3 or 5.5 was made in the original dispute – a matter contested by Canada -- the fact that no such claim may have been dealt with in the original dispute does not prevent an Article 21.5 compliance panel from doing so. Nowhere in the DSU can we trace the requirement referred to by Australia that Article 21.5 compliance panels can only reconsider WTO provisions dealt with by the original panel in case of a "change in circumstances". If, indeed, no "change in circumstances" occurred, as a matter of substance, one could expect that a compliance panel would simply confirm the finding made by the original panel. This issue is, however, a matter of substantive compliance with WTO rules, not one of terms of reference."⁵

Second, India recalls once again that the task of the complying Member under the ADA is to undertake an overall reconsideration of the measure in light of the DSB ruling, not just remedy some of the inconsistencies found:

" ... Part of the difficulty with SECOFI's redetermination in this case is that while SECOFI apparently undertook to respond to the specific criticisms set out in the original Panel's report, and has set out additional information relevant to the specific points made by the Panel in that report, there does not appear to have been an **overall reconsideration and analysis** of the information in light of the requirements of the AD Agreement, as clarified by the original Panel."⁶ (Emphasis added)

Third, India recalls that in *Canada-Aircraft (21.5)*, the Panel declined to examine one of the Brazil's argument on the ground that this argument "did not form part" of the reasoning of the original panel and was "not relevant to the present dispute, which concerns the issue of whether or not Canada *has implemented the DSB recommendation...*". The Appellate Body disagreed with the Panel and stated that Panel proceedings pursuant to Article 21.5 of the DSU involve, in principle, not the original measure, but a new and different measure that was not before the original Panel. Therefore, "in carrying out its review under Article 21.5 of the DSU, a Panel is not confined to examining the 'measure taken to comply' from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings."⁷

In *US-Shrimp (21.5)* the Appellate Body went on to state that:

"When the issue concerns the consistency of a new measure "taken to comply", the task of a Panel in a matter referred to it by the DSB for an Article 21.5 proceeding is to consider that new measure in its totality. The fulfilment of this task requires that a Panel consider both the measure itself and the measure's application. As the title of Article 21 makes clear, the task of Panels under Article 21.5 forms part of the process of the "*Surveillance of Implementation of the Recommendations and Rulings*" of the

⁵Panel Report, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada* ("*Australia – Salmon (Article 21.5 – Canada)*"), WT/DS18/RW, adopted 20 March 2000, para. 7.10, subpara. 14.

⁶Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States* ("*Mexico – Corn Syrup (Article 21.5 – US)*"), WT/DS132/RW, adopted 21 November 2001, as upheld by the Appellate Body Report, WT/DS132/AB/RW, para. 6.37.

⁷Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU* ("*Canada – Aircraft (Article 21.5 – Brazil)*"), WT/DS70/AB/RW, adopted 4 August 2000, para. 41.

DSB. Toward that end, the task of a Panel under Article 21.5 is to examine the "consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB. That task is circumscribed by the specific claims made by the complainant when the matter is referred by the DSB for an Article 21.5 proceeding."⁸ (footnotes omitted, underlining added)

India submits that it is for these reasons that as such it is entirely "appropriate" for the present Panel to deal with India's arguments under Article 3.5.

With regard to the specifics of this case, since the claim under Article 3.5 was presented once before, India wants to address the question twice, depending on how India should read it.

If the question indeed was intended as "On what basis do you consider that it is appropriate for an Article 21.5 Panel to base its ruling in respect of a certain claim upon arguments that could have been made in the original proceedings, but were not?" India will present its arguments under (I).

Alternatively, if India misunderstands the question of the Panel, and the Panel in fact wishes to revise its finding in the paragraph 6.144 of the original report and conclude that in the present case it should deal with India's additional *arguments* under Article 3.5 as with a new *claim* which could have been raised in the original proceedings, but was not, then India will answer the question "On what basis do you consider that it is appropriate for an Article 21.5 Panel to rule on a claim, that could have been raised in the original proceedings but was not?". In such case India will present its arguments under (II).

India submits at this point that it in no way is suggesting that the claims under Articles 3.4 and 3.5 of the ADA contained in its request for establishment of this Panel are new claims that could have been raised in the original proceedings, but were not. In the original proceedings India did raise claims under those Articles as the Panel explicitly recognised in paragraph 6.144 of its report. India's view in the current proceedings is, therefore, that the Panel should deal with additional arguments under Article 3.5 of the ADA as with additional *arguments* and not as with an additional *claim*. (Question and Answer I, rather than II).

I. On what basis do you consider that it is appropriate for an Article 21.5 Panel to base its ruling in respect of a certain claim upon arguments that could have been made in the original proceedings, but were not?

First of all India refers of course to its general answers recalling the pertinent and existing case law, of which the relevant parts are reproduced above (*Australia–Salmon (21.5)*, *Mexico–HFCS (21.5)*, *Canada–Aircraft (21.5)*, *US–Shrimp (21.5)*).

1. India recalls that there is no provision in the DSU that would compel a Member to participate as a party in a Panel proceeding.⁹ Accordingly there is nothing that would oblige a Member to bring in claims, to come up with arguments in their support, to add or modify arguments or even to leave claims unsubstantiated without any arguments. Thus, Members are free to make whatever arguments they wish in support of their claims.

⁸Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia* ("US – Shrimp (Article 21.5 – Malaysia)"), WT/DS58/AB/RW, adopted 21 November 2001, para. 87.

⁹Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the European Communities* ("EC – Bananas III (Article 21.5 – EC)"), WT/DS27/RW/EEC and Corr.1, 12 April 1999, para. 4.12.

2. In the particular context of Article 21.5 there is no provision that would allow a Panel to disregard in a preliminary manner arguments made by one of the parties irrespective of the fact that they are new or have not been raised in the original proceedings.

3. As has already been mentioned above it is in the nature of Article 21.5 proceedings that some of the arguments will be new since it is always a new revised measure that is examined in its totality by a 21.5 Panel.

4. As a rule, an omission of certain arguments in the original proceedings is made not in bad faith, but rather in order not to overload the Panel with complicated parallel lines of arguments and thus consistent with one of the objectives of the DSU – the one to achieve prompt settlement of the disputes. To give an example, in the original *Bed Linen* case India in theory could have submitted multiple arguments in support of each and every of its claims. However, in reality in view of the number of *claims* put forward by India (31) it is and it was unreasonable to expect to support each of them with several arguments rather than with one.

India also notes that the premise upon which the original Panel's question is based, namely that if a certain argument is brought in front of a Panel it will automatically be addressed by the Panel is not necessarily correct. India recalls the following statement of the Appellate Body in this regard:

"Nothing in the DSU limits the faculty of a Panel freely to use arguments submitted by any of the parties -- or to develop its own legal reasoning -- to support its own findings and conclusions on the matter under its consideration. A Panel might well be unable to carry out an objective assessment of the matter, as mandated by Article 11 of the DSU, if in its reasoning it had to restrict itself solely to arguments presented by the parties to the dispute."¹⁰

Thus, even if an argument is brought in front of the Panel the latter is not obliged to consider it and thus there is no guarantee, as the question posed above assumes, that it will actually be addressed.

5. Finally India submits that the failure of a Member to come up in the original proceedings with certain possible arguments can hardly prejudice any procedural rights of other Members. It is an ordinary practice of the WTO Dispute Settlement that parties to the dispute modify, withdraw and bring in new arguments during different stages of proceedings. If one accepts that litigation *per se* does not hurt those taking part in it, one should also accept that it is equally harmless to bring in new arguments in support of the old claims legitimately forming part of the terms of reference of a Panel.

For these reasons, India believes that it is appropriate for a 21.5 Panel to base its ruling in respect of a certain claim upon the arguments that could have been made in the original proceedings, but were not.

In the alternative, if India has misunderstood the question, it wishes to present its alternative answer to the following question.

II. *"On what basis do you consider that it is appropriate for an Article 21.5 Panel to rule on a claim, that could have been raised in the original proceedings but was not?"*

Again, India refers to the pertinent and existing case law as recalled above (*Australia–Salmon* (21.5), *Mexico–HFCS* (21.5), *Canada–Aircraft* (21.5), *US–Shrimp* (21.5)).

¹⁰Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)* ("EC – Hormones"), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, para. 156.

1. First of all, India notes that as a rule, a "new" claim (claim, that could have been raised in the original proceedings but was not) is contained in the request for the establishment of a 21.5 Panel and thus falls under its terms reference. For example, in the present proceedings claim under Article 3.5 of the ADA forms part of the document WT/DS141/13/Rev.1 and therefore, falls within the terms of reference of the Panel. It is for this reason in the first turn that it is appropriate for this Panel to rule on it.

2. Furthermore, again there is no legal ground in the DSU to exclude from the terms of reference of a 21.5 Panel claims that although specified in the request for the establishment of a Panel, could have been raised in the original proceedings, but were not:

"The reference to "disagreement as to the ... consistency with a covered agreement" of certain measures, implies that an Article 21.5 compliance Panel can potentially examine the consistency of a measure taken to comply with a DSB recommendation or ruling in the light of any provision of any of the covered agreements. Article 21.5 is not limited to consistency of certain measures with the DSB recommendations and rulings adopted as a result of the original dispute; nor to consistency with those covered agreements or specific provisions thereof that fell within the mandate of the original Panel; nor to consistency with specific WTO provisions under which the original Panel found violations. If the intention behind this provision of the DSU had been to limit the mandate of Article 21.5 compliance Panels in any of these ways, the text would have specified such limitation. The text, however, refers generally to "consistency with a covered agreement".¹¹ (underlining in the original)

3. Again it is in the nature of Article 21.5 proceedings that some of the claims will be new since it is always a new revised measure that is examined in its totality by a 21.5 Panel.

4. The objective of prompt settlement of disputes embodied in Article 21.5 is best served by an interpretation that allows to bring in new claims:

"a complainant, after having prevailed in an original dispute, should not have to go through the entire DSU process once again if an implementing Member in seeking to comply with DSB recommendations under a covered agreement is breaching, inadvertently or not, its obligations under other provisions of covered agreements. In such instances an expedited procedure should be available. This procedure is provided for in Article 21.5. It is in line with the fundamental requirement of "prompt compliance" with DSB recommendations and rulings expressed in both Article 3.3 and Article 21.1 of the DSU."¹²

5. The assumption implicitly contained in the question presupposes that every claim brought by the complaining party in the original proceedings is adjudicated by the Panel. It is well known, however, that due to the principle of judicial economy this is not the case:

"Nothing in this provision or in previous GATT practice requires a Panel to examine all legal claims made by the complaining party... Furthermore, such a requirement is not consistent with the aim of the WTO dispute settlement system. Article 3.7 of the DSU explicitly states: "The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a

¹¹Panel Report, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada* ("Australia – Salmon (Article 21.5 – Canada)"), WT/DS18/RW, adopted 20 March 2000, para. 7.10, subpara. 9.

¹²*Ibid.*

dispute and consistent with the covered agreements is clearly to be preferred".... Thus, the basic aim of dispute settlement in the WTO is to settle disputes. This basic aim is affirmed elsewhere in the *DSU*... A Panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute."¹³

To give an example, in the present case the EC in its third request for the preliminary ruling suggests that India should have brought in the original proceedings two claims under the same Article 3.5 of the ADA. India submits that while it is probably clear today, that this should have been done due to the ruling of the original Panel that India has failed to present a *prima facie* case under Article 3.5, it was not clear at all at the moment of drafting of the request for the establishment of the original Panel. In particular, India had no illusions with respect to the fact that the Panel would exercise judicial economy in regard to this claim especially taking into account the fact that the initial complaint contained 31 claims.

This example also demonstrates that an omission of certain claims in the original proceedings was not bad faith, but rather in order not to overload the Panel with too many claims.

6. India also submits that as a rule ruling by a 21.5 Panel on a claim that could have been raised in the original proceedings, but was not will not prejudice procedural rights of the complying Member irrespective of the fact that deadlines are shorter in Article 21.5 proceedings and no reasonable period of time to comply is available following a 21.5 Panel report.

The illustration from the present case is appropriate. Here the EC has had at least four months at its disposal (7 May 2002 – request for the establishment of the Panel – 10 September 2002 – date of oral hearings) to address India's claim concerning Article 3.5. It may be the case that four months is less than Members have during the original proceeding. This in itself, however, is not a proof of the fact that the EC has suffered any prejudice to its procedural rights.

As for the absence of the reasonable period of time for compliance following a 21.5 Panel proceedings, India submits that the prejudice from the lack of such could arise only in one case, *i.e.* when the "new" claim is the only claim before a 21.5 Panel or when a 21.5 Panel has found that there is not a single other inconsistency of a revised measure with the WTO Agreement. As it has been recently noted elsewhere:

"In waiting until after the defendant government completes its compliance to introduce a new issue, the complainant government puts its adversary in an arguably unfair predicament of having no time to correct an unanticipated violation. In *US-FSC* the Article 21.5 Panel held that *none* of the previously-found WTO violations were corrected, so the addition of a new issue did not engender much unfairness. Yet one can imagine circumstances where the defendant does succeed in responding to all of the recommendations of the DSB only to get blindsided in the Article 21.5 proceeding with a new complaint about a WTO violation that may have been intentionally or unintentionally omitted from the original dispute."¹⁴ (underlining added)

In the present case which resembles the facts of the *US-FSC (21.5)* case instead of the situation described in the last sentence of the citation, India has not brought claims exclusively under Article 3.5 of the ADA. Rather India has brought claims with respect to the numerous violations of the

¹³Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India* ("US – Wool Shirts and Blouses"), WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323, pages 18-19.

¹⁴Jason E. Kearns and Steve Charnovitz, *Adjudicating Compliance in the WTO: A Review of DSU Article 21.5*, JIEL, Volume 5, Issue 2, July 2002: p. 349.

covered agreements some of which have already been accepted by the EC during the meeting with the parties.

7. Finally, as India has already stated in its oral statement during the meeting with the parties the situation of claims that form part of the terms of reference of a 21.5 Panel and that could have been raised in the original dispute, but were not, is already familiar to WTO dispute settlement. In the *US-FSC (21.5)* the EC did not in the original proceedings bring the claim under Article III of the GATT 1994.¹⁵ This, however, has not precluded the EC from raising this issue during the Article 21.5 proceedings. Neither did it preclude first the Panel and then the Appellate Body from making finding in respect of claim under Article III of the GATT 1994.

Furthermore, in the *EC-Bananas (21.5) (Ecuador)* the EC has unsuccessfully argued exactly the same issue:

"The European Communities notes that it would be disadvantaged if new claims were allowed because the shorter period of time allowed for an Article 21.5 panel process (90 days compared to a normal panel timetable of at least six months) would affect its ability to defend its measures and because it would not be entitled to a new reasonable period of time to implement any new panel recommendations or rulings."¹⁶

Understandably the Panel did not pay much attention to this argument:

"As to the EC's argument that it is unfair to expect it to defend itself in respect of new issues in an expedited panel process, we note that the issues raised by Ecuador in this proceeding are quite similar to those raised in *Bananas III*. As to the EC's argument that it will be deprived of a reasonable period of time in which to implement any new recommendations and rulings of the DSB, that would not justify limiting the scope of an Article 21.5 proceeding. In any event, in our view, these arguments to restrict the scope of Article 21.5 on the grounds of alleged unfairness are not based on the text of Article 21.5 and do not offset the arguments outlined above concerning the need to resolve promptly implementation issues in one panel proceeding."¹⁷

Since adopted Panel and Appellate Body reports create legitimate expectations among the WTO Members¹⁸ India submits that it is legitimate expectation that the present 21.5 Panel as well as subsequent 21.5 Panels will follow this example in their reports.

For these reasons, India believes that it is appropriate for a 21.5 Panel to rule on a claim, that could have been raised in the original proceedings but was not. India, however, emphasises once again that situation described in India's question 2.II addressed in the section 2.II above does not reflect realities of the present case and thus has no relevance to it, unless the Panel decides otherwise.

¹⁵*United States – Tax Treatment for "Foreign Sales Corporations"*, Request for the Establishment of a Panel by the European Communities, WT/DS108/2 of 9 July 1998.

¹⁶Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by Ecuador* ("*EC – Bananas III (Article 21.5 – Ecuador)*"), WT/DS27/RW/ECU, 12 April 1999, para. 6.3.

¹⁷*Ibid.*, para. 6.10.

¹⁸Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* ("*Japan – Alcoholic Beverages II*"), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97, at 14.

3. *In para. 72 of its FWS, the EC referred to Article 6.10 to substantiate its arguments and respond to India's arguments with respect to relevant context for the interpretation of Article 2.2.2(ii). Was India referring to this particular provision, as the EC suggests?*

Reply

Yes. This was in addition to footnotes 2 and 5 to which India also referred.

4. *In para. 90 of the Indian Second Written Submission, India states that the principle of good faith as enshrined in the Vienna Convention ensures that the EC case law constitute context, and refers to the rulings by the European Court of Justice. How can this be considered as relevant "context" for the interpretation of the ADA under the Vienna Convention? Can India express its views on the difference, if any, between the **performance** of a treaty and the **interpretation** of a treaty in the context of the principle of good faith?*

Reply

India recalls that "the principle of good faith, which is, at once, a general principle of law and a principle of general international law, ... informs the provisions of the *Anti-Dumping Agreement*, as well as the other covered agreements".¹⁹

As enshrined in the Vienna Convention this principle requires States to both: (1) perform treaty in good faith (Article 26) as well as (2) to interpret treaty in good faith (Article 31). Thus **performance** of a treaty obligation means carrying out the substance of the mutual understanding embodied in the treaty honestly and loyally. Accordingly, **interpretation** of a treaty provision pre-supposes the same attitude to the clarification of the mutual understanding embodied in the treaty, *i.e.* in an honest and loyal manner. Naturally both processes are closely related and indeed the failure to demonstrate good faith in one of them necessarily results in the bad faith in the other.

One of the manifestations of the principle of good faith is the concept of estoppel.²⁰ "Estoppel is premised on the view that where one party has been induced to act in reliance on the assurances of another party, in such a way that it would be prejudiced were the other party later to change its position, such a change in position is "estopped", that is precluded".²¹ India submits that the concept of estoppel is of importance in the process of treaty interpretation. In particular, where one party has been induced to act in reliance on a certain interpretation of a treaty provision made public by another party, in such a way that it would be prejudiced were the other party later to change its position, such a change in position is "estopped", that is precluded.

In this context India submits that interpretation of certain provisions of the Regulation 384/96 identical to those of the ADA as applied by the EC in its everyday domestic practice should preclude the EC from advocating a different interpretation of the same provisions at the WTO level. Alternatively, if the panel while not accepting EC arguments develops its own line of reasoning similar to the one contained in the interpretations proposed by the EC, the panel still should find a

¹⁹Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ("US – Hot-Rolled Steel"), WT/DS184/AB/R, adopted 23 August 2001, para. 101. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, para. 158; Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, para. 166.

²⁰Ian Brownlie, *Principles of Public International Law*, 5th ed (Oxford: Clarendon Press 1998), at 17-18.

²¹Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico* ("Guatemala – Cement II"), WT/DS156/R, adopted 17 November 2000, para. 8.23.

violation of the respective provision of the ADA as being applied in bad faith. It is in this sense that India consider the judgments of the ECJ to be a relevant context for the interpretation of the ADA under the Vienna Convention. It is India's understanding that Panel's question 16 to the EC in the present proceeding as well as, for example, Panel's questions 3 and 48 in *United States–Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* (WT/DS213) are being put forward precisely in order to identify the good faith of the EC or lack thereof in its arguments.

India also notes that, in the same way as in respect of Article 2.2.2(ii) of the ADA, the EC should be precluded to raise arguments in respect of India's approach to interpretation of Article 5.7 of the ADA. Or, alternatively, the EC should be found to act in bad faith under this latter provision and thus violate it. India recalls that contrary to what it argues in the present case, it was the EC in *United States–Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* which took the view that the *de minimis* standard contained in Article 11 of the ASCM should also apply in review proceedings even though Article 21 does not expressly repeat that *de minimis* standard.²²

5. *Could India expand on its assertion that Article 5.7 of the ADA prohibits separate consideration of injury and dumping in the circumstances of this dispute, in view of the fact that Article 11.2 specifically allows separate reviews of injury and dumping ?*

Reply

It is correct that Article 11.2 *first* mentions the possibility of a separate review of dumping or injury. Article 11.2 however *also* foresees a review of "*both*" dumping and injury as a third possibility. More specifically, the second sentence of Article 11.2 mentions three situations substantiating the need for a review:

- (1) whether the continued imposition of the duty is necessary to offset dumping;
- (2) whether the injury would be likely to continue or recur if the duty were removed or varied;
- or
- (3) both.

When, as a result of the DSB findings—and assuming that the re-determination and the subsequent actions qualify as a review—it was necessary to re-do both dumping and injury, the EC found itself in this third situation.

²²Report on *Certain Corrosion Resistant Carbon Steel Flat Products from Germany* WT/DS213/R of 3 July 2002, paragraph 5.41 last sentence:

"The EC submits that, for the reasons stated above, this threshold is not appropriate, and that since 0.53 per cent is below the 1 per cent *de minimis* level which should apply in sunset reviews, the US was in breach of Article 21.3 in continuing the measure" (emphasis in original)

and paragraph 5.112:

"... a systematic and good faith interpretation of Article 21.3 with Articles 21.1, 22.1, 22.7 and 11.9 of the *SCM Agreement*, would suggest clearly that the *de minimis* rule of 1 per cent should be applied also in sunset reviews."

Or, as the EC stated in paragraph 5.417:

"... the US is proposing again a formalistic interpretation of the terms of Article 21.3 and in complete isolation of its object, purpose and context."

India has not challenged that injury or dumping could be assessed separately. In such a situation it could be possible that either injury or dumping could be assessed without assessing the other.

What India has challenged is that *once both* findings were under reconsideration, the important procedural discipline enshrined in Article 5.7 should be respected. Thus, once injury and dumping were both up for revision it was illegal to do so in various episodes.

In this connection India has recalled the recent Panel Report concerning *Certain Corrosion Resistant Carbon Steel Flat Products from Germany*. In that case it was *the EC* which took the view that the *de minimis* standard contained in Article 11 of the ASCM should also apply in review proceedings even though Article 21 does not expressly repeat that *de minimis* standard.²³ The Panel in that case agreed.²⁴ While that Panel recognized that the text of the *de minimis* provision did not mandate its application in a review, it found that the terms of the provision were unequivocal.²⁵

That Panel took into account that the provision in question was couched in mandatory and strong language, conveying that the drafters had in mind a particular outcome to protect exporters and to prevent trade harassment. Eventually the panel concluded, *inter alia*, that finding otherwise would compromise the disciplinary framework that the drafters sought to create throughout the Agreement.²⁶

²³*Ibid.* paragraph 5.41 last sentence:

"The EC submits that, for the reasons stated above, this threshold is not appropriate, and that since 0.53 per cent is below the 1 per cent *de minimis* level which should apply in sunset reviews, the US was in breach of Article 21.3 in continuing the measure" (emphasis in original)

and paragraph 5.112:

"... a systematic and good faith interpretation of Article 21.3 with Articles 21.1, 22.1, 22.7 and 11.9 of the *SCM Agreement*, would suggest clearly that the *de minimis* rule of 1 per cent should be applied also in sunset reviews."

Or, as the EC stated in paragraph 5.417:

"... the US is proposing again a formalistic interpretation of the terms of Article 21.3 and in complete isolation of its object, purpose and context."

²⁴*Ibid.*, paragraphs 8.56-8.81.

²⁵*Ibid.* paragraph 8.59.

²⁶*Ibid.* paragraph 8.59:

"... we recognise, at the outset, that nothing in the text of the provision provides for its *de minimis* standard to be implied in Article 21.3. What is clear from this language, however, is that a *de minimis* subsidy cannot be countervailed, and that, upon a finding of a *de minimis* subsidy, the Agreement mandates but one outcome. Investigating authorities must not only terminate the investigation, but they must do so immediately. The terms of the provision are unequivocal. Such mandatory ("shall") and strong ("immediate") language would suggest that the drafters had an important consideration in mind in drafting this provision, reflected in the precise choice of words. In particular, the mandatory nature and strong language of the provision convey, in our view, that the drafters sought a particular outcome, to protect exporters under investigation and prevent trade harassment through continuation of an investigation of a *de minimis* subsidy."

And 8.79:

"In sum, we consider that the rationale for the *de minimis* standard set out in Article 11.9 is clearly that CVDs are to be used to counter injurious subsidisation, and the threshold set out in this provision demarcates the level below which subsidisation is deemed to be so small as to be non-injurious for purposes of the imposition of CVDs. Having found this to be the case, and having established that one of the objects and purposes of the SCM Agreement is to regulate the imposition of CVDs and to create a disciplinary framework therefor, we are of the view that the *de minimis* standard must be applicable to sunset reviews as it is to investigations. Finding otherwise would compromise the very object and purpose of the SCM Agreement and the disciplinary framework that the drafters sought to create through the Agreement."

India respectfully submits that the EC admit that similar logic applies to Article 5.7 of the Anti-Dumping Agreement. India has in its submissions already recalled the mandatory and strong language of Article 5.7 conveying the idea that the drafters had in mind a particular outcome to protect exporters and to prevent trade harassment. In other words, having arrived in the third situation substantiating the need for a review, in which both dumping and injury must be re-assessed, such findings should not be separated if one were to respect the disciplinary framework that the drafters sought to create throughout the Agreement.

6. *A. Given that Article 6.10 does not require that the "sample" in the investigation of dumping be a "statistically valid" sample, and that therefore there is no guarantee that the chosen sample will, in actual fact, be representative of the whole population of producers, on what basis does India support its assertion that the proportion of imports found to be dumped in the sample must, in all cases, be applied to the imports from non-investigated producers.*

Reply

As a preliminary observation India respectfully disagrees with the premise of this question (that Article "does not require" that samples are statistically valid). In particular, the plain text of the second sentence of Article 6.10, provides two possibilities to the investigating authorities.

The authorities may:

""limit their examination either to a reasonable number of interested parties or products by

[1] using samples which are statistically valid on the basis of information available to the authorities at the time of the selection,

or

[2] to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated." (underlining added)

The text of the first option of this second sentence of Article 6.10 presumes, therefore, that samples are statistically valid (samples "which are statistically valid").

This first option to limit the examination was the choice that was applied by the authorities in this case: the authorities chose the sample. The original panel report at paragraph 2.5 also acknowledged that the EC conducted its analysis of dumping based on a sample of Indian exporters. It is the Agreement that presumes that the sample is statistically valid. The EC has not challenged the statistical validity of its sample.

Moreover, even if that sample so chosen is not statistically valid (a question which is not in dispute here), one can still argue that a "sample" is still a "sample" and *ipso facto* intended to represent the whole. When India asked the EC, during the meeting with the Parties, what meaning the EC attached to the word "sample" the EC agreed with the dictionary (and common sense) definition of a sample as presented by India in its First Written Submission.

As regards the precise question of the Panel "*on what basis does India support its assertion that the proportion of imports found to be dumped in the sample must, in all cases, be applied to the imports from non-investigated producers*" India recalls that its premise is that a sample is intended to see what the whole is like. Since a sample is meant to see what the whole is like, there is, in principle, no reason to acknowledge the results of a sample in some cases but not in all cases. This is only different

when there would be specific and compelling reasons not to acknowledge such results. No such reasons to disregard the results of the sample exist in the context of the injury determination. If the result of the sample is *de facto* ignored, this time because more than half of the sample is non-dumped, there is no compelling reason to accept the results of the sample in the future, even if the whole sample shows dumping.

In fact, one can seriously wonder why in case of Pakistan the result of the sample was completely accepted to represent the country as a whole; if the "logic" of the EC as applied to India would have prevailed for Pakistan, all zero and *de minimis* margins in that sample should have been disregarded, and co-operating non-sampled producers in Pakistan should have been attributed a weighted average dumping margin, even if there was no proof for it. Indeed, by taking a different, even contradictory, approach for the two countries as regards the meaning of the sample it cannot be said that the evaluation of the facts was "unbiased and objective."

B. Assuming this were done, and an anti-dumping order were applied, would India consider that dumping duties could only be collected on a proportion of future imports equal to the proportion of imports found to be dumped during the investigation period?

Reply

India does not consider this and the question is therefore not applicable.

C. If so, how would India envision that this could be done? In particular, please discuss in this context the implications of the first sentence of Article 9.2.

Reply

As noted, India does not consider this.

D. If India does not consider that dumping duties could only be collected on a proportion of future imports equal to the proportion of imports found to be dumped during the investigation period, could India explain how it would justify the different treatment of imports in the two contexts – i.e., as dumped for the assessment of anti-dumping duties in the future, but as not dumped, in part, for the determination of injury?

Reply

India has pointed out in its written submissions, and during the meeting with the parties, that the rules on the collection and imposition of duties must be separated from the rules that establish dumping and injury.

The dumping and injury findings logically precede the establishment of the level of a duty. The determination of the level of a duty takes place only if and when dumping and injury have been found to exist. The Article 9 that regulates the imposition of a duty is also clearly separate from the rules on the determination of dumping, injury, and the use of a sample.

In the context of the final determination of the duty, *once* dumping and injury are established, Article 9.4 contains a very specific exclusion concept for the purposes of calculating the weighted average duty for co-operating non-sampled producers. Specifically, Article 9.4 mentions that in the determination of the weighted average duty authorities shall disregard three sets of margins. This qualifying language of that Article specifically restricts that exclusion very explicitly to "the purpose of *this* paragraph" for the determination of a duty. This qualifying language is precise and unequivocal. Hence, as India has pointed out, such exclusion concept should not be read into a

situation such as the determination of injury. This qualifying language does not exist elsewhere in the Agreement.

Accordingly it is possible that even though a sample shows no dumping margin for exporters representing 53% of the volume, a weighted average *duty* can still be calculated (if injury is established) based on the results of the other exporters, calculated under the specific rules of Article 9.4.

At the risk of repetition, the qualifying language only exists for the purpose of the establishment of a duty. There is no reason to assume that the qualifying language with its exclusion concept, and which comes as a last step, and only for the determination of a duty, should be interjected in the previous steps of determining dumping and injury. Indeed, it is textually unsound to impute the specific exclusion concept that exists in the context of a duty determination into the preceding context of the dumping and injury determination.

Had the drafters wished that the qualifying language with the exclusion concept should apply in the context of dumping and injury they would have included that specific logic into Article 6.10 ("for the purpose of injury the non-dumped imports in a sample should not count as non-dumped imports"). Or they would not have restricted the text of Article 9.4 into such a limited scope of application ("for the purpose of this Agreement", rather than "for the purpose of this paragraph"). The drafters did neither.

To answer the question more precisely, the different treatment for the purpose of dumping and injury on the one hand, and the purpose of duties on the other hand, follows from the specific method foreseen in Article 9.4 for the determination of the weighted average duty for co-operating non-sampled producers. The express and specific exclusion for duty purposes in Article 9.4 brings with it that no such exclusion should be implied in Article 6.10. As the Appellate Body noted in *India – Patents*: "principles of interpretation neither require nor condone the imputation into a treaty of concepts that were not intended."²⁷

For the sake of completeness it may be noted that co-operating exporters, not selected in the sample but subjected to such weighted average duty, could request a refund under Article 9.3.2 if they show, individually, that they are not dumping. They could also request an individual, partial, interim review if they would wish that.

7. *In the context of injury factors for which data were analysed by the EC in the redetermination, A. what information relating to inventories, capacity utilisation and investment were not specifically elaborated upon by the EC? B. What in India's opinion were the other factors for which data were neither collected nor ultimately analysed? C. In what respect was the analysis conducted by the EC inadequate?*

Reply

India first recalls the recitals of the re-determination as regards stocks and capacity utilisation.

"4.4.2 Stocks and capacity of production

(28) These indicators were found not to have a bearing on the State of the Community industry.

(29) As to stocks, this is the case for two reasons. Firstly, production (e.g. of printed patterns) often takes place in response to or in anticipation of orders placed by

²⁷Appellate Body Report, WT/DS50/AB/R, adopted 16 January 1998, para. 45.

particular clients, thus reducing the possibility to produce purely for stocks. Secondly, stock valuation often takes place at 31 December, which is towards the end of a peak period of activity for the bed linen sector. Large stock variations can take place between one year and another simply because of large orders leaving the warehouse on 30 December in one season and 2 January the next. While some increase in stocks was observed in some companies, neither the complainant nor any sampled producer adduced increase in stocks as evidence of injury. An increase in stocks in this sector can thus indicate increased actual or anticipated orders rather than unsold production.

- (30) As to production capacity, the Community industry is characterised by a large number of highly flexible small and medium-sized companies. Machinery can, relatively easy, be bought, sold or used for other products. Under these circumstances, reliable capacity of production figures were extremely difficult to establish throughout the period concerned in the present case. However, the investigation showed that many producers were able to maintain a high rate of capacity utilisation and even had to subcontract surplus production, to allow them to run at high utilisation even in depressed periods."

India will now turn to the specific questions.

7.A "[W]hat information relating to inventories, capacity utilisation and investment were not specifically elaborated upon by the EC?"

7.A.1 Stocks

As a first observation India recalls that the investigation period ran from 1 July 1995 to 30 June 1996. The EC does not provide any data pertaining to these two cut-off points. These two cut-off points would logically have been relevant for measuring the difference between the opening stock and the closing stock, *i.e.* the actual stock movement.

Despite this investigation period running from July to June, the EC only provides a speculative assessment as regards the theoretically expected behaviour of stocks right in the middle of the investigation period (30 December – 2 January). Since both the opening and closing date of the I.P. were at a maximum six-months distance of that midpoint one may only wonder about the relevance of the EC's contemplation.

To answer the question ("A. *what information were not specifically elaborated upon by the EC?*"): the information not elaborated upon is the situation of stocks at the beginning and end of the investigation period. In fact, those data remain completely unknown as of today, more than seven years after the investigation period. India has already pointed out that at the EC wide level consumption was measured (in the original provisional Regulation, recital (63)) with a deliberate disregard for stocks. This latter recital was confirmed in recital (20) of the re-determination.²⁸

Despite the absence of stock collection—as also witnessed by the very design of the questionnaire which does not ask such question—the EC then states that "some increase in stocks was observed for some companies"; in fact this is the only "information" that was ever disclosed as regards stocks. This observation from the EC in itself raises two questions: What about the stock situation for other companies? For which period was this increase observed? Was it for the year-end turn that the EC described? Or was it for the difference between 1 July 1995 and 30 June 1996? Again, to answer the question ("A. *what information were not specifically elaborated upon by the EC?*"): The information

²⁸See also India FWS, footnote 82.

not elaborated upon here is therefore the actual situation of stocks for other companies not belonging to the "some companies" as defined. To answer the third question ("*C. In what respect was the analysis conducted by the EC inadequate?*"): the analysis is based on an observation only with respect to (allegedly) part of the facts; and even those facts are not known.

7.A.2 Capacity Utilization

The only "hard" fact information that was ever revealed is that "the investigation showed that many producers were able to maintain a high rate of capacity utilisation and even had to subcontract surplus production"; the fact that even these figures are uncertain is because the EC qualifies the statement by a preceding statement indicating that the figures are not reliable. The other sentences in the recital do not reveal any facts but only contain unsubstantiated allegations. To answer the precise question ("*A. what information were not specifically elaborated upon by the EC?*"): no facts are disclosed about the actual rate of capacity utilisation, nor about the benchmark against which this rate of utilisation was compared. The fact that surplus production even had to be subcontracted indicates that there were even more orders than could be digested, a fact which however remains unaddressed. To answer the third question ("*C. In what respect was the analysis conducted by the EC inadequate?*"): there is no analysis based on facts. There is only a statement that the utilization was so high that some production had to be outsourced. No analysis is made based on the scarce facts as disclosed.

7.A.3 Investments

No data on investments are contained in Regulation 1644/2001. Section 4.4.6 of that Regulation that purportedly deals with investments reveals no data. It only states at recital (39) that: " ... the maintenance of the production tools was the main purpose of the Community's investments during the period considered". This statement is followed by a table that reveals profits divided by investments, also in indexed form. The only thing, if any, that the table shows is that the profits divided by investments was always positive and always 7% or more. Indeed, the profits on investments during the investigation period were the same as in 1993. To answer the question ("*A. what information were not specifically elaborated upon by the EC?*"): for example, the actual investments are not disclosed. The documents that previously accompanied the disclosure [India-Exhibit-RW-5] only showed that throughout all the years the industry has continued to steadily invest, even though the actual amounts are unclear. Throughout the injury analysis period there was always a positive return on investments. To answer the third question ("*C. In what respect was the analysis conducted by the EC inadequate?*"): the EC does not draw any conclusions as regards the continued investments and positive return on investment over all the years. There was no analysis.

7.B What in India's opinion were the other factors for which data were neither collected nor ultimately analysed?

India first recalls that the Panel found in paragraph 6.167 of the original Report, basing itself on its two preceding paragraphs, that data was not even collected for all the factors listed in Article 3.4. As the EC admitted during the meeting with the parties: it did not go out in the field and collect the missing information.

For India to identify what factors exactly were not collected it may therefore first of all rely on the facts as found in the original panel report. These findings were not challenged by the EC, nor did those facts change after the adoption of the Reports by the DSB (during the meeting with parties the EC once again confirmed that it did not go out in the field and collect data on all missing factors).

In paragraph 6.165 the Panel identified "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" as factors that were not even referred to in the original Provisional Regulation.

In paragraph 6.166 the Panel identified that data for the Community industry and the sampled producers was only collected for "trends" concerning production, sales by value, employment, prices, and profitability. The trends at the level of the entire Community (i.e. outside the domestic industry) "provides", as the Panel noted in paragraph 6.182, "no basis for conclusions about the impact of the dumped imports on the domestic industry itself."

No additional data collection took place after the original DSB report. The situation about uncollected information has therefore remained unchanged. This therefore implies that the following factors were neither collected or analysed for the Community industry or the sample:

market share; productivity; return on investments; utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; cash flow; inventories; wages; growth; ability to raise capital or investments.

Given that in the question above the items (1) inventories, (2) capacity utilization, and (3) investments are already identified in the question as not collected, and granted that the "margin of dumping" was collected in the investigation of dumping, the following other factors also remained uncollected since the original panel findings:

- (4) market share;
- (5) productivity;
- (6) return on investments;
- (7) factors affecting domestic prices;
- (8) cash flow;
- (9) wages;
- (10) growth;
- (11) ability to raise capital or investments.

It can also be noted from the questionnaire sent to EC producers (page 11) that information on a number of factors has simply never been collected; instead the EC merely requests producers to "*describe the effects*" on items such as (1) market share, (2) sales, (3) prices, (4) production, (5) capacity utilisation, (6) stocks, (7) employment, (8) profitability, (9) ability to invest, (10) etc.

7.C In what respect was the analysis conducted by the EC inadequate?

Data on the aforementioned factors were not collected, as found by the Panel in the original Report, and the EC did not appeal this finding. As the EC admitted during the meeting with the parties: it did not go out in the field and collect the missing information.

Surely a factor cannot be evaluated without the prior collection of the relevant data.

In case it is somehow established that the data were collected, then India refers to paragraphs (157) through (213) of its First Written Submission as to how this analysis was inadequate. In this regard India also refers to paragraphs (150) through (181) of its Second Written Submission.

8. *India has challenged the sequence of reasoning of the EC regarding its analysis of injury factors (see in particular, paragraphs 147-152 of India's First Written Submission with respect to inventories and paragraphs 153-156 of that submission with respect to capacity utilization). Does India consider that a particular order or sequence of reasoning could negatively affect the analysis of these factors? If so, can India explain why?*

Reply

As India has stated in paragraph 52 of its FWS, "facts pertaining to a certain factor must *first* be collected and brought on record, *after* which they can be evaluated". India submits that only this logical type of reasoning satisfies requirement of Article 3.4 of the ADA to conduct an "evaluation of all relevant economic factors and indices having a bearing on the state of the industry". The reverse type of reasoning proposed by the EC in its re-determination and previously the provisional regulation not only negatively affects the analysis of injury factors, but actually makes it impossible for an investigating authority to conduct an evaluation, let alone an objective one. If facts pertaining to a certain factor have not been first collected, they logically cannot be evaluated.

India finds support to this statement in the original Panel report:²⁹

"... 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.⁵⁵

⁵⁵ We note, in this regard, that the Panel in *Korea – Dairy Safeguard*, interpreting 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:

"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. 8.123." (underlining and emphasis added)

India also recalls the finding of the Panel in *Argentina–Footwear* which addresses precisely the issue under consideration:

"Article 4.2(a) requires that during the investigation, the competent authority shall "evaluate all relevant factors of an objective and quantifiable nature". It appears that to satisfy this requirement, the authority should first conduct an appraisal of the data, including confirmation or verification of their accuracy and representativeness. Second, Article 4.2(a) and (b) require full analysis and evaluation of those data, and 4.2(c) including by cross-reference Article 3, requires written presentation of a detailed analysis of the case, including the findings and reasoned conclusions reached

²⁹Panel Report, para. 6.155.

on all pertinent issues of fact and law, and a demonstration of the relevance of the factors examined."³⁰ (underlining added)

By failing to do exactly this, the EC has therefore acted inconsistently with the specific findings of these three Panel reports, and notably *Argentina-Footwear*.

These Panels will surely have considered that the very order of the sequence evaluating the facts and setting forth the conclusions based on the data on record could indeed and very well negatively affect the result. The formal aspect of data collection and the substantive aspect of objective evaluation of data should not be improperly mixed.

Basically, an evaluation cannot take place without collecting the facts first.

Indeed, by first setting out an evaluation any fact-finding process that follows becomes distorted. In other words: by setting forth a pre-conceived conclusion, the subsequent reasoning (or "factual evaluation") that follows is inherently influenced by the conclusion already set forth. An authority could first set forth the pre-ordained conclusion and will then be able to tailor or select the subsequent facts in such a fashion so as to make the facts fit the desired conclusion. Conversely, by adhering to proper sequencing such manipulation becomes more difficult. A proper sequencing of steps therefore inserts a safety-stop into the fact-finding and evaluation process rather than "rushing to justice" and reaching the required conclusion.

9. *Does India consider that the EC is limited to consideration of information that it specifically requested in the questionnaires, or does India admit the possibility that it may be possible to derive necessary information from other information submitted, i.e., derive information on inventories from information on production and exports?*

Reply

As India also answered during the meeting with the Parties: the short answer is that some information could in theory be derived from other information. Yet such derivatives do not serve the purpose of independent fact finding.

The collection of information on certain of the 15 factors has, at least, a 'control' function, in addition to an independent function of data collection. By means of illustration, as India pointed out in its second written submission at paragraph 138: some data in the accounts are only reflected at a company level. This is for example exactly the case with stocks. For such purpose the questionnaires for *exporters* invariably contain separate detailed questions and tables on stock data for the product concerned. Data on stocks form an important means in EC anti-dumping practice through which sales and production data are double-checked. Stock records are often kept in different departments than the records on sales; collecting both records from different sources within the same company introduces a basic element of objectivity in the data collection process, similar to the way it is always done at the side of the exporters. While it may therefore in theory be possible that information is "derived", this is not enough to satisfy the obligation to "collect". On the contrary, the fact that certain information is allegedly "derived" is in fact proof that it was never collected.

³⁰Panel Report, *Argentina – Safeguard Measures on Imports of Footwear* ("Argentina – Footwear (EC)"), WT/DS121/R, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS121/AB/R, para. 8.25.

The longer answer is therefore: yes it is in theory possible but no, it makes no sense. By allowing most factors simply to be derivatives from other data undermines the very essence of objective fact finding.

10. At paragraph 26 of its oral statement, India states that "an overall reconsideration and analysis should, for example, have led to the inclusion of the verified sampled EC producer who was importing the product from Pakistan." A. Could India explain on what basis it considers that this producer should have been included? B. Could India further explain how the Panel can make a ruling on this question, given that India explicitly states that it has made no claim under Article 4.1, which governs the exclusion of importing producers from the domestic industry?

A. Article 3.1 mandates that a determination shall be based on positive evidence.

The evidence on the record has always included verified information from one particular EC producer (paragraph 54 Provisional Regulation). In the original proceeding the evidence pertaining to this producer was excluded after verification. This particular exclusion of positive evidence was at that time possible on the basis of application of Article 4.1(i). Now, since Pakistan is no longer dumping, the exclusion of that positive evidence is no longer possible. In other words, with the absence of dumping from Pakistan, this positive evidence on the record should have been considered. There is no longer any justification to invoke Article 4.1(i) and to exclude that positive evidence on the record.

The evidence pertaining to that producer should have been included in order for the injury determination to be objective and based on positive evidence. The failure to consider this positive evidence is not objective and therefore contrary to Article 3.1 (as well as Article 17.6(i)).

The disregard of positive evidence does not require a claim under Article 4.1(i). This latter Article was only mentioned as an illustration as to why that positive evidence could previously be disregarded but not now.

B. Claim 5 of India relates to Articles 3.1 and 3.4. Since India identified these Articles in its request for the Panel it is perfectly possible for the Panel to rule that positive evidence has been ignored. The fact that Article 4.1(i) is no longer an acceptable excuse for the EC to disregard positive evidence was an *argument* of India to support its claim that Article 3.1 was violated—an illustration as to why that positive evidence could previously be disregarded but not now. While a violation of Article 4.1(i) will always result into violation of Article 3.1, there is no reason to believe that Article 3.1 could be violated only in case there is first an inconsistency with Article 4.1(i). Clearly a measure can be inconsistent with Article 3.1 due to many reasons. In this case Article 3.1 was violated by deliberately disregarding positive evidence on the record and thereby not making an objective determination.

In this connection India also refers to paragraphs 215 through 217 of its First Written Submission. India recalls that this information was only excluded after verification. India also refers to its footnote 34 in its Second Written Submission.

11. *India's arguments suggest that it considers that the EC was somehow precluded from imposing an anti-dumping measure on bed-linen imports from India. Is this in fact India's view? On what basis would India assert that a Member may not impose an anti-dumping measure **consistent with the Agreement**, merely because the original measure on the same products was found to be inconsistent by a Panel?*

India does not contest that a Member may impose an anti-dumping measure which is **consistent** with the Agreement. Yet, since the original measure was found illegal on account of elementary aspects of dumping, injury, and developing country status, it would be unsound to merely permit a simple

reformulation of that illegal measure and then allow it to pass. In fact, and in view of the fundamental mistakes on account of dumping, injury, and developing country status, the most proper way to comply would have been to immediately withdraw the entire measure.

12. *Could India please respond specifically to the arguments in the EC's oral statement at paragraphs 41 and 42 concerning the question of the basis on which volume should be calculated, if volume were considered to be the appropriate weighting factor in calculating the weighted average under Article 2.2.2(ii) in this case?*

Reply

India has not specified that volume should be measured in a particular manner, e.g. "units/sets" rather than weight or size. As India pointed out it only required the EC to adhere to the volume as previously defined, i.e. 80% for Bombay Dyeing and 14% for Standard Industries. As India has no means to know how that volume was originally calculated (units, sets, weight, size) it cannot mandate a choice for a particular method of measuring the volume.

What is clear however is that volume is neutral as regards the sizes of the companies and does not attach relatively more relevance to companies that sell at higher prices. Volume flows naturally from relevant context such as footnotes 2 and 5, as well as Article 6.10. The allegation by the EC that the violation is "inconsequential" is not true since it would have led to three companies not found dumping, at least if the EC would stick to the sizes 80-14 as originally declared.

13. *Does India agree with the EC's representation of its views as set out in the last sentence of paragraph 56 of the EC's oral statement, that India has not disputed the EC's finding that all imports from non-sampled exporters were dumped? If not, could India please point out specifically where it has disputed the finding referred to by the EC?*

Reply

India does not agree. The dispute of this EC finding by India has been India's subsidiary argument (secondary to the argument that a sample should mean what it always means).

Specifically, in its Second Written Submission India has disputed this EC finding in paragraphs 130 through 132. In its Oral Statement India has disputed this EC finding in paragraph 42. In its Closing Statement India has disputed this EC finding in paragraph 42.

14. *The EC has argued that the increased cost of raw cotton was not, standing alone, a cause of injury to the domestic industry, but was only a cause of injury in combination with the dumped imports which undersold the domestic product and prevented the EC industry from increasing prices in response to increased costs, thereby resulting in declining profits. The EC has also acknowledged that other factors than dumped imports might prevent a domestic industry from raising its prices in response to increased costs. However, the EC argues, India has not alleged or demonstrated that any such other factors were at work in this case. A. Can India point to any other factors which were known at the time of the original determination that the EC authorities should have addressed in considering why EC producers were not able to increase prices in the face of increased raw cotton costs? In para 233 of India's first written submission, India states that "the EC completely fails to ensure that the injurious effects of the other known factors are not attributed to dumped imports. **For example**, one factor mentioned in recital (50), the result of prices not being able to pace with inflation in prices of consumer goods, is not discussed at all in point 5.3." (emphasis added). India also references the increase in raw cotton prices. B. What additional "other factors", if any, were in India's view known and should have been taken into consideration but were not?*

A. Clearly, the inflation that was known was not addressed. The "depressed period" during which the analysis took place (see also the answer under B) was also not taken into account. The same goes for the "contraction in demand" (see also the answer under B).

B. India does not, of course, know what all the EC knew but has chosen to disregard. However, from the determinations as published, and the disclosures provided, it would appear that there are a number of such other factors at work:

B.1 The "Depressed Period"

Recital (30) of the re-determination states that the analysis covered "depressed periods". More specifically it states that "the investigation showed that many producers were able to maintain a high rate of capacity utilisation and even had to subcontract surplus production, to allow them to run at high utilisation even in depressed periods." Thus, while the *Bed Linen* industry was apparently suffering from that depressed period, the EC ignores to analyze this as an "other factor."

B.2 The Volume and Prices of imports not sold at dumping prices

The effect of volume and prices of non-dumped imports from all third countries was not properly taken into account as recital (63) of the re-determination suggests.

As is clear from India-Exhibit-RW-26 those imports grew from 31.9% in 1992 to 34.5% in the I.P.; this means that the volume of such imports was known.

As regards prices recital (101) of the original Provisional Regulation explicitly stated:

"... imports from countries not concerned which undercut the Community industry's prices could also have contributed to the injury suffered by the Community industry."

This means that the prices of such imports were known.

Yet, while the volume and prices of these imports were known—and were even acknowledged as a possible cause of injury—the injury caused by this factor was not taken into account in the re-determination.

B.3 The Contraction in Demand

There was a steady decrease in consumption (recital (104) of the original Provisional Regulation). The EC in that same recital acknowledged that this decline:

"... has contributed to the situation of the Community industry".

In the re-determination the reasoning changed. Specifically, in recital (62) of that Regulation it was concluded that:

"... the Community industry was hardly affected, if at all, by the developments in the Community consumption."

Hence, while this other factor was known, and should have been taken into consideration, it was not. Even worse: while this factor was in the original Regulation acknowledged to be a cause of injury, it was not acknowledged to be one such cause in the re-determination.

B.4 Export Performance

In view of the collection of sales data the export performance would probably have been known to the EC, but was not taken into account at all.

To the EC :

15. *Do we understand from the EC's fourth request for preliminary rulings that, in the EC's view, those parts of the original determination that were not the subject of a claim in the original dispute, and thus remained unchanged and were adopted by reference in the redetermination 1644/2001 are not part of the measure taken to comply? In this regard, the EC's attention is drawn to paragraph 6.144 of the original Panel report, in which the Panel stated:*

"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."

Comment of India:

India respectfully submits that the Panel while examining the response of the EC to this question should take into account the following finding of the Panel in the *EC–Bananas (21.5) (Ecuador)*:

"Article 21.5 refers to the "consistency with a covered agreement of measures taken to comply with the recommendations and rulings"... There is no suggestion in the text of Article 21.5 that only certain issues of consistency of measures may be considered. Nor is there a suggestion that the term "measures" has a special meaning in Article 21.5 that would imply that only certain aspects of a measure can be considered."³¹ (underlining added)

India recalls that this finding was in response to the opposite argument of the EC, which in the present case again argues the same as it did in *EC–Bananas (21.5) (Ecuador)*.

16. *In para. 80 of its FWS, the European Communities mentioned that it used sales value to average the amounts of SG&A and profits because that method is easier to apply and can be used in all the investigations. Is the Panel correct in understanding that this is the standing practice of the Communities in all its investigations? May the EC authorities rely on some other basis for weighting the averages of amounts for SG&A and profits in a particular case? Has the EC ever done so? If yes, in what cases, and can the EC explain the reasons for choosing a different basis?*

17. *Can the EC respond to the arguments made by India in paras. 55-60 of its FWS?*

18. *How did the EC obtain the information regarding inventories, capacity utilisation, and investment? were there specific questions put to sampled producers regarding these factors in the questionnaires or otherwise? What was the composition of the sample from which these pieces of information were obtained and what was the methodology used to derive such information from that sample?*

³¹Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by Ecuador* ("EC – Bananas III (Article 21.5 – Ecuador)"), WT/DS27/RW/ECU, 12 April 1999, para. 6.8.

19. *Does the EC consider that the calculation of a dumping margin above de minimis for unexamined producers (i.e., those not examined as part of the sample) constitutes a determination of dumping with respect to those producers?*

20. *Following the adoption of the original Panel and Appellate Body reports in the Bed-Linen dispute, has the EC undertaken to re-calculate dumping margins for any products subject to an anti-dumping order other than the bed-linen imports from India, Egypt, and Pakistan? Was this done on the EC's own initiative, or in response to requests for review received from interested parties?*

21. *Could the EC explain the basis for the premise, implied in paragraph 114 of its oral statement, that bed linen producers would pass raw cotton price increases through to customers in the form of increases in the prices of bed-linen? What factors might limit the ability of producers to pass through cost increases in the form of price increases, for instance contractions in demand? Did the EC consider whether any such factors were at work in the bed-linen industry, and if so, how did the EC exclude the possibility that such other factors were the reason cost increases were not passed through. Could the EC address the proportion of such raw material cost increases that would be passed through to customers in the form of price increases in the bed-linen industry under what the EC has referred to as "normal" conditions?*

22. *In recital 57 of regulation 1644/2001, it is stated that "average sales price did not increase." Does this statement refer to the average price of one (or more) of the reference products, or the average price per kilogram of bed linen? Depending on the answer, please clarify the statements concerning price movements in paragraphs 168-172 of the EC's first written statement and paragraphs 78-79 of the EC's oral statement to the Panel.*

To both parties and third parties:

23. *In your view, should regulation 696/2002 be considered a measure independent of the EC's efforts to comply? If not, on what basis do you consider that it should be treated as part of the process to bring the measures faulted by the original panel into conformity with the EC's obligations? Please explain how you consider that regulation 696/2002 should be treated in this context?*

Reply

As an introductory observation India notes that the DSU does not empower a 21.5 Panel to exclude from its terms of reference certain measures explicitly identified in the request for the establishment of a Panel. In this regard India first wishes to provide the following preliminary comments.

Whether regulation 696/2002 (as well as regulation 160/2002) is a measure independent of the EC's efforts to comply or not, is an issue which cannot narrow the scope of the current proceedings.

In considering the scope of terms of reference of the present Panel, India recalls that when this case was referred to it by the DSB, it was provided that the Panel would have standard terms of reference. Such terms of reference are defined in Article 7.1 of the DSU and, as adapted to this case, are as follows:

"To examine, in the light of the relevant provisions of the covered agreements cited by India in document WT/DS141/13/Rev.1, the matter referred by India to the DSB

in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."³²

As explained by the Appellate Body:

"[T]he matter referred to the DSB for purposes of Article 7 of the DSU ... must be the 'matter' identified in the request for establishment of a panel under Article 6.2 of the DSU. That provision requires the complaining Member, in a panel request, to 'identify the *specific measures at issue* and provide a brief summary of the *legal basis of the complaint* sufficient to present the problem clearly'. The 'matter' referred to the DSB', therefore, consists of two elements: the *specific measures at issue* and the *legal basis of the complaint* (or the *claims*)."³³

Thus, pursuant to its terms of reference, the Panel is to consider the matter referred to the DSB by India and that matter consists of the measures and claims specified by India in WT/DS141/13/Rev.1. In case a limitation is suggested in the question, then that cannot be found in the terms of reference of this Panel.

India submits that such limitation also cannot be found in the ordinary meaning of the terms of Article 21.5 of the DSU. On the contrary, in *Australia-Salmon* (21.5) the wording of this provision has been used in order to include into terms of reference of the Panel the measure which has not been explicitly mentioned in the request for the establishment of a Panel:

"As noted earlier, compliance is often an ongoing or continuous process and once it has been identified as such in the panel request, as it was in this case, any "measures taken to comply" can be presumed to fall within the panel's mandate, unless a genuine lack of notice can be pointed to."³⁴

Thus, Article 21.5 has been used in order to expand terms of reference of a Panel rather than to limit them. This interpretation of Article 21.5 of the DSU is supported by its context and the object and purpose of the DSU. For example, Article 21.1 of the DSU states that "[p]rompt compliance with the recommendations and rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members". Article 3, which sets out the general provisions of the DSU, provides in its paragraph 3:

"The prompt settlement of situation in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members."

India also notes that proponents of the opposite interpretation of Article 21.5 often refer to the following statement of the Appellate Body in *Canada–Aircraft* (21.5):³⁵

³²*European Communities–Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India–Recourse by India to Article 21.5 of the DSU*, Constitution of the Panel established, Note by the Secretariat, WTO document WT/DS141/14 of 2 July 2002.

³³Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico* ("Guatemala – Cement I"), WT/DS60/AB/R, adopted 25 November 1998, para. 72.

³⁴Panel Report, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada* ("Australia – Salmon (Article 21.5 – Canada)"), WT/DS18/RW, adopted 20 March 2000, para. 7.10, subpara. 28.

³⁵EC FWS, para. 23.

"Proceedings under Article 21.5 do not concern just *any* measure of a Member of the WTO; rather, Article 21.5 proceedings are limited to those 'measures *taken to comply* with the recommendations and rulings' of the DSB. In our view, the phrase "measures taken to comply" refers to measures which have been, or which should be, adopted by a Member to bring about compliance with the recommendations and rulings of the DSB."³⁶

India fails to see how this statement limits the mandate of a 21.5 Panel. If the quotation of the Appellate Body Report is done properly (the entire paragraph is quoted), it becomes clear that this statement is about the temporal aspect of "measures taken to comply" and not about the limitations of terms of reference of a 21.5 Panel. It explains what *is* the matter before a 21.5 Panel rather than mandates what it *should be*:

"Proceedings under Article 21.5 do not concern just *any* measure of a Member of the WTO; rather, Article 21.5 proceedings are limited to those "measures *taken to comply* with the recommendations and rulings" of the DSB. In our view, the phrase "measures taken to comply" refers to measures which have been, or which should be, adopted by a Member to bring about compliance with the recommendations and rulings of the DSB. In principle, a measure which has been "taken to comply with the recommendations and rulings" of the DSB will *not* be the same measure as the measure which was the subject of the original dispute, so that, in principle, there would be two separate and distinct measures³⁷: the original measure which *gave rise* to the recommendations and rulings of the DSB, and the "measures taken to comply" which are – or should be – adopted to *implement* those recommendations and rulings. In these Article 21.5 proceedings, the measure at issue is a new measure, the *revised* TPC programme, which became effective on 18 November 1999 and which Canada presents as a "measure taken to comply with the recommendations and rulings" of the DSB."³⁸

India also recalls that in *Canada–Aircraft (21.5)* the task of the Appellate Body was not to decide whether a certain measure was properly before the Panel, but whether the Panel was entitled to decline to examine the substance of one of Brazil's arguments on the basis of the fact that such argument had not formed part of the reasoning of the Panel in the original dispute.

As regards the precise question itself, India is pleased to present the following comments:

Clearly, as the EC has itself recognised during the oral hearings, regulation 696/2002 (as well as regulation 160/2002) is inextricably linked to the EC's unsuccessful efforts to comply, *i.e.* regulation 1644/2001. This follows from the fact that regulation 696/2002 amends the injury re-determination made in regulation 1644/2001. The fact that regulation 696/2002 was necessitated by the adoption of regulation 160/2002 proves that the latter is also part of EC's "implementation" programme. The EC does not contest the fact that regulations 160/2002 and 696/2002 are closely connected.³⁹ The EC also does not contest that regulation 1644/2001 is a "measure taken to comply". Logically, therefore, all three measures are "measures taken to comply".

³⁶Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft – recourse by Brazil to Article 21.5 of the DSU* ("Canada – Aircraft (21.5)"), WT/DS70/AB/RW, para. 36. (Emphasis added in the original).

³⁷We recognize that, where it is alleged that there exist *no* "measures taken to comply", a panel may find that there is *no* new measure.

³⁸Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft – recourse by Brazil to Article 21.5 of the DSU* ("Canada – Aircraft (21.5)"), WT/DS70/AB/RW, para. 36. (Footnotes and emphasis in the original).

³⁹Oral Statement of the EC, para. 10.

India recalls that it is a normal practice of the WTO Dispute Settlement to deal with amendments to "measures taken to comply" as with "measures taken to comply". In *EC–Bananas (21.5) (Ecuador)* a mere fact that certain regulations were taken in order to modify the original EC's bananas import regime was enough to find that these measures are "taken to comply".⁴⁰ In *Australia–Salmon (21.5)* the Panel has explicitly stated that "any quarantine measure introduced by Australia subsequent to the adoption on 6 November 1998 of DSB recommendations and rulings in the original dispute—and within a more or less limited period of time thereafter—that applies to imports of fresh chilled or frozen salmon from Canada, is a "measure taken to comply"."⁴¹ As recently has been noted elsewhere:

"In our view, an Article 21.5 Panel should examine an aggravating measure when there is reason to believe that the measure is linked to the measure that the defendant claims is taken to comply with the DSB's recommendations and rulings. Defendant governments should not be allowed to escape oversight by revoking the original measure only to replace it with another measure that has the same effect."⁴²

For these reasons India believes that regulations 696/2002 and 160/2002 form part of the EC's efforts to comply. Thus, India submits that these measures should be treated as "measures taken to comply".

24. *Could the parties clarify whether the relevant date for considering the existence or consistency of measure taken to comply is considered to be the date of the request for establishment of the Panel, or the date on which the DSB actually established the Panel?*

Reply

India submits that the relevant date for considering the *overall* existence or *overall* consistency of measures taken to comply is the date of the request for the establishment of the Panel. This is without prejudice to the fact that the relevant date for considering the existence or consistency of measures taken to comply *within* the reasonable period of time is the date of expiration of the reasonable period of time.

India also refers to paragraph 17 of its closing statement.

25. *What, in your view, does the term "dumped imports" as used in Articles 3.1 and 3.2 mean in the context of the analysis and determination of injury? Specifically, may it be interpreted to include imports from unexamined producers for which a determination of dumping under Article 2 has not been made?*

With regard to the first question.

As the panel noted in its original report at paragraph 6.137:

"... all imports from any producer/exporter found to be dumping may be considered as dumped imports for purposes of injury analysis."

⁴⁰Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by Ecuador* ("EC – Bananas III (Article 21.5 – Ecuador)"), WT/DS27/RW/EQU, 12 April 1999, para. 6.8.

⁴¹Panel Report, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada* ("Australia – Salmon (Article 21.5 – Canada)"), WT/DS18/RW, adopted 20 March 2000, para. 7.10, subpara. 22.

⁴²Jason E. Kearns and Steve Charnovitz, *Adjudicating Compliance in the WTO: A Review of DSU Article 21.5*, JIEL, Volume 5, Issue 2, July 2002: p. 347.

A contrario, India may logically assume that all imports from any producer/exporter not found to be dumping may not be considered as dumped imports for purposes of injury analysis.

As regards the second question.

There is no explicit finding of dumping or explicit finding of absence of dumping for co-operating non-sampled producers. The only evidence that exists is the evidence of the sample that was selected in order to represent the whole.

Now suppose that there are unexamined producers. For these unexamined producers no direct determination of dumping or absence of dumping has been made. This compels the investigating authority to make an assumption as regards the existence or absence of dumping for such producers. If no assumption is made then part of the total of exports of the country would be completely ignored, whether as dumped or non-dumped. Since positive evidence on the record cannot be ignored, either way, there has to be an assumption on the basis of what is available.

If, for example, the sample shows that all exporters from the sample were dumping, then authorities would assume that all imports from the country were dumped, even though no explicit determination was made for such imports. This makes sense: otherwise authorities could land a situation where although the total sample of 5000 tonnes is dumped (out of a total 100,000 tonnes) they would need to ignore the non-examined 95,000 tonnes.

And *vice versa*: if authorities find that all imports from a sample were non-dumped, they would assume that all imports from that country were not dumped. This makes sense: otherwise authorities could land a situation where although the total sample of 5000 tonnes is dumped, out of the total 100,000 they would still consider 95,000 tonnes as dumped. This was done for example in the case of Pakistan: when the EC found that all imports from the sample from Pakistan were non-dumped, they terminated the case for Pakistan. Thus, in the case of Pakistan the EC acknowledged that the sample was meant to represent the whole.

Now, if there is a situation in between, where half of the sample is dumped, and the other half is non-dumped, then it makes no sense to speculate either way. The analysis of the positive evidence has to be made *unbiased* and *objectively*, and the only way to do so is to take the meaning of a sample to its consequence. When out of 5000 tonnes half is dumped, and the total pool was 100,000 then it is fair and makes sense to assume that out of 100,000 half is dumped, and half is non-dumped. There is no evidence for the total pool either way so the assumption that should be made should be "objective" and "unbiased."

26. *Can you elaborate on the meaning and implications of the terms "imposition" and "application" of an anti-dumping measure. Can the two terms be considered as alternatives for one another? Please consider, in your response, other provisions of the ADA where these terms are used in explaining your views.*

India has in its Second Written Submission (paragraph 227) already referred to the reasoning of the Appellate Body in *Line Pipe*:

" ... Article 9.1 is concerned with the application of a safeguard measure on a *product*. And we note, too, that a duty, such as the supplemental duty imposed by the line pipe measure, does not need actually to be enforced and collected to be "applied" to a product. In our view, duties are "applied against a *product*" when a Member imposes conditions under which that product can enter that Member's

market—including when that Member establishes, as the United States did here, a duty to be imposed on over-quota imports. Thus, in our view, duties are "applied" irrespective of whether they result in making imports more expensive, in discouraging imports because they become more expensive, or in preventing imports altogether."⁴³ (underlining added)

Hence, duties are "applied" when a Member imposes conditions under which that product can enter that Member's market. India considers that the same systemic logic of the Appellate Body as enunciated in *Line Pipe* is capable to find application in the context of the ADA. Even though the EC had suggested in its First Written Submission (para. 267) that the suspension was "unconditional" and therefore was not a form of an application, India has already pointed out in its Second Written Submission (para. 228), there *is* a very specific timing condition.

Accordingly, India submits, anti-dumping measures can be considered applied once a Member imposes conditions under which that product can enter that Member's market irrespective of whether these measures result in making imports more expensive.

As regards the word "imposition", it would appear that its meaning is more limited. Thus, Article 9 of the ADA, specifically carries the title "Imposition and Collection of Anti-Dumping Duties". It would appear therefore that the word imposition is connected with the concrete and ultimate action of levying the charge.

Article 7 of the ADA deals with the application of a provisional measure. Article 7.1 enumerates situations under which provisional measures may be "applied" and Article 7.2 provides examples as to the form of the application of a provisional measure. A provisional measure could take the form of a provisional duty, a security (deposit or bond), or the withholding of appraisement. It would appear that therefore that the word applying is connected with the tentative and not-ultimate act of taking a measure as long as imposes conditions under which that product can enter that Member's market—irrespective of whether these measures result in making imports more expensive.

India therefore respectfully submits that the words imposition and application are not interchangeable. The application of a measure is wider and includes even tentative and non-ultimate acts as long as it imposes a condition under which a product can enter the market. By contrast, it appears that the imposition of a duty is more restrictive and related to the ultimate action of levying the charge.

India also recalls the presumption that different words have different meanings. As early as in *US–Gasoline* the use of different expressions of relationship in the various parts of Article XX of GATT 1994 was seen to show an intention of different degrees of connection. This has been constant jurisprudence. For example, in *EC – Hormones* the Appellate Body held that:

"The implication arises that the choice and use of different words in different places ... are deliberate, and that the different words are designed to convey different meanings. A treaty interpreter is not entitled to assume that such usage was merely inadvertent on the part of the Members who negotiated and wrote that Agreement."⁴⁴

For these reasons, India respectfully submits, the words are not mere alternatives for each other.

⁴³Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* ("US – Line Pipe"), WT/DS202/AB/R, adopted 8 March 2002, paragraph 129.

⁴⁴*EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/A/R, WT/DS48/AB/R, Report of the Appellate Body adopted on 13 February 1998, para. 164 (citation omitted).

27. *One might argue that, for unexamined producers (i.e., those not individually examined as part of the sample), there is no direct evidence, only indirect evidence from the sampled companies) as to whether there is dumping or not, since there is no information collected from these producers on the basis of which a dumping determination under Article 2 of the AD Agreement might be made. If this is considered to be the case, can the parties and third parties point the Panel to any specific provisions of the AD Agreement (not including the Article 3.1 reference to positive evidence) that address the question of **how** a determination of dumping is to be made for producers for which there is no information?*

Reply

First of all, the Appellate Body noted in *US-Hot Rolled Steel* in paragraphs 55-56, that Article 17.6(i) also defines, in effect, when *investigating authorities* can be considered to have acted inconsistently with the ADA in the course of their "establishment" and "evaluation" of the relevant facts. Thus, Panels must assess if the establishment of the facts by the *investigating authorities* was proper and if the evaluation of those facts by those authorities was unbiased and objective.

Thus, an overbearing consideration for any determination of dumping is that the evaluation of the facts should be "unbiased" and "objective".

This Article 17.6(i) is therefore the first basic provision that addresses the question of *how a determination of dumping is to be made for producers for which there is no information?* Whatever way the determination is made, it should be made in a way that is "unbiased" and "objective".

Respecting this overbearing and basic consideration, it is the view of India that elementary calculation-concepts of Article 2, must also apply in the context of determining a weighted average dumping margin. It makes no sense if the basic concepts that do apply with respect to the calculation of a company-specific dumping margin can simply be set-aside when determining a country-wide weighted average dumping margin. India has already noted that such a margin should be distinguished from a duty that may apply on a weighted average basis.

Such basic concepts enshrined in Article 2, include, for example, the obligation to make a "fair comparison" between normal values and export prices as well as the prohibition of "zeroing" negative dumping amounts. These concepts are enshrined, respectively, in Article 2.4, and in the *Bed Linen* case law concerning the prohibition of "zeroing". Respect for these basic concepts should therefore provide compelling guidance as to the question of the calculation of a dumping margin for producers for which there is no information.

Summing up, the Indian method is mandated by the basic concepts contained in Articles 2 and 3.1 as interpreted in light of Article 17(6)(i). By the same token, these provisions prohibit the EC method.

28. *The EC's actions in the redetermination might be considered to be one method of making a dumping determination for unexamined producers, based on the calculation of a weighted average margin of dumping for examined producers in the sample. India has proposed another method, based on applying the proportion of imports in the sample found to be dumped to the unexamined imports. Can the parties and third parties point to any specific provisions in the Agreement which either prohibit the EC method or require the Indian method?*

Reply

As a preliminary remark India respectfully recalls that its interpretation of the word sample was specifically made in the context of the injury determination. Thus, India has proposed to extrapolate, respectively, the non-dumped and dumped imports of the sample, to the total imports as a whole.

India has in its written submissions already pointed to the text of Articles 3.1, 3.2 and 6.10 itself. This has been further clarified during the meeting with the parties. According to India, the meaning of a sample is what it always means, not what it never means. The fact that for duty purposes there is a very specific rule (under Article 9.4) does not detract from this basic fact.

Clearly such purpose of a sample is to form the basis for an "objective examination" of "positive evidence" of "dumped imports" under Article 3.1 and 3.2. In accordance with Article 17.6(i) this assessment should be "unbiased" and "objective". In other words, once a sample shows that part of the exports are non-dumped, this positive evidence should be assessed, objectively, and not in a manner that makes it less likely or more likely that there is a finding of dumping and injury.

Summing up, the Indian method is required by Article 3.1, 3.2 and 17.6(i) as interpreted in light of Article 6.10. By the same token, those provisions prohibit the EC method.

29. *Could the parties and third parties address the meaning and significance of the term "positive evidence" as used in Article 3.1 of the AD Agreement? In particular, could the parties address the question whether the EC's method, as described in question 0 above, rests on positive evidence, and the question whether India's method, as described in question 0 above, rests on positive evidence.*

Reply

Positive evidence was defined in *US-Hot Rolled Steel* at paragraphs 192-193. The Appellate Body held that

"192. ... The term "positive evidence" relates, in our view, to the quality of the evidence that authorities may rely upon in making a determination. The word "positive" means, to us, that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible.

193. ... the term "positive evidence" focuses on the facts underpinning and justifying the injury determination ... "

As India has pointed out, the hard evidence on the record is that 53% of the sample was non-dumped. This evidence pertained to 4,888 tonnes, supposedly representing 18,428 tonnes. These are the only hard facts that underpin the injury determination.

As India has pointed out: there is simply no evidence concerning the balance 13,540 tonnes. Yet, the EC merely *assumes* all those tonnes as dumped. As India noted: this is not objective since no such evidence exists. Following such logic India could equally argue that in the absence of evidence on 13,540 tonnes this should all be treated as non-dumped. Such view would be equally biased.

Hence, the only unbiased and correct approach, as India has argued all along, is that the sample 4,888 tonnes should *represent* the total 18,428 tonnes, if the meaning of a sample is to represent the underlying whole. The only objective conclusion, if one finds that 53% of the 4,888 tonnes is non-dumped, is that 53% of the whole is not dumped.

Clearly, India's method, submitting that 53% of the total is non-dumped, is based on the available positive evidence that 53% of the sample was non-dumped. India's method is therefore both unbiased and objective: it does not overstate nor understate the dumped imports either way.

These views from India should be seen in the light of the Appellate Body's finding on an "objective examination":

"193. ... an "objective examination" requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation. The duty of the investigating authorities to conduct an "objective examination" recognizes that the determination will be influenced by the objectivity, or any lack thereof, of the investigative process."

By contrast, a finding that 86% of the total is dumped (as the EC did), based on the evidence that 53% of the sample—representing the whole—was non-dumped cannot be considered unbiased and objective.

30. *In light of the Appellate Body findings pertaining to Article 3.5 of the AD Agreement in US-Hot-Rolled Steel Products from Japan, how do your authorities comply with the obligation to "separate and distinguish" the injurious effects of dumped imports from those of other known causal factors?*

Reply

India is confident that its own anti-dumping law and practice is fully in accordance with the Anti-Dumping Agreement. Indian authorities separate and distinguish the injurious effects of other factors. Indian authorities also identify the nature and extent of the injurious effects of such factors.

31. *Against what standard would you consider that a Panel should assess whether a Member has complied with Article 21.2 of the DSU? In particular, what specific obligations does this provision impose on Members. In this context, would India please address the actions the EC has cited as fulfilling any obligations it may have under this provision.*

Article 21.2 of the DSU states the following:

"Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement."

It goes without saying that different developing countries have different interests. Besides that, the same developing country may have different interests in different cases depending on the circumstances of a particular case. Thus, the issue of what specific obligation does this provision impose on Members should be decided on case-by-case basis.

In the present case India has requested the Panel to find a violation of Article 21.2 of the DSU due to: 1) the initiation by the EC of a partial interim review of the measures against India; as well as 2) the failure of the EC to comply with the original Panel finding under Article 15 of the ADA. In this regard India also refers to section IV.G.2 of its Second Written Submission, paragraphs 232-251.

As for the actions the EC has cited as fulfilling obligations under Article 21.2 of the DSU India notes the following.

The implementation period depended on the mutual agreement and not on the fact that India is a developing country. If the EC had not accepted the reasonable period of time of five months and two days, India has all grounds to suggest that it would have obtained the same or even better outcome under the Article 21.3 arbitration. Moreover, in any case the EC did not comply within the reasonable period of time.

The EC asserts that it accepted India's request for a Panel the first time it was put on the agenda; however, this is not correct since the request had been made once before even though it was later withdrawn.⁴⁵

As a last resort the EC mentions that it took account of India's interests by suspending the imposition of the measures. As we know now that later action seems not to have been taken in good faith: in retrospect it appears no more than temporary lip service to enable the initiation of yet another *Bed Linen* proceeding and soon to impose duties higher than ever.

To the EC and third parties:

32. *India is of the opinion that the outcome of a sample analysis must be extended to the whole. On what basis does the EC consider that this is inappropriate, and that it is appropriate, under the Agreement, to assume that imports from non-investigated foreign producers/exporters are dumped? Third parties are also requested to address this question.*

To Korea

33. *In the original dispute the Panel found, inter alia, that the EC had failed to comply with the obligations of Article 3.4 by failing to address all the factors set out in that Article in its determination. In reaching that conclusion, the Panel noted that, looking at the list of data considered in the examination of injury, "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." In its oral statement, Korea argued that the EC failed to comply with the Panel's ruling in part because the EC did not collect additional data or information. Is Korea of the view that collection of data would always be necessary in order to conduct a redetermination subsequent to a finding by a Panel of a violation of Article 3.4 for failure to address all the factors set out in that Article, or is its argument based on its view that the EC had not, in fact, collected data on all the factors in its original investigation?*

34. *Korea argues that using sales value as the weighting factor in calculating weighted average SGA and profits for purposes of Article 2.2.2(ii) distorts the relative importance of the producers' whose information makes up the average by over-representing the producers with higher SGA and prices, and is therefore inconsistent with Article 2.2.2(ii). Korea suggest, however, that using sales value as the weighting factor for purposes of Article 9.4(i) is acceptable because the dumping margin is independent of sales value. Could Korea comment on the potential for distortion arising from using sales value as the weighting factor under Article 9.4(i). Would not weight-averaging based on sales value over-represent the producers with higher dumping margins in the average?*

To the United States

35. *The United States argues that there is no requirement in Article 2.2.2(ii) as to the weighting factor to be used in calculating weighted average SGA and profits, and therefore investigating authorities have discretion to choose among available possibilities. Does the United States consider that this discretion is unlimited? If not, what are the limitations on that discretion? Does the requirement in Article 2.2.2(iii) that any other method chosen be "reasonable" suggest that the choice of a weighting factor for purposes of Article 2.2.2(ii) must be reasonable? If so, how should a Panel assess whether the choice made in a particular case is reasonable?*

⁴⁵India's first written submission paragraph 24.

ANNEX E-2

ANSWERS OF THE EUROPEAN COMMUNITIES TO THE QUESTIONS FROM THE PANEL

23 September 2002

Questions to the EC

Question 15

Do we understand from the EC's fourth request for preliminary rulings that, in the EC's view, those parts of the original determination that were not the subject of a claim in the original dispute, and thus remained unchanged and were adopted by reference in the redetermination 1644/2001 are not part of the measure taken to comply?

. Yes. As explained below, the same is true where India formally stated a claim in the original panel request but submitted no arguments in support of that claim, with the consequence that the original Panel made no ruling of inconsistency with respect to the findings of the original determination that were the subject of such claim.

In this regard, the EC's attention is drawn to paragraph 6.144 of the original Panel report, in which the Panel stated:

"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. As explained in the EC's oral statement¹, in India's original panel request the claim under Article 3.5 was so broadly formulated that it could encompass any conceivable claim under that provision, including the specific claims now raised by India with respect to the inflation in consumer prices and the increased cost of raw cotton.

3. However, India made no arguments with respect to those two "other factors" or, indeed, with respect to any "other factors". For that reason, as recalled in the question, the original Panel rejected India's claim. In view of that, when considering the implementing measures at issue, the EC authorities had no reason to revise their analysis of those two factors, or more generally of any "other factors".

Question 16

In para. 80 of its FWS, the European Communities mentioned that it used sales value to average the amounts of SG&A and profits because that method is easier to apply and can be used in

¹ EC's Oral Statement, para. 22.

all the investigations. Is the Panel correct in understanding that this is the standing practice of the Communities in all its investigations?

4. Yes.

May the EC authorities rely on some other basis for weighting the averages of amounts for SG&A and profits in a particular case?

5. Yes. In general, the EC authorities may depart from an established practice where the specific circumstances of a case so warrant.

Has the EC ever done so? If yes, in what cases, and can the EC explain the reasons for choosing a different basis?

6. Although it has not been possible to review the relevant calculations in all the cases concerned, the European Commission believes that there is no case, at least in recent years, where the practice at issue was not followed.

Question 17

Can the EC respond to the arguments made by India in paras. 55-60 of its FWS?

7. The EC has responded to the arguments made in paragraphs 55-60 of India's First Written Submission in paragraphs 70-78 of its own First Written Submission.

Question 18

How did the EC obtain the information regarding inventories, capacity utilisation, and investment?

8. Data and supporting documents on inventories, capacity utilisation and investments was obtained in the replies to questionnaire responses and during the on the spot verification visits.² Data on inventories and investments were also included in the audited accounts, which were either annexed to the questionnaire replies or obtained during the on spot verification visits.³ Further information on production capacity was available from the complainant, Eurocoton⁴. Finally, data on inventories could also be derived from verified data on production and sales volume.⁵

Were there specific questions put to sampled producers regarding these factors in the questionnaires or otherwise?

9. Yes. First, specific questions were put to sampled producers in the questionnaire both directly (section VI) and indirectly for inventories (sections II and V). It is important to note that in the questionnaire the EC specifically requested that all sections of the questionnaire be completed, that all documents and data be kept available for investigation purposes, and that information beyond that requested in the questionnaire may also be requested. Certain further specific questions were put in the deficiency letters addressed to sampled producers and in the pre-verification communications to

² EC's First Written Submission, paras. 151, 153; India-RW-Exhibit-17, pages 4 and 5.

³ EC's First Written Submission, para. 151; India-RW-Exhibit-17, pages 4 and 5.

⁴ India –Exhibit –6, page 30.

⁵ EC's First Written Submission, para 151; India-RW-Exhibit-17, page 4.

sampled producers, for instance asking companies to supply or make available inter alia relevant supporting documentation on stocks, capacity and investments for the product concerned.

What was the composition of the sample from which these pieces of information were obtained and what was the methodology used to derive such information from that sample?

Investments

10. Data on investments was sought and obtained from all producers within the sample.⁶ Given that the machinery used for the product concerned can also be used for other products, turnover was used to allocate the proportion of investments for the product concerned for each sampled company.⁷ The data for each sampled company was then aggregated to obtain an overall figure for the sample.

Inventories

11. Data on inventories in terms of value could be derived from the audited accounts for all sampled producers.⁸ The proportion of inventories for the product concerned could be allocated according to turnover. The review of the audited accounts revealed that a number of sampled producers did not have stocks for any finished products at all towards the end of the period considered.

12. Data on inventories could also be derived from verified data on production and sales volume.⁹ This was then cross-checked with verified data on the cost of production and average prices of key products obtained for all sampled producers.

13. In addition, during the on-the-spot visits, the majority of sampled producers provided more detailed information regarding inventories relating to the product concerned. This permitted the EC investigating authorities to have a more precise view on the extent of inventories, if any, relating to the product concerned. A number of sampled producers were found to be sub-contracting and had no stocks of bed linen of their own. Certain producers had no (or only marginal) stocks since they were only (or predominantly) producing to order.¹⁰

14. At the level of individual sampled producers, it was found that any fluctuation in stocks was independent from the performance of the company during the period under consideration, since an increase or decrease in stocks in this sector can indicate orders rather than unsold production.¹¹

Capacity utilisation

15. With regard to capacity utilisation, the EC has pointed out that data on production capacity (and hence capacity utilisation) did not exist for the majority of sampled producers.¹²

16. During the on the spot visits attempts were made together with technical staff of the sampled company to construct appropriate amounts for production capacity. However given the differing product mixes of the sampled producers throughout the period under consideration (1992 to the IP), it

⁶ India-RW-Exhibit-17, page 5.

⁷ Ibid.

⁸ EC's First Written Submission, para 151.

⁹ EC's First Written Submission, para 151.

¹⁰ EC's First Written Submission, para. 192; EC's Oral Statement paras. 67-68.

¹¹ Regulation 1644/2001, recital 29.

¹² EC's First Written Submission, paras. 153-154.

was impossible to calculate production capacity or capacity utilisation for the sampled producers with any consistency or accuracy.¹³

Question 19

Does the EC consider that the calculation of a dumping margin above de minimis for unexamined producers (i.e., those not examined as part of the sample) constitutes a determination of dumping with respect to those producers?

17. Yes.

Question 20

Following the adoption of the original Panel and Appellate Body reports in the Bed-Linen dispute, has the EC undertaken to re-calculate dumping margins for any products subject to an anti-dumping order other than the bed-linen imports from India, Egypt, and Pakistan? Was this done on the EC's own initiative, or in response to requests for review received from interested parties?

18. On 5 December 2001 the European Commission published a "Notice concerning the initiation of a review of the anti-dumping measures applicable to imports of threaded malleable cast-iron tube or pipe fittings originating in Brazil, the Czech Republic, Japan, the People's Republic of China, the Republic of Korea and Thailand" (2001/C 342/03, OJ C 342, 5.12.2001, p.5). The scope of the review is limited "to the examination of dumping by those exporting producers in the countries concerned whose duty rates are based on a methodology at issue in the [Bed Linen] reports.", i.e. zeroing and Article 2.2.2(ii). This notice was published following a request made by a Czech exporter. The review has not been concluded yet.

19. On 8 May 2002 the European Commission published, on its own initiative, a "Notice regarding the anti-dumping measures in force following a ruling of the Dispute Settlement Body of the World Trade Organisation adopted on 12 March 2001" (2002/C 111/04, OJ C 111, 8.5.2002, p. 4). With this notice, the European Commission invited "any exporting producer whose exports are subject to existing anti-dumping measures and which considers that the measures should be reviewed in the light of the legal interpretations regarding the determination of dumping margins" contained in the reports of the panel and the Appellate Body in the Bed Linen dispute (i.e. zeroing and Article 2.2.2 (ii)), to request a review. No request has been received so far pursuant to this notice.

20. In connection with this question, the EC wishes to clarify that when it has indicated that Regulation 160/2002 was adopted by the EC authorities "on their own initiative" it did not mean to suggest that those authorities had not acted in response to a request from the exporters concerned, but rather that they were under no obligation to adopt that regulation pursuant to the WTO Agreement. In fact, both the Pakistani and the Egyptian exporters did request the EC authorities to re-determine their dumping margins.

Question 21

Could the EC explain the basis for the premise, implied in paragraph 114 of its oral statement, that bed linen producers would pass raw cotton price increases through to customers in the form of increases in the prices of bed-linen?

¹³ EC's First Written Submission, paras. 153-154; EC's Oral Statement, paras. 69-70.

21. It is based on the assumption that the producers of bed linen, like any other market operators, will always try to maximise their profits. Therefore, it is reasonable to assume that they would only refrain from passing on the cost increase if that causes them to lose sales and, as a result, profits, due to the presence of factors such as those discussed below.

What factors might limit the ability of producers to pass through cost increases in the form of price increases, for instance contractions in demand? Did the EC consider whether any such factors were at work in the bed-linen industry, and if so, how did the EC exclude the possibility that such other factors were the reason cost increases were not passed through.

22. At the outset, it must be recalled that, in accordance with Article 3.5, the EC authorities were not required to examine each and every “other factor” which might conceivably have affected the ability of the domestic producers to pass on the cost increases, besides the dumped imports, but only those factors which were “known” to them. Having regard to the submissions of the parties and other evidence available, the EC authorities identified three such “other factors”: the competition from other EC producers not included in the Community industry; the evolution of the EC consumption; and the non-dumped imports. The Indian exporters did not bring to the attention of the EC authorities any relevant “other factors” in the course of the investigation.

23. The EC authorities found that the competition from other EC producers was not a cause of injury, as production and sales by those producers declined markedly between 1992 and the Investigation Period (IP).¹⁴ Indeed, 29 of those producers went out of business during that period.¹⁵ Furthermore, the prices of the other EC producers were higher than those of the Indian exporters.¹⁶ For those reasons, it was concluded that the other EC producers did not have a negative impact on the prices of the Community industry. India has at no point contested the assessment of this factor made by the EC authorities.

24. As regards the evolution of demand, the EC authorities found that the EC consumption fell by 7 per cent between 1992 and the IP.¹⁷ Nevertheless, it was also found that the supply fell by a much larger amount, due to the fact that, as just mentioned, 29 EC producers went out of business.¹⁸ In accordance with basic economic theory, the supply and demand trends observed in the EC market should have led, all other things being equal, to an increase in prices, rather than to a decrease. Thus, the decline in consumption cannot be considered as a cause of price suppression. India has not disputed before this Panel the assessment of this factor made by the EC authorities.

25. Finally, as regards imports, the EC authorities found that imports from some other sources, notably from Egypt and Pakistan, could have been a cause of injury.¹⁹ The EC authorities concluded, nevertheless, that imports from India were, on their own, a substantial cause of injury having regard, inter alia, to the following findings:

- Indian prices undercut the prices of the Community industry by 19 per cent during the IP²⁰;

¹⁴ Provisional Regulation, recitals 107-108. Regulation 1644/2001, recital 64.

¹⁵ Provisional Regulation, recitals 81, 82, 91.

¹⁶ Ibid., para. 44.

¹⁷ Ibid., recital 63.

¹⁸ Ibid., recital 105.

¹⁹ Regulation 696/2002, recitals 44 and 50. The EC recalls its position that imports from Pakistan and Egypt can be considered as “non-dumped” for the purposes of this dispute only in so far as the Panel were to find that Regulations 160/2002 and 696/2002 are measures “taken to comply”.

²⁰ Ibid., recital 10.

- Indian prices were among the lowest. They were lower than the Pakistani prices²¹;
- Between the 1994 and the IP, when the financial situation of the Community industry deteriorated most, Indian prices decreased by 25 per cent, whereas Pakistani prices decreased by 3 per cent and Egyptian prices increased by 3 per cent²²;
- Indian imports increased significantly in absolute and relative terms between 1992 and the IP. By contrast, imports from Pakistan remained by and large stable during the same period. Imports from Egypt increased, but at the end of the IP they remained still far below the Indian levels.²³

26. Again, India has at no point during these proceedings contested the analysis of the effects of other sources of imports made by the EC authorities.

Could the EC address the proportion of such raw material cost increases that would be passed through to customers in the form of price increases in the bed-linen industry under what the EC has referred to as "normal" conditions?

27. As explained above, the EC authorities concluded that, of all the known "other factors", only the imports from certain sources (notably Pakistan and Egypt) could have been a cause of injury. Therefore, it may be reasonably assumed that, in the absence of both those other imports and the dumped imports, the Community industry would have been able to pass on most, if not all, of the cost increase.

28. As also explained, the EC authorities found that, although other sources of imports could have contributed to the injury, imports from India were, on their own, a substantial cause of injury, and indeed a more important cause of injury than those other imports. Thus, it may be reasonable to assume that, under "normal" conditions, i.e. in the absence of dumped imports, the Community industry would have been able to pass on a major portion of the cost increase.

29. The EC authorities did not, nevertheless, attempt to make during the investigation the type of quantification suggested by the Panel, and indeed the EC doubts whether it may be feasible at all. In any event, the EC considers that such quantification is not required by Article 3.5 and that the findings summarised above are more than sufficient to support reasonably the conclusion that there was a genuine and substantial causal link between the imports from India and the price suppression suffered by the EC industry.

Question 22

In recital 57 of regulation 1644/2001, it is stated that "average sales price did not increase." Does this statement refer to the average price of one (or more) of the reference products, or the average price per kilogram of bed linen? Depending on the answer, please clarify the statements concerning price movements in paragraphs 168-172 of the EC's first written statement and paragraphs 78-79 of the EC's oral statement to the Panel.

30. The statement in recital 57 of Regulation 1644/2001 that "average sales prices did not increase" refers to the average price (per kg) of all the defined reference products. As noted in Regulation 1069/97, average prices for the defined reference products fell between 1993 and the IP.²⁴

²¹ Ibid., recitals 39 and 40.

²² Ibid., recital 40.

²³ Ibid., recital 38.

²⁴ Regulation 1069/97, recital 86.

31. By contrast, the average price per kilogram for all bed linen products increased over roughly the same period. As the EC noted in its First Submission²⁵, the fact that there had been an overall increase in average prices (i.e. on a per kilogram basis), even though there had been a decrease in average prices for the defined reference products, merely reflected the shift in production and sales towards higher value niche products.

32. The EC pointed out in its oral statement to the Panel²⁶ that India has not disputed that there was such a shift in sales and production towards higher value niche products. Nor did India dispute that average prices actually decreased for the defined reference products in the sample. The fact is that average prices per kilogram may still increase even though average prices per product type decrease, if the proportion of higher value products sold increases. This is precisely what happened in the present case.

To both parties and third parties:

Question 16

In your view, should regulation 696/2002 be considered a measure independent of the EC's efforts to comply?

33. Yes. The injury re-determination for imports from India set out in Regulation 696/2002 was rendered necessary by the previous dumping re-determination for Pakistan and Egypt made in Regulation 160/2002. Had the EC authorities not conducted such dumping re-determination, they would not have been required to determine whether imports from India alone were a cause of injury. As explained elsewhere, Regulation 160/2002 is not a measure "taken to comply" because it concerns measures that were not in dispute before the original Panel. Since the adoption of Regulation 696/2002 was entirely dependent upon the adoption of Regulation 160/2002, it follows that Regulation 160/2002 cannot be considered as a measure "taken to comply" either.

If not, on what basis do you consider that it should be treated as part of the process to bring the measures faulted by the original panel into conformity with the EC's obligations? Please explain how you consider that regulation 696/2002 should be treated in this context?

34. Not applicable.

Question 24

*Could the parties clarify whether the relevant date for considering the existence or consistency of measure taken to comply is considered to be the date of the **request** for establishment of the Panel, or the date on which the DSB actually established the Panel?*

35. In its First Submission²⁷, the EC argued that the relevant date for assessing the consistency of the measures taken to comply with the covered agreements is the date of establishment of the Panel, because that was the date which appears to have been considered as relevant by the panel in US – Shrimps (21.5).²⁸ The agrees with the reasoning of that panel.

²⁵ EC's First Written Submission, paras. 168-169; Regulation 1069/97, recitals 86 and 87.

²⁶ EC's Oral Statement, para. 79.

²⁷ EC's First Submission, paras. 34-35.

²⁸ Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 by Malaysia* ("United States – Shrimps (21.5)"), WT/DS58/RW, paras. 5.12-5.13.

36. The EC, nevertheless, considers that the Panel need not reach the issue of whether the relevant date is that of the panel request or that of the establishment of the panel, since, in any event, all the measures cited by India in its panel request were taken before the earlier of those two dates.

Question 25

What, in your view, does the term "dumped imports" as used in Articles 3.1 and 3.2 mean in the context of the analysis and determination of injury? Specifically, may it be interpreted to include imports from unexamined producers for which a determination of dumping under Article 2 has not been made?

37. As explained in its First Submission, the EC considers that dumping is determined for countries and, therefore, that the investigating authorities are entitled to consider all imports from a country found to be dumping as "dumped imports" for the purposes of Article 3.²⁹

38. Should the Panel reject the above interpretation, the EC has submitted in the alternative that in Article 3 the term "dumped imports" means those imports for which the authorities have previously determined that they are "dumped" in accordance with the relevant provisions of the Anti-Dumping Agreement dealing with the determination of dumping, regardless of whether such determination is based on the data collected for each exporter concerned, or on data collected for other exporters, where the authorities have limited their examination in accordance with Article 6.10, or on "facts available", where the circumstances of Article 6.8 are present.

Question 26

Can you elaborate on the meaning and implications of the terms "imposition" and "application" of an anti-dumping measure. Can the two terms be considered as alternatives for one another? Please consider, in your response, other provisions of the ADA where these terms are used in explaining your views.

39. The terms "imposition" and "application" are not synonymous and are not used as such in the Anti-Dumping Agreement.

40. The word "imposition" ("establecimiento" in the Spanish version) alludes to the action whereby the authorities adopt a generally applicable act (a Regulation in the EC) providing for the collection of anti-dumping duties on individual shipments. The term "imposition" is used in that sense, for example, in Articles 9.1, 11.2 or 12.2.2.

41. In turn, when used in connection with the term "anti-dumping duties", the word "application" refers to the action whereby an anti-dumping duty previously "imposed" by the authorities is "made operative"³⁰, i.e. is levied or collected on individual shipments.

²⁹ EC's First Submission, paras. 118-121.

³⁰ According to the Black's Law Dictionary (West Publishing Co., 1990), the word "apply" is used in connection with statutes in two senses. When constructing a statute, in describing the class of persons, things or functions which are within its scope; as that the statute does not "apply" to transactions in interstate commerce. When discussing the use made of a statute, in referring to the process by which the statute is made operative; as where the jury is told to "apply" the statute of limitations if they find that the cause of action arose before a given date.

42. Thus, for example, Article 10.1 provides that

... anti-dumping duties shall only be *applied* to products which enter for consumption after the time when the decision taken under paragraph 1 of Article 9 ... enters into force, subject to the exceptions set out in this Article.

43. The decision referred to in paragraph 1 of Article 9 is the decision whether to “impose” anti-dumping duties. This confirms that the “application” of duties is an action which is distinct from and subsequent to the “imposition” of duties.

44. By way of exception to the non-retroactivity rule laid down in Article 10.1, the subsequent paragraphs of Article 10 allow in certain cases the retroactive “levying” (cf. Article 10.2, 10.6 10.8) or “collection” (cf. Article 10.7) of duties. This confirms that, in connection with “anti-dumping duties”, the Anti-Dumping Agreement uses the word “apply” as a synonymous of “levy” and “collect”. (The term “levy” is defined in footnote 12 as “the definitive or final legal assessment or collection of a duty or tax”.)

45. The EC’s interpretation of the term “application” is consistent with the object and purpose of the second sentence of Article 15, which is to encourage the adoption of measures that, while providing a remedy to the domestic industry, are less onerous for the exporters than the “application of anti-dumping duties”. Where, as in the case at hand, the importing Member decides to suspend the assessment and collection of duties, the exploration of constructive remedies provided for by the Agreement would be superfluous, because any such remedy (e.g. a price undertaking) would be far more onerous for the exporters than the suspension.

Question 27

*One might argue that, for unexamined producers (i.e., those not individually examined as part of the sample), there is no direct evidence, only indirect evidence from the sampled companies) as to whether there is dumping or not, since there is no information collected from these producers on the basis of which a dumping determination under Article 2 of the AD Agreement might be made. If this is considered to be the case, can the parties and third parties point the Panel to any specific provisions of the AD Agreement (not including the Article 3.1 reference to positive evidence) that address the question of **how** a determination of dumping is to be made for producers for which there is no information?*

46. The EC would disagree with the suggested distinction between “direct” and “indirect” in so far as it were meant to imply that the use of what the question describes as “indirect” evidence would be less appropriate.

47. Article 6.10 provides that, where it is not possible to determine an individual margin of dumping for each of the exporters under investigation, the authorities may limit the examination to some exporters. It is implicit in Article 6.10 that, where the authorities decide to resort to that possibility, they may use the dumping margins established for the examined exporters in order to determine the margin of dumping of the unexamined exporters. Indeed, if the authorities were prevented from doing so, and had to collect data from the unexamined exporters in order to calculate their dumping margin, the possibility offered by Article 6.10 to limit the examination to some exporters would serve no useful purpose.

48. The Anti-Dumping Agreement, and more specifically Article 6.10, does not prescribe any specific formula to calculate the dumping margin of the unexamined exporters on the basis of the dumping margins established for the examined exporters. This is not saying, however, that the

authorities enjoy complete discretion in making that calculation. Article 9.4 places a ceiling on the rate of the duty that may be applied to the imports from the unexamined exporters. Since the duty rate can never exceed the dumping margin (cf. Article 9.3), the formula set out in Article 9.4 also operates, indirectly, as an upper limit on the dumping margin.

49. India has suggested that the dumping margin of the unexamined exporters should be calculated by averaging the margins of the examined exporters, but without excluding the de minimis and zero margins.³¹ That interpretation has no basis in the *Anti-Dumping Agreement*. Moreover, it would lead to an absurd result: in accordance with Article 9.4, the importing Member would be entitled to apply anti-dumping duties to imports from the unexamined exporters at a higher rate than that calculated by using India's formula; further, in accordance with Article 9.4, the importing Member could apply anti-dumping duties to imports from the unexamined exporters even where it has been established, by applying India's formula, that such imports are not dumped.

Question 28

The EC's actions in the redetermination might be considered to be one method of making a dumping determination for unexamined producers, based on the calculation of a weighted average margin of dumping for examined producers in the sample. India has proposed another method, based on applying the proportion of imports in the sample found to be dumped to the unexamined imports. Can the parties and third parties point to any specific provisions in the Agreement which either prohibit the EC method or require the Indian method?

50. Contrary to what is suggested in the question, India's "method" is not "one method of making a dumping determination for unexamined exporters". Unlike the EC's "method", India's does not allow to determine what is the dumping margin of the unexamined exporters. Its sole purpose is to establish what is the volume of dumped imports outside the sample.

51. The formula applied by the EC in order to calculate the dumping margin of the co-operative unexamined exporters is not prohibited by any provision of the *Anti-Dumping Agreement*. Furthermore, the EC's formula is consistent with the formula set out in Article 9.4. In any event, the EC recalls that India has stated no claim in its panel request to the effect that the determinations of dumping for the unexamined exporters (both co-operative and non-co-operative) made by the EC authorities are inconsistent with any of the provisions of the *Anti-Dumping Agreement* dealing with the determination of dumping. The issue raised in the question, therefore, is beyond the Panel's terms of reference.

52. India's "method" is not required by any provision of the *Anti-Dumping Agreement*. Indeed, there is no reason why the *Anti-Dumping Agreement* should prescribe a method to calculate the volume of dumped imports, because the answer to that question follows from the answer to the previous question addressed by the EC's "method", i.e. what is the margin of dumping of the unexamined exporters.

Question 29

Could the parties and third parties address the meaning and significance of the term "positive evidence" as used in Article 3.1 of the AD Agreement? In particular, could the parties address the question whether the EC's method, as described in question 28 above, rests on positive evidence, and the question whether India's method, as described in question 28 above, rests on positive evidence.

³¹ India's Second Submission, paras. 130-132.

53. The EC considers that Article 3.1 is not relevant in this context. Article 3 is concerned exclusively with the determination of injury. By India's logic, any claim concerning the determination of dumping (e.g. whether an adjustment has been properly rejected) could also be formulated as a violation of Article 3. That would be clearly absurd. The question of whether imports are "dumped" for the purposes of the injury determination must be examined in the light of those provisions of the Anti-Dumping Agreement which deal specifically with the determination of dumping, and not of Article 3. Yet, India has not invoked any such provision in its Panel request.

54. At any rate, the method followed by the EC for establishing the dumping margin of the co-operative unexamined exporters rests on "positive evidence", because it is based on "positive evidence" of dumping for the examined exporters. With the sole exception of the Claim No 1 under Article 2.2.2 (ii), India has not challenged the determination of dumping for those exporters.

55. Although the term "sample" has been loosely used by all the parties during the underlying investigation and in this dispute in order to refer to the group of exporters included in the examination, the EC has never claimed that such group constitutes a "statistically valid sample" within the meaning of Article 6.10. Rather, it represents the largest percentage of the volume of exports which could be reasonably investigated. Accordingly, the EC considers that, as suggested in Question 6 from the Panel to India, it cannot be assumed that the proportion of imports found to be dumped within the "sample" constitutes "positive evidence" of the proportion of dumped imports which would have been found outside the "sample", had all the exporters been examined individually.

Question 30

In light of the Appellate Body findings pertaining to Article 3.5 of the AD Agreement in US-Hot-Rolled Steel Products from Japan, how do your authorities comply with the obligation to "separate and distinguish" the injurious effects of dumped imports from those of other known causal factors?

56. The causality analysis made by the EC authorities in this case takes into account and is in conformity with the guidance provided by the Appellate Body in United States – Hot Rolled Steel.

Question 31

Against what standard would you consider that a Panel should assess whether a Member has complied with Article 21.2 of the DSU? In particular, what specific obligations does this provision impose on Members.

57. As explained, the EC considers that Article 21.2 of the DSU is a non-mandatory provision, which imposes no binding obligations upon developed country Members.³²

58. The EC has submitted in the alternative that, assuming that Article 21.2 imposed a binding obligation, such obligation would relate to the procedural requirements of the implementation process set out in the other provisions of Article 21, and not to the content of the implementing measures.³³

In this context, would India please address the actions the EC has cited as fulfilling any obligations it may have under this provision.

59. Not applicable.

³² EC's First Submission, paras. 279-284. See also EC's Oral Statement, paras. 122-125.

³³ EC's First Submission, paras. 285-288. See also EC's Oral Statement, paras. 126-127.

To the EC and third parties:**Question 32**

India is of the opinion that the outcome of a sample analysis must be extended to the whole. On what basis does the EC consider that this is inappropriate, and that it is appropriate, under the Agreement, to assume that imports from non-investigated foreign producers/exporters are dumped? Third parties are also requested to address this question.

60. Contrary to what is suggested in the question, the EC authorities did not “assume” that imports from unexamined exporters were dumped. Rather, the EC authorities determined that those imports were dumped on the basis of the evidence of dumping found for the examined exporters (in the case of the co-operative unexamined exporters) or on the basis of facts available (in the case of the non- co-operative unexamined exporters).

61. As explained above, the EC does not claim that the examined exporters constitute a “statistically valid sample” within the meaning of Article 6.10, but rather the largest percentage of the volume of exports which could be reasonably investigated. The EC does agree, nonetheless, that it is appropriate to rely on data from the examined exporters in order to reach findings for the unexamined exporters. Indeed, that is precisely what the EC authorities did in this case. They relied upon the dumping margins established for the examined exporters in order to determine the dumping margin for the co-operative unexamined exporters.

62. The disagreement between the EC and India rather concerns the question of the purpose for which the data pertaining to the examined exporters should be used. Article 6.10 is concerned with the determination of dumping margins, and not with the determination of injury. Accordingly, the data collected from the examined exporters must be used in order to calculate the dumping margin of the unexamined exporters, rather than in order to estimate the volume of dumped imports. As explained, the answer to that question follows from the answer to the question which precedes it logically, i.e. what is the dumping margin of the unexamined exporters. India’s “method” leaves that question unanswered.

To Korea**Question 34**

Korea argues that using sales value as the weighting factor in calculating weighted average SGA and profits for purposes of Article 2.2.2(ii) distorts the relative importance of the producers' whose information makes up the average by over-representing the producers with higher SGA and prices, and is therefore inconsistent with Article 2.2.2(ii).

63. As already explained in the EC’s First Submission³⁴, contrary to Korea’s suggestion, the fact that a producer/exporter has a bigger total sales value does not necessarily imply that its level of profits and SGA expenses is higher. India acknowledged this in its Second Submission.³⁵

64. In the first place, because the level of profits is a function not only of the prices but also of the costs of each producer. Under normal market conditions, the prices of all the operators will tend to be similar, while their costs may diverge substantially due to a variety of reasons (e.g. degree of

³⁴ EC’s First Submission, paras. 83 and 84.

³⁵ India’s Second Submission, paras. 99 and 100.

amortisation of the investments, differences in technology and production methods, different sources of financing, etc.). Thus, in practice, the differences in profitability between the exporters/producers are more likely to arise from differences in costs than from differences in prices.

65. More particularly, Korea overlooks that the level of profits is also a function of the SGA expenses. Lower SGA expenses will result in higher profits and vice-versa. Thus, in the case at hand, Bombay Dyeing, the company with a higher average price (per “units/set”) had a higher profit margin, but a lower margin for SGA (10.39 %) than Standard Industries (19.15 %).³⁶ This contradicts Korea’s contention that higher prices reflect always both higher profits and higher SGA.³⁷

66. Second, a bigger sales turnover may reflect a different product mix, rather than higher unit prices for comparable products. Indeed, this appears to have been the case here. While Bombay Dyeing’s average unit price per “unit/set” (213 rs) was higher than Standard’s (73 rs), Standard’s average unit price per kg. (306 rs) was higher than Bombay Dyeing’s (288rs).³⁸ This shows that Bombay Dyeing and Standard were selling a very different mix of products.³⁹

Korea suggest, however, that using sales value as the weighting factor for purposes of Article 9.4(i) is acceptable because the dumping margin is independent of sales value. Could Korea comment on the potential for distortion arising from using sales value as the weighting factor under Article 9.4(i). Would not weight-averaging based on sales value over-represent the producers with higher dumping margins in the average?

67. Using sales value as the weighting factor for purposes of Article 9.4(i) does not necessarily “overrepresent” the exporters with higher dumping margins. The size of the dumping margin is not directly related to the total export sales value of each exporter. Rather, it is the result of a complex calculation involving the comparison of the export price of each type to the domestic price or cost of production of the same type.

³⁶ See the table included in India’s First Submission, para. 45

³⁷ The EC requests confidential treatment for the percentages mentioned in this paragraph.

³⁸ See the table included in the EC’s First Submission, para. 93.

³⁹ The EC requests confidential treatment for the figures mentioned in this paragraph.

ANNEX E-3

ANSWERS OF THE EUROPEAN COMMUNITIES TO THE QUESTIONS FROM INDIA

23 September 2002

Question 1

EC may like to clarify that which provision of the WTO Agreement and Vienna Convention does the EC rely when stating that it is possible to extensively interpret provisions of substantive law (as it has argued in the US–Certain Corrosion Resistant Carbon Steel Flat Products from Germany) and impossible as regards the provisions of procedural law?

1. In the case mentioned by India, the EC argued that the requirement to terminate the investigation where the amount of the subsidy is *de minimis* applies also to sunset reviews. The Panel agreed. The EC considers that the reasoning followed by the panel in *US - Corrosion Resistant Steel* cannot be extrapolated to other provisions. Rather, the question of whether a provision which is not expressly cited in Article 11.4 may nevertheless apply to reviews under Article 11.2 must be considered on a case-by-case basis. The EC considers that, for that purpose, it may be relevant that, unlike the provision at issue in *US – Corrosion Resistant Steel*, Article 5.7 is a purely procedural provision, like the provisions referred to in Article 11.4. The EC, nevertheless, has not argued that no procedural provision, other than those referred to in Article 11.4, can ever be applicable to reviews under Articles 11.2 or 11.3. To repeat, the question must be considered on a case-by-case basis. Unlike the EC in *US - Corrosion Resistant Steel*, India has not cited any compelling reasons to consider that Article 5.7 should apply to reviews, notwithstanding its express wording.

Question 2

It goes without saying that the EC as a third party in the Australia–Salmon (Article 21.5–Canada) case recalls the following finding of the panel:

" ... we note that an Article 21.5 panel cannot leave it to the full discretion of the implementing Member to decide whether or not a measure is one "taken to comply". If one were to allow that, an implementing Member could simply avoid any scrutiny of certain measures by a compliance panel, even where such measures would be so clearly connected to the panel and Appellate Body reports concerned, both in time and in respect of the subject-matter, that any impartial observer would consider them to be measures "taken to comply"." (emphasis added)

In light of this statement could the EC in its reply comment upon the reasons not to consider Regulation 160/2002 and Regulation 696/2002 as measures "taken to comply"? Specifically why does the EC believe that these measures are not "clearly connected"? Could the EC in its reply bear in mind the following paragraph of the article by Jason E. Kearns and Steve Charnovitz:

"Evidence of a clear connection or inextricable link between the two measures could include the following: the aggravating and implementing measure (1) are linked in official government statements; (2) were enacted or adopted within a reasonably close period of time; (3) affect and specifically target the same product(s) or same

producer(s); (4) were enacted or adopted by the same legislative or administrative body; and (5) are of the same general nature (e.g., both are sanitary measures). In many cases, for example, the aggravating measure will be part of the same legislation or regulation as the implementing measure (and, therefore, will be enacted or adopted by the same body). As a general matter, we would expect that an aggravating measure and an implementing measure that are part of the same legislation or regulation would be sufficiently connected to justify an Article 21.5 review of both measures."

2. The "subject matter" of Regulation 160/2002 is different from the "subject matter" of the measure in dispute before the original panel. The anti-dumping duties on imports from Egypt and Pakistan were not in dispute before the original panel.

Question 3

The EC in paragraph 35 of its First Written Submission (FWS) states:

"As submitted above, the EC considers that Regulations 160/2002 and 696/2002 are not measures "taken to comply". However, should the Panel conclude that they are, the EC submits that the relevant date for assessing the consistency of the measures "taken to comply" with the covered agreements is the date of establishment of the panel, and not that of the end of the "reasonable period of time".

Does the EC generally believe that the scope and substance of the obligation to comply depends on the terms of reference of a subsequent 21.5 panel or is it an ad hoc opinion?

3. The EC believes that the position expressed in paragraph 35 of the EC's First Written Submission is valid with respect to all Article 21.5 disputes.

What is the textual support for this approach in the WTO Agreement?

4. As observed by the Panel in *US – Shrimps*, "the DSU is silent as to the date on which the existence or consistency of the implementing measure must be assessed".¹

Does the EC suggest that the promptness of compliance depends not on the outcome of Article 21.3 arbitration or mutual agreement of the parties as in the present case, but on how fast a 21.5 panel is established and with what terms of reference?

5. India persists in confusing two different issues: the scope of the Panel's jurisdiction under Article 21.5 and the obligations of the implementing Member under Article 21.3.

Question 4

In US–Section 301 case the EC recalled the US the following ruling of the GATT panel on United States – Measures Affecting Alcoholic and Malt Beverages (Beer II):

"Even if Massachusetts may not currently be using its police powers to enforce this mandatory legislation, the measure continues to be mandatory legislation which may influence the decisions of economic operators. Hence, a non-enforcement of a mandatory law in respect of imported products does not ensure that imported beer

¹ Panel Report, *US – Shrimps*, para. 5.12.

and wine are not treated less favourably than like domestic products to which the law does not apply".

The EC added afterwards:

*"... the provisions of Sections 301-310 stipulating WTO-inconsistent action would thus remain WTO-inconsistent even if the USTR did not enforce them at all.
(underlining in original)*

Why does the EC believe that this reasoning does not apply to the current suspension or non-application of anti-dumping duties which otherwise would be illegal due to the failure to explore constructive remedies?

6. In *US – Malt and Alcoholic Beverages* the United States did not argue that the measure was suspended as a matter of law. Rather, the United States argued that, *de facto*, the authorities of Massachusetts were not using their police powers to enforce it. The panel correctly rejected that argument. Unlike the Massachusetts authorities, the EC customs authorities could not “enforce” the measures in dispute even if they wished to. The decision to suspend the application of the duties means that the EC customs authorities are legally prevented from assessing and collecting any anti-dumping duties on imports from India.

Question 5

Could the EC clarify how the citation from the Appellate Body report in paragraph 227 of its FWS concerning increased imports as "the sole cause" of serious injury support its statement in the same paragraph that "the EC authorities were not required to prove that dumped imports were the cause of the injury suffered by the EC industry"?

7. The EC recalls that in the statement mentioned by India, the EC was citing India’s own First Written Submission. The use of the definite article “the”, rather than the indefinite “a”, in the phrase “the cause of injury” implies that dumped imports must be the sole cause of injury.

Question 6

In the US–Wheat Gluten case the EC argued that Article 4.2(b) of the Agreement on Safeguards requires that a Member demonstrate that "increased imports" caused "serious injury per se, i.e. taken alone". Although India is nowhere arguing the same in the present case, it still would have nothing against the identical EC’s position in respect of Article 3.5 of the ADA. Why did the EC change its views? Do Panel or Appellate Body reports prohibit a Member to take a more liberal approach to the issues than may be actually contained in the text of the WTO Agreement?

8. The EC made that argument in connection with Article 4.2 (b) of the *Agreement on Safeguards* and not with respect to Article 3.5 of the *Anti-Dumping Agreement*. Indeed, when making that argument, the EC emphasised the exceptional nature of the *Agreement on Safeguards*.²

Question 7

² Appellate Body Report, *United States – Definitive Safeguard measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, para. 17.

What is the difference between a "niche product" and a "like product"? Are "niche products" unlike "non-niche products"?

9. As the EC explained before the Panel, a “niche” bed linen product falls within the definition of the like product. The EC noted in its First Submission that cotton type bed linen is a product which comprises several different types or ranges of product, all of which constitute the like product.³

10. In this respect, the EC wishes to point out that where India refers in its closing statement to the Panel to “identical” products within the meaning in Article 2.6 of the Anti-Dumping Agreement, it fails to cite that provision in full.⁴ Article 2.6 provides:

Throughout this Agreement the term “like product” (‘produit similaire’) shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

11. In any event, India has raised no claim under Article 2.6 in this Panel request and has not directly disputed the fact that the niche product is the like product. Rather, India has disputed the fact that the EC refers to the (uncontested) shift in production and sales towards the higher value niche products in analysing the overall increase in average prices of bed linen on a per kilogram basis. The EC maintains, however, that it is entitled to analyse such developments in context.⁵

Question 8

The EC states in paragraph 114 of its oral statement "the increase in the cost of raw cotton is not a different causal factor, because it cannot have any injurious effects on its own." How does the EC reconcile this statement with recital 103 of the original Provisional Regulation wherein it stated: "the Commission concluded that increases in raw material prices had caused injury"? Also, how does the EC reconcile that paragraph 114 with recital (50) of the re-determination?

12. As already explained in paragraphs 245-248 of the EC’s First Submission, India takes those statements out of context. In particular, in recital 103 of Regulation 1069/97 it was not merely stated that the increase in raw material prices had caused injury, but that any injury caused was in turn due to inability to pass on the increased cost of the raw material to customers. It should be noted that recital 50 of Regulation 1644/2001 simply points to the injury suffered by the Community industry and highlights the declining and inadequate profitability which is the result of prices which did not reflect the increases in costs of raw cotton and which had not been able to keep pace with inflation in prices of consumer goods. The pertinent analysis as to the causation of this injury is however dealt with in recitals 52 –70 of Regulation 1644/2001 and further explained in the EC’s First Written Submission and Oral Statement to the Panel.⁶

Question 9

The EC contends that "the prices of bed linen do not increase in line with the prices of other consumer goods". (paragraph 110 of the oral statement) How does the EC reconcile this statement

³ EC’s First Written Submission, para. 170.

⁴ India’s closing statement, para 47.

⁵ EC’s Oral Statement to the Panel, paras 79-81.

⁶ EC’s First Written Submission, paras. 208-248; EC’s Oral Statement to the Panel, paras. 107-114.

with its position in paragraph 78 of the oral statement the prices of "niche products" went up? Has inflation affected only the "niche products"?

13. The EC did not state in para. 78 of its oral statement that the prices of niche products went up. It merely stated that there was a shift (i.e. in the overall product mix sold) towards higher value niche products. As explained in response to the Panel's question 22 to the EC, the average price of a particular product type may decrease but the overall average price per kilogram sold will still increase if there has been a shift in the proportion of higher value products sold.

Question 10

Stating in para. 261 of its FWS that "as long as a developed country Member is not "applying" any anti-dumping duties, it has still the possibility to explore constructive remedies and, therefore, cannot be found to be in violation of Article 15" does the EC accept that if anti-dumping duties were not suspended as of August 14, then that would constitute a violation of Article 15?

14. Had the EC not suspended the application of anti-dumping duties, it would have explored first the possibilities of constructive remedies in accordance with Article 15. If the EC were to end the suspension in place, it would explore first the possibilities of constructive remedies.

ANNEX E-4

RESPONSES OF THE UNITED STATES TO QUESTIONS FROM THE PANEL

23 September 2002

1. The United States provides these responses to questions provided by the Panel to the parties and third parties on 13 September 2002.

To both parties and third parties:

23. *In your view, should regulation 696/2002 be considered a measure independent of the EC's efforts to comply? If not, on what basis do you consider that it should be treated as part of the process to bring the measures faulted by the original panel into conformity with the EC's obligations? Please explain how you consider that regulation 696/2002 should be treated in this context?*

2. The United States does not take a position on this question at this time.

24. *Could the parties clarify whether the relevant date for considering the existence or consistency of measure taken to comply is considered to be the date of the request for establishment of the Panel, or the date on which the DSB actually established the Panel?*

3. As we noted in paragraph 7 of our third party submission, Regulation 696/2002 predates both the request for establishment and the establishment of the Panel, so there is no need in this proceeding to reach the issue of which is the proper benchmark.

25. *What, in your view, does the term "dumped imports" as used in Articles 3.1 and 3.2 mean in the context of the analysis and determination of injury? Specifically, may it be interpreted to include imports from unexamined producers for which a determination of dumping under Article 2 has not been made?*

4. In its original report the Panel in this dispute thoroughly addressed the meaning of the term "the dumped imports" as used throughout Article 3¹ of the *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement").² The Panel found that the dumping determination is made with reference to a *product*, not with reference to individual transactions.³ Consequently, the Panel correctly concluded that investigating authorities may treat all imports from producers/exporters for which an affirmative determination has been made as "dumped imports" for the purposes of the injury analysis.⁴

5. The United States agrees with the analysis and findings of the original Panel. Further, the rationale for the Panel's original findings clearly extends to show that the injury analysis under Article 3 may include consideration of the volume and price effects of imports from unexamined

¹ Report of the Panel in *EC – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted as modified by the Appellate Body in other respects on March 12, 2001, paras. 6.121–141 ("*Bed Linens I*").

² Except as otherwise referenced below, all references to Articles are to the AD Agreement.

³ *Bed Linens I*, para. 6.136.

⁴ *Bed Linens I*, paras. 6.136 and 6.139.

producers for which a determination of dumping under Article 2 has not been made. Article 2.1 defines *dumped* products “[f]or the purpose of [the AD] Agreement,” on a countrywide basis.

6. The references to “dumped imports” in Articles 3.1 and 3.2 and throughout Article 3 therefore refer to all imports of the product from the countries subject to the investigation.⁵ In this respect, the Agreement requires investigating authorities to examine, on one hand, the volume and price effects of *the dumped imports*, and on the other, all relevant economic factors having a bearing on the state of the domestic industry. Through this overlapping examination of both *the dumped imports* and the domestic industry factors, the investigating authorities examine the “consequent impact” of those *dumped imports* on the domestic industry.⁶

7. As the Panel recognized in *Bed Linens I*, “the dumped imports” referenced in Article 3 are neither confined to particular transactions which have been examined for dumping determinations nor limited temporally to the period covered by the dumping determination. Nor are they confined to particular companies which have been examined for dumping determinations. This interpretation is consistent with the AD Agreement’s recognition that it will be impracticable in some cases to make individual dumping determinations for each known exporter or producer. In those cases, Article 6.10 allows the authorities to limit their dumping examination to either a sampled selection or the largest percentage of the volume of exports from the subject country which “can reasonably be investigated”. In addition, Article 9.4 provides bases for determining the anti-dumping duty margin to be applied to the non-examined exporters or producers. In each of the circumstances illustrated above, the dumping determinations for examined companies would apply equally to the non-examined companies. All imports subject to either their own calculated margin or to a dumping margin for other imports should be treated as “dumped imports” for purposes of the injury determination.

26. *Can you elaborate on the meaning and implications of the terms “imposition” and “application” of an anti-dumping measure. Can the two terms be considered as alternatives for one another? Please consider, in your response, other provisions of the ADA where these terms are used in explaining your views.*

⁵ The United States appreciates this opportunity to clarify its view on the question of whether dumping is determined for countries. See *Bed Linens I*, para. 6.131 and note 50. The United States agrees with the EC that dumping is determined for countries. In the original panel proceedings in this dispute, the Panel asked the third parties to comment on –

whether, in their view, investigating authorities are obligated to exclude, from their examination of volume and price effects, imports attributable to companies for which a negative determination of dumping has been made based on the determination of a zero or de minimis margin of dumping.

The United States explained in its response to this question that its own practice is to exclude from the injury evaluation companies for which a negative determination of dumping margins has been made based on the determination of a zero or *de minimis* margin.

Thus, once there has been a specific negative dumping determination made with respect to imports from a particular company, the investigating authorities examining injury will not consider those imports as “dumped” for the purposes of the injury evaluation. Absent a negative dumping determination, the Agreement permits, and it is the US practice to include in its injury evaluation, *all* imports from the subject country. We note that this approach is consistent with the analysis and findings of the Panel in paragraph 6.138 of *Bed Linens I*.

⁶ See Articles 3.1 and 3.3.

8. “Imposition” can be defined as, among other things, “the action of imposing a charge, obligation, duty, etc.”.⁷ Thus, as used in the AD Agreement, the term “imposition” tends to refer to the initial determination resulting in the collection of anti-dumping duties when subject merchandise enters a Member. See, for example, Articles 9.1 of the AD Agreement. Such uses are not completely uniform throughout the Agreement. See, for example, the references to the “continued imposition” of a duty in Article 11.2.

9. “Application” can be defined as, among other things, “the bringing of a general or figurative statement, a theory, principle, etc., to bear upon a matter; [...] practical operation”.⁸ Thus, as used in the AD Agreement, the term “application” tends to refer to the collection of an actual anti-dumping duty at the time a particular entry occurs. See, for example, Articles 10.4 and 10.5 (referring to the “period of the application of provisional measures”). As is the case with the term “imposition,” “application” is not used in a uniform manner throughout the AD Agreement. See, for example, Article 15 (referring to the consideration of the “application” of anti-dumping measures).

10. As these examples illustrate, the uses of “imposition” and “application” in the AD Agreement, while different in some ways, overlap in other ways. Any attempt to give these terms completely distinct meanings will result in their not being given their ordinary meanings in their context and in the light of the AD Agreement’s object and purpose.

27. *One might argue that, for unexamined producers (i.e., those not individually examined as part of the sample), there is no direct evidence, only indirect evidence from the sampled companies) as to whether there is dumping or not, since there is no information collected from these producers on the basis of which a dumping determination under Article 2 of the AD Agreement might be made. If this is considered to be the case, can the parties and third parties point the Panel to any specific provisions of the AD Agreement (not including the Article 3.1 reference to positive evidence) that address the question of how a determination of dumping is to be made for producers for which there is no information?*

11. Article 6.10 of the AD Agreement provides circumstances under which an administering authority need not individually determine the margin of dumping for each known exporter or producer of a product under investigation. When Article 6.10 has been invoked to limit the number of examined exporters or producers, Article 9.4 provides bases for determining the anti-dumping duty to be applied to the non-examined exporters or producers.

28. *The EC’s actions in the redetermination might be considered to be one method of making a dumping determination for unexamined producers, based on the calculation of a weighted average margin of dumping for examined producers in the sample. India has proposed another method, based on applying the proportion of imports in the sample found to be dumped to the unexamined imports. Can the parties and third parties point to any specific provisions in the Agreement which either prohibit the EC method or require the Indian method?*

12. There are no specific provisions in the AD Agreement which either prohibit the EC method or require the Indian method; however, Article 9.4 of the AD Agreement permits the EC method.

29. *Could the parties and third parties address the meaning and significance of the term “positive evidence” as used in Article 3.1 of the AD Agreement? In particular, could the parties address the question whether the EC’s method, as described in question 28 above, rests on positive*

⁷ The New Shorter Oxford English Dictionary (1993).

⁸ *Id.*

evidence, and the question whether India's method, as described in question 28 above, rests on positive evidence.

13. The term *positive evidence* as used in Article 3.1 reflects that a determination of injury must be based on affirmative evidence demonstrating that, as provided in Article VI:6 of GATT 1994, "the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry". The term appears only in Article 3.1, and is limited to "a determination of *injury* for the purposes of Article VI of GATT 1994". It has no application to the determination of dumping under Article 2.

30. *In light of the Appellate Body findings pertaining to Article 3.5 of the AD Agreement in US-Hot-Rolled Steel Products from Japan, how do your authorities comply with the obligation to "separate and distinguish" the injurious effects of dumped imports from those of other known causal factors?*

14. As an initial matter, the United States notes that Article 3.5 of the AD Agreement does not contain the term "separate and distinguish". The Appellate Body did not address the differences between the causation language of the *Agreement on Safeguards* (Article 4.2) and Article 3.5 of the AD Agreement.⁹

15. Consistent with Article 3.5, the US investigating authorities examine the volumes and price effects of the dumped imports against the relevant economic factors bearing on the condition of the domestic industry, to determine whether there is a "causal relationship" between the subject imports and injury to the domestic industry. In making this examination, the authorities also examine the other known real or alleged causal factors to assure that the authorities are not attributing to the dumped imports injury caused by such other factors. The investigating authorities' responsibility in this regard extends only to the examination of factors of which the investigating authorities possess knowledge or with which they are made familiar or become acquainted.¹⁰

⁹ The United States has expressed its concerns to the Dispute Settlement Body about the Appellate Body report in the *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* dispute. When that report was considered for adoption, the United States said:

. . . [t]he United States had presented a detailed analysis to the Appellate Body as to why the causation analysis reflected in the "Wheat Gluten" and "Lamb" Appellate Body Reports involving the Safeguards Agreement were different from that in the Anti-Dumping Agreement. These were two separate Agreements, with different objects and purposes and with wholly different texts pertaining to the question of causation and the manner of establishment of a causal link between imports and injury. The Appellate Body had made no reference to these important differences and appeared to have disregarded the interpretative principle that the use of distinct language connoted an intended difference in meaning. Instead, the Appellate Body's findings seemed to depend solely on the similarity of the non-attribution texts in the two Agreements, failing both to acknowledge the distinct context for that language and to ascribe any meaning or importance to the detailed direction regarding causation found in the Anti-Dumping Agreement, but absent from the Safeguards Agreement. Considering the importance of this issue to Members' rights under the Anti-Dumping Agreement, the Appellate Body should have explained why no consideration had been due to paragraphs 3.2 and 3.4 of the Agreement in establishing the relevant causation analysis.

Dispute Settlement Body, Minutes of Meeting Held on 23 August 2001, WT/DSB/M/108, para. 72 (footnotes omitted).

¹⁰ As the panel in *Thailand - H Beams* found –

16. For example, the US investigating authorities generally seek data concerning nonsubject imports. By separating and independently examining the data on nonsubject imports, the investigating authorities assure that subject imports are a cause of material injury to the domestic industry.

31. *Against what standard would you consider that a Panel should assess whether a Member has complied with Article 21.2 of the DSU? In particular, what specific obligations does this provision impose on Members. In this context, would India please address the actions the EC has cited as fulfilling any obligations it may have under this provision.*

17. The United States does not take a position on this question at this time.

To the EC and third parties:

32. *India is of the opinion that the outcome of a sample analysis must be extended to the whole. On what basis does the EC consider that this is inappropriate, and that it is appropriate, under the Agreement, to assume that imports from non-investigated foreign producers/exporters are dumped? Third parties are also requested to address this question.*

18. As the United States indicated in response to Question 27, when Article 6.10 of the AD Agreement has been invoked to limit the number of examined exporters or producers, Article 9.4 provides bases for determining the anti-dumping duty to be applied to the non-examined exporters or producers.

To Korea

33. *In the original dispute the Panel found, inter alia, that the EC had failed to comply with the obligations of Article 3.4 by failing to address all the factors set out in that Article in its determination. In reaching that conclusion, the Panel noted that, looking at the list of data considered in the examination of injury, "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." In its oral statement, Korea argued that the EC failed to comply with the Panel's ruling in part because the EC did not collect additional data or information. Is Korea of the view that collection of data would always be necessary in order to conduct a redetermination subsequent to a finding by a Panel of a violation of Article 3.4 for failure to address all the factors set out in that Article, or is its argument based on its view that the EC had not, in fact, collected data on all the factors in its original investigation?*

We consider that other "known" factors would include those causal factors that are clearly raised before the investigating authorities by interested parties in the course of an investigation. We are of the view that there is no express requirement in Article 3.5 that investigating authorities seek out and examine in each case on their own initiative the effects of all possible factors other than imports that may be causing injury to the domestic industry under investigation.

Report of the Panel in *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, adopted as modified by the Appellate Body in other respects on 5 April 2001, para. 7.273.

19. The United States does not take a position on this question at this time.

34. *Korea argues that using sales value as the weighting factor in calculating weighted average SGA and profits for purposes of Article 2.2.2(ii) distorts the relative importance of the producers' whose information makes up the average by over-representing the producers with higher SGA and prices, and is therefore inconsistent with Article 2.2.2(ii). Korea suggest, however, that using sales value as the weighting factor for purposes of Article 9.4(i) is acceptable because the dumping margin is independent of sales value. Could Korea comment on the potential for distortion arising from using sales value as the weighting factor under Article 9.4(i). Would not weight-averaging based on sales value over-represent the producers with higher dumping margins in the average?*

20. The United States does not take a position on this question at this time.

To the United States

35. *The United States argues that there is no requirement in Article 2.2.2(ii) as to the weighting factor to be used in calculating weighted average SGA and profits, and therefore investigating authorities have discretion to choose among available possibilities. Does the United States consider that this discretion is unlimited? If not, what are the limitations on that discretion? Does the requirement in Article 2.2.2(iii) that any other method chosen be "reasonable" suggest that the choice of a weighting factor for purposes of Article 2.2.2(ii) must be reasonable? If so, how should a Panel assess whether the choice made in a particular case is reasonable?*

21. The Panel in this dispute need not determine that the discretion of an investigating authority to choose a weighting factor is unlimited in order to find that the EC's method of weighting SG&A and profit was not inconsistent with the AD Agreement. Instead, the Panel must simply determine whether the EC actually weight-averaged the figures in question. The term weighted average refers to the result of "the multiplication of each component by a factor reflecting its importance".¹¹ Thus, provided that the weighting factor is one which allows the result to reflect the relative importance of the individual components, the use of that weighting factor is not inconsistent with the AD Agreement. To that end, both sales volume and sales value are means of reflecting the importance of individual companies' SG&A and profit and permitted as weighting factors pursuant to Article 2.2.2(ii).

22. As noted in the Panel's question, Article 2.2.2(iii) permits an investigating authority to use "any other reasonable method...". This phrasing makes clear that Article 2.2.2(iii) permits investigating authorities to use "other ... methods" than the two already identified (and approved) in Articles 2.2.2(i) (*i.e.*, same general category of products for the same exporter or producer) and (ii) (*i.e.*, weight averaging of other exporters or producers). The function of the word "reasonable" in Article 2.2.2(iii) is simply to circumscribe the range of "other ... methods" that an investigating authority may use: such "other ... methods" must be reasonable. As such and by its placement, the word "reasonable" in Article 2.2.2(iii) does not apply to the investigating authority's choice of a weighting factor for purposes of Article 2.2.2(ii).

¹¹ The New Shorter Oxford English Dictionary.

ANNEX E-5

WRITTEN ANSWERS OF THE REPUBLIC OF KOREA TO THE QUESTIONS OF THE PANEL

23 September 2002

1. Answer to Question 33

As Article 3.1 of the ADA stipulates that a determination of injury shall be based on positive evidence and involve an objective examination of both (a) volume of the dumped imports and their effect on prices in the domestic market and (b) the consequent impact of these imports on domestic producers, the collection of data on all relevant economic factors and indices enumerated in Art. 3.4 of the ADA is a prerequisite for the determination of injury.

When it comes to a redetermination following a Panel's finding of a violation of Art. 3.4, Korea believes that the collection of data is necessary because the Panel's ruling of violation was directly based on inadequate data collection. If the losing party intends to implement the DSB ruling through redetermination in such a case, fulfilling the data collection requirement forms an indispensable element of compliance.

In the case where the investigating authorities fulfilled the requirement of data collection according to Art. 3.4 of the ADA but failed to conduct an objective examination, additional data collection would be unnecessary.

2. Answer to Question 34

The purpose of weight-averaging the exporters or producers under Article 9.4(i) is to calculate a margin of dumping which would represent these exporters or producers in a fair and equitable manner. In this exercise, therefore, one should examine whether a particular weighting factor – volume or value – is biased or not.

As Korea has pointed out during the 3rd Parties' Session held on 11 September 2002, assuming that exporters or producers decided to dump their products on foreign markets, they will base their decision with respect to the degree of dumping first and foremost on the situation in their domestic market and the overseas market targeted for dumping, in particular, the price elasticity of demand in the overseas market. In other words, the degree of dumping by the exporters or producers is essentially not related to either the volume or value of domestic and export sales by the dumpers.

As Korea does not see any inherent correlation between the sales value and the degree of dumping, Korea does not recognize any potential for distortion arising from using sales value as the weighting factor under Article 9.4(i). In other words, the dumping margin of a producer with a higher sales value can be lower than a different producer with a lower sales value, and vice versa.

Based on this analysis, Korea believes that weight-averaging based on sales value would not distort the relative importance of the selected exporters or producers for the purposes of Article 9.4(i) of the ADA.

ANNEX E-6

WRITTEN RESPONSES OF JAPAN

1. The Government of Japan, as a third party, has taken the liberty of replying to certain questions of the panel to the third parties, which raise issues of systemic concern and interpretation of the provisions of the AD Agreement.

I. REPLY TO QUESTIONS 25, 27 AND 28

2. We think it is appropriate to reply to these three questions, which are closely related to each other, at the same time.

3. In the view of Japan, the term “dumped imports” used in Articles 3.1 and 3.2 means those imports from suppliers which are found to be dumped (with a dumping margin in excess of the *de minimis* threshold) in accordance with Articles 2 and 6. Article 2 of the AD Agreement provides for substantive rules for the determination of dumping. Applicable evidential rules are stipulated in Article 6.

4. With respect to unexamined producers for which a determination of individual dumping margin has not been made in accordance with Article 2, Article 6.10 would apply. Article 6.10 obligates the authorities to, “as a rule, determine an individual margin of dumping for each known exporter or producer ...”. If, however, it is impracticable, the Article permits the authorities to “limit their examination ... to a reasonable number of interested parties or products by using samples which are *statistically valid* ...” (emphasis added). This “statistical validity” is required directly for *sampling*, but would be required indirectly for the *estimation* of the individual margin of dumping using samples; these two processes are logically intertwined and inseparable.

5. The investigating authorities are further required to provide a detailed explanation for the estimation of individual dumping margins of unexamined producers pursuant to Article 12.2. This Article requires that public notice be given of any preliminary or final determination, which explains, among others, the “statistical validity” for both sampling and estimation.

6. The authorities, however, may not base the estimation methodology on Article 9.4. Article 9.4 sets forth restrictions on the amount of anti-dumping duties imposed on unexamined producers (the calculation of the so-called “all others rate”) after the investigating authorities determine to impose an anti-dumping duty. In the view of Japan, this is irrelevant to the determination of injury and causation under Article 3. Article 9.4 specifically states “any dumping *duty* applied to imports from exporters or producers not included in the examination shall not exceed ...”. It further states “the authorities shall apply individual duties ... to imports from exporter or producer ... who *has provided* the necessary information *during the course of the investigation*” (emphasis added). These languages show the Members’ understanding that this Article applies only to the determination of dumping duties, not to the determination of “dumping”. Indeed, the formula set forth in Article 9.4 presupposes that *some* amount of anti-dumping duties should be imposed on unexamined producers. For the reasons stated above, this Article is applicable to anti-dumping cases only after the authority finds that all the requirements for imposing anti-dumping duties, i.e. dumping, injury and causation, are met with respect to unexamined producers in accordance with the relevant Articles, in particular, Articles 2, 3 and 6. If Article 9.4 were to be applied to the determination of “dumping”, it could result in illogical and unreasonable consequences.

7. Finally, the Panel is required to examine whether the authorities' determination on sampling and estimation is "proper" and "unbiased and objective" based on Article 17.6(i) of the AD Agreement.

8. Japan respectfully requests that the Panel determine the EC's methodologies in light of the above.

II. REPLY TO QUESTION 30

9. Japan has fully complied with Article 3.5 of the AD Agreement. In a recent anti-dumping investigation, for example, we examined each factor known to us that would potentially cause injury to the domestic industry in accordance with Article 3.5, as shown in the relevant public notice (Kanpo gogai No.159, dated July 26,2002, Keizaisangyo Koho No. 15078, dated July 26, 2002). In this case, the authorities concluded that dumped imports under investigation, through the effects of dumping, caused material injury to the domestic industry, among others, based upon the examination of whether and to what extent each of the factors had caused injury to the domestic industry.

ANNEX E-7

COMMENTS OF INDIA ON ANSWERS OF THE EUROPEAN COMMUNITIES TO THE QUESTIONS FROM THE PANEL

30 September 2002

Questions to the EC

Question 15

Do we understand from the EC's fourth request for preliminary rulings that, in the EC's view, those parts of the original determination that were not the subject of a claim in the original dispute, and thus remained unchanged and were adopted by reference in the redetermination 1644/2001 are not part of the measure taken to comply?

1. Yes. As explained below, the same is true where India formally stated a claim in the original panel request but submitted no arguments in support of that claim, with the consequence that the original Panel made no ruling of inconsistency with respect to the findings of the original determination that were the subject of such claim.

COMMENT OF INDIA TO EC's ANSWER TO PANEL QUESTION 15, para. 1

India notes that the EC's answer effectively expands its first request for a preliminary ruling by asking to exclude from the terms of reference of the Panel recitals 10, 15, 16, 20, 34, 36, 60, 63, 64 and 71 of the Regulation 1644/2001. India recalls in this regard that "principle of good faith requires that responding Members seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB or the Panel, so that corrections, if needed, can be made to resolve disputes. The procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes."¹ For that reason India submits that the EC's argument presented above should be disregarded or, if it amounts to modification of request for the preliminary ruling, dismissed.

India also notes that the failure to timely raise procedural objections concerning Regulation 1644/2001 casts doubt on the genuine intention of the EC in its first request for preliminary ruling. If the EC believes that the terms of reference of the Panel should not cover measures that it mistakenly considers to be independent of the implementation process, it should have mentioned that in the first request for the preliminary ruling *all* such measures, *i.e.* Regulations 160/2002 and 696/2002 as well as the aforementioned recitals of Regulation 1644/2001. Absent that, the Panel is entitled to believe that the EC tries to narrow the scope of proceedings not because of its systemic concern with the Panel's terms of reference, but rather with a view to escape the legitimate scrutiny of the Panel in

¹ Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"* ("US – FSC"), WT/DS108/AB/R, adopted 20 March 2000, para. 166.

respect to its inconsistent measures. In any event, the EC's ability to defend itself has in no way been prejudiced.²

Furthermore, the EC disregards the fundamental difference between claims and arguments.³ As a result, since claims are not arguments, what may be true for claims would not necessarily be true for arguments. As it follows from the Appellate Body jurisprudence, arguments have no bearing upon the terms of reference of the Panel.⁴

India also refers to its previous comments on this question submitted alongside the answers of India to the questions from the Panel.

In this regard, the EC's attention is drawn to paragraph 6.144 of the original Panel report, in which the Panel stated:

"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. As explained in the EC's oral statement⁵, in India's original panel request the claim under Article 3.5 was so broadly formulated that it could encompass any conceivable claim under that provision, including the specific claims now raised by India with respect to the inflation in consumer prices and the increased cost of raw cotton.

COMMENT OF INDIA TO EC's ANSWER TO PANEL QUESTION 15, para. 2

India draws attention of the Panel to the fact that the text of the DSU does not distinguish between a "broadly formulated claim" and a "specific claim". There is no reason to attach to the word "claim" special meaning only because such claim is raised during the 21.5 proceeding.

² Compare *Korea – Dairy Safeguards*, WT/DS98/AB/R, Report of the Appellate Body, Section VII. Or, more recently, *EC – Sardines*, WT/DS231/AB/R, Section IV.A.

³ "There is a significant difference between the *claims* identified in the request for the establishment of a Panel, which establish the Panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions, and the first and second Panel meetings with the parties as a case proceeds" (Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* ("*India – Patents (US)*"), WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9, para. 88). "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" (Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas* ("*EC – Bananas III*"), WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591, para. 143).

⁴ Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* ("*India – Patents (US)*"), WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9, para. 88; Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas* ("*EC – Bananas III*"), WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591, para. 143.

⁵ EC's Oral Statement, para. 22.

3. However, India made no arguments with respect to those two “other factors” or, indeed, with respect to any “other factors”. For that reason, as recalled in the question, the original Panel rejected India’s claim. In view of that, when considering the implementing measures at issue, the EC authorities had no reason to revise their analysis of those two factors, or more generally of any “other factors”.

COMMENT OF INDIA TO EC's ANSWER TO PANEL QUESTION 15 para. 3

Again the EC tries to overlook a fundamental difference between "claims" and "arguments" and thus to rephrase its first request for a preliminary ruling.

India also fails to understand on what basis the EC argues that it had no reason to revise its analysis of "other factors". The original Panel did not rule that the original determination as such was consistent with the ADA. It found that "India has failed to present a *prima facie* case" in respect to Article 3.5. As India has stated on number of occasions during this proceeding, the duty to comply in good faith with the WTO Agreement cannot be presumed to exist only in case when there is a respective DSB ruling.

Question 16

In para. 80 of its FWS, the European Communities mentioned that it used sales value to average the amounts of SG&A and profits because that method is easier to apply and can be used in all the investigations. Is the Panel correct in understanding that this is the standing practice of the Communities in all its investigations?

4. Yes.

May the EC authorities rely on some other basis for weighting the averages of amounts for SG&A and profits in a particular case?

5. Yes. In general, the EC authorities may depart from an established practice where the specific circumstances of a case so warrant.

Has the EC ever done so? If yes, in what cases, and can the EC explain the reasons for choosing a different basis?

6. Although it has not been possible to review the relevant calculations in all the cases concerned, the European Commission believes that there is no case, at least in recent years, where the practice at issue was not followed.

COMMENT OF INDIA TO EC's ANSWER TO PANEL QUESTION 16, para. 6

Except in the Bed Linen case where the EC deviated from previously established sizes for Bombay Dyeing and Standard Industries. It is surprising that the explanations provided during the meeting with the Panel came more than one year after the argument was first presented to the EC. If this is not an *ex post* explanation then India is not clear about the meaning of an *ex post* explanation.

Question 17

Can the EC respond to the arguments made by India in paras. 55-60 of its FWS?

7. The EC has responded to the arguments made in paragraphs 55-60 of India's First Written Submission in paragraphs 70-78 of its own First Written Submission.

Question 18

How did the EC obtain the information regarding inventories, capacity utilisation, and investment?

8. Data and supporting documents on inventories, capacity utilisation and investments was obtained in the replies to questionnaire responses and during the on the spot verification visits.⁶ Data on inventories and investments were also included in the audited accounts, which were either annexed to the questionnaire replies or obtained during the on spot verification visits.⁷ Further information on production capacity was available from the complainant, Eurocoton⁸. Finally, data on inventories could also be derived from verified data on production and sales volume.⁹

Were there specific questions put to sampled producers regarding these factors in the questionnaires or otherwise?

9. Yes. First, specific questions were put to sampled producers in the questionnaire both directly (section VI) and indirectly for inventories (sections II and V). It is important to note that in the questionnaire the EC specifically requested that all sections of the questionnaire be completed, that all documents and data be kept available for investigation purposes, and that information beyond that requested in the questionnaire may also be requested. Certain further specific questions were put in the deficiency letters addressed to sampled producers and in the pre-verification communications to sampled producers, for instance asking companies to supply or make available *inter alia* relevant supporting documentation on stocks, capacity and investments for the product concerned.

What was the composition of the sample from which these pieces of information were obtained and what was the methodology used to derive such information from that sample?

Investments

10. Data on investments was sought and obtained from all producers within the sample.¹⁰ Given that the machinery used for the product concerned can also be used for other products, turnover was used to allocate the proportion of investments for the product concerned for each sampled company.¹¹ The data for each sampled company was then aggregated to obtain an overall figure for the sample.

⁶ EC's First Written Submission, paras. 151, 153; India-RW-Exhibit-17, pages 4 and 5.

⁷ EC's First Written Submission, para. 151; India-RW-Exhibit-17, pages 4 and 5.

⁸ India –Exhibit –6, page 30.

⁹ EC's First Written Submission, para 151; India-RW-Exhibit-17, page 4.

¹⁰ India-RW-Exhibit-17, page 5.

¹¹ Ibid.

Inventories

11. Data on inventories in terms of value could be derived from the audited accounts for all sampled producers.¹² The proportion of inventories for the product concerned could be allocated according to turnover. The review of the audited accounts revealed that a number of sampled producers did not have stocks for any finished products at all towards the end of the period considered.

12. Data on inventories could also be derived from verified data on production and sales volume.¹³ This was then cross-checked with verified data on the cost of production and average prices of key products obtained for all sampled producers.

13. In addition, during the on-the-spot visits, the majority of sampled producers provided more detailed information regarding inventories relating to the product concerned. This permitted the EC investigating authorities to have a more precise view on the extent of inventories, if any, relating to the product concerned. A number of sampled producers were found to be sub-contracting and had no stocks of bed linen of their own. Certain producers had no (or only marginal) stocks since they were only (or predominantly) producing to order.¹⁴

14. At the level of individual sampled producers, it was found that any fluctuation in stocks was independent from the performance of the company during the period under consideration, since an increase or decrease in stocks in this sector can indicate orders rather than unsold production.¹⁵

Capacity utilisation

15. With regard to capacity utilisation, the EC has pointed out that data on production capacity (and hence capacity utilisation) did not exist for the majority of sampled producers.¹⁶

16. During the on the spot visits attempts were made together with technical staff of the sampled company to construct appropriate amounts for production capacity. However given the differing product mixes of the sampled producers throughout the period under consideration (1992 to the IP), it was impossible to calculate production capacity or capacity utilisation for the sampled producers with any consistency or accuracy.¹⁷

COMMENT OF INDIA TO EC's ANSWER TO PANEL QUESTION 18

With respect to all its answers in response to question 18 the EC appears to have re-discovered its arguments as it already presented them to the Panel in the original proceeding. It requires no elaboration that the Panel at that time already did not accept those arguments.

¹² EC's First Written Submission, para 151.

¹³ EC's First Written Submission, para 151.

¹⁴ EC's First Written Submission, para. 192; EC's Oral Statement paras. 67-68.

¹⁵ Regulation 1644/2001, recital 29.

¹⁶ EC's First Written Submission, paras. 153-154.

¹⁷ EC's First Written Submission, paras. 153-154; EC's Oral Statement, paras. 69-70.

Question 19

Does the EC consider that the calculation of a dumping margin above de minimis for unexamined producers (i.e., those not examined as part of the sample) constitutes a determination of dumping with respect to those producers?

17. Yes.

Question 20

Following the adoption of the original Panel and Appellate Body reports in the Bed-Linen dispute, has the EC undertaken to re-calculate dumping margins for any products subject to an anti-dumping order other than the bed-linen imports from India, Egypt, and Pakistan? Was this done on the EC's own initiative, or in response to requests for review received from interested parties?

18. On 5 December 2001 the European Commission published a "Notice concerning the initiation of a review of the anti-dumping measures applicable to imports of threaded malleable cast-iron tube or pipe fittings originating in Brazil, the Czech Republic, Japan, the People's Republic of China, the Republic of Korea and Thailand" (2001/C 342/03, OJ C 342, 5.12.2001, p.5). The scope of the review is limited "to the examination of dumping by those exporting producers in the countries concerned whose duty rates are based on a methodology at issue in the [*Bed Linen*] reports.", i.e. zeroing and Article 2.2.2(ii). This notice was published following a request made by a Czech exporter. The review has not been concluded yet.

19. On 8 May 2002 the European Commission published, on its own initiative, a "Notice regarding the anti-dumping measures in force following a ruling of the Dispute Settlement Body of the World Trade Organization adopted on 12 March 2001" (2002/C 111/04, OJ C 111, 8.5.2002, p. 4). With this notice, the European Commission invited "any exporting producer whose exports are subject to existing anti-dumping measures and which considers that the measures should be reviewed in the light of the legal interpretations regarding the determination of dumping margins" contained in the reports of the panel and the Appellate Body in the *Bed Linen* dispute (i.e. zeroing and Article 2.2.2 (ii)), to request a review. No request has been received so far pursuant to this notice.

20. In connection with this question, the EC wishes to clarify that when it has indicated that Regulation 160/2002 was adopted by the EC authorities "on their own initiative" it did not mean to suggest that those authorities had not acted in response to a request from the exporters concerned, but rather that they were under no obligation to adopt that regulation pursuant to the WTO Agreement. In fact, both the Pakistani and the Egyptian exporters did request the EC authorities to re-determine their dumping margins.

COMMENT OF INDIA TO EC's ANSWER TO PANEL QUESTION 20

From the first and second answer in paras. 18 and 19 respectively India trusts that it is clear to the Panel that the EC has *not* undertaken to recalculate any dumping margins for any other cases on its own initiative. The only time a recalculation was ever made on its own initiative was in the case of *Bed Linen*. In this endeavour to comply, as India has already pointed out, the EC did so in various episodes, for various parts of the measure, as and when deemed fit (Regulations 1644/2001, 160/2002, 696/2002).

The EC has given a perverse response in its last part of its answer. As the EC previously stated, the margins for Egypt and Pakistan were calculated "*on their own initiative*". Yet, suddenly, as per the current answer, this "own initiative" apparently meant that this was done on "*request from the*

exporters". Such a response defies common sense. India may in good faith rely on the statements published by the EC in its Official Journal. If even *official* statements are unreliable then anything else could be equally defective. Perhaps the EC would also argue that it never selected a sample of Indian exporters.

Question 21

Could the EC explain the basis for the premise, implied in paragraph 114 of its oral statement, that bed linen producers would pass raw cotton price increases through to customers in the form of increases in the prices of bed-linen?

21. It is based on the assumption that the producers of bed linen, like any other market operators, will always try to maximise their profits. Therefore, it is reasonable to assume that they would only refrain from passing on the cost increase if that causes them to lose sales and, as a result, profits, due to the presence of factors such as those discussed below.

What factors might limit the ability of producers to pass through cost increases in the form of price increases, for instance contractions in demand? Did the EC consider whether any such factors were at work in the bed-linen industry, and if so, how did the EC exclude the possibility that such other factors were the reason cost increases were not passed through.

22. At the outset, it must be recalled that, in accordance with Article 3.5, the EC authorities were not required to examine each and every "other factor" which might conceivably have affected the ability of the domestic producers to pass on the cost increases, besides the dumped imports, but only those factors which were "known" to them. Having regard to the submissions of the parties and other evidence available, the EC authorities identified three such "other factors": the competition from other EC producers not included in the Community industry; the evolution of the EC consumption; and the non-dumped imports. The Indian exporters did not bring to the attention of the EC authorities any relevant "other factors" in the course of the investigation.

COMMENT OF INDIA TO EC's ANSWER TO PANEL QUESTION 21, para. 22

This answer clearly contradicts section 3(b) of the provisional regulation (e.g. recital (103): "The Commission concluded that increases in raw material prices had caused injury." This section was explicitly confirmed in recital (60) of the re-determination. The EC's statement also explicitly contradicts recital (50) of the re-determination which mentions that "declining and inadequate profitability ... is basically the result of ... the increases in the costs of raw cotton ..."

23. The EC authorities found that the competition from other EC producers was not a cause of injury, as production and sales by those producers declined markedly between 1992 and the Investigation Period (IP).¹⁸ Indeed, 29 of those producers went out of business during that period.¹⁹ Furthermore, the prices of the other EC producers were higher than those of the Indian exporters.²⁰ For those reasons, it was concluded that the other EC producers did not have a negative impact on the prices of the Community industry. India has at no point contested the assessment of this factor made by the EC authorities.

¹⁸ Provisional Regulation, recitals 107-108. Regulation 1644/2001, recital 64.

¹⁹ Provisional Regulation, recitals 81, 82, 91.

²⁰ Ibid., para. 44.

24. As regards the evolution of demand, the EC authorities found that the EC consumption fell by 7 % between 1992 and the IP.²¹ Nevertheless, it was also found that the supply fell by a much larger amount, due to the fact that, as just mentioned, 29 EC producers went out of business.²² In accordance with basic economic theory, the supply and demand trends observed in the EC market should have led, all other things being equal, to an increase in prices, rather than to a decrease. Thus, the decline in consumption cannot be considered as a cause of price suppression. India has not disputed before this Panel the assessment of this factor made by the EC authorities.

COMMENT OF INDIA TO EC's ANSWER TO PANEL QUESTION 21, para. 24

Again, this answer directly contradicts the Provisional Regulation. At recital (104) of the Provisional Regulation the EC declares that: "It is clear that the decline in consumption between 1992 and the investigation period has contributed to the situation of the Community industry."

25. Finally, as regards imports, the EC authorities found that imports from some other sources, notably from Egypt and Pakistan, could have been a cause of injury.²³ The EC authorities concluded, nevertheless, that imports from India were, on their own, a substantial cause of injury having regard, *inter alia*, to the following findings:

Indian prices undercut the prices of the Community industry by 19% during the IP²⁴;

Indian prices were among the lowest. They were lower than the Pakistani prices²⁵;

Between the 1994 and the IP, when the financial situation of the Community industry deteriorated most, Indian prices decreased by 25%, whereas Pakistani prices decreased by 3 % and Egyptian prices increased by 3%²⁶;

Indian imports increased significantly in absolute and relative terms between 1992 and the IP. By contrast, imports from Pakistan remained by and large stable during the same period. Imports from Egypt increased, but at the end of the IP they remained still far below the Indian levels²⁷.

26. Again, India has at no point during these proceedings contested the analysis of the effects of other sources of imports made by the EC authorities.

COMMENT OF INDIA TO EC's ANSWER TO PANEL QUESTION 21, para. 26

Once the EC acknowledged that imports from third countries were a known factor (section 3.a of the original Provisional Regulation) there was no reason for India to bring that fact once again to the attention of the EC. On the contrary, once this factor was known to the EC, it should have segregated the injurious effects caused by such imports. When this known factor was again

²¹ Ibid., recital 63.

²² Ibid., recital 105.

²³ Regulation 696/2002, recitals 44 and 50. The EC recalls its position that imports from Pakistan and Egypt can be considered as "non-dumped" for the purposes of this dispute only in so far as the Panel were to find that Regulations 160/2002 and 696/2002 are measures "taken to comply".

²⁴ Ibid., recital 10.

²⁵ Ibid., recitals 39 and 40.

²⁶ Ibid., recital 40.

²⁷ Ibid., recital 38.

confirmed in Regulation 696/2002 (recital (44) first sentence) it should have segregated the injurious effects caused by such imports.

Could the EC address the proportion of such raw material cost increases that would be passed through to customers in the form of price increases in the bed-linen industry under what the EC has referred to as "normal" conditions?

27. As explained above, the EC authorities concluded that, of all the known "other factors", only the imports from certain sources (notably Pakistan and Egypt) could have been a cause of injury. Therefore, it may be reasonably assumed that, in the absence of both those other imports and the dumped imports, the Community industry would have been able to pass on most, if not all, of the cost increase.

COMMENT OF INDIA TO EC's ANSWER TO PANEL QUESTION 21, para. 27

This statement is untrue. One needs only to look at the provisional Regulation, section 3 where the EC did identify the other known factors such as the increase in raw cotton prices or the decrease in consumption; one may also compare the re-determination at recital (50).

28. As also explained, the EC authorities found that, although other sources of imports could have contributed to the injury, imports from India were, on their own, a substantial cause of injury, and indeed a more important cause of injury than those other imports. Thus, it may be reasonable to assume that, under "normal" conditions, i.e. in the absence of dumped imports, the Community industry would have been able to pass on a major portion of the cost increase.

29. The EC authorities did not, nevertheless, attempt to make during the investigation the type of quantification suggested by the Panel, and indeed the EC doubts whether it may be feasible at all. In any event, the EC considers that such quantification is not required by Article 3.5 and that the findings summarised above are more than sufficient to support reasonably the conclusion that there was a genuine and substantial causal link between the imports from India and the price suppression suffered by the EC industry.

COMMENT OF INDIA TO EC's ANSWER TO PANEL QUESTION 21, para. 29

The fact that the EC doubts that this is feasible is legally irrelevant. The segregation and quantification of the injurious effects of other factors is precisely what is required by the non-attribution language.

The fact that the EC then states that this quantification is not required runs contrary to the existing case law as already quoted repeatedly by India.

Question 22

In recital 57 of regulation 1644/2001, it is stated that "average sales price did not increase." Does this statement refer to the average price of one (or more) of the reference products, or the average price per kilogram of bed linen? Depending on the answer, please clarify the statements concerning price movements in paragraphs 168-172 of the EC's first written statement and paragraphs 78-79 of the EC's oral statement to the Panel.

30. -The statement in recital 57 of Regulation 1644/2001 that “average sales prices did not increase” refers to the average price (per kg) of all the defined reference products. As noted in Regulation 1069/97, average prices for the defined reference products fell between 1993 and the IP.²⁸

31. By contrast, the average price per kilogram for all bed linen products increased over roughly the same period. As the EC noted in its First Submission²⁹, the fact that there had been an overall increase in average prices (i.e. on a per kilogram basis), even though there had been a decrease in average prices for the defined reference products, merely reflected the shift in production and sales towards higher value niche products.

32. The EC pointed out in its oral statement to the Panel³⁰ that India has not disputed that there was such a shift in sales and production towards higher value niche products. Nor did India dispute that average prices actually decreased for the defined reference products in the sample. The fact is that average prices per kilogram may still increase even though average prices per product type decrease, if the proportion of higher value products sold increases. This is precisely what happened in the present case.

COMMENT OF INDIA TO EC's ANSWER TO PANEL QUESTION 22

As India has pointed out, "Bed Linen" is the product under investigation. This was the like product as defined by the EC. By departing from that definition as and when convenient, the EC's analysis is no longer unbiased and objective. In case the EC would have wished to investigate only a certain "niche" type of Bed Linen it would have had the power to define the product as such.

To both parties and third parties:

Question 16

In your view, should regulation 696/2002 be considered a measure independent of the EC's efforts to comply?

33. Yes. The injury re-determination for imports from India set out in Regulation 696/2002 was rendered necessary by the previous dumping re-determination for Pakistan and Egypt made in Regulation 160/2002. Had the EC authorities not conducted such dumping re-determination, they would not have been required to determine whether imports from India alone were a cause of injury. As explained elsewhere, Regulation 160/2002 is not a measure “taken to comply” because it concerns measures that were not in dispute before the original Panel. Since the adoption of Regulation 696/2002 was entirely dependent upon the adoption of Regulation 160/2002, it follows that Regulation 160/2002 cannot be considered as a measure “taken to comply” either.

COMMENT OF INDIA TO EC's ANSWER TO PANEL QUESTION 16

India draws attention of the Panel to the fact that the EC is using circular arguments. First the EC states that the adoption of Regulation 696/2002 was rendered necessary by the adoption of Regulation 160/2002 and thus is not a measure taken to comply. Then it concludes that since Regulation 696/2002 was adopted, Regulation 160/2002 cannot be considered as a measure "taken to comply".

²⁸ Regulation 1069/97, recital 86.

²⁹ EC's First Written Submission, paras. 168-169; Regulation 1069/97, recitals 86 and 87.

³⁰ EC's Oral Statement, para. 79.

In contrast to that pseudo-reasoning, India recalls that all three Regulations— Regulation 1644/2001, 160/2002 and 696/2002—are closely connected as has been recognised by the EC itself during the oral hearings. Respectively, since Regulation 1644/2001 is a measure taken to comply, Regulations 160/2002 and 696/2002 are also measures taken to comply. Indeed, the EC would agree that if A is B and B is C, then A is C.

If not, on what basis do you consider that it should be treated as part of the process to bring the measures faulted by the original panel into conformity with the EC's obligations? Please explain how you consider that regulation 696/2002 should be treated in this context?

34. Not applicable.

Question 24

Could the parties clarify whether the relevant date for considering the existence or consistency of measure taken to comply is considered to be the date of the request for establishment of the Panel, or the date on which the DSB actually established the Panel?

35. In its First Submission³¹, the EC argued that the relevant date for assessing the consistency of the measures taken to comply with the covered agreements is the date of establishment of the Panel, because that was the date which appears to have been considered as relevant by the panel in *US – Shrimps (21.5)*³². The EC agrees with the reasoning of that panel.

36. The EC, nevertheless, considers that the Panel need not reach the issue of whether the relevant date is that of the panel request or that of the establishment of the panel, since, in any event, all the measures cited by India in its panel request were taken before the earlier of those two dates.

Question 25

What, in your view, does the term "dumped imports" as used in Articles 3.1 and 3.2 mean in the context of the analysis and determination of injury? Specifically, may it be interpreted to include imports from unexamined producers for which a determination of dumping under Article 2 has not been made?

37. As explained in its First Submission, the EC considers that dumping is determined for countries and, therefore, that the investigating authorities are entitled to consider all imports from a country found to be dumping as “dumped imports” for the purposes of Article 3.³³

38. Should the Panel reject the above interpretation, the EC has submitted in the alternative that in Article 3 the term “dumped imports” means those imports for which the authorities have previously determined that they are “dumped” in accordance with the relevant provisions of the *Anti-Dumping Agreement* dealing with the determination of dumping, regardless of whether such determination is based on the data collected for each exporter concerned, or on data collected for other exporters, where the authorities have limited their examination in accordance with Article 6.10, or on “facts available”, where the circumstances of Article 6.8 are present.

Question 26

³¹ EC's First Submission, paras. 34-35.

³² Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 by Malaysia* (“*United States – Shrimps (21.5)*”), WT/DS58/RW, paras. 5.12-5.13.

³³ EC's First Submission, paras. 118-121.

Can you elaborate on the meaning and implications of the terms "imposition" and "application" of an anti-dumping measure. Can the two terms be considered as alternatives for one another? Please consider, in your response, other provisions of the ADA where these terms are used in explaining your views.

39. The terms “imposition” and “application” are not synonymous and are not used as such in the *Anti-Dumping Agreement*.

40. The word “imposition” (“establecimiento” in the Spanish version) alludes to the action whereby the authorities adopt a generally applicable act (a Regulation in the EC) providing for the collection of anti-dumping duties on individual shipments. The term “imposition” is used in that sense, for example, in Articles 9.1, 11.2 or 12.2.2.

41. In turn, when used in connection with the term “anti-dumping duties”, the word “application” refers to the action whereby an anti-dumping duty previously “imposed” by the authorities is “made operative”³⁴, i.e. is levied or collected on individual shipments.

42. Thus, for example, Article 10.1 provides that

... anti-dumping duties shall only be *applied* to products which enter for consumption after the time when the decision taken under paragraph 1 of Article 9 ... enters into force, subject to the exceptions set out in this Article.

43. The decision referred to in paragraph 1 of Article 9 is the decision whether to “impose” anti-dumping duties. This confirms that the “application” of duties is an action which is distinct from and subsequent to the “imposition” of duties.

44. By way of exception to the non-retroactivity rule laid down in Article 10.1, the subsequent paragraphs of Article 10 allow in certain cases the retroactive “levying” (cf. Article 10.2, 10.6 10.8) or “collection” (cf. Article 10.7) of duties. This confirms that, in connection with “anti-dumping duties”, the *Anti-Dumping Agreement* uses the word “apply” as a synonymous of “levy” and “collect”. (The term “levy” is defined in footnote 12 as “the definitive or final legal assessment or collection of a duty or tax”.)

45. The EC’s interpretation of the term “application” is consistent with the object and purpose of the second sentence of Article 15, which is to encourage the adoption of measures that, while providing a remedy to the domestic industry, are less onerous for the exporters than the “application of anti-dumping duties”. Where, as in the case at hand, the importing Member decides to suspend the assessment and collection of duties, the exploration of constructive remedies provided for by the Agreement would be superfluous, because any such remedy (e.g. a price undertaking) would be far more onerous for the exporters than the suspension.

³⁴ According to the Black’s Law Dictionary (West Publishing Co., 1990), the word “apply” is used in connection with statutes in two senses. When constructing a statute, in describing the class of persons, things or functions which are within its scope; as that the statute does not “apply” to transactions in interstate commerce. When discussing the use made of a statute, in referring to the process by which the statute is made operative; as where the jury is told to “apply” the statute of limitations if they find that the cause of action arose before a given date.

COMMENT OF INDIA TO EC's ANSWER TO PANEL QUESTION 26

India obviously disagrees that application is necessarily "subsequent to" imposition, as suggested by the EC. For this one only needs to look at Article 7, which states that provisional measures are "applied". Hence, "application" of provisional measures could obviously be before "imposition" of definitive measures.

India also refers to its comments concerning EC's answers to questions 4 and 10 of India.

Question 27

One might argue that, for unexamined producers (i.e., those not individually examined as part of the sample), there is no direct evidence, only indirect evidence from the sampled companies) as to whether there is dumping or not, since there is no information collected from these producers on the basis of which a dumping determination under Article 2 of the AD Agreement might be made. If this is considered to be the case, can the parties and third parties point the Panel to any specific provisions of the AD Agreement (not including the Article 3.1 reference to positive evidence) that address the question of how a determination of dumping is to be made for producers for which there is no information?

46. The EC would disagree with the suggested distinction between "direct" and "indirect" in so far as it were meant to imply that the use of what the question describes as "indirect" evidence would be less appropriate.

47. Article 6.10 provides that, where it is not possible to determine an individual margin of dumping for each of the exporters under investigation, the authorities may limit the examination to some exporters. It is implicit in Article 6.10 that, where the authorities decide to resort to that possibility, they may use the dumping margins established for the examined exporters in order to determine the margin of dumping of the unexamined exporters. Indeed, if the authorities were prevented from doing so, and had to collect data from the unexamined exporters in order to calculate their dumping margin, the possibility offered by Article 6.10 to limit the examination to some exporters would serve no useful purpose.

48. The *Anti-Dumping Agreement*, and more specifically Article 6.10, does not prescribe any specific formula to calculate the dumping margin of the unexamined exporters on the basis of the dumping margins established for the examined exporters. This is not saying, however, that the authorities enjoy complete discretion in making that calculation. Article 9.4 places a ceiling on the rate of the duty that may be applied to the imports from the unexamined exporters. Since the duty rate can never exceed the dumping margin (cf. Article 9.3), the formula set out in Article 9.4 also operates, indirectly, as an upper limit on the dumping margin.

49. India has suggested that the dumping margin of the unexamined exporters should be calculated by averaging the margins of the examined exporters, but without excluding the *de minimis* and zero margins.³⁵ That interpretation has no basis in the *Anti-Dumping Agreement*. Moreover, it would lead to an absurd result: in accordance with Article 9.4, the importing Member would be entitled to apply anti-dumping duties to imports from the unexamined exporters at a higher rate than that calculated by using India's formula; further, in accordance with Article 9.4, the importing Member could apply anti-dumping duties to imports from the unexamined exporters even where it has been established, by applying India's formula, that such imports are not dumped.

³⁵ India's Second Submission, paras. 130-132.

COMMENT OF INDIA TO EC's ANSWER TO PANEL QUESTION 27

India trusts that it is clear to the Panel that Article 9 addresses the question of "imposition and collection of anti-dumping duties."

While a duty is imposed *as a result of* dumping and injury determined, dumping is not calculated and injury is *not determined as a result of* the imposition of a duty. There is a clear distinction and logical sequence in these two steps. By inappropriately mixing the one-way order of these two distinct steps the EC comes to repeat its own argument based on that wrong premise.

Question 28

The EC's actions in the redetermination might be considered to be one method of making a dumping determination for unexamined producers, based on the calculation of a weighted average margin of dumping for examined producers in the sample. India has proposed another method, based on applying the proportion of imports in the sample found to be dumped to the unexamined imports. Can the parties and third parties point to any specific provisions in the Agreement which either prohibit the EC method or require the Indian method?

50. Contrary to what is suggested in the question, India's "method" is not "one method of making a dumping determination for unexamined exporters". Unlike the EC's "method", India's does not allow to determine what is the dumping margin of the unexamined exporters. Its sole purpose is to establish what is the volume of dumped imports outside the sample.

51. The formula applied by the EC in order to calculate the dumping margin of the co-operative unexamined exporters is not prohibited by any provision of the *Anti-Dumping Agreement*. Furthermore, the EC's formula is consistent with the formula set out in Article 9.4. In any event, the EC recalls that India has stated no claim in its panel request to the effect that the determinations of dumping for the unexamined exporters (both co-operative and non-co-operative) made by the EC authorities are inconsistent with any of the provisions of the *Anti-Dumping Agreement* dealing with the determination of dumping. The issue raised in the question, therefore, is beyond the Panel's terms of reference.

52. India's "method" is not required by any provision of the *Anti-Dumping Agreement*. Indeed, there is no reason why the *Anti-Dumping Agreement* should prescribe a method to calculate the volume of dumped imports, because the answer to that question follows from the answer to the previous question addressed by the EC's "method", i.e. what is the margin of dumping of the unexamined exporters.

COMMENT OF INDIA TO EC's ANSWER TO PANEL QUESTION 28

While not every conceivable action could probably be expressly prohibited beforehand, this does not mean that this thereby automatically allows all possible actions, if these involve results that are inconsistent with the Agreement. In this case, by disregarding positive evidence of the sample the EC acted inconsistently with Article 3.1. By so wrongly establishing the volume of "dumped" imports the EC has also acted inconsistently with Article 3.2.

Question 29

Could the parties and third parties address the meaning and significance of the term "positive evidence" as used in Article 3.1 of the AD Agreement? In particular, could the parties address the

question whether the EC's method, as described in question 28 above, rests on positive evidence, and the question whether India's method, as described in question 28 above, rests on positive evidence.

53. The EC considers that Article 3.1 is not relevant in this context. Article 3 is concerned exclusively with the determination of injury. By India's logic, any claim concerning the determination of dumping (e.g. whether an adjustment has been properly rejected) could also be formulated as a violation of Article 3. That would be clearly absurd. The question of whether imports are "dumped" for the purposes of the injury determination must be examined in the light of those provisions of the *Anti-Dumping Agreement* which deal specifically with the determination of dumping, and not of Article 3. Yet, India has not invoked any such provision in its Panel request.

COMMENT OF INDIA TO EC's ANSWER TO PANEL QUESTION 29, para. 53

While the EC does not wish Article 3.1 to be relevant for the injury determination, it is the basic paragraph that informs the entire Article 3 that addresses the determination of injury. The volume of dumped imports is a basic element in the determination of injury. By disregarding positive evidence of the sample the volume of dumped imports has been misrepresented. Clearly this runs contrary to Article 3.1 itself.

54. At any rate, the method followed by the EC for establishing the dumping margin of the co-operative unexamined exporters rests on "positive evidence", because it is based on "positive evidence" of dumping for the examined exporters. With the sole exception of the Claim No 1 under Article 2.2.2 (ii), India has not challenged the determination of dumping for those exporters.

55. Although the term "sample" has been loosely used by all the parties during the underlying investigation and in this dispute in order to refer to the group of exporters included in the examination, the EC has never claimed that such group constitutes a "statistically valid sample" within the meaning of Article 6.10. Rather, it represents the largest percentage of the volume of exports which could be reasonably investigated. Accordingly, the EC considers that, as suggested in Question 6 from the Panel to India, it cannot be assumed that the proportion of imports found to be dumped within the "sample" constitutes "positive evidence" of the proportion of dumped imports which would have been found outside the "sample", had all the exporters been examined individually.

COMMENT OF INDIA TO EC's ANSWER TO PANEL QUESTION 29, para. 55

The EC seeks to defy common sense by arguing now, suddenly, that it has not selected a sample but, rather, applied the other option of Article 6.10, *i.e.* the largest volume of exports.

One needs only recall the factual record. For example the original Panel Report at paragraph 2.5 makes clear that this assertion now made by the EC is not true. It is a simple fact that a sample was established. One may also recall the EC statement during the recent meeting of the (21.5) Panel with the parties where the EC referred to recital (19) of the Provisional Regulation pointing out that a sample was established. The existence of the sample has never been in doubt.

For the EC to argue now—more than five years after the initiation of investigation—that facts on which that investigation was based were in fact different from reality and different from those published in the EC's Official Journal defies common sense. It even casts general doubts about the veracity of the other statements in the EC's Official Journal. If even official and published statements in the Official Journal are apparently not true then one may only wonder what else is not true.

Question 30

In light of the Appellate Body findings pertaining to Article 3.5 of the AD Agreement in US-Hot-Rolled Steel Products from Japan, how do your authorities comply with the obligation to "separate and distinguish" the injurious effects of dumped imports from those of other known causal factors?

56. The causality analysis made by the EC authorities in this case takes into account and is in conformity with the guidance provided by the Appellate Body in *United States – Hot Rolled Steel*.

Question 31

Against what standard would you consider that a Panel should assess whether a Member has complied with Article 21.2 of the DSU? In particular, what specific obligations does this provision impose on Members.

57. As explained, the EC considers that Article 21.2 of the DSU is a non-mandatory provision, which imposes no binding obligations upon developed country Members³⁶.

58. The EC has submitted in the alternative that, assuming that Article 21.2 imposed a binding obligation, such obligation would relate to the procedural requirements of the implementation process set out in the other provisions of Article 21, and not to the content of the implementing measures³⁷.

COMMENT OF INDIA TO EC's ANSWER TO PANEL QUESTION 31, para. 58

India notes that there is nothing in the text of Article 21.2 of the DSU which would suggest that this is not a mandatory provision. Neither does India see textual support for the limitation of the scope of this provision by procedural requirements. The EC reads into Article 21.2 words that are not there. In any case, as India has already stated on a number of occasions, the EC has not even complied with the procedural requirements of Article 21.2.

In this context, would India please address the actions the EC has cited as fulfilling any obligations it may have under this provision.

59. Not applicable.

To the EC and third parties:

Question 32

India is of the opinion that the outcome of a sample analysis must be extended to the whole. On what basis does the EC consider that this is inappropriate, and that it is appropriate, under the Agreement, to assume that imports from non-investigated foreign producers/exporters are dumped? Third parties are also requested to address this question.

60. Contrary to what is suggested in the question, the EC authorities did not "assume" that imports from unexamined exporters were dumped. Rather, the EC authorities determined that those imports were dumped on the basis of the evidence of dumping found for the examined exporters (in

³⁶ EC's First Submission, paras. 279-284. See also EC's Oral Statement, paras. 122-125.

³⁷ EC's First Submission, paras. 285-288. See also EC's Oral Statement, paras. 126-127.

the case of the co-operative unexamined exporters) or on the basis of facts available (in the case of the non- co-operative unexamined exporters).

61. As explained above, the EC does not claim that the examined exporters constitute a “statistically valid sample” within the meaning of Article 6.10, but rather the largest percentage of the volume of exports which could be reasonably investigated. The EC does agree, nonetheless, that it is appropriate to rely on data from the examined exporters in order to reach findings for the unexamined exporters. Indeed, that is precisely what the EC authorities did in this case. They relied upon the dumping margins established for the examined exporters in order to determine the dumping margin for the co-operative unexamined exporters.

62. The disagreement between the EC and India rather concerns the question of the purpose for which the data pertaining to the examined exporters should be used. Article 6.10 is concerned with the determination of dumping margins, and not with the determination of injury. Accordingly, the data collected from the examined exporters must be used in order to calculate the dumping margin of the unexamined exporters, rather than in order to estimate the volume of dumped imports. As explained, the answer to that question follows from the answer to the question which precedes it logically, i.e. what is the dumping margin of the unexamined exporters. India’s “method” leaves that question unanswered.

COMMENT OF INDIA TO EC's ANSWER TO PANEL QUESTION 32

India refers to her comments made above in respect to question 29.

To Korea

Question 34

Korea argues that using sales value as the weighting factor in calculating weighted average SGA and profits for purposes of Article 2.2.2(ii) distorts the relative importance of the producers' whose information makes up the average by over-representing the producers with higher SGA and prices, and is therefore inconsistent with Article 2.2.2(ii).

63. As already explained in the EC’s First Submission³⁸, contrary to Korea’s suggestion, the fact that a producer/exporter has a bigger total sales value does not necessarily imply that its level of profits and SGA expenses is higher. India acknowledged this in its Second Submission³⁹.

64. In the first place, because the level of profits is a function not only of the prices but also of the costs of each producer. Under normal market conditions, the prices of all the operators will tend to be similar, while their costs may diverge substantially due to a variety of reasons (e.g. degree of amortisation of the investments, differences in technology and production methods, different sources of financing, etc.). Thus, in practice, the differences in profitability between the exporters/producers are more likely to arise from differences in costs than from differences in prices.

65. More particularly, Korea overlooks that the level of profits is also a function of the SGA expenses. Lower SGA expenses will result in higher profits and vice-versa. Thus, in the case at hand, Bombay Dyeing, the company with a higher average price (per “units/set”) had a higher profit margin,

³⁸ EC’s First Submission, paras. 83 and 84.

³⁹ India’s Second Submission, paras. 99 and 100.

but a lower margin for SGA (10.39 %) than Standard Industries (19.15%).⁴⁰ This contradicts Korea's contention that higher prices reflect always both higher profits and higher SGA.⁴¹

66. Second, a bigger sales turnover may reflect a different product mix, rather than higher unit prices for comparable products. Indeed, this appears to have been the case here. While Bombay Dyeing's average unit price per "unit/set" (213 rs) was higher than Standard's (73 rs), Standard's average unit price per kg. (306 rs) was higher than Bombay Dyeing's (288rs).⁴² This shows that Bombay Dyeing and Standard were selling a very different mix of products.⁴³

Korea suggest, however, that using sales value as the weighting factor for purposes of Article 9.4(i) is acceptable because the dumping margin is independent of sales value. Could Korea comment on the potential for distortion arising from using sales value as the weighting factor under Article 9.4(i). Would not weight-averaging based on sales value over-represent the producers with higher dumping margins in the average?

67. Using sales value as the weighting factor for purposes of Article 9.4(i) does not necessarily "overrepresent" the exporters with higher dumping margins. The size of the dumping margin is not directly related to the total export sales value of each exporter. Rather, it is the result of a complex calculation involving the comparison of the export price of each type to the domestic price or cost of production of the same type.

⁴⁰ See the table included in India's First Submission, para. 45

⁴¹ The EC requests confidential treatment for the percentages mentioned in this paragraph.

⁴² See the table included in the EC's First Submission, para. 93.

⁴³ The EC requests confidential treatment for the figures mentioned in this paragraph.

ANNEX E-8

COMMENTS OF INDIA ON ANSWERS OF THE EUROPEAN COMMUNITIES TO THE QUESTIONS FROM INDIA

30 September 2002

Question 1

EC may like to clarify that which provision of the WTO Agreement and Vienna Convention does the EC rely when stating that it is possible to extensively interpret provisions of substantive law (as it has argued in the US–Certain Corrosion Resistant Carbon Steel Flat Products from Germany) and impossible as regards the provisions of procedural law?

1. In the case mentioned by India, the EC argued that the requirement to terminate the investigation where the amount of the subsidy is *de minimis* applies also to sunset reviews. The Panel agreed. The EC considers that the reasoning followed by the panel in *US - Corrosion Resistant Steel* cannot be extrapolated to other provisions. Rather, the question of whether a provision which is not expressly cited in Article 11.4 may nevertheless apply to reviews under Article 11.2 must be considered on a case-by-case basis. The EC considers that, for that purpose, it may be relevant that, unlike the provision at issue in *US – Corrosion Resistant Steel*, Article 5.7 is a purely procedural provision, like the provisions referred to in Article 11.4. The EC, nevertheless, has not argued that no procedural provision, other than those referred to in Article 11.4, can ever be applicable to reviews under Articles 11.2 or 11.3. To repeat, the question must be considered on a case-by-case basis. Unlike the EC in *US - Corrosion Resistant Steel*, India has not cited any compelling reasons to consider that Article 5.7 should apply to reviews, notwithstanding its express wording.

COMMENT OF INDIA TO EC's ANSWER TO INDIA's QUESTION 1

India draws attention of the Panel to the fact that the EC has changed the position that it took during the oral hearings. Then, the EC was of the opinion that "the requirement to terminate the investigation where the amount of subsidy is *de minimis*" is a provision of *substantive* law. Now the EC claims that it is a provision of *procedural* law in contrast to Article 5.7 of the ADA which is "a *purely procedural* provision". India submits that this distinction is an arbitrary invention of the EC having no support whatsoever in the text of the WTO Agreement. Accordingly India believes that the compelling reasons accepted by the Panel in *U.S. – Corrosion Resistant Steel* to interpret Article 11.9 of the ASCM extensively should also be applied in respect of Article 5.7 of the ADA. India notes that the EC shifts its positions as regards the interpretation of the covered agreements depending on whether the EC is a complainant or a respondent. Thus, the Panel should disregard the EC's arguments made in paragraphs 6, 106-109 of the EC's First Written Submission (FWS), paragraph 10 of the EC's Second Written Submission (SWS) and paragraph 50 of the EC's Oral Statement.

Question 2

It goes without saying that the EC as a third party in the Australia–Salmon (Article 21.5–Canada) case recalls the following finding of the panel:

" ... we note that an Article 21.5 panel cannot leave it to the full discretion of the implementing Member to decide whether or not a measure is one "taken to comply". If one were to allow that, an implementing Member could simply avoid any scrutiny of certain measures by a compliance panel, even where such measures would be so clearly connected to the panel and Appellate Body reports concerned, both in time and in respect of the subject-matter, that any impartial observer would consider them to be measures "taken to comply"." (emphasis added)

In light of this statement could the EC in its reply comment upon the reasons not to consider Regulation 160/2002 and Regulation 696/2002 as measures "taken to comply"? Specifically why does the EC believe that these measures are not "clearly connected"? Could the EC in its reply bear in mind the following paragraph of the article by Jason E. Kearns and Steve Charnovitz:

"Evidence of a clear connection or inextricable link between the two measures could include the following: the aggravating and implementing measure (1) are linked in official government statements; (2) were enacted or adopted within a reasonably close period of time; (3) affect and specifically target the same product(s) or same producer(s); (4) were enacted or adopted by the same legislative or administrative body; and (5) are of the same general nature (e.g., both are sanitary measures). In many cases, for example, the aggravating measure will be part of the same legislation or regulation as the implementing measure (and, therefore, will be enacted or adopted by the same body). As a general matter, we would expect that an aggravating measure and an implementing measure that are part of the same legislation or regulation would be sufficiently connected to justify an Article 21.5 review of both measures."

2. The "subject matter" of Regulation 160/2002 is different from the "subject matter" of the measure in dispute before the original panel. The anti-dumping duties on imports from Egypt and Pakistan were not in dispute before the original panel.

COMMENT OF INDIA TO EC's ANSWER TO INDIA's QUESTION 2

India notes the refusal of the EC to enter into a substantive discussion on the objective criteria of a "clear connection" between Regulations 1644/2001, 160/2002 and 696/2002. Thus, the EC confirms once again the statement it made during the oral hearings that these three measures are closely connected. Accordingly, since Regulation 1644/2001 is recognised by the EC as a "measure taken to comply" all three Regulations are "measures taken to comply". As for the subjective criteria of "subject matter" India draws attention of the Panel to the almost identical titles of Regulations 1644/2001 and 160/2002. India recalls in this connection that it was not India who cumulated the imports from India, Egypt and Pakistan in the original Regulation 2398/97 in the first place.

Question 3

The EC in paragraph 35 of its First Written Submission (FWS) states:

"As submitted above, the EC considers that Regulations 160/2002 and 696/2002 are not measures "taken to comply". However, should the Panel conclude that they are, the EC submits that the relevant date for assessing the consistency of the measures "taken to comply" with the covered agreements is the date of establishment of the panel, and not that of the end of the "reasonable period of time".

Does the EC generally believe that the scope and substance of the obligation to comply depends on the terms of reference of a subsequent 21.5 panel or is it an ad hoc opinion?

3. The EC believes that the position expressed in paragraph 35 of the EC's First Written Submission is valid with respect to all Article 21.5 disputes.

What is the textual support for this approach in the WTO Agreement?

4. As observed by the Panel in *US – Shrimps*, “the DSU is silent as to the date on which the existence or consistency of the implementing measure must be assessed”¹.

Does the EC suggest that the promptness of compliance depends not on the outcome of Article 21.3 arbitration or mutual agreement of the parties as in the present case, but on how fast a 21.5 panel is established and with what terms of reference?

5. India persists in confusing two different issues: the scope of the Panel's jurisdiction under Article 21.5 and the obligations of the implementing Member under Article 21.3.

COMMENT OF INDIA TO EC's ANSWER TO INDIA's QUESTION 3

India does not "persist in confusing two different issues: the scope of the Panel's jurisdiction under Article 21.5 and the obligations of the implementing Member under Article 21.3". India has merely reproduced the EC's "line" of reasoning contained in paragraph 35 of the EC's FWS. Indeed, it was the purpose of the question to demonstrate that it is *the EC* by making a conditional argument on a systemic problem who confuses two different issues. India thanks the EC for accepting that its logic in paragraph 35 of the FWS is absurd. Thus, the whole second request of the EC for the preliminary ruling is absurd.

Question 4

In US–Section 301 case the EC recalled the US the following ruling of the GATT panel on United States – Measures Affecting Alcoholic and Malt Beverages (Beer II):

"Even if Massachusetts may not currently be using its police powers to enforce this mandatory legislation, the measure continues to be mandatory legislation which may influence the decisions of economic operators. Hence, a non-enforcement of a mandatory law in respect of imported products does not ensure that imported beer and wine are not treated less favourably than like domestic products to which the law does not apply".

The EC added afterwards:

*"... the provisions of Sections 301-310 stipulating WTO-inconsistent action would thus remain WTO-inconsistent even if the USTR did not enforce them at all.
(underlining in original)"*

Why does the EC believe that this reasoning does not apply to the current suspension or non-application of anti-dumping duties which otherwise would be illegal due to the failure to explore constructive remedies?

¹ Panel Report, *US – Shrimps*, para. 5.12.

6. In *US – Malt and Alcoholic Beverages* the United States did not argue that the measure was suspended as a matter of law. Rather, the United States argued that, *de facto*, the authorities of Massachusetts were not using their police powers to enforce it. The panel correctly rejected that argument. Unlike the Massachusetts authorities, the EC customs authorities could not “enforce” the measures in dispute even if they wished to. The decision to suspend the application of the duties means that the EC customs authorities are legally prevented from assessing and collecting any anti-dumping duties on imports from India.

COMMENT OF INDIA TO EC's ANSWER TO INDIA's QUESTION 4

India notes that the EC does not comment on the position the EC has taken in the *US–Section 301*. To remind, in this case the fact that the United States argued that the measure had been suspended as a matter of law, did not preclude the EC from arguing that non-application of a measure can be considered as a form of application. Thus, again India notes that the EC shifts its position as for interpretation of the covered agreements depending on whether the EC is a complainant or a respondent. Accordingly, the Panel should disregard the EC's arguments concerning the status of suspension of anti-dumping duties. Undoubtedly, the latter is a form of application of anti-dumping measures.

Question 5

Could the EC clarify how the citation from the Appellate Body report in paragraph 227 of its FWS concerning increased imports as "the sole cause" of serious injury support its statement in the same paragraph that "the EC authorities were not required to prove that dumped imports were the cause of the injury suffered by the EC industry"?

7. The EC recalls that in the statement mentioned by India, the EC was citing India's own First Written Submission. The use of the definite article “the”, rather than the indefinite “a”, in the phrase “the cause of injury” implies that dumped imports must be the sole cause of injury.

COMMENT OF INDIA TO EC's ANSWER TO INDIA's QUESTION 5

The EC defies common sense by seeing no difference between the phrases “the sole cause” and “the cause”. For that reason, EC's arguments contained in paragraphs 227-230 of the EC's FWS, paragraph 13 of the EC's SWS and 107-108 of the EC's Oral Statement should be disregarded.

Question 6

In the US–Wheat Gluten case the EC argued that Article 4.2(b) of the Agreement on Safeguards requires that a Member demonstrate that “increased imports” caused “serious injury per se, i.e. taken alone”. Although India is nowhere arguing the same in the present case, it still would have nothing against the identical EC's position in respect of Article 3.5 of the ADA. Why did the EC change its views? Do Panel or Appellate Body reports prohibit a Member to take a more liberal approach to the issues than may be actually contained in the text of the WTO Agreement?

8. The EC made that argument in connection with Article 4.2 (b) of the *Agreement on Safeguards* and not with respect to Article 3.5 of the *Anti-Dumping Agreement*. Indeed, when making that argument, the EC emphasised the exceptional nature of the *Agreement on Safeguards*.²

² Appellate Body Report, *United States – Definitive Safeguard measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, para. 17.

COMMENT OF INDIA TO EC's ANSWER TO INDIA's QUESTION 6

The EC is well aware of the fact that in spite of the exceptional nature of *safeguard measures* (not the *Agreement on Safeguards*!), "adopted panel and Appellate Body reports relating to the non-attribution language in the *Agreement on Safeguards* can provide guidance in interpreting the non-attribution language in Article 3.5 of the *Anti-Dumping Agreement*."³ Bearing in mind this awareness India notes that the EC has put forward no explanation to the shift in its position. Thus, again the EC changes its approach to the interpretation of the covered agreements depending on whether it is a complainant or a respondent. Respectively, this represents an additional rationale for the Panel to disregard EC's arguments contained in paragraphs 227-230 of the EC's FWS, paragraph 13 of the EC's SWS and 107-108 of the EC's Oral Statement.

Question 7

What is the difference between a "niche product" and a "like product"? Are "niche products" unlike "non-niche products"?

9. As the EC explained before the Panel, a "niche" bed linen product falls within the definition of the like product. The EC noted in its First Submission that cotton type bed linen is a product which comprises several different types or ranges of product, all of which constitute the like product.⁴

10. In this respect, the EC wishes to point out that where India refers in its closing statement to the Panel to "identical" products within the meaning in Article 2.6 of the Anti-Dumping Agreement, it fails to cite that provision in full.⁵ Article 2.6 provides:

Throughout this Agreement the term "like product" ('produit similaire') shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

11. In any event, India has raised no claim under Article 2.6 in this Panel request and has not directly disputed the fact that the niche product is the like product. Rather, India has disputed the fact that the EC refers to the (uncontested) shift in production and sales towards the higher value niche products in analysing the overall increase in average prices of bed linen on a per kilogram basis. The EC maintains, however, that it is entitled to analyse such developments in context.⁶

COMMENT OF INDIA TO EC's ANSWER TO INDIA's QUESTION 7

India is surprised to note that after all these years the EC now takes as a "fact" that "the niche product is the like product." India trusts that it is clear to the Panel that the product under consideration is Bed Linen, as originally defined by the EC, and not part of the Bed Linen as is now submitted by the EC.

³ Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ("US – Hot-Rolled Steel"), WT/DS184/AB/R, adopted 23 August 2001, para. 230.

⁴ EC's First Written Submission, para. 170.

⁵ India's closing statement, para 47.

⁶ EC's Oral Statement to the Panel, paras 79-81.

Question 8

The EC states in paragraph 114 of its oral statement "the increase in the cost of raw cotton is not a different causal factor, because it cannot have any injurious effects on its own." How does the EC reconcile this statement with recital 103 of the original Provisional Regulation wherein it stated: "the Commission concluded that increases in raw material prices had caused injury"? Also, how does the EC reconcile that paragraph 114 with recital (50) of the re-determination?

12. As already explained in paragraphs 245-248 of the EC's First Submission, India takes those statements out of context. In particular, in recital 103 of Regulation 1069/97 it was not merely stated that the increase in raw material prices had caused injury, but that any injury caused was in turn due to inability to pass on the increased cost of the raw material to customers. It should be noted that recital 50 of Regulation 1644/2001 simply points to the injury suffered by the Community industry and highlights the declining and inadequate profitability which is the result of prices which did not reflect the increases in costs of raw cotton and which had not been able to keep pace with inflation in prices of consumer goods. The pertinent analysis as to the causation of this injury is however dealt with in recitals 52 –70 of Regulation 1644/2001 and further explained in the EC's First Written Submission and Oral Statement to the Panel.⁷

COMMENT OF INDIA TO EC's ANSWER TO INDIA's QUESTION 8

Contrary to what the EC states in its answer, the second sentence in recital 103 does not state that "injury caused [by increase in raw material prices] was in turn due to inability to pass on the increased cost of the raw material to customers." The second sentence states that "the *extent* of such injury depends on the ability of the producers to pass on some or all of the increased cost" (emphasis added). The third and the last sentence in this recital then goes on to state that "in this case, it was reasonable to assess that the dumped imports were the main reason why such pass-through did not occur". Thus, the second and the third sentences represent an unsatisfactory attempt of the EC to undertake the second step of the non-attribution analysis mandated by Article 3.5 of the ADA and consisting in separation of injurious effects of other known factors from the injurious effects caused by dumped imports.⁸ Respectively, the first sentence cited by India in her question (recital (103) of Provisional Regulation) and the sentence of recital (50) of the re-determination represent the only two sentences devoted by the EC to the examination of this type of other known factors. India has not taken this sentence out of its context simply because there is no context.

Furthermore, India disagrees with the statement of the EC that "the pertinent analysis as to the causation of this injury is however dealt with in recitals 52–70 of Regulation 1644/2001 and further explained in the EC's First Written Submission and Oral Statement to the Panel". The only recital dealing with the injury caused by increase in raw cotton prices is recital 60 stating that "the findings set out in recitals 102 and 103 of the provisional can be confirmed". As for the EC's submissions to the Panel, India fails to understand how can they cure inconsistencies contained in the measures taken by the EC to comply.

⁷ EC's First Written Submission, paras. 208-248; EC's Oral Statement to the Panel, paras. 107-114.

⁸ "[Article 3.5] requires investigating authorities, as part of their causation analysis, first, to examine *all* "known factors", "other than dumped imports", which are causing injury to the domestic industry "at the same time" as dumped imports. Second, investigating authorities must ensure that injuries which are caused to the domestic industry by known factors, other than dumped imports, are not "*attributed* to the dumped imports." (Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ("US – Hot-Rolled Steel"), WT/DS184/AB/R, adopted 23 August 2001, para. 222).

Question 9

The EC contends that "the prices of bed linen do not increase in line with the prices of other consumer goods". (paragraph 110 of the oral statement) How does the EC reconcile this statement with its position in paragraph 78 of the oral statement the prices of "niche products" went up? Has inflation affected only the "niche products"?

13. The EC did not state in para. 78 of its oral statement that the prices of niche products went up. It merely stated that there was a shift (i.e. in the overall product mix sold) towards higher value niche products. As explained in response to the Panel's question 22 to the EC, the average price of a particular product type may decrease but the overall average price per kilogram sold will still increase if there has been a shift in the proportion of higher value products sold.

According to India this answer once again brings to light the flawed logic of the EC. In plain words the EC merely says that a decrease in the average price for a particular product *type* indicates injury, but an overall price increase of the 'like product' does not. India has already pointed out in its second written submission that with such a contrived logic 'injury' can always be found": if average prices for the 'like product' go down then this is apparently a sign of injury while if average prices go up there is apparently a shift in product mix. If this 'logic' of the EC is to be taken serious at all it indicates, if anything, a problem on account of the 'like product' under investigation.

Question 10

Stating in para. 261 of its FWS that "as long as a developed country Member is not "applying" any anti-dumping duties, it has still the possibility to explore constructive remedies and, therefore, cannot be found to be in violation of Article 15" does the EC accept that if anti-dumping duties were not suspended as of August 14, then that would constitute a violation of Article 15?

14. Had the EC not suspended the application of anti-dumping duties, it would have explored first the possibilities of constructive remedies in accordance with Article 15. If the EC were to end the suspension in place, it would explore first the possibilities of constructive remedies.

COMMENT OF INDIA TO EC's ANSWER TO INDIA's QUESTION 10

India takes note of this statement; India also notes that the statement of the EC in paragraph 261 of its FWS should be read in light of the interpretative approach taken by the EC in the *US–Section 301* (see India's comment to the EC's answer to the question 4 from India). India recalls that the EC has been unable to explain why this approach should not be applied in the present case.

ANNEX E-9

COMMENTS OF THE EUROPEAN COMMUNITIES TO INDIA'S ANSWERS TO THE QUESTIONS FROM THE PANEL

30 September 2002

Question 6

1. India suggests that the EC would have acknowledged that the exporters included in the examination constitute a “statistically valid sample” within the meaning of Article 6.10 of the *Anti-Dumping Agreement*.

2. As already explained in the EC's answer to question 29 from the Panel (at paragraph 55), the EC has never claimed that the selected exporters constituted a “statistically valid sample” for the purposes of Article 6.10. In the letter No 060644 of 11 October 1996 addressed to the representatives of the Indian exporters and their association TEXPROCIL¹ the EC Commission specified that

The aim of this exercise is to select a sample representing the largest volume of exports which can reasonably be investigated within the time available taking also into account the need to cover companies with domestic sales as well as companies of different types (i.e. integrated, semi-integrated, merchant exporters).

3. Furthermore, the validity of a sample depends on the purpose for which the sample is selected. In this case, the selection of the examined exporters was made specifically with a view to calculate the average margin of dumping of the unexamined exporters. The selection criteria would have been different, had the purpose of the selection been to estimate the volume of dumped transactions outside the “sample”. Both the purpose of the selection and the selection criteria used by the EC authorities were well known to the Indian exporters and to the Indian Government, which never called them into question.

4. India's claim is based on the same type of reasoning that was rejected by the panel in the original proceedings, where India claimed that the EC should have excluded from the injury examination the non-dumped transactions. The original Panel reasoned that the existence of dumping is established with respect to all the imports of the product concerned from each exporter and not with respect to individual transactions. The consequence of this is that either all the imports from an exporter are “dumped” or all of them are “non-dumped”. It is implicit in Article 6.10 that, by way of exception to the rule that the authorities must calculate an individual dumping margin for each exporter, they may calculate a single, “non-individual” margin for all the unexamined exporters. Thus, the question of what proportion of imports from the unexamined exporters is “dumped” does not even arise. Either all such imports are “dumped” or all of them are “non-dumped”, just like all imports from each selected exporter are either “dumped” or “non-dumped”.

5. The data collected from the examined exporters does not allow to establish which of the unexamined exporters are dumping, but only to calculate an average dumping margin for all of them. The fact that a certain percentage of the total volume of imports from the group of examined exporters is “non-dumped” is not evidence that the same percentage of the volume of imports from the unexamined exporters is also “non-dumped”. This is so because the dumping margin must be

¹ This letter was attached as Annex 22 to India's First Written Submission to the original Panel.

determined for each exporter, rather than on a transaction basis. As a result, it is perfectly possible that, even if it could be shown that in the case at hand transactions accounting for 53% of the import volume from the unexamined exporters were “non-dumped”, all the unexamined exporters were nevertheless found to be dumping when the individual dumping margin of each of them is calculated on an overall basis with respect to all the transactions.

Question 7A

6. India argues that the EC’s analysis on stocks is somehow deficient since it did not provide data pertaining to the situation at 1 July 1995 and 30 June 1996, the end-to end dates of the investigation period. The EC would recall that for injury purposes, trends are usually analysed over the period considered, namely 1992 to the end of the IP. An analysis of the development in stocks within a one year period alone would be rather meaningless. Since the period considered for injury purposes included four calendar years (1992-1995) as well as the IP, it is obvious why seasonal stock movements at the beginning or end of a calendar year could distort the picture.

7. The EC’s statement that some increase in stocks was observed for some companies consequently relates to an increase during the period considered, not merely during the IP or during the seasonal period in any particular year. It should be noted that such an increase in stocks would ordinarily point towards injury. The increase in stocks witnessed in some firms was also confirmed by the information on production and sales at the level of the sample. However, the EC looked beyond the apparent trends in analysing this factor. It noted in particular that annual fluctuations could be distorted due to the high volume of sales and orders towards the end of the calendar year when stock valuations were often performed; some companies produced mainly to order, some were sub-contracting surplus production, and had no or very little stocks. In the light of this information, the EC considered that data and information collected on stocks was not consistent across the sampled producers since an increase in stocks could indicate increased orders rather than unsold production, and therefore concluded that stocks could not be considered as a relevant factor for the assessment of the state of the Community industry.²

8. In relation to capacity utilisation and investments, India ignores the explanations already provided and raises no new arguments. The EC therefore refers the Panel to its submissions at paras. 153-154 and 188 of its First Written Submission, paras. 69-70 and 93³ of its Oral Statement and its replies to Question 18 from the Panel.

Question 7B

9. For the first time in this Panel proceeding, India identifies a number of other factors for which the EC is alleged to have collected no data. For most of these other factors, India relies on paragraph 6.165 of the original Panel report, where the Panel refers to certain factors which were not expressly mentioned in recitals 81-91 of the original Provisional Regulation. The EC has already explained that the original Panel did not make any factual findings regarding the collection of data, it merely noted that in the absence of any express references to those factors in the determination it could not simply be assumed that they had been analysed.

10. In addition to the list of factors referred to by the original Panel at paragraph 6.165, India further alleges that there was no collection of data regarding market share and factors affecting domestic prices. Since the EC has described in detail its analysis of both those factors during these

² Regulation 1644/2001, recital 29; EC reply to Question 18 from the Panel.

³ Please note that footnote 82 should refer to the table in Exhibit-India-RW-5 rather than Exhibit-India-RW-4, which does not contain any table.

Panel proceedings, it is rather astonished that India only now seeks to argue that no data was collected. The EC refers the Panel to the numerous explanations already provided in this respect.⁴

11. Finally, India states a number of times in its reply to Question 7 that the EC “admitted” during the meeting with the parties that “it did not go out in the field and collect the missing information”. That assertion is incorrect and misleading. The EC confirmed that it did not collect any new data after the original Panel report because it did not need to; that was simply not necessary as the EC had all the information required. In other words, there was no “missing” data.

Question 7C

12. As regards the alleged inadequacy of the EC’s analysis, India raises no new arguments and the EC refers the Panel to its earlier submissions at paras. 156-207 of its First Written Submission and paras. 66-106 of its Oral Statement.

Question 14

13. India cites four “other factors” which were “known” to the EC but were not taken into account by the EC: the “depressed periods” of the domestic industry, the effects of the non-dumped imports, the contraction in demand and the export performance of the domestic industry.

14. As discussed below, one of those factors (the “depressed periods”) is not a relevant “other factor”, while the other three were properly examined by the EC authorities.

A.- “Depressed periods”

15. India alleges that the EC authorities found that the domestic industry suffered from a “depressed period” but failed to analyse this as an “other factor”. India relies on the following statement contained in recital 30 of Regulation 1644/2001.

The investigation showed that many producers were able to maintain a high rate of capacity utilisation and even had to subcontract surplus production, to allow them to run at high utilisation even in depressed periods.

16. India has misread the above passage. Contrary to what is implied by India, the EC authorities did not find that the domestic producers underwent “a depressed period” during the reference period used for the injury determination. Rather, the EC authorities made the observation that the bed linen producers subcontract surplus production (rather than increasing production capacity), so that in “depressed periods” (in the plural form) they may continue to run at a higher rate of capacity utilisation. This is a description of a structural and permanent characteristic of the bed linen industry, and not a factual finding to the effect that the domestic industry was undergoing a conjunctural “depression” during the reference period.

17. India’s allegation is based on a misunderstanding of the terms “depressed periods”. As explained elsewhere, the bed linen producers usually manufacture to order. Orders and production are not evenly distributed throughout the year and across the sampled producers. As a result, at any given point in time, certain producers may have few orders, while others may have orders in excess of their capacity. This makes it possible for the latter to subcontract the available production capacity of the

⁴ Regulation 1644/2001, recitals 35, 45; Regulation 1069/97, recitals 84, 85, and 88; EC First Written Submission, para. 189 and 167; Exhibit-India-RW-17, in particular pages 4, 7 and 8.

former.⁵ The terms “depressed period” were used by the EC authorities to designate the periods during which each producer has relatively few orders as compared to its peak periods, rather than to a period where the bed linen industry as a whole was “depressed”. Thus, the “depressed periods” mentioned in paragraph 30 are not an indication of injury.

18. In any event, it should be noted that the Indian exporters did not at any point during the original investigation or the re-determination allege that the existence of “depressed periods” was a separate cause of injury.

B. Non dumped imports

19. India alleges that the effects of non-dumped imports from other countries were not “properly taken into account”, but submits no arguments in support of such allegation.

20. The EC recalls that it has carefully analysed the effects of other imports in the Provisional Regulation (recitals 100 and 101, confirmed by Regulation 1644/2001, recital 63) and in Regulation 1696/2002 (recitals 30-46). India has nowhere addressed the findings set out in those sections.

C. Contraction in demand

21. India alleges that the contraction in demand was not “taken into account” and that there is a contradiction between the Provisional Regulation and Regulation 1644/2001).

22. Contrary to India’s allegations, this factor was duly taken into account by the EC authorities. As explained in the EC’s answer to question 21 from the Panel (at paragraph 24), the EC authorities concluded that the contraction in demand was not a cause of injury because the supply of bed linen fell by a much a larger amount, due to the fact that 29 EC producers not included in the Community industry went out of business.

23. There is no contradiction between recital 105 of the Provisional Regulation and recital 62 of Regulation 1644/2001. In both regulations, the EC authorities noted that the contraction in demand had a different impact on the EC producers not included in the Community industry, whose sales fell by 50% more than the total fall in consumption, and the Community industry, whose sales remained by and large stable because they could benefit, although less than the dumped imports, from the disappearance of other EC producers not included in the Community industry.

D. Export performance

24. India alleges that the EC authorities did not take into account the export performance of the domestic industry.

25. India’s allegation is unfounded. The EC authorities found that exports from the EC (including exports by the domestic industry) had performed better than domestic sales and that, indeed, the increase in exports was one of the reasons for the overall increase in output of the Community industry (Provisional Regulation, recital 81). Thus, it is plain that the export performance of the domestic industry was not a cause of injury, but rather the opposite, a factor which mitigated the injury suffered by the Community industry on the EC market .

⁵ The development of sub-contracting has been further encouraged by the process of consolidation of the bed linen industry through mergers and alliances (provisional regulation, recital 114)

26. In any event, this factor was not raised at any point by the Indian exporters.
