PERMANENT MISSION OF THE UNITED STATES TO THE WORLD TRADE ORGANIZATION
MISSION PERMANENTE DES ÉTATS-UNIS D'AMÉRIQUE
AUPRÈS DE L'ORGANISATION MONDIALE DU COMMERCE
1-3 AVENUE DE LA PAIX
1202 GENÈVE

DS141

January 8, 2001

Ms. Debra Steger
Director
Appellate Body Secretariat
World Trade Organization
Centre William Rappard
154, Rue de Lausanne
1211 Geneva 21

Re: *European Communities – Anti-dumping Duties on Imports of Cotton-Type Bed Linen from India* (AB-2000-13)

Dear Ms. Steger:

Enclosed is the third-participant submission of the United States in the dispute *European Communities – Anti-dumping Duties on Imports of Cotton-Type Bed Linen from India* (AB-2000-13), as well as an executive summary of that submission. The United States has served a copy of the submission and executive summary to the European Communities, India, Egypt and Japan.

Sincerely,

Bruce Hirsh
Legal Advisor

Enclosure

cc: Amb. Carlo Trojan, Permanent Delegation of the European Commission
Amb. Srinivasan Narayanan, Permanent Mission of India
Amb. Fayza Aboulnaga, Permanent Mission of Egypt
Amb. Koichi Haraguchi, Permanent Mission of Japan

DS141

BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

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

(AB-2000-13)

Third-Participant Submission of the United States

8 January 2001

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

THIRD-PARTICIPANT SUBMISSION OF THE UNITED STATES

EXECUTIVE SUMMARY

The United States supports the European Communities' (EC) appeal with respect to the Panel's finding that the EC employed an impermissible methodology when calculating the overall margin of dumping.

The object and purpose behind calculating dumping margins is to permit the importing country to offset dumping. In order to offset dumping, the importing country must be permitted to collect antidumping dumping duties equal to the amount by which normal value has exceeded export price. When fair comparisons have been made, dumping margins determined, and injury found, the AD Agreement permits the imposition of duties to offset the amount by which the normal value exceeds the export price.

There is no obligation in the AD Agreement that requires importing countries to reduce dumping margins with amounts by which export prices exceeded normal value on other, non-comparable transactions. Nevertheless, the Panel found that the EC's methodology, which did not grant such reductions for non-comparable transactions, was an impermissible interpretation of the AD Agreement. Because the AD Agreement contains no such obligation, the Panel's rejection of the EC's methodology was erroneous and should be reversed by the Appellate Body.

The United States is of the view that the Panel correctly found that Article 2.2.2(ii) may be used to determine profit and SG&A amounts where there is only one other producer or exporter. The Panel was likewise correct in its finding that an investigating authority may freely choose among the alternative calculation methods in Article 2.2.2(i), (ii), and (iii), and was not required to make additional findings regarding the EC's objectivity and lack of bias in choosing the method contained in Article 2.2.2(ii), or in implementing that choice. The United States concurs with the Panel that the EC was not obligated to look outside the sample when determining SG&A and profit under Article 2.2.2(ii), and that Article 2.2.2(ii) does not prohibit an investigating authority from excluding below-cost sales from constructed value calculations of profit.

I. Introduction

1. The United States makes this third-participant submission in support of the European Communities' (EC) appeal in *European Communities – Antidumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R (October 30, 2000) (hereafter "Panel Report"). The United States supports the Panel Report with respect to the EC's calculation of selling, general, and administrative ("SG&A") and profit for constructed value purposes and, for that reason, opposes India's Appellant Submission.

2. The issue raised by the EC is one which has commonly (but inaccurately) been referred to as "zeroing" of negative margins. This term has been used to describe a methodology employed by the EC, the United States, and other WTO Members when calculating overall margins of dumping. Generally speaking, this methodology is comprised of the following steps:

- *Identification of Export Transactions* – the investigating authority determines the models, levels of trade, and bases for price adjustments on the export models.

- *Identification of Normal Value Transactions* – the investigating authority identifies the identical and/or similar models which will form the basis for normal value and the price adjustments for those transactions at the appropriate level of trade.

- *Weight Averaging* – export transactions and normal value transactions which are comparable are weight averaged on at least a model and level of trade basis.

- *Comparison* – the weighted average export prices are compared to the weighted average normal value for the identical or most similar model and level of trade.

- *Margins* – for the dumping margins calculated based on the above comparisons, duties may be collected by the importing Member, while duties are not collected based on comparisons for which export price exceeded normal value.

- *Administration* – in order to facilitate the collection of duties for these dumping margins, and/or to conduct an administrable antidumping duty process, an overall antidumping rate is established for assessment and/or cash deposit purposes. This rate is calculated by aggregating the margins of dumping and dividing that amount by the aggregate value of all merchandise subject to the investigation.

3. This methodology allows the authorities to collect no more or less than the aggregate amount of dumping calculated.

4. In its Report, the Panel found that such a methodology is an impermissible interpretation of the Antidumping Agreement ("AD Agreement"). That panel finding creates a new obligation found nowhere in the AD Agreement – requiring importing countries to offset dumping margins with amounts by which export prices exceed normal value on other, non-comparable transactions.

As we demonstrate in Section II below, the Panel's finding is erroneous and should be reversed by the Appellate Body.

5. Section III below addresses India's claims regarding constructed normal value calculations pursuant to Article 2.2.2(ii). The United States urges the Appellate Body to uphold the Panel's determination that Article 2.2.2(ii) may be applied where an investigating authority only has data concerning profit and SG&A for one other producer or exporter. The United States concurs with the Panel's finding that an investigating authority has discretion to choose among the alternative methods in Article 2.2.2(i) through (iii); based on this legal finding, India has no grounds to challenge the EC's choice or implementation of methods as biased or lacking in objectivity. The United States likewise is of the view that the Panel correctly determined that Article 2.2.2(ii) allows, but does not require, an investigating authority to exclude below-cost sales from constructed value calculations of profit. This decision is based on a permissible reading of the Agreement, and therefore should not be disturbed.

II. The EC's Margin Calculation Methodology is Consistent with Article 2.4.2.

6. In its Report, the Panel found that the European Communities:

> acted inconsistently with Article 2.4.2 of the AD Agreement in establishing the existence of margins of dumping on the basis of a methodology which included zeroing negative price differences calculated for some models of bed linen.[1]

7. The United States is of the view that the Panel erred in its analysis and conclusion in at least two significant ways.[2] First, in adopting its own interpretation of Article 2.4.2, the Panel failed to interpret the provision in question in its context and in light of its object and purpose, as required by Article 17.6(ii) of the AD Agreement. Second, while the Panel seemed to adopt a position against the EC's methodology based on a reading of Article 2.4.2 within the context of Article 2.1, the Panel failed to recognize that its reading does not comport with the remainder of Article 2.4.2.

8. An interpretation of Article 2.4.2, performed in accordance with customary rules of treaty interpretation, demonstrates that the EC's methodology of spreading margins of dumping across the value of all entries for purposes of calculating a single cash deposit or assessment rate is one permissible interpretation of that provision.

9. Article 31(1) of the Vienna Convention[3], which sets out one of the customary rules of treaty interpretation provides:

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[1] Panel Report, para. 6.118.

[2] The United States largely agrees with the positions taken by the EC in its Appellant Submission dated 11 December 2000. This submission elaborates on two of the arguments put forth by the EC. The omission of certain other arguments does not indicate that we disagree with those positions.

[3] *Vienna Convention on the Law of Treaties* ("*the Vienna Convention*"), done at Vienna, 23 May 1969, 1155 U.N.T.S. 221; 8 International Legal Materials 697 (1969).

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Neither India nor the Panel has argued that the EC's methodology is inconsistent with a good faith interpretation of the AD Agreement. In fact, the Panel explicitly recognized that Article 2.4.2 "does not, in so many words, prohibit 'zeroing.'"[4] Rather, the dispute centers on the ordinary meaning of the terms of Article 2.4.2, in their context and in the light of their object and purpose.

10. In making its erroneous finding, the Panel effectively created a new obligation which was not part of the AD Agreement. The Panel cannot interpret the AD Agreement in such a way that adds to or diminishes the rights and obligations provided in that agreement.[5] It is not the role of the Panel to make new commitments but to clarify existing provisions in accordance with customary rules of interpretation of public international law.[6]

11. Article 2.4.2 provides:

> Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-average or transaction-to-transaction comparison.

12. The first phrase of Article 2.4.2 announces its object and purpose, to insure a fair comparison of normal value and export price. It authorizes two equally permissible means to attain this goal: (1) a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions; and (2) a comparison of normal value and export prices on a transaction-to-transaction basis. A third option, the comparison of weighted average normal value to individual export prices is allowed under limited conditions.

A. *The Panel Failed to Interpret the Weight-average Comparison Provision of Article 2.4.2 in Context and in Light of its Object and Purpose.*

13. Article 2.4.2 does not require the use of average-to-average comparisons. The plain text of Article 2.4.2 permits a Member to determine the existence and amount of dumping on a transaction-to-transaction basis. An experts' report adopted by the GATT 1947 Contracting

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[4] Panel Report, para. 6.117.

[5] Dispute Settlement Understanding ("DSU"), Article. 3.2 and 19.2.

[6] DSU, Article 3.2.

Parties concluded that such a transaction-to-transaction methodology was desirable, but difficult to implement.[7] Therefore, an assessment of an averaging methodology logically would use as a benchmark the results that would be obtained by a transaction-to-transaction comparison.

14. The EC practice being challenged is not restricted by Article 2.4.2 because it arises at a step subsequent to the comparison of export price and normal value. It takes place at the stage when the product-specific margins are combined into an overall average rate of dumping.[8]

15. The fact that this practice occurs at a subsequent stage which is not covered by Article 2.4.2 is confirmed by the fact that Article 2.4.2 explicitly permits transaction-to-transaction comparisons and, in limited circumstances, average normal value to individual export price comparisons, without providing a methodology for combining margins calculated pursuant to those methodologies for cash deposit or assessment purposes.

16. The Panel's failure to address the totality of Article 2.4.2 illustrates the error of its reliance on Article 2.1 for providing the context to Article 2.4.2. Having found that Article 2.1 requires that a determination of dumping can only be established "for the product at issue, and not for individual transactions concerning that product, or discrete models of that product"[9] (an assertion which is not clearly evident from the text of Article 2.1 nor otherwise supported by the Panel), the Panel goes on to find that "'the margins of dumping' established under Article 2.4.2, [...] must relate to the ultimate question being addressed: whether the product is being dumped."[10]

17. The United States agrees with the Panel about the need for a relationship between the margins found pursuant to Article 2.4.2 and the ultimate question of dumping; however, the nature of that relationship is not detailed in the Agreement. That relationship cannot be dictated by the phrase "a weight average of prices of **all** comparable export transactions" in Article 2.4.2,[11] because Article 2.4.2 provides for two alternative methods of calculating dumping margins, without reference to the phrase quoted above. Thus, even if the Panel's reading of Article 2.1 is correct regarding a determination of dumping for "the product," the Panel also approved of the EC's use of multiple comparisons pursuant to Article 2.4.2; however, the AD Agreement does not dictate the methodology for combining those multiple comparisons to get to the overall dumping determination under Article 2.1.[12]

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[7] "The ideal method of fulfilling these principles [of Article VI] was to make a determination in respect of both dumping and material injury in respect of each single importation of the product concerned. This, however, was clearly impracticable, particularly as regards injury." Second Report of the Group of Experts on Anti-Dumping and Countervailing Duties, adopted 27 May 1960, BISD 9S/194, 195, paragraph 8.

[8] *See e.g., EC - Imposition of Anti-dumping Duties on Imports of Cotton Yarn from Brazil*, ADP/137, (4 July 1995) paras. 500-501 (finding the practice of "zeroing" not to be inconsistent with the Anti-dumping Code).

[9] Panel Report, para. 6.114.

[10] Id.

[11] Panel Report, para. 6.115 (emphasis added by Panel).

[12] To this end, we further note that Article 2.1 of the AD Agreement does not differ in any material way from its predecessor provision in the Antidumping Code which was applicable when a GATT Panel found the practice of spreading only positive margins over entered value in calculating the overall margin of dumping not to

18. When this subsequent stage is reached, the individual, product-specific differences between normal value and export price (whether weighted averages or individual transactions) may be positive or negative. If positive, they represent the aggregate amount of dumping duties that the importing country is permitted to collect for that transaction or group of transactions. If negative, they represent the amount by which the export price exceeded the normal value. However, the Agreement imposes no liability on the importing country to make payments (directly or in the form of offsets) to the importer or anyone else involved in the transaction for not dumping the merchandise in question. The negative difference between normal value and export price simply means that the dumping margin for that transaction or group of transactions is zero. Thus, for such products with no dumping margins, the amount of dumping duties which the importing country is permitted to collect is zero.[13]

19. Equally important, when the investigating authority calculates an overall, average rate of dumping, neither Article 2.4.2 nor any other Article of the Agreement requires that the importing country collect any less dumping duties than if the dumping duties were to be collected on a product-specific basis. Nevertheless, that would be the result if the Panel's interpretation of Article 2.4.2 were accepted. This problem may be illustrated with the following example (in which all values are in the same currency units and based on the same volume of goods):

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be inconsistent with that Code (see supra, note 8):

Antidumping Code	**Antidumping Agreement**
2.1 For the purpose of this Code a product is to be considered as being dumped, i.e. introduced into the commerce of anther country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.	2.1 For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

[13] Contrary to the Panel's assertion, there is no equivalence to "manipulating the individual export prices counted in calculating the weighted average, in order to arrive at a weighted average equal to the weighted average normal value." Panel Report, para. 6.115. The negative margins represent instances in which there is no dumping liability and, therefore, nothing to include in the calculation of the overall dumping margin.

	Aggregate Normal Value	Aggregate Export Price	Difference Between Export Price and Normal Value	Model-specific Aggregate Dumping Duties
Model 1	6000	5000	1000	1000
Model 2	1800	2000	-200	0
Model 3	3500	3000	500	500
Model 4	4500	5000	-500	0
Model 5	2300	2000	300	300
TOTAL	18100	17000	1100	1800

20. Based on the above figures, the overall, average rate of dumping is 10.59 percent (1800/17000). Moreover, the application of that dumping margin to the total import value (10.59 percent * 17000) would result in the collection of 1800 in dumping duties – no more and no less than the importing country is permitted to collect on a product-specific basis.

21. By contrast, if this calculation were to be performed based on the Panel's interpretation, the overall, average rate of dumping would be 6.47 percent (1100/17000). The application of that margin of dumping to the total import value (6.47 percent * 17000) would result in the collection of only 1100 in dumping duties. Stated another way, there would be an additional 700 in dumping which the importing country would not be permitted to remedy.[14]

22. The United States also disagrees with the Panel's reading of Article 2.4.2 as requiring dumping margins to be offset with amounts by which export prices exceeded normal value on other, non-comparable transactions. By having calculated margins of dumping based on groups of comparable export transactions, the EC attempted to ensure that fair comparisons were made between the export price and the normal value, taking into account the types of differences discussed in Article 2.4.[15] When combining these margins of dumping calculated on a comparable product basis, as the United States described above, calculating the overall margin of dumping by aggregating all positive margins over the aggregate entered value permits the importing Member to collect only the amount of dumping duties calculated and collectable as if the collection occurred on the comparable product basis. Offsetting dumping margins, as the Panel would require, would have the effect of combining the prices of comparable transactions with non-comparable transactions, obscuring the result of the product-specific comparisons. To the extent that the Panel's interpretation would render the use of the term "comparable" a nullity, the Panel's

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[14] As indicated in Article VI:2 of GATT 1994, the purpose of antidumping duties is to "offset or prevent dumping."

[15] The Panel agreed that it was appropriate for the EC to have made multiple comparisons on a model basis in this case. Panel Report, para. 6.117.

finding is inconsistent with general rules of treaty interpretation which call for giving effect to all terms in the treaty.[16]

B. *The Panel Failed to Account for the Remaining Provisions of Article 2.4.2.*

23. In the present case, the EC calculated margins of dumping by comparing the weighted average normal value to the weighted average export price. Consistent with the requirements of Article 2.4.2, the EC had the option to have calculated margins of dumping by comparing individual normal values with individual export prices. Alternatively, had certain conditions been met, the EC could have calculated margins of dumping by comparing weighted average normal values to individual export prices. In either case, the EC still would have combined those individual export price-based margins of dumping into an overall dumping margin. In such a case, Article 2.4.2 does not contain any restrictions or guidelines for that subsequent step.

24. Under the Panel's interpretation of Article 2.4.2, only when the EC elects to calculate margins of dumping by comparing weighted average normal value to weighted average export price does the Panel's requirement of offsetting dumping margins with amounts by which export price exceeds normal value on other, non-comparable transactions arise. This requirement arises from the Panel's erroneous reading of the phrase "all comparable export transactions." In reading that phrase, the Panel emphasizes the word "all" in stating its finding that the practice of including only positive margins fails to include all comparable export transactions in the calculation.[17] In emphasizing the term "all," the Panel loses sight of the fact that it is not "all export transactions" which must be included, but only "all **comparable** export transactions."[18]

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[16] The "fundamental principle of *effet utile* is that a treaty interpreter is not free to adopt a meaning that would reduce parts of a treaty to redundancy or inutility." *Automotive Leather*, at para. 6.25. Further, in *Reformulated Gasoline*, the Appellate Body noted that "[o]ne of the corollaries of the 'general rule of interpretation' in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of the treaty" (emphasis supplied). *Reformulated Gasoline*, at 23.

[17] See Panel Report at paras. 6.115-6.118, particularly para. 6.117.

[18] The negotiating history of the AD Agreement confirms this interpretation. The word "all" in the first sentence Article 2.4.2 first appeared in the Dunkel Draft issued in December 1991, as follows:

> [T]he existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all export transactions or by a comparison of normal value and export prices on a transaction to transaction basis. (*Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations,* GATT Doc. MTN.TNC/W/FA, at Article 2.4.2 (Dec. 20, 1991) (*Dunkel Draft).*)

The word "all," as modifying "export transactions," was viewed by many participants, including the United States, as a drafting error, not a new and intentional substantive change to the text of Article 2.4.2. Accordingly, in November 1993, the United States proposed to delete the word "all":

> Price Averaging
>
> Article 2.4 of the antidumping text properly requires that a fair comparison be made between the export price and the normal value, at the same level of trade and using sales made at as nearly as possible the same time. [...]
>
> Unfortunately, the clear direction which article 2.4 provides is clouded later in article 2.4.2. in describing the normal basis of comparison, article 2.4.2 states that "the existence of margins ...

25. Article 2.4.2 clearly states that averages must be limited to "comparable" transactions.[19] In conducting an anti-dumping investigation, where an investigating authority identifies two transactions which are not comparable, and are not made so, for example, through an adjustment pursuant to Article 2.4, then under Article 2.4.2 they must not be included in a single average. Consequently, the assumption underlying Article 2.4.2 is that most investigations will involve multiple average-to-average comparisons. Indeed, it will only be in the rare case in which every transaction is comparable to every other transaction, that the investigating authority will be permitted to construct a single average normal value and a single average export price. Thus, while the assumption of multiple comparisons underlies Article 2.4.2, Article 2.4.2 does not require a particular methodology for combining those multiple comparisons, regardless of whether they were based on average-to-average or transaction-to-transaction comparisons.

26. For these reasons, the Panel's finding that the EC's methodology for calculating the overall margin of dumping was impermissible should be reversed.

III. India's Claims Under Article 2.2.2

27. The United States concurs with the Panel's finding that the EC was entitled to apply Article 2.2.2(ii) where there was SG&A and profit data for only one other producer or exporter.[20] The Panel recognized that, in ordinary usage, as well as in the specific context of the AD Agreement, the plural form is understood to contain the singular; thus, it was permissible under Article 2.2.2(ii) to use data from a single producer or exporter. The United States likewise concurs with the Panel's finding that it was permissible for the EC to exclude sales not in the ordinary course of trade from the determination of profit amount to be used in calculation of a

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shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all export transactions ..." (emphasis added). Even though the introductory clause to this subparagraph indicates that the comparison is to be made "subject to the provisions governing fair comparison in paragraph 4 of this Article," the United States is concerned that the use of the term "all" may imply that average export price is to be established on the basis of sales both within and outside of the category of comparison. To clarify this, we propose that the word "all" simply be deleted. (*Explanation of U.S. Proposals to Amend The Draft Antidumping Agreement*, at p. 7-8 (Nov. 26, 1993).)

Subsequently, the phrase in question was modified by the addition of the word "comparable," which satisfied the concerns expressed by the United States.

[19] The term "comparable" is not itself defined in the AD Agreement, although Article 2.4 does address the issue of comparability. Indeed, the WTO panel in *United States - Measures Affecting the Importation, Internal Sale and Use of Tobacco*, found that the word comparable is inherently ambiguous. (Panel Report on *United States -- Measures Affecting the Importation, Internal Sale and Use of Tobacco*, adopted 4 October 1994, BISD 41S/131 ("*U.S. -- Tobacco*").) As stated in the panel report, "it appeared to the Panel that the term 'comparable', including the ordinary meaning thereof, was susceptible of a range of meanings." (*Id.*, 41S/176, para. 123.) Although the panel in *US - Tobacco* was looking at the word in a different context, the fundamental finding is no less relevant in the present case: the ordinary meaning of the word "comparable" is subject to a range of permissible interpretations.

[20] Panel Report, para. 6.75.

constructed normal value.[21] Both the text and the context of Article 2.2.2(ii) demonstrate that the EC's reading is permissible under the Agreement.

A. *The Panel Correctly Decided That Article 2.2.2(ii) May Be Applied Where There Is Data Concerning Profit and SG&A For Only One Other Producer or Exporter.*

28. India argues that Article 2.2.2(ii) clearly excludes the use of profit and SG&A data from a single company because the relevant language of the provision is in the plural, referring to a "weighted average," "amounts," and "exporters and producers."

29. The term "weighted average" is not determinative of this issue, but simply makes clear the methodology to be employed when there are two or more other companies from which the SG&A and profit amounts will be utilized.[22] The word "amounts" in Article 2.2.2(ii) likewise is not determinative, since it refers back to language in the *chapeau* referring to the "amounts for administrative, selling and general costs and for profits." In this context, "amounts" refers to two things: the SG&A amount and the profit amount; it contains no guidance as to whether these amounts are to be drawn from a single company or multiple companies.

30. The phrase "other exporters or producers" also is not determinative, and cannot be read to exclude a single producer or exporter without creating absurd results throughout the Agreement, which frequently uses plurals to embrace both the singular and the plural of the thing referred to.[23] Interpretations of the Agreement which lead to such absurd results should be avoided.[24]

31. India argues that the Panel erred in comparing the plural forms of Article 2.2.2(ii) to those found in Articles 4.1 and 9.4(i) of the Anti-Dumping Agreement, because the terms "producers" and "exporters" are not legal terms of art that must be interpreted consistently.[25] As the Panel correctly observed, plural forms are understood to contain the singular case as well when the context so requires, both in everyday usage and in specific provisions of the AD Agreement.[26]

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[21] Id., para. 6.87.

[22] In the Panel's view, the "weighted average" language is relevant where information from more than one exporter or producer is available to be considered, and "eliminates the possibility of a result-oriented or otherwise biased or discriminatory choice among available data." *See* Panel Report, para. 6.71.

[23] As the United States noted in its Third-Party Submission of 3 April, 2000, if the use of a plural term necessarily excludes the singular, then a domestic industry composed of a single producer could never obtain relief from dumping; if there is only a single exporter or producer, it would not be entitled to some of the procedural safeguards contained in Article 6 of the Agreement; and a single other exporter or producer could never be the basis for a profit cap pursuant to Article 2.2.2(iii). *See U.S. Third-Party Submission* at para. 7, notes 6 through 9.

[24] *See Vienna Convention,* Articles 31 and 32 (a treaty should be interpreted in good faith and supplementary means of interpretation may be used when the interpretation leads to absurd or unreasonable results).

[25] India Appellant Submission at para. 6(d), p. 8.

[26] The mere availability of "alternatives" to Article 2.2.2(ii) does not somehow prove that its use of plural language could not possibly include the singular case, nor does it otherwise render the comparison of Articles 2.2.2(ii) and 4.1 inapposite.

32. India claims that one other provision uses the plural form where no singular could have been intended – the Article 6.12 references to "industrial users" and "consumer organizations."[27] Although the provision appears to prevent an administering authority from limiting participation to a single user or organization, it is doubtful that this provision would be rendered inoperative if there were only one industrial user or consumer organization in a given case. Because this provision does not completely exclude the singular, India's counter-example is inapposite.[28]

33. India also claims that the Panel violated Article 17.6(i), because it failed to undertake an examination into whether the EC's choice of the second option (Article 2.2.2(ii)) was objective and fair. According to India, the fact that there were "viable alternatives" to the EC's choice – including Articles 2.2.2(i) or 2.2.2(iii) – indicates that the EC's decision "cannot have been, and was not, unbiased and objective," because "the criteria for option (ii) were not fulfilled."[29]

34. The Panel was not required to make a separate finding that the EC's choice of the second option was objective and fair. Although the Panel did not make an explicit finding that the EC's evaluation of the facts was unbiased and objective, it examined the facts related to India's claim, finding that the EC did not "arbitrarily" pick one producer's data to use in its calculation, because there was only one producer whose data was available for the calculation under Article 2.2.2(ii). India merely disagrees with the result.

B. *Article 2.2.2(ii) Permits an Investigating Authority to Exclude Below-cost Sales from Constructed Value Calculations of Profit.*

35. India contends that the Panel erred in finding it permissible under Article 2.2.2(ii) to exclude sales below cost from constructed value profit calculations, because below-cost sales are not mentioned in the text of Article 2.2.2(ii), and because the context of this provision does not proscribe the use of data from below-cost sales as a basis for constructed value profit calculations.[30]

36. Regarding the text, the Panel noted that Article 2.2.2(ii) makes no reference to sales in the ordinary course of trade, and:

> Thus, we would agree with the view that exclusion of sales not in the ordinary course of trade is **not mandated** by that provision. However, we do not understand the European Communities to be arguing that it was **required** to exclude those sales in its determination of the profit rate, merely that it was

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[27] India Appellant Submission at para. 6(f), pp. 8-9.

[28] India does not cite any further examples from the AD Agreement, but instead cites two unrelated provisions of the GATT and TBT Agreements, respectively, regarding "contracting parties" and "other Members." Even if India is correct about the use of plurals in these two provisions, the provisions are from different agreements and their meaning is determined by a different context.

[29] *See* India Appellant Submission, paras. 8-10, pp. 10-11.

[30] India also argues that, on the facts in this case, "it does make sense, for the purpose of Article 2.2.2(ii), to take into account the sales at a loss for the profit determination." *See* India Appellant Submission, para. 19, p. 16. We do not address its factual assertions, but confine our analysis to the legal concerns relevant here.

> **permitted** to do so, based on the general principle allowing the exclusion of sales not in the ordinary course of trade from the calculation of normal value.[31]

Contrary to India's charges, neither the EC nor the Panel was required to impute to the Agreement "words that are not there," nor to import "concepts that were not intended,"[32] in order to conclude that below-cost sales may be excluded from constructed value calculations under Article 2.2.2(ii). Nothing in the text requires this exclusion, but nothing in the text forbids such exclusion.

37. The concept of the ordinary course of trade is integral to the very definition of dumping.[33] Consistent with the basic definition of dumping that is contained in Article 2.1, when sales in the domestic market are in such low volumes that they do not permit a proper comparison, or, when there are no sales of the like product in the ordinary course of trade in the exporting country, Article 2.2 of the Agreement provides for the use of a constructed normal value. When below-cost sales have been made, Article 2.2.1 makes clear that investigating authorities are under no obligation to consider them in the determination of normal value, provided that certain conditions have been met.

38. Moreover, it is consistent with the overall operation of Article 2 of the Agreement to exclude the profit on sales not in the ordinary course of trade from the figures used pursuant to Article 2.2.2(ii). Indeed, excluding sales below cost avoids the creation of perverse incentives that otherwise would reward exporters and producers with the greatest amount of sales not in the ordinary course of trade.[34] The United States is of the view that such an unfair result could not have been intended.

39. India argues that, because the *chapeau* of Article 2.2.2 is the only place where an "ordinary course" restriction is specifically linked to SG&A and profit calculation, it would be "logically unsound" for the Panel to "read into" the three alternatives a restriction only included in the *chapeau*, since the alternatives are available only when the *chapeau* does not apply.

40. The United States submits that the Panel correctly determined that a basic principle of Article 2.2 – that data associated with sales that are unprofitable are unreliable – may properly be

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[31] Id., para. 6.84 (emphasis added).

[32] *See* India Appellant Submission, para. 24, n. 28, p. 19.

[33] Under Article 2.1 of the Agreement, a product is dumped when "the export price of the product exported from one country to another is less than the comparable price, **in the ordinary course of trade**, for the like product when destined for consumption in the importing country." (Emphasis added).

[34] This simply means that in an investigation involving two producers (A and B), if producer A has no domestic market sales in the ordinary course of trade, and producer B has 50 percent of its domestic market sales in the ordinary course of trade, producer A will be assigned the same profit rate as producer B, rather than a more favorable rate. If producer B's profit rate on the ordinary course of trade sales was 15 percent, but on all domestic market sales (including below-cost sales) was 4 percent, it would be illogical to interpret the Agreement as requiring the use of the 15 percent profit for producer B, but to use the profit rate of 4 percent for producer A (the company that made all of its domestic sales outside the ordinary course of trade).

understood to apply to Article 2.2.2(ii).[35] It is reasonable to construe the *chapeau* of Article 2.2.2 as prohibiting sales outside the ordinary course of trade from being considered in calculating profit under that provision, because it expressly states that "the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales **in the ordinary course of trade**."[36] At the same time, it is reasonable to read Article 2.2.2(ii) as allowing, but not requiring, such sales to be excluded from these calculations, pursuant to Article 2.2.1.[37] Therefore, it is unnecessary to refer to supplementary means of interpretation in the attempt to discredit the Panel's correct interpretation of Article 2.2.2(ii) and its related provisions.[38]

41. India argues that it is appropriate not to apply the "ordinary course" exclusion to producers whose own data are not used in constructed value calculations pursuant to Article 2.2.2(i) - (iii).[39] Specifically, India claims that "...administering authorities **should** be more circumspect with the use of SG&A and profits for producers whose own data are not used, as opposed to a producer whose own data **are** used," because otherwise, "producers whose own data are not used could never know in advance whether they are dumping or not since their dumping margin depends on data beyond their knowledge."[40] This argument lacks merit, because there is no reason to assume producers would always know the SG&A and profit rates for other producers, nor does this justify providing such a benefit to those producers whose own data are not used.

42. In sum, the United States is of the view that the Panel correctly determined that it is permissible, though not mandatory, for an administering authority to exclude sales outside the ordinary course of trade from constructed value calculations made pursuant to Article 2.2.2(ii) of the Agreement. Nothing in the Agreement requires an administering authority to include such sales in this context.

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[35] Panel Report, paras. 6.83-6.85.

[36] *See* Article 2.2.2 (emphasis added).

[37] *See* Id., para. 6.84, n. 39. As noted above, Article 2.2.1 makes clear that when below cost sales have been made, the investigating authorities are allowed to exclude them from the determination of normal value, provided that certain conditions are met. Even if the conditions are met, Article 2.2.1 imposes no obligation to exclude below cost sales. By contrast, the *chapeau* of Article 2.2.2 specifically requires sales in the ordinary course of trade as the basis for constructed normal value SG&A and profit. Because there is no such restriction in alternative method described under Article 2.2.2(ii), and because Article 2.2.1 contains no restriction that would prevent it from applying to Article 2.2.2(ii), it is reasonable to interpret Article 2.2.2(ii) as allowing exclusion of below-cost sales, pursuant to Article 2.2.1, when the conditions of that provision are met.

[38] The United States further takes issue with India's contention that the "ordinary course" language may not be applied to Article 2.2.2(ii) because it would lead to "absurd" or "unreasonable" results if applied to options (i) and (iii). It is not clear that reading the "ordinary course" language into Article 2.2.2(ii) requires it to be read into Articles 2.2.2(i) and (iii). Moreover, the issue before the Appellate Body is only whether sales below cost may be excluded under Article 2.2.2(ii); thus, we need not address here whether sales outside the ordinary course of trade may be excluded under Article 2.2.2(i) or (iii).

[39] India Appellant Submission, paras. 30-31, pp. 24-25.

[40] Id., para. 31, p. 25.

IV. Conclusion

43. For the foregoing reasons, the United States respectfully submits that the Panel should be reversed with respect to the EC's calculation of the overall margin of dumping and affirmed with respect to the determination of SG&A and profit for purposes of constructed value.