

*European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linens
(Recourse to Article 21.5 of the DSU by India)*

ORAL STATEMENT OF THE UNITED STATES
AT THE THIRD-PARTY SESSION

September 11, 2002

1. Thank you, Mr. Chairman, and members of the Panel. It is a pleasure to appear before you today to present the views of the United States in this proceeding. The purpose of this oral statement is to highlight certain aspects of the issues addressed in our written submission, and to comment on some issues in India's submission.

I. The Provisions of Antidumping Agreement Article 5.7 Do Not Apply to Implementation Measures

2. As the United States explained in its third party submission, the text of Article 5.7 of the Antidumping Agreement specifies that the obligation applies in two circumstances – in the decision whether or not to initiate an investigation of dumping and injury and during the course of that investigation. The absence of reference to other circumstances, such as a proceeding to bring a measure into compliance with adverse DSB recommendations and rulings, indicates that Article 5.7 does not apply in those other circumstances.

3. In support of its view to the contrary, India cites to the Panel Report in *Certain Corrosion Resistant Carbon Steel Flat Products from Germany*.¹ In that dispute, the panel, with one member dissenting, concluded that the *de minimis* requirements of Article 11.9 of the *Agreement on Subsidies and Countervailing Measures* (“SCM Agreement”), which explicitly reference only the investigation stage, also apply in a five-year review under Article 21.3 of the SCM Agreement.

4. The United States believes the conclusions of the *Corrosion Resistant* panel are based upon erroneous findings on issues of law and related legal interpretations, and has appealed the *Corrosion Resistant* panel’s findings on the pertinent issue to the Appellate Body. In this respect, the United States notes that the report of the panel in the *Corrosion Resistant* dispute is at odds with the report of the panel in the *Korea DRAMs* dispute.² As the panel in *Korea DRAMs* concluded in reference to the fact that Article 5 of the Antidumping Agreement is entitled *Initiation and Subsequent Investigation*, “the term ‘investigation’ means the investigative phase leading up to the final determination of the investigating authority.”³

5. The United States’ view of the correct law is and has been consistent in the current Article 21.5 proceeding, in the *Korea DRAMs* dispute and in the *Corrosion Resistant* dispute. In all three cases, the fact that the text of an article (here Article 5.7 of the Antidumping Agreement)

¹ WT/DS213/R (Circulated July 3, 2002).

² *United States - Anti-dumping Duty On Dynamic Random Access Memory Semiconductors (DRAMs) Of One Megabit Or Above From Korea* (“*Korea DRAMs*”), WT/DS99/R, Report of the Panel adopted 19 March 1999, para. 6.40.

³ *Korea DRAMs*, para. 6.48, n. 494.

explicitly delineates the circumstances to which it applies, but contains no reference to certain other circumstances (here the circumstances occurring after the initiation and initial investigations) must mean something. The ordinary meaning of the absence of such a reference is simply that there is no requirement to apply the Article 5.7 simultaneity requirements to measures taken to comply with DSB recommendations and rulings.

6. In any event, the policy reasons articulated by the two-panelist majority in the *Corrosion Resistant* case simply are not present in the current case. In the *Corrosion Resistant* dispute, the panel was interpreting two provisions addressing the minimum requirements that investigating authorities must follow when they initially conduct an original investigation and a sunset review. In contrast, the instant case involves the question of what types of actions may be taken to correct an antidumping determination that has already been the subject of a complete investigation, if a Member chooses to reconsider that determination in order to bring the measure into compliance with the DSB recommendations and rulings.

7. India appears to recognize that Article 5.7 does not impose a blanket requirement for simultaneous consideration of dumping and injury in all proceedings. It admits that Article 5.7 would permit a Member, upon implementing a DSB recommendation or ruling addressing only dumping or only injury, to reconsider only the dumping findings or only the injury findings.⁴ India fails to explain how Article 5.7 can be read *not* to require a simultaneous consideration of

⁴ India's Second Written Submission at para. 118.

dumping and injury in response to *some* DSB recommendations and rulings, yet to require reconsideration in response to certain other DSB recommendations and rulings.

8. If a Member chooses to implement DSB recommendations and rulings by reconsidering a dumping determination, neither the Antidumping Agreement nor the DSU requires investigating authorities to include in their reconsideration findings that were not found to be inconsistent with the covered agreements. Furthermore, requiring investigating authorities to go beyond the scope of the DSB recommendations and rulings in the context of implementation could also create inconsistencies with Article 6.9 of the Antidumping Agreement, which requires authorities to inform all interested parties of the essential facts under consideration in sufficient time for the parties to defend their interests.

9. Finally, we note that India's argument would require an investigating authority to reconsider every aspect of a determination when it implements DSB recommendations and rulings that are applicable only to certain aspects of that determination. If that were the rule, it would greatly expand the time necessary to comply with recommendations and rulings regarding antidumping and countervailing measure determinations, contrary to one of the central objectives of the DSU, as described in Article 21.1, which is to secure prompt compliance with the recommendations and rulings of the DSB.

II. Comparison of Antidumping Agreement and Safeguards Agreement

10. As India notes, the texts of Article 3.5 of the Antidumping Agreement and Article 4.2(b) of the Safeguards Agreement are not identical.⁵ The United States agrees with India that the standard of causation applicable in disputes arising under the Safeguards Agreement should not be transposed to disputes arising under the Antidumping Agreement.

11. Likewise, the Panel should reject India's efforts to transpose the *Line Pipe* Appellate Body finding concerning Article 5.1 of the Safeguards Agreement onto its interpretation of Article 11.1 of the Antidumping Agreement.⁶ The texts of the two provisions are not, as India asserts, similar. Article 5.1 of the Safeguards Agreement addresses the nature of the measure that the Member takes in the first instance "to remedy serious injury and to facilitate adjustment." Article 11.1 of the Antidumping Agreement addresses the "duration and review" of antidumping duties that have already been issued. Furthermore, in an antidumping duty action, unlike the measure contemplated under Article 5.1 of the Safeguards Agreement, the Member does not have to choose among a quota, a tariff-rate quota, and a tariff in taking action.

⁵ India's Second Written Submission at paras. 196-197.

⁶ India's Second Written Submission at para. 208.

III. Weight Averaging

12. With respect to India's claim that the EC improperly used sales value as the basis for weight averaging sales, general and administrative expenses ("SG&A") as well as profit, the Antidumping Agreement does not specify whether sales value or sales volume must or may be the weighing factor. Article 2.2.2(ii) of the Antidumping Agreement is silent as to the type of weighting factor to be used. As both sales value and sales volume represent permissible bases for weight-averaging these figures, the Member conducting an investigation of dumping retains the discretion to choose between them. If the Panel were to require use of a particular method, it would add to the obligations to which the WTO Members have agreed, in direct contravention of Article 3.2 of the DSU.

13. India suggests that Article 17.6 of the Antidumping Agreement may have been improperly applied by failing to first interpret Article 2.2.2(ii) of the Antidumping Agreement in accordance with the customary rules of interpretation of public international law. India's argument, however, is premised on its assertion that Article 2.2, footnote 2, Article 2.2.1 and Article 6 of the Antidumping Agreement somehow provide relevant context for the interpretation of Article 2.2.2(ii). These Articles, however, are wholly unrelated to the averaging of SG&A and profit. To the extent that the Panel finds it relevant that these provisions specifically refer to volume as the basis for evaluating a requirement, the fact that Article 2.2.2(ii) of the Antidumping Agreement does not refer to volume should be considered equally relevant.

IV. Conclusion

14. This concludes my presentation. Thank you again for this opportunity to express our views.