

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

(WT/DS141)

Responses of the United States to Questions from the Panel

23 September 2002

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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

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.

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 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

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

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 U.S. 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.

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 antidumping 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.*

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 antidumping 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 antidumping 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 antidumping 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*

⁷ The New Shorter Oxford English Dictionary (1993).

⁸ *Id.*

*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 antidumping 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 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 U.S. 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 –

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 - Antidumping 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.

16. For example, the U.S. 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 antidumping 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?

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

¹¹ The New Shorter Oxford English Dictionary.

“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).