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

AB-2000-13

Report of the Appellate Body

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WORLD TRADE ORGANIZATION
APPELLATE BODY

**European Communities – Anti-Dumping Duties
on Imports of Cotton-Type Bed Linen from
India**

European Communities, *Appellant/Appellee*
India, *Appellant/Appellee*

Egypt, *Third Participant*
Japan, *Third Participant*
United States, *Third Participant*

AB-2000-13

Present:

Bacchus, Presiding Member
Abi-Saab, Member
Feliciano, Member

I. Introduction

1. The European Communities and India appeal certain issues of law and legal interpretations in the Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* (the "Panel Report").¹ The Panel was established to consider a complaint by India with respect to definitive anti-dumping duties imposed by the European Communities on imports of cotton-type bed linen.

2. On 13 September 1996, the European Communities initiated an anti-dumping investigation into certain imports of cotton-type bed linen from, *inter alia*, India.² The European Communities made its preliminary affirmative determination of dumping, injury and causal link on 12 June 1997, and imposed provisional anti-dumping duties with effect from 14 June 1997.³ The European Communities made its final affirmative determination of dumping, injury and causal link on

¹WT/DS141/R, 30 October 2000.

²Panel Report, para. 2.3.

³Commission Regulation (EC) No 1069/97 of 12 June 1997 imposing a provisional anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan, Official Journal, No L 156, 13 June 1997, p. 11.

28 November 1997, and imposed definitive anti-dumping duties with effect from 5 December 1997.⁴ The factual aspects of this dispute are set out in greater detail in the Panel Report.⁵

3. The Panel considered claims by India that, in imposing the anti-dumping duties on imports of cotton-type bed linen, the European Communities acted inconsistently with Articles 2.2, 2.2.2, 2.4.2, 3.1, 3.4, 3.5, 5.3, 5.4, 12.2.2, and 15 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "Anti-Dumping Agreement").⁶

4. In its Report, circulated to Members of the World Trade Organization (the "WTO") on 30 October 2000, the Panel concluded that:

... the European Communities did not act inconsistently with its obligations under Articles 2.2, 2.2.2, 3.1, 3.4, 3.5, 5.3, 5.4, and 12.2.2 of the AD Agreement in:

- (a) calculating the amount for profit in constructing normal value (India's claims 1 and 4),
- (b) considering all imports from India (and Egypt and Pakistan) as dumped in the analysis of injury caused by dumped imports (India's claims 8, 19, and 20),
- (c) considering information for producers comprising the domestic industry but not among the sampled producers in analyzing the state of the industry (India's claim 15, in part),
- (d) examining the accuracy and adequacy of the evidence prior to initiation (India's claim 23),
- (e) establishing industry support for the application (India's claim 26), and
- (f) providing public notice of its final determination (India's claims 3, 6, 10, 22, 25 and 28).⁷

... the European Communities acted inconsistently with its obligations under Articles 2.4.2, 3.4, and 15 of the AD Agreement in:

⁴Council Regulation (EC) No 2398/97 of 28 November 1997 imposing a definitive anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan, Official Journal, No L 332, 4 December 1997, p. 1.

⁵Panel Report, paras. 2.1-2.11.

⁶The Panel did not examine the claims withdrawn by India in the course of the Panel proceedings and declined to consider certain claims falling outside the scope of its terms of reference. Furthermore, the Panel did not deem it necessary nor appropriate to make findings on a number of other claims in light of considerations of judicial economy. See Panel Report, para. 7.3.

⁷Panel Report, para. 7.1.

- (g) determining the existence of margins of dumping on the basis of a methodology incorporating the practice of zeroing (India's claim 7),
- (h) failing to evaluate all relevant factors having a bearing on the state of the domestic industry, and specifically all the factors set forth in Article 3.4 (India's claim 11),
- (i) considering information for producers not part of the domestic industry as defined by the investigating authority in analyzing the state of the industry (India's claim 15, in part), and
- (j) failing to explore possibilities of constructive remedies before applying anti-dumping duties (India's claim 29).⁸

5. The Panel recommended that the Dispute Settlement Body (the "DSB") request the European Communities to bring its measure into conformity with its obligations under the *Anti-Dumping Agreement*.⁹

6. On 1 December 2000, the European Communities notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed a Notice of Appeal pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*"). On 11 December 2000, the European Communities filed its appellant's submission.¹⁰ On 18 December 2000, India filed an other appellant's submission.¹¹ On 4 January 2001, Egypt filed a third participant's submission. On 8 January 2001, India and the European Communities each filed an appellee's submission. On the same day, Japan and the United States each filed a third participant's submission.¹²

7. The oral hearing in the appeal was held on 24 January 2001. The participants and third participants presented oral arguments and responded to questions put to them by the Members of the Division hearing the appeal.

⁸Panel Report, para. 7.2.

⁹Panel Report, para. 7.5.

¹⁰Pursuant to Rule 21 of the *Working Procedures*.

¹¹Pursuant to Rule 23(1) of the *Working Procedures*.

¹²Following a joint request by the European Communities and India, the Division hearing the appeal decided on 12 December 2000, pursuant to Rule 16(2) of the *Working Procedure* and in the light of the "exceptional circumstances" in this appeal, to extend the time-period for filing the appellee's and third participant's submissions from 2 January 2001 to 8 January 2001.

II. Arguments of the Participants and the Third Participants

A. *Claims of Error by the European Communities – Appellant*

1. Article 2.4.2 of the *Anti-Dumping Agreement* – Practice of "zeroing"

8. The European Communities appeals the finding of the Panel that the European Communities acted inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement* by "zeroing" the "negative dumping margins" established for certain models or product types of cotton-type bed linen – the product under investigation – when calculating the overall rate of dumping for bed linen. The European Communities alleges the following specific errors committed by the Panel in reaching its finding.

9. The European Communities first claims that the Panel, in making its finding, did not follow the rules of interpretation of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*").¹³ In particular, the Panel did not begin its analysis with the text of the provision at issue, Article 2.4.2, but, rather, with another provision, Article 2.

10. Next, the European Communities submits that the interpretation of the Panel fails to give proper meaning to the word "comparable" in Article 2.4.2. Article 2.4.2 requires only that weighted average normal value be compared with weighted average export prices for "comparable" transactions. By determining a dumping margin for individual product types, i.e., for "comparable" transactions, this is precisely what the European Communities did.

11. Furthermore, the European Communities contends that in this case, the calculation of the *overall* rate of dumping for the product under investigation does not fall within the express terms of Article 2.4.2. Article 2.4.2 provides no guidance as to how the "dumping margins" determined for individual product types should be combined in order to calculate an overall rate of dumping for the product under investigation.

12. The European Communities then argues that the Panel's interpretation is based on the erroneous premise that dumping margins can be established only for the *product* under investigation. The concept of "dumping margin", as used in the *Anti-Dumping Agreement*, may refer not only to the dumping margin for the *product* under investigation, but also to the dumping margin established for each *product type* or for each *individual transaction*.

¹³Done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679.

13. The European Communities further claims that the Panel's interpretation would distort price comparability and disregard the notion of "normal value", as the existence of dumping margins would depend on the product mix sold by the exporter. By requiring "positive dumping margins" to be offset by "negative dumping margins", the Panel is effectively requiring comparison of a weighted average normal value for *all product types* of bed linen with a weighted average export price for *all product types*.

14. In addition, the European Communities submits that the Panel's finding would disadvantage Members applying anti-dumping duties on a "prospective" basis because a Member applying anti-dumping duties "retrospectively" is not required to give credit for transactions with a "negative dumping margin". Another result of the interpretation of the Panel is that Members would not be able to counter dumping targeted to certain product types.

15. Finally, the European Communities argues that the Panel failed to apply the standard of review set out in Article 17.6(ii) of the *Anti-Dumping Agreement*. In particular, in interpreting Article 2.4.2, the Panel never referred to Article 17.6(ii), and did not determine whether Article 2.4.2 admits of more than one permissible interpretation.

B. *Arguments of India – Appellee*

1. Article 2.4.2 of the *Anti-Dumping Agreement* – Practice of "zeroing"

16. India submits that in interpreting Article 2.4.2 of the *Anti-Dumping Agreement*, the Panel properly followed the rules of interpretation of the *Vienna Convention*. Article 2.4 and the remainder of Article 2 of the *Anti-Dumping Agreement* constitute the context of Article 2.4.2, since the entire Article relates to the determination of whether dumping exists. Accordingly, the Panel properly began its analysis with the text of Article 2.4.2 and correctly considered it in its context.

17. Next, India is of the view that the Panel correctly interpreted the word "comparable" in Article 2.4.2 of the *Anti-Dumping Agreement* in the light of its context. Even assuming that the word "comparable" carries with it a different meaning in Article 2.4.2, it does not follow that zeroing of these "comparable" data is allowed. The European Communities incorrectly represented the historical background of the word "comparable" and of Article 2.4.2. India believes that the addition of this word in the last phase of the Uruguay Round negotiations does not mean that "comparable" has a different meaning than in Article VI of the GATT 1994 or the rest of Article 2 of the *Anti-Dumping Agreement*.

18. India also claims that the Panel rightly applied Article 2.4.2 to the calculation of the overall rate of dumping for the product under investigation. The calculation of the amount of dumping for various models or types of the product under investigation is not separate from the calculation of the dumping margin for the product under investigation. Both fall within the terms of Article 2.4.2. Furthermore, the drafting history does not support the European Communities' view of Article 2.4.2 as allowing the practice of "zeroing".

19. Next, India argues that the Panel correctly determined that the concept of "dumping margin" in Article 2.4.2 of the *Anti-Dumping Agreement* refers only to the dumping margin established for each product, and not for each model of that product, or for each individual transaction. India distinguishes the *dumping results or amounts*, that is, the differences between the normal value and export price on a per type basis, and the *dumping margin*, that is, the final expression of the total of these amounts (for the product, for a particular producer). It is clear from Articles 2.1 and 2.2 that a "dumping margin" is to be calculated for the "product under investigation".

20. Moreover, the interpretation of the Panel neither distorts price comparability nor disregards the notion of "normal value". For India, the finding of the Panel does not disadvantage the importing Members applying anti-dumping duties on a prospective basis. Results under a prospective system should not necessarily be the same as under a retrospective system and a retrospective system should not necessarily form a bench mark for the prospective system.

21. With regard to the question whether the Panel's finding would preclude Members from countering dumping targeted to certain product types, India's view is that the Panel's finding rightly disallows Members to do so. The text of Article 2.4.2 does not provide for the possibility to counter dumping targeted to certain product types.

22. Finally, India believes that the Panel applied the appropriate standard of review pursuant to Article 17.6(ii) of the *Anti-Dumping Agreement*. The Panel was not faced with a choice between multiple "permissible" interpretations, requiring deference, because the ordinary meaning of the terms of Article 2.4.2, in their context and in the light of the object and purpose of the *Anti-Dumping Agreement*, is clear.

C. *Claims of Error by India – Appellant*

1. Article 2.2.2(ii) of the *Anti-Dumping Agreement* – Data from "other exporters or producers"

23. India argues that the Panel erred in finding that Article 2.2.2(ii) of the *Anti-Dumping Agreement* may be applied in circumstances where data is available for only one other exporter or

producer. The Panel's ruling to this effect is inconsistent with the rules of treaty interpretation in the *Vienna Convention*.

24. India stresses that Article 2.2.2(ii) refers to the "weighted average" of the "amounts" incurred and realized by other "exporters or producers". The use of the plural form of "amounts" and "exporters or producers", in combination with the reference to a "weighted average" of the "amounts", indicates that figures for multiple exporters or producers must be available if Article 2.2.2(ii) is to be relied on. The Panel's conclusion that Article 2.2.2(ii) may be applied where data is available for only one exporter or producer ignores the clear meaning of these words.

25. India further argues that the Panel should have examined whether the choice of the European Communities of the method to calculate the amounts for administrative, selling and general costs and for profits set out in Article 2.2.2(ii) was "objective and fair". Article 17.6(i) of the *Anti-Dumping Agreement* requires that the evaluation of the investigating authorities of the facts be "unbiased and objective". With viable alternatives, such as Article 2.2.2(i) and Article 2.2.2(iii), available, the insistence of the European Communities on using the second option cannot have been "unbiased and objective". By failing to consider whether this choice of methodology was proper, the Panel erred in law.

26. Finally, India contends that the finding of the Panel that the European Communities was not obligated to look at available information outside the sample is not only inconsistent with the standard of review set out in Article 17.6(i), but is also incompatible with the later finding of the Panel that "it is not possible to have an objective evaluation of the evidence if some of the evidence is required to be ignored, even though it relates precisely to the issues to be resolved."¹⁴ In the circumstances of this case, data for an additional producer was available to the European Communities in the "reserve sample" it had established for the investigation. Information from this producer should have been taken into account when relying on the methodology provided in Article 2.2.2(ii). India recalls that, in examining the question of injury to the domestic industry, the European Communities relied on information from outside the sample, and the Panel upheld this decision by the European Communities. Failure to take into account the available information of an exporting producer included in the reserve sample for dumping, while simultaneously taking into account information outside the sample when establishing whether injury to the domestic industry had occurred, does not constitute an "unbiased and objective" investigation. The Panel's failure to reach this conclusion violates the standard of review set out in Article 17.6(i).

¹⁴Panel Report, para. 6.181.

2. Article 2.2.2(ii) of the *Anti-Dumping Agreement* – "actual amounts incurred and realized"

27. The Panel found that it is permissible to exclude sales outside the ordinary course of trade in calculating amounts for administrative, selling and general costs ("SG&A") and for profits under Article 2.2.2(ii) of the *Anti-Dumping Agreement*. According to India, such finding is contrary to the text and context of Article 2.2.2(ii). The text of Article 2.2.2(ii) explicitly refers to the "amounts incurred and realized", whereas, by contrast, the text of the chapeau of Article 2.2.2 requires to consider the relevant data "in the ordinary course of trade". Nothing in the terms of Article 2.2.2(ii) suggests that only "amounts" of profitable sales are concerned. Article 2.2.2(ii) simply does not contain an "ordinary course of trade" restriction.

28. India contends that the context of Article 2.2.2(ii) confirms this interpretation. It would be illogical to read into the three alternative options a principle appearing in the chapeau of Article 2.2.2, since the alternative options come into play when the chapeau does not apply. Further, none of the main principles contained in Articles 2.1 and 2.2 contain any specific "ordinary course of trade" requirement with regard to the calculation of amounts for SG&A and profits. According to India, the negotiating history of the *Anti-Dumping Agreement* supports its view on this point.

D. *Arguments of the European Communities – Appellee*

1. Article 2.2.2(ii) of the *Anti-Dumping Agreement* – Data from "other exporters or producers"

29. The European Communities submits that the Panel correctly found that Article 2.2.2(ii) of the *Anti-Dumping Agreement* may be invoked even when only one other exporter or producer has eligible data. The Panel performed an analysis of the ordinary meaning of the words in Article 2.2.2(ii), and properly took account of the phrase "weighted average". The interpretation of the Panel does not undermine the effect of the phrase "weighted average" in Article 2.2.2(ii), since another arithmetic mean could have been set out therein for cases involving two or more exporters or producers.

30. Next, the European Communities rejects India's contention that the anti-dumping investigation at issue in this case was not "unbiased and objective" as required under Article 17.6(i) of the *Anti-Dumping Agreement* because the European Communities chose to apply Article 2.2.2(ii) rather than Article 2.2.2(i). According to the European Communities, this is not a proper subject for appeal, and India's claim fails to raise any substantive issue. India's contention was not set out in its request for a panel nor in its submissions to the Panel and, therefore, it is not a proper subject for this appeal, since Article 17.6 of the DSU confines appeals to issues of law or legal interpretations developed by the panel. In addition, India's allegation may raise new legal issues which could require

proof of new facts. India's argument is not a substantive claim, because Article 17.6 of the *Anti-Dumping Agreement* establishes that the obligation of national authorities to be unbiased and objective applies to the evaluation of the facts of the case.

31. Finally, in the view of the European Communities, India's allegation that the implementation of Article 2.2.2(ii) by the investigating authorities of the European Communities was not "unbiased and objective", for not taking account of certain data from an additional producer, is similarly not a proper subject for appeal, for the same reasons as above.

2. Article 2.2.2(ii) of the *Anti-Dumping Agreement* – "actual amounts incurred and realized"

32. The European Communities argues that investigating authorities are allowed to disregard data relating to sales that are not made in the ordinary course of trade, in particular those made at prices below cost, when establishing a constructed normal value pursuant to Article 2.2.2(ii) of the *Anti-Dumping Agreement*. As the Panel observed, if sales not in the ordinary course of trade were considered, "the constructed value could be equal to cost and thus would not include a reasonable amount for profit"¹⁵. Moreover, the "ordinary course of trade" principle in Article 2 and in the chapeau of Article 2.2.2 would become meaningless, and therefore redundant, if sales not in the ordinary course of trade were included.

33. With regard to the context of Article 2.2.2(ii), the European Communities suggests that the exclusion of sales not in the ordinary course of trade in Article 2.2.2(i) is not "impossible". The *Anti-Dumping Agreement* merely authorizes Members to exclude those sales but does not require to do so. Finally, India's claim that under the Panel's interpretation of Article 2.2.2(ii) exporters would be unfairly treated, because at the time of selling, they would not be in a position to anticipate whether their sales would be found to be dumped, has no merit and should be rejected.

E. *Arguments of the Third Participants*

1. Egypt

34. Egypt welcomes the finding of the Panel that the practice of "zeroing" employed by the European Communities in calculating the margin of dumping violated the provisions of Article 2.4.2 of the *Anti-Dumping Agreement*. Furthermore, Egypt argues that the European Communities violated the provisions of Article 2.2.2(ii) of the *Anti-Dumping Agreement* for not having properly applied the method identified therein nor met its requirements.

35. In addition, Egypt submits views on certain issues that it considers to be fundamental for the proper legal interpretation of the *Anti-Dumping Agreement*. In particular, Egypt makes a number of comments on the findings of the Panel in relation to Articles 3.4, 5.3, and 15 of the *Anti-Dumping Agreement*. However, since none of these findings have been appealed, Egypt's comments do not directly bear upon this appeal.

2. Japan

36. Japan argues that the analysis of the Panel relating to the practice of "zeroing" of the European Communities was consistent with the rules of interpretation of the *Vienna Convention*. Japan submits that the decision of the Panel with respect to "zeroing" was also consistent with the standard of review in Article 17.6(ii) of the *Anti-Dumping Agreement*.

37. Furthermore, Japan underlines that the European Communities did not justify the need for introducing the concept of "overall rate of dumping", a concept not referred to anywhere in the *Anti-Dumping Agreement*. Moreover, the use of the plural form of the word "margins" in Article 2.4.2 of the *Anti-Dumping Agreement* is merely indicative that there may be more than one exporter involved in an investigation. According to Japan, the Panel correctly interpreted the word "comparable" in Article 2.4.2, finding that it echoed the overall mandate in the *Anti-Dumping Agreement* that dumping calculations be based on fair comparison, and made between "comparable transactions".

38. Moreover, according to Japan, the argument of the European Communities that the interpretation of the Panel would disadvantage Members applying anti-dumping duties on a prospective basis is irrelevant. In the view of Japan, the Panel correctly focused its findings on Article 2.4.2, since the dispute was related to the calculation of dumping margins for the product under investigation. The manner in which duties may be collected under the *Anti-Dumping Agreement* is relevant, only if, and only after, the investigating authorities find dumping for a particular producer as a result of a proper application of the methodologies set out in the *Anti-Dumping Agreement*.

39. Finally, Japan finds the "policy" argument of the European Communities regarding "product targeting" not persuasive. The European Communities ignores the fact that Article 2.4.2 does not include "product targeting" as a specific form of dumping justifying an exceptional calculation methodology, whereas Article 2.4.2 identifies three other forms of "targeting" justifying such exceptional methodology.

¹⁵Panel Report, para. 6.86; European Communities' appellee's submission, para. 46.

3. United States

40. In the view of the United States, the Panel failed to interpret the weighted-average comparison provision of Article 2.4.2 of the *Anti-Dumping Agreement* in its context and in the light of the object and purpose of the *Anti-Dumping Agreement*. The *Anti-Dumping Agreement* does not require that importing countries reduce dumping margins by amounts by which export prices exceeded normal value on other, non-comparable transactions. The United States supports the methodology of the European Communities for calculating the overall margin of dumping.

41. Next, the United States contends that the Panel failed to account for the remaining provisions of Article 2.4.2. The Panel should have addressed the totality of Article 2.4.2 before turning to Article 2.1 for providing the context to Article 2.4.2. The Panel incorrectly emphasized the word "all", and lost sight of the fact that Article 2.4.2 refers to only all "comparable" export transactions. Article 2.4.2 makes it clear that averages must be limited to "comparable" transactions.

42. The United States submits that the Panel was correct in holding that Article 2.2.2(ii) of the *Anti-Dumping Agreement* may be applied where there is data concerning only one other exporter or producer. The phrase "weighted average" is not determinative of this issue, but simply clarifies the method to be employed when there are two or more companies from which data will be utilised pursuant to Article 2.2.2(ii). Likewise, the word "amounts" in Article 2.2.2(ii) is not determinative, since it refers to the "amounts for administrative, selling and general costs and for profits", provided for in the chapeau. There is no guidance as to whether these amounts can be drawn from a single company or multiple companies. In addition, the phrase "other exporters or producers" is also not determinative, in the United States' view, because it cannot be read to exclude a single exporter or producer without creating "absurd results" throughout the *Anti-Dumping Agreement*, which often uses plurals as including the singular.

43. Moreover, the United States argues that the Panel was not required to examine separately whether the choice of the European Communities of the method set out in Article 2.2.2(ii) of the *Anti-Dumping Agreement* was objective and fair, pursuant to Article 17.6(i) of the *Anti-Dumping Agreement*, as compared with the alternative methods provided for in Articles 2.2.2(i) and 2.2.2(iii).

44. The United States concurs with the Panel and the European Communities that pursuant to Article 2.2.2(ii) of the *Anti-Dumping Agreement*, below-cost sales may be excluded from constructed normal value calculations. Nothing in the text *requires* this exclusion, but nothing in the text *forbids* such an exclusion either. It is therefore permissible, though not mandatory, to exclude sales outside the ordinary course of trade from the calculations made pursuant to Article 2.2.2(ii). In addition,

excluding the profit on sales not in the ordinary course of trade from the figures used pursuant to Article 2.2.2(ii) is consistent with the overall operation of Article 2 of the *Anti-Dumping Agreement*.

III. Issues Raised in this Appeal

45. This appeal raises the following issues:

- (a) Whether the Panel erred in finding that the practice of "zeroing" when establishing "the existence of margins of dumping", as applied by the European Communities in the anti-dumping investigation at issue in this dispute, is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*; and
- (b) Whether the Panel erred in finding that:
 - (1) the method for calculating amounts for administrative, selling and general costs and profits provided for in Article 2.2.2(ii) of the *Anti-Dumping Agreement* may be applied where there is data on administrative, selling and general costs and profits for only one other exporter or producer; and
 - (2) in calculating the amount for profits under Article 2.2.2(ii) of the *Anti-Dumping Agreement*, a Member may exclude sales by other exporters or producers that are not made in the ordinary course of trade.

IV. Article 2.4.2 of the *Anti-Dumping Agreement*

46. The first issue raised in this appeal is whether the practice of "zeroing" when establishing "the existence of margins of dumping", as applied by the European Communities in the anti-dumping investigation at issue in this dispute, is consistent with Article 2.4.2 of the *Anti-Dumping Agreement*.

47. The practice of "zeroing", as applied in this dispute, can briefly be described as follows¹⁶: first, the European Communities identified with respect to the product under investigation – cotton-type bed linen – a certain number of different "models" or "types" of that product. Next, the European Communities calculated, for each of these models, a *weighted average* normal value and a *weighted average* export price. Then, the European Communities compared the weighted average normal value with the weighted average export price for each model. For some models, normal value was *higher* than export price; by subtracting export price from normal value for these models, the European Communities established a "*positive* dumping margin" for each model. For other models, normal value was *lower* than export price; by subtracting export price from normal value for these other

¹⁶For a more detailed description, see Panel Report, para. 6.102.

models, the European Communities established a "*negative* dumping margin" for each model.¹⁷ Thus, there is a "positive dumping margin" where there *is* dumping, and a "negative dumping margin" where there *is not*. The "positives" and "negatives" of the amounts in this calculation are an indication of precisely *how much* the export price is above or below the normal value. Having made this calculation, the European Communities then added up the amounts it had calculated as "dumping margins" for each model of the product in order to determine an *overall* dumping margin for the product *as a whole*. However, in doing so, the European Communities treated any "negative dumping margin" as zero – hence the use of the word "zeroing". Then, finally, having added up the "positive dumping margins" and the zeroes, the European Communities divided this sum by the cumulative total value of all the export transactions involving all types and models of that product. In this way, the European Communities obtained an overall margin of dumping for the product under investigation.

48. With respect to this first issue appealed, 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.¹⁸

49. The European Communities appeals this finding. In defending its practice of "zeroing", the European Communities principally argues that the Panel was mistaken about the ordinary meaning of Article 2.4.2. According to the European Communities, Article 2.4.2 requires a comparison with a "weighted average of prices of all *comparable* export transactions" (emphasis added), which, in the view of the European Communities, as we understand it, is not the same as requiring a comparison with a weighted average of *all* export transactions. Emphasizing the presence in Article 2.4.2 of the word "comparable", the European Communities maintains that, where the product under investigation consists of various "non-comparable" types or models, the investigating authorities should first calculate "margins of dumping" for each of the "non-comparable" types or models, and, then, at a subsequent stage, combine those "margins" in order to calculate an overall margin of dumping for the product under investigation. Thus, the European Communities sees two stages in calculating margins of dumping in such an anti-dumping investigation, and contends that Article 2.4.2 provides *no guidance* as to how the "margins of dumping" for each of the types or models should be combined in the second stage in order to calculate an overall margin of dumping for the product under

¹⁷For these latter models, in other words, dumping had not occurred, as the *export price exceeded the normal value*.

¹⁸Panel Report, para. 6.119.

investigation. On this reasoning, the European Communities asserts that, as "zeroing" takes place during this second stage of the domestic anti-dumping process, "zeroing" cannot be inconsistent with Article 2.4.2. Accordingly, the European Communities concludes that the Panel failed to give proper meaning to the word "comparable" as well as to the comparability requirement in Article 2.4.2¹⁹, erroneously applied Article 2.4.2 to the calculation of the overall margin of dumping for the product under investigation²⁰, and erred in its overall analysis of this issue on the premise that dumping margins can be established only for a *product*.²¹

50. As always, we turn first to the text of the provision at issue on appeal. Article 2.4.2 of the *Anti-Dumping Agreement* states:

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-weighted average or transaction-to-transaction comparison. (emphasis added)

51. Article 2.4.2 of the *Anti-Dumping Agreement* explains how domestic investigating authorities must proceed in establishing "the existence of margins of dumping", that is, it explains how they must proceed in establishing that there *is* dumping. Toward this end, Article 2.1 states:

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. (emphasis added)

From the wording of this provision, it is clear to us that the *Anti-Dumping Agreement* concerns the dumping of a *product*, and that, therefore, the margins of dumping to which Article 2.4.2 refers are the margins of dumping for a *product*.

¹⁹European Communities' appellant's submission, paras. 14-20 and 38-41.

²⁰European Communities' appellant's submission, paras. 21-30.

²¹European Communities' appellant's submission, paras. 31-37.

52. We observe that, in this case, the European Communities defined the *product* at issue in its anti-dumping investigation as follows:

The *proceeding covers bed linen of cotton-type fibres*, pure or mixed with man-made fibres or flax, bleached, dyed or printed. Bed linen includes bed sheets, duvet covers and pillow cases, packaged for sale either separately or in sets.

...

Notwithstanding the *different possible product types* due to different weaving construction, finish of the fabric, presentation and size, packing, etc., *all of them constitute a single product for the purpose of this proceeding* because they have the same physical characteristics and essentially the same use.²² (emphasis added)

53. Thus, of its own accord, the European Communities clearly identified cotton-type bed linen as the *product* under investigation in this case. This is undisputed in this appeal. Having defined the *product* as it did, the European Communities was bound to treat that *product* consistently thereafter in accordance with that definition. Thus, it follows that, with respect to Article 2.4.2, the European Communities had to establish "the existence of margins of dumping" for the *product* – cotton-type bed linen – and not for the various types or models of that product. We see nothing in Article 2.4.2 or in any other provision of the *Anti-Dumping Agreement* that provides for the establishment of "the existence of margins of dumping" for *types or models* of the product under investigation; to the contrary, all references to the establishment of "the existence of margins of dumping" are references to the *product* that is subject of the investigation. Likewise, we see nothing in Article 2.4.2 to support the notion that, in an anti-dumping investigation, two different stages are envisaged or distinguished in any way by this provision of the *Anti-Dumping Agreement*, nor to justify the distinctions the European Communities contends can be made among *types or models* of the same product on the basis of these "two stages". Whatever the method used to calculate the margins of dumping, in our view, these margins must be, and can only be, established for the *product* under investigation as a whole. We are unable to agree with the European Communities that Article 2.4.2 provides no guidance as to how to calculate an *overall* margin of dumping for the product under investigation.

54. With this in mind, we recall that Article 2.4.2, first sentence, provides that "the existence of margins of dumping" for the product under investigation shall normally be established according to

²²Commission Regulation (EC) No 1069/97, *supra*, footnote 3, para. 10. See also Council Regulation (EC) No 2398/97, *supra*, footnote 4, para. 9.

one of two methods. At issue in this case is the first method set out in that provision, under which "the existence of margins of dumping" must 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 ...

55. Under this method, the investigating authorities are required to compare the weighted average normal value with the weighted average of prices of *all* comparable export transactions. Here, we emphasize that Article 2.4.2 speaks of "all" comparable export transactions. As explained above, when "zeroing", the European Communities counted as zero the "dumping margins" for those models where the "dumping margin" was "negative". As the Panel correctly noted, for those models, the European Communities counted "the weighted average export price to be equal to the weighted average normal value ... despite the fact that it was, in reality, higher than the weighted average normal value."²³ By "zeroing" the "negative dumping margins", the European Communities, therefore, did *not* take fully into account the entirety of the prices of *some* export transactions, namely, those export transactions involving models of cotton-type bed linen where "negative dumping margins" were found. Instead, the European Communities treated those export prices as if they were less than what they were. This, in turn, inflated the result from the calculation of the margin of dumping. Thus, the European Communities did *not* establish "the existence of margins of dumping" for cotton-type bed linen on the basis of a comparison of the weighted average normal value with the weighted average of prices of *all* comparable export transactions – that is, for *all* transactions involving *all* models or types of the product under investigation. Furthermore, we are also of the view that a comparison between export price and normal value that does *not* take fully into account the prices of *all* comparable export transactions – such as the practice of "zeroing" at issue in this dispute – is *not* a "fair comparison" between export price and normal value, as required by Article 2.4 and by Article 2.4.2.

56. We are mindful that Article 2.4.2 provides for "a comparison of a weighted average normal value with a weighted average of prices of all *comparable* export transactions". (emphasis added) In our view, the word "comparable" in Article 2.4.2 does not affect, or diminish in any way, the obligation of investigating authorities to establish the existence of margins of dumping on the basis of "a comparison of the weighted average normal value with the weighted average of prices of *all* comparable export transactions". (emphasis added)

57. The ordinary meaning of the word "comparable" is "able to be compared".²⁴ "Comparable export transactions" within the meaning of Article 2.4.2 are, therefore, export transactions that are

²³Panel Report, para. 6.115.

²⁴*The Concise Oxford Dictionary of Current English* (Clarendon Press, 1995), p. 269.

able to be compared. The European Communities argues before us that export transactions involving different types or models of cotton-type bed linen are not "comparable" because different types or models of cotton-type bed linen have very different physical characteristics. Specifically, the European Communities suggests that the differences between the various models or types of bed linen involved in the relevant export transactions are "so substantial that they cannot be eliminated by making adjustments for differences in physical characteristics".²⁵ However, as we have already noted, at the very outset of its anti-dumping investigation, the European Communities identified, of its own accord, cotton-type bed linen as the *product* under investigation. Moreover, in defining cotton-type bed linen as the product at issue, the European Communities stated that "the *different* possible *product types* ... *constitute a single product* for the purpose of this proceeding because *they have the same physical characteristics and essentially the same use*".²⁶ (emphasis added) Furthermore, we observe that, in the context of defining the product at issue, the European Communities also made the following determination relating to the identity of the "like product" on the Community market subject to its investigation:

The Commission examined whether cotton-type bed linen produced by the Community industry and sold on the Community market, as well as cotton-type bed linen produced in Egypt, India and Pakistan and sold on the Community market and on their domestic markets were alike.

...

²⁵European Communities' appellant's submission, para. 39. See also para. 40 and footnote 34 of the European Communities' appellant's submission.

²⁶Commission Regulation (EC) No 1069/97, *supra*, footnote 3, para. 10.

The Commission concluded that although there were differences in the mix of products produced in the Community and that sold for export to the Community or sold domestically in the countries concerned, *there were no differences in the basic characteristics and uses of the different types and qualities of bed linen of cotton-type fibres*. Therefore domestic and export types in the countries concerned and types produced in the Community were considered *like products* within the meaning of Article 1(4) of Regulation (EC) No 384/96 ...²⁷ (emphasis added)

58. Having defined the product at issue and the "like product" on the Community market as it did, the European Communities could not, at a subsequent stage of the proceeding, take the position that some types or models of that product had physical characteristics that were so different from each other that these types or models were not "comparable". All types or models falling within the scope of a "like" product must necessarily be "comparable", and export transactions involving those types or models must therefore be considered "comparable export transactions" within the meaning of Article 2.4.2.

59. This interpretation of the word "comparable" in Article 2.4.2 is reinforced by the context of this provision. Article 2.4 of the *Anti-Dumping Agreement* states in relevant part:

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

Article 2.4 sets forth a general obligation to make a "fair comparison" between export price and normal value. This is a general obligation that, in our view, informs all of Article 2, but applies, in particular, to Article 2.4.2 which is specifically made "subject to the provisions governing fair comparison in [Article 2.4]". Moreover, Article 2.4 sets forth specific obligations to make comparisons at the same level of trade and at, as nearly as possible, the same time. Article 2.4 also requires that "due allowance" be made for differences affecting "price comparability". We note, in particular, that Article 2.4 requires investigating authorities to make due allowance for "differences in ... physical characteristics".

²⁷Commission Regulation (EC) No 1069/97, *supra*, footnote 3, paras. 11 and 14. See also Council Regulation (EC) No 2398/97, *supra*, footnote 4, para. 9.

60. We note that, while the word "comparable" in Article 2.4.2 relates to the comparability of export transactions, Article 2.4 deals more broadly with a "fair comparison" between export price and normal value and "price comparability". Nevertheless, and with this qualification in mind, we see Article 2.4 as useful context sustaining the conclusions we draw from our analysis of the word "comparable" in Article 2.4.2. In our view, the word "comparable" in Article 2.4.2 relates back to both the general and the specific obligations of the investigating authorities when comparing the export price with the normal value. The European Communities argues on the basis of the "due allowance" required by Article 2.4 for "differences in physical characteristics" that distinctions can be made among different types or models of cotton-type bed linen when determining "comparability". But here again we fail to see how the European Communities can be permitted to see the physical characteristics of cotton-type bed linen in one way for one purpose and in another way for another.²⁸

61. In support of its appeal of the Panel's interpretation of Article 2.4.2, the European Communities argues, additionally, that this interpretation would not allow Members to counter dumping "targeted" to certain types of the product under investigation.²⁹ With respect to the notion of "targeted" dumping, we note that Article 2.4.2, second sentence, states:

A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find *a pattern of export prices which differ significantly among different purchasers, regions or time periods*, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison. (emphasis added)

62. This provision allows Members, in structuring their anti-dumping investigations, to address three kinds of "targeted" dumping, namely dumping that is targeted to certain purchasers, targeted to certain regions, or targeted to certain time periods. However, neither Article 2.4.2, second sentence, nor any other provision of the *Anti-Dumping Agreement* refers to dumping "targeted" to certain "models" or "types" of the same product under investigation. It seems to us that, had the drafters of the *Anti-Dumping Agreement* intended to authorize Members to respond to such kind of "targeted" dumping, they would have done so explicitly in Article 2.4.2, second sentence. The European Communities has not demonstrated that any provision of the Agreement implies that targeted dumping may be examined in relation to specific types or models of the product under investigation. Furthermore, we are bound to add that, if the European Communities wanted to address, in particular,

²⁸See *supra*, paras. 57-58.

²⁹European Communities' appellant's submission, paras. 46-49.

dumping of certain types or models of bed linen, it could have defined, or redefined, the *product* under investigation in a narrower way.³⁰

63. Finally, the European Communities argues that the Panel did not establish that the interpretation of Article 2.4.2 by the European Communities was "impermissible" and that, therefore, the Panel failed to apply the standard of review laid down in Article 17.6(ii) of the *Anti-Dumping Agreement*.³¹ On this, we observe that Article 17.6(ii) states:

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

64. In this case, the Panel explicitly recognized that it was to interpret the *Anti-Dumping Agreement* in accordance with the customary rules of interpretation of public international law as set out in the *Vienna Convention*.³² Having interpreted Article 2.4.2 accordingly, 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.³³ (emphasis added)

65. It appears clear to us from the emphatic and unqualified nature of this finding of inconsistency that the Panel did not view the interpretation given by the European Communities of Article 2.4.2 of the *Anti-Dumping Agreement* as a "permissible interpretation" within the meaning of Article 17.6(ii) of the *Anti-Dumping Agreement*. Thus, the Panel was not faced with a choice among multiple "permissible" interpretations which would have required it, under Article 17.6(ii), to give deference to the interpretation relied upon by the European Communities. Rather, the Panel was faced with a situation in which the interpretation relied upon by the European Communities was, to

³⁰The European Communities also argues in its appellant's submission, paras. 42-45, that the Panel's interpretation of Article 2.4.2 would disadvantage those importing Members which collect anti-dumping duties on a "prospective" basis when compared to those importing Members which collect anti-dumping duties on a "retrospective" basis. We note, though, that Article 2.4.2 is not concerned with the collection of anti-dumping duties, but rather with the determination of "the existence of margins of dumping". Rules relating to the "prospective" and "retrospective" collection of anti-dumping duties are set forth in Article 9 of the *Anti-Dumping Agreement*. The European Communities has not shown how and to what extent these rules on the "prospective" and "retrospective" collection of anti-dumping duties bear on the issue of the establishment of "the existence of dumping margins" under Article 2.4.2.

³¹European Communities' appellant's submission, paras. 50-58.

³²Panel Report, para. 6.46.

³³Panel Report, para. 6.119.

borrow a word from the European Communities, "impermissible". We do not share the view of the European Communities that the Panel failed to apply the standard of review set out in Article 17.6(ii) of the *Anti-Dumping Agreement*.

66. For all these reasons, we uphold the finding of the Panel in paragraph 6.119 of the Panel Report that the practice of "zeroing" when establishing "the existence of margins of dumping", as applied by the European Communities in the anti-dumping investigation at issue in this dispute, is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*.

V. Article 2.2.2(ii) of the *Anti-Dumping Agreement*

67. The two other issues raised in this appeal both concern the Panel's interpretation of Article 2.2.2(ii) of the *Anti-Dumping Agreement*. Pursuant to Article 2.2, the margin of dumping for the product under investigation may, in certain circumstances, be determined by comparison of the export price of the product with a constructed normal value consisting of the cost of production of the product in the country of origin plus a reasonable amount for administrative, selling and general costs ("SG&A") as well as for profits. Article 2.2.2 sets forth how the amounts for SG&A and profits are to be calculated in such circumstances. Article 2.2.2 states:

For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:

- (i) the actual amounts incurred and realized by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products;
- (ii) *the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;*
- (iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin. (emphasis added)

68. The first issue raised is whether the method of calculating amounts for SG&A and profits set out in Article 2.2.2(ii) may be applied where there is data on SG&A and profits for only *one* other

exporter or producer. The second issue is whether, in calculating the amount for profits under Article 2.2.2(ii), a Member may exclude sales by other exporters or producers that are not made in the ordinary course of trade.

69. With respect to the first issue, the Panel found:

As we have concluded that Article 2.2.2(ii) may be applied in a case where there is data concerning profit and SG&A for only one other producer or exporter, we conclude that the European Communities was not precluded from applying the methodology set out in that provision in this case, and therefore did not act inconsistently with Article 2.2.2(ii) in this regard.³⁴

70. With respect to the second issue, the Panel found:

Thus we consider that an interpretation of Article 2.2.2(ii) under which sales not in the ordinary course of trade are excluded from the determination of the profit amount to be used in the calculation of a constructed normal value is permissible. We therefore conclude that the European Communities did not err in its application of paragraph (ii) by using data only on transactions in the ordinary course of trade.³⁵

71. India appeals both these findings. With respect to the first of these two findings of the Panel, relating to the applicability of Article 2.2.2(ii) where there is data for only *one* other exporter or producer, India argues that the text of Article 2.2.2(ii), and, in particular, the use of the terms "amounts" and "exporters or producers" in the plural, in combination with the reference to a "weighted average" of the "amounts", clearly indicate that Article 2.2.2(ii) cannot be applied where there is data for only *one* other exporter or producer.³⁶ Furthermore, with respect to this finding, India argues that the Panel failed to meet the standard of review set forth in Article 17.6(i) of the *Anti-Dumping Agreement*.³⁷ With respect to the second of these two findings of the Panel, relating to the exclusion of sales by other exporters or producers that are not made in the ordinary course of trade, India argues that the text of Article 2.2.2(ii) states that the amount for profits must be based on "amounts incurred and realized", and that nothing in these terms suggests that they relate only to profitable sales.³⁸ According to India, this reading of Article 2.2.2(ii) is confirmed by the chapeau of Article 2.2.2, which, in contrast with Article 2.2.2(ii), explicitly excludes sales made outside the ordinary course of trade.

³⁴Panel Report, para. 6.75.

³⁵Panel Report, para. 6.87.

³⁶India's appellant's submission, paras. 5-7.

³⁷India's appellant's submission, paras. 8-17.

72. On the first of these two issues on appeal – that is, whether the method for calculating amounts for SG&A and profits set out in Article 2.2.2(ii) may be applied where there is data on SG&A and profits for only *one* other exporter or producer – we recall that Article 2.2.2(ii) states that, when this method is chosen by the investigating authorities, the amounts for SG&A and profits must be calculated on the basis of:

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

Here, we note especially that Article 2.2.2(ii) refers to "the *weighted average* of the actual *amounts* incurred and realized by *other exporters or producers*". (emphasis added)

73. In construing this provision, the Panel found that the phrase "other exporters or producers":

... as a general matter, admits of an understanding where the plural form includes the singular case – the case where there is only one other producer or exporter. ... In this context, we do not consider that the reference to other producers or exporters in the plural necessarily must be understood to preclude resort to option (ii) in the case where there is only one other producer or exporter of the like product.³⁹

74. We disagree. In our view, the phrase "weighted average" in Article 2.2.2(ii) precludes, in this particular provision, understanding the phrase "other exporters or producers" in the plural as including the singular case. To us, the use of the phrase "weighted average" in Article 2.2.2(ii) makes it impossible to read "other exporters or producers" as "one exporter or producer". First of all, and obviously, an "average" of amounts for SG&A and profits *cannot* be calculated on the basis of data on SG&A and profits relating to only *one* exporter or producer.⁴⁰ Moreover, the textual directive to "weight" the average further supports this view because the "average" which results from combining the data from different exporters or producers must reflect the relative importance of these different exporters or producers in the overall mean.⁴¹ In short, it is simply not possible to calculate the "weighted average" relating to only one exporter or producer. Indeed, we note that, at the oral hearing in

³⁸India's appellant's submission, paras. 18-32.

³⁹Panel Report, para. 6.70.

⁴⁰"Average" is defined in *The Concise Oxford Dictionary of Current English*, *supra*, footnote 24, p. 86, as follows: "an amount obtained by dividing the total of given amounts by the number of amounts in the set".

⁴¹"To weight" is defined as "multiply the components of (an average) by factors to take account of their importance". See *The Concise Oxford Dictionary of Current English*, *supra*, footnote 24, p. 1589. "Weighted average" is defined as "resulting from the multiplication of each component by a factor reflecting its importance". See *The New Shorter Oxford English Dictionary* (Clarendon Press, 1993), Vol. II, p. 3651.

this appeal, the European Communities conceded that the phrase "weighted average" envisages a situation where there is more than one exporter or producer.

75. The requirement to calculate a "weighted average" in Article 2.2.2(ii) is, in our view, the key to interpreting that provision. It is indispensable to the calculation method set forth in this provision, and, thus, it is indispensable to the entire provision – which deals only with the mechanics of that calculation. We disagree with the Panel that "the concept of weighted averaging is relevant only *when there is information from more than one other producer or exporter* available to be considered."⁴² (emphasis in the original) We see no justification, textual or otherwise, for concluding that amounts for SG&A and profits are to be determined on the basis of the weighted average *some* of the time but not *all* of the time. In so interpreting Article 2.2.2(ii), the Panel, in effect, reads the requirement of calculating a "weighted average" out of the text in some circumstances. In those circumstances, this would substantially empty the phrase "weighted average" of meaning.⁴³

76. In our view, then, the use of the phrase "weighted average", combined with the use of the words "amounts" and "exporters or producers" in the plural in the text of Article 2.2.2(ii), clearly anticipates the use of data from *more than one* exporter or producer. We conclude that the method for calculating amounts for SG&A and profits set out in this provision can only be used if data relating to more than one other exporter or producer is available.

77. Accordingly, we reverse the finding of the Panel, in paragraph 6.75 of the Panel Report, that the method for calculating amounts for SG&A and profits provided for in Article 2.2.2(ii) of the *Anti-Dumping Agreement*, may be applied where there is data on SG&A and profits for only one other exporter or producer.

78. We recall that India also argues that the Panel's finding in paragraph 6.75 of the Panel Report on the applicability of Article 2.2.2(ii) was inconsistent with the standard of review set forth in Article 17.6(i) of the *Anti-Dumping Agreement*. However, since we have already concluded that the finding of the Panel in that paragraph is inconsistent with Article 2.2.2(ii), there is no need for us to examine whether the Panel in making this finding also acted inconsistently with Article 17.6(i).

⁴²Panel Report, para. 6.71.

⁴³We note that in a case where there is data relating to only one other exporter or producer, a Member may have recourse to the calculation method set forth in Article 2.2.2(iii), provided, of course, that the specific requirements for the use of this calculation method are met. We recall that Article 2.2.2(iii) states that amounts for SG&A and profits may be calculated on the basis of :

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

79. On the second issue relating to the Panel's interpretation of Article 2.2.2(ii) – that is, whether in calculating the amount for profits pursuant to Article 2.2.2(ii), Members may exclude sales by other exporters or producers that are not made in the ordinary course of trade – we recall that the amounts for SG&A and profits for an exporter or a producer under investigation are, under Article 2.2.2(ii), calculated on the basis of:

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

80. Here, we note especially that Article 2.2.2(ii) refers to "the weighted average of *the actual amounts incurred and realized* by other exporters or producers". (emphasis added) In referring to "the actual amounts incurred and realized", this provision does not make any exceptions or qualifications. In our view, the ordinary meaning of the phrase "*actual* amounts incurred and realized" includes the *SG&A actually incurred*, and the *profits or losses actually realized*⁴⁴ by other exporters or producers in respect of production and sales of the like product in the domestic market of the country of origin. There is no basis in Article 2.2.2(ii) for excluding *some* amounts that were actually incurred or realized from the "actual amounts incurred or realized". It follows that, in the calculation of the "weighted average", *all* of "the actual amounts incurred and realized" by other exporters or producers must be included, *regardless* of whether those amounts are incurred and realized on production and sales made in the ordinary course of trade or not. Thus, in our view, a Member is not allowed to exclude those sales that are not made in the ordinary course of trade from the calculation of the "weighted average" under Article 2.2.2(ii).

81. We find support for this textual interpretation of Article 2.2.2(ii) in the context of this provision and, in particular, in the first sentence of the chapeau of Article 2.2.2, which sets out the principal method for calculating amounts for SG&A and profits. The method set out in Article 2.2.2(ii) is one of three alternative methods which may be applied *only* in circumstances where the amounts for SG&A and profits cannot be determined by the principal method set out in the chapeau of Article 2.2.2.⁴⁵ In setting out this principal method, the first sentence of the chapeau of Article 2.2.2 states:

⁴⁴It is worthwhile noting that "realized" is a word used with respect to both gains (profits) and losses. See *Black's Law Dictionary* (West Group, 1999), p. 1271, which speaks of both "realized gain" and "realized loss".

⁴⁵See second sentence of the chapeau of Article 2.2.2.

For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits *shall be based on actual data pertaining to production and sales in the ordinary course of trade* of the like product by the exporter or producer under investigation. (emphasis added)

82. In contrast to Article 2.2.2(ii), the first sentence of the chapeau of Article 2.2.2 refers to "actual data pertaining to production and sales *in the ordinary course of trade*". (emphasis added) Thus, the drafters of the *Anti-Dumping Agreement* have made clear that sales *not* in the *ordinary course of trade* are to be *excluded* when calculating amounts for SG&A and profits using the method set out in the chapeau of Article 2.2.2.

83. The exclusion in the chapeau leads us to believe that, where there is no such explicit exclusion elsewhere in the same Article of the *Anti-Dumping Agreement*, no exclusion should be implied. And there is no such explicit exclusion in Article 2.2.2(ii). Article 2.2.2(ii) provides for an *alternative* calculation method that can be employed precisely when the method contemplated by the chapeau cannot be used. Article 2.2.2(ii) contains its own specific requirements. On their face, these requirements do not call for the exclusion of sales not made in the ordinary course of trade. Reading into the text of Article 2.2.2(ii) a requirement provided for *in the chapeau* of Article 2.2.2 is not justified either by the text or by the context of Article 2.2.2(ii). In our Report in *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, we stated:

The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the *Vienna Convention*. But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.⁴⁶

84. Therefore, we reverse the finding of the Panel in paragraph 6.87 of the Panel Report that, in calculating the amount for profits under Article 2.2.2(ii) of the *Anti-Dumping Agreement*, a Member may exclude sales by other exporters or producers that are not made in the ordinary course of trade.

85. In view of our findings in paragraphs 77 and 84 of this Report, we conclude that the European Communities, in calculating amounts for SG&A and profits in the anti-dumping investigation at issue in this dispute, acted inconsistently with Article 2.2.2(ii) of the *Anti-Dumping Agreement*.

⁴⁶Appellate Body Report, WT/DS50/AB/R, adopted 16 January 1998, para. 45.

VI. Findings and Conclusions

86. For the reasons set out in this Report, the Appellate Body:

- (1) upholds the finding of the Panel in paragraph 6.119 of the Panel Report that the practice of "zeroing" when establishing "the existence of margins of dumping", as applied by the European Communities in the anti-dumping investigation at issue in this dispute, is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*; and
- (2) reverses the findings of the Panel in paragraphs 6.75 and 6.87, respectively, of the Panel Report that:
 - (a) the method for calculating amounts for administrative, selling and general costs and profits provided for in Article 2.2.2(ii) of the *Anti-Dumping Agreement* may be applied where there is data on administrative, selling and general costs and profits for only one other exporter or producer; and
 - (b) in calculating the amount for profits under Article 2.2.2(ii) of the *Anti-Dumping Agreement*, a Member may exclude sales by other exporters or producers that are not made in the ordinary course of trade;

and, as a consequence, concludes that the European Communities, in calculating amounts for administrative, selling and general costs and profits in the anti-dumping investigation at issue in this dispute, acted inconsistently with Article 2.2.2(ii) of the *Anti-Dumping Agreement*.

87. The Appellate Body recommends that the DSB request that the European Communities bring its measure found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the *Anti-Dumping Agreement* into conformity with its obligations under that Agreement.

Signed in the original at Geneva this 8th day of February 2001 by:

James Bacchus
Presiding Member

Florentino P. Feliciano
Member

Georges-Michel Abi-Saab
Member