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THE EC BED LINEN DISPUTE

India challenges the EC's implementation of the WTO Antidumping Agreement

Abstract

The bed linen dispute provided a welcome and long overdue opportunity to throw some light on, and perhaps reign in some of the more blatant and excessive abuses of the European Commission's anti-dumping practices, which over the years, have come under repeated attack by a broad range of legal and economic commentators.

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I. INTRODUCTION

India's challenge to the European Communities' antidumping duties on cotton-type bed linen provided an important test of the disciplines imposed by the WTO Antidumping Agreement.[1] The dispute subjected the European Commission's methods of calculating dumping margins and determining injury to detailed scrutiny, raising questions about the limits of investigating authorities' discretion and the protection afforded to exporters.

This commentary reviews the findings of the Panel and the Appellate Body, with particular attention to constructed normal value, the practice of zeroing, injury determinations and the treatment of developing country Members. The case was a significant victory for India, but left important interpretative questions unresolved. It also exposed the difficulty of translating negotiated disciplines into effective constraints on antidumping practice.

II. FACTS

A. Measure at Issue

The measure at issue in this case is Council Regulation (EC) No 2398/97 of 28 November 1997[2] imposing definitive anti-dumping duties in the amount of the dumping margins determined in the preceding anti-dumping investigation, ranging from 2.6% to 24.7% depending on the exporter in question (the measure).

As pointed out by India[3], the measure at issue was equally Commission 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[4].This is because the Commission's anti-dumping practice and EC law both provide that certain findings and determinations made in the Provisional Regulation are adopted, by way of a mere reference to such findings and determinations, in the Definitive Regulation.

B. Products at Issue

The products affected by the measure are cotton-type bed linen originating from India, with the exception of certain handloom products. To be more precise, the products in issue were 'bed linen of cotton type fibres, pure or mixed with man-made fibres or flax, bleached, dyed or printed'.[5] The designation 'bed-linen' covered the following products: 'bed sheets, duvet covers and pillow cases, packaged for sale either separately or in sets'.[6]

C. Proceedings before the European Communities

The dispute, which has a relatively long history and which had been fermenting long before proceedings were formally initiated[7], was launched in July 1996 when the EC federation of national producers' associations of cotton textile products 'Eurocoton'[8] filed a petition with the European Communities seeking the imposition of anti-dumping duties against the products at issue, originating from several countries including India. A notice announcing the initiation of an anti-dumping investigation was published in September of the same year.

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1 EC - Bed Linen, Panel Report WT/DS141/R and Appellate Body Report WT/DS141/AB/R.
2 Council 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.
3 Report of the Panel, WT/DS 141/R (the Panel Report), para. 6.10.
4 Official Journal No L 156 , 13 June 1997 pp. 11 ff.
5 Ibid, para. 10.
6 Ibid.
7 This was, in fact, the second case against bed linen producers from India. A petition had previously been filed and then subsequently withdrawn in 1994.
8 Committee of the Cotton and Allied Textile Industries of the European Communities.

In June 1997 the EC published notice of its preliminary affirmative determination of dumping, injury and causal link and consequently imposed provisional anti-dumping duties. Following further investigation, the Commission published notice of the final affirmative determination in November 1997.

D. Proceedings before the WTO

In August 1998 India requested consultations with the European Communities, which were held in September 1998 and April 1999 without a mutually satisfactory resolution of the matter being found. In September 1999 (more than a year after India's original request for consultations), India requested the establishment of a panel, which was done at the Dispute Settlement Body (DSB) meeting of 27 October of the same year.

Not being able to find any kind of consensus as to the Panel's composition, India finally requested that the Director General of the WTO do so in January 1998. The Director-General named Dr. Dariusz Rosati, ex-minister for foreign affairs of Poland, as the Panel's Chairman and named Ms Marta Lemme and Mr. Paul O'Connor as the remaining members.

Egypt, Japan and the United States reserved their rights as third parties to the dispute.

The Panel met with the parties and third parties in May and June of 2000. In its Report, circulated on 30 October 2000, the Panel found that the EC had acted inconsistently with its obligations under the Anti-Dumping Agreement[9] (the AD Agreement or simply the Agreement), and recommended that the DSB request the European Communities to bring the measure into conformity with its WTO obligations.

Both the European Communities and India chose to appeal certain issues of law and legal interpretations of the Panel as developed in its Report. The required notifications and submissions were filed between December 2000 and January 2001. Egypt, Japan and the United States also chose to act as third parties in the appeal before the Appellate Body.

The oral hearing took place on 24 January 2001, with the Appellate Body handing down its ruling on 8 February 2001. In its Report, published on 1 March 2001, the Appellate Body also concluded that the EC had acted inconsistently with its obligations under the AD Agreement and recommended that the DSB request the European Communities to bring the measure into conformity with its obligations under the WTO Anti-Dumping Agreement.

III. CLAIMS

The proceedings before the Panel began with a large amount of posturing over procedural issues such as the scope of the Panel's terms of reference, the admissibility of certain pieces of evidence, the burden of proof and the applicable standard of review. The present commentary shall briefly cover the Panel's findings on these threshold questions of procedure (none of which were subsequently taken up before the Appellate Body), before moving to the substantive issues of the case.

A. Procedural Issues

1. Scope of the Panel's Terms of Reference

The EC sought to obtain a preliminary ruling by the Panel that several of India's claims were outside of the Panel's terms of reference, essentially because they had either not been duly mentioned in India's request for establishment of a panel pursuant to Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), or alternatively because they concerned the EC's Provisional Regulation which had been superseded by the Definitive Regulation.

[9] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

The outcome of this motion was that India effectively withdrew several of its claims (the language used being that it 'did not seek a ruling' on them[10]), whilst the Panel also found that India's claims under Article 6 of the Agreement were inadmissible as this Article had not been mentioned in India's request for the establishment of a panel (a mistake which India characterized as an 'inadvertent omission'[11]).

As to the EC's objections with respect to certain of India's claims under Article 3.4 of the Agreement, the Panel found firstly that Article 3.4 had been explicitly listed in the request for establishment and that neither the EC nor any third parties or potential third parties had been prejudiced, despite the fact that India's request was marred by a lack of sufficient clarity. It therefore admitted India's claims under this Article. This finding was arrived at in application of the Appellate Body's case-law on specificity of panel requests as elaborated in the *Korea – Dairy Safeguard* dispute.[12]

2. The Admissibility of Certain Pieces of Evidence

Under this title the Panel handled three objections, two by the EC and one by India, as to the admissibility of certain documents submitted by the parties.

The EC objected firstly to India's submission of verbatim reports of the consultations which had taken place between the parties before the establishment of the Panel. Without actually saying so in so many words, it is clear from the Report that India essentially submitted this exhibit in order to establish what it considered to be the EC's lack of sympathetic consideration in the consultation phase.

The Panel began its analysis by stating that the evidence concerning the consultations was 'at best unnecessary, and may be irrelevant',[13] but that did not affect the evidence's admissibility as such. In what could be construed as an indication of the Panel's irritation at the level of procedural wrangling, it stated, that in its opinion 'there was little to be gained by expending our time and effort in ruling on points of "admissibility" of evidence *vel non*.'[14] The Panel also reminded the parties, at this juncture, of its right, under Article 13.2 of the DSU, to seek information from 'any relevant source', as well as of the fact that the DSU contains no provisions limiting the forms of evidence open to panels to consider. The Panel concluded on this point by denying the EC's request on the grounds that to grant it would accomplish nothing.

The EC also objected to India's inclusion of a dumping calculation from a different anti-dumping investigation, stating that this evidence constituted a breach of confidentiality obligations. Interestingly enough, the United States submitted an argument in support of the EC on this point, as it continued to do with respect to many other (but not all) claims in this dispute.

The Panel found that since the party to whom the information in question belonged had waived its rights and agreed to the Panel's consideration of the information, it saw no reason why the information should be excluded. The Panel also stated that the information would be of little relevance in the present dispute, as it (the Panel) was charged to determine, on the basis of the facts in question and not on the basis of the facts of a previous dispute, whether the EC had violated its obligations under the WTO Anti-Dumping Agreement. It thus denied the EC's request on this point.

India objected to the EC's submission of a document, which summarized the declarations of support from producers and exporters of the relevant industry associations. India felt that this document had been created after the initiation of proceedings before the WTO. The EC stated that the document merely re-organized and re-stated evidence which had already been available to India.

[10] Panel Report, para. 6.6 and 6.10.
[11] Panel Report, para. 6.14.
[12] Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products, Appellate Body Report (WT/DS98/AB/R), para. 6.
[13] Panel Report, para. 6.32.
[14] Panel Report, para. 6.33. Italics in original.

On this point the Panel again ruled against the exclusion of evidence, and thus against India, on the ground that, under Article 17.5 (ii) of the Anti-Dumping Agreement, it was not required to only consider evidence which had been submitted to it in the same format it had been submitted to the investigating authority.

3. Burden of Proof and Standard of Review

In an effort to prepare the groundwork for its subsequent analysis as to the substantive claims of the case concerning the conformity (or indeed non-conformity) of the EC's practices in anti-dumping investigations with its obligations under the WTO AD Agreement, the Panel chose, at this juncture, to pause and re-iterate the state of the prevailing case-law on burden of proof and standard of review.

a. Burden of Proof

In a re-statement of the case-law expressed *in United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India,*[15] the Panel affirmed the principle on burden of proof, according to which the burden of adducing evidence in support of a particular claim or defense, rests with the party that asserts the claim or defense in question. In this context, the Panel stated that the onus was on India to present a *prima facie* case of violation of the relevant Articles of the Agreement, and that where India was able to do so, it would subsequently be up to the EC to provide 'effective refutation' of the evidence and arguments presented by India.[16]

b. Standard of Review

The Panel begun here by examining the special standard of review for disputes arising under the Anti-Dumping Agreement pursuant to Article 17.6 of the Agreement, and concluded by laying out what its methodology would be when examining the conformity of the measure with the AD Agreement.

In interpreting the AD Agreement the Panel stated that it would do so in accordance with the principles set out in the Vienna Convention on the Law of Treaties. It would thus consider the 'ordinary meaning of the provision in question, in its context and in light of its object and purpose'.[17] It would then, if necessary, consider the *travaux préparatoires* or the negotiating history of the Agreement. Finally it would determine whether the EC's interpretation of the Agreement is one that is 'permissible in light of the customary rules of interpretation of international law'.[18]

Finally the Panel sets out its view that although the EC's Definitive Regulation is the measure at issue in the present dispute, it would feel free to include the Provisional Regulation within any analysis it chose to make, as it considered the latter a constituent element of the former under EC practice.[19]

A. Substantive Issues

In filing its submission, India adopted an approach which can only be likened to carpet bombing, making more than 30 claims, several of which were eventually withdrawn or declared outside of the Panel's terms of reference. In an effort to bring a sense of order and deal with the remaining claims in some kind of systematic manner, the Panel structured its Report on an article-by-article basis. The present commentary shall essentially follow the order established by the Panel in reviewing the substantive issues ruled upon in this dispute.

[15] See WT/DS33/AB/R, p. 14.
[16] Panel Report, para. 6.44.
[17] Panel Report, 6.46.
[18] Ibid.
[19] '... to the extent we seek to understand the European Communities' analysis and explanation concerning any given element of its final determination in order to evaluate India's claims, we consider it appropriate to look to both the Provisional Regulation and the Definitive Regulation to inform ourselves as to the substance of the challenged decision.' Panel Report, para. 6.47.

1. Claims under Article 2, determination of dumping

Article 2 of the Agreement is concerned with how the investigating authority is to determine whether and to what extent a product is being dumped, meaning, for the purposes of the Agreement, 'introduced into the commerce of a country at less than its normal value' (see Article 2.1 of the Agreement).[20] Of course, where a product is both sold on its domestic market and exported to the market of the investigating authority, a comparison of domestic prices and prices in the export market would allow the investigating authority to make the necessary price comparison and determine whether or not the product is being dumped. Article 2.2 of the Anti-Dumping Agreement provides rules in the event that no such easy price comparison can be made, and allows the investigating authority to either choose a third country market for its price comparison, or to construct a price on the basis of production costs in the country of origin plus what is termed a 'reasonable amount for administrative, selling and general costs'(SG&A), as well as a profit margin.

a. Article 2.2.2, order of options when calculating SG&A

The first of India's claims under this Article, was brought under Article 2.2.2, which provides rules for the calculation of SG&A. These costs are namely to be calculated on the basis of actual production and sales data obtained in the ordinary course of trade of the product under investigation. However where such data is not available, paragraphs (i), (ii), (iii) of Article 2.2.2 provide alternative methods for making a calculation of SG&A. India's and the EC's dispute under this claim, was essentially about whether this Article established a compulsory order in which such alternative calculation methods were to be used, or whether the EC was free to use the method provided under (ii) before attempting to calculate SG&A under paragraph (i), something which it does as a matter of course in its anti-dumping investigations.[21] India argued that the order of preference pursued by the European Communities was inconsistent with that set out by the AD Agreement as applied in the bed linen investigation.[22]

The Panel found against India on this point, firstly because it felt that the mere fact that these options were listed in some kind of sequential order, did not, in and of itself, indicate any preference of one option over another. Furthermore the Panel considered that, if the drafters of the AD Agreement had wanted to indicate such a hierarchy between the different options for calculating SG&A, they would have done so in more explicit terms.

This finding was not appealed by India.

b. Article 2.2.2 (ii), amounts, exporters and producers: singular or plural

When calculating SG&A in order to arrive at a constructed price, one of the options available to the investigating authority, pursuant to Article 2.2.2 (ii), is to determine such costs on the basis of the weighted average of the actual amounts incurred by other exports or producers of the like product on the domestic market of the country of origin.

India contended that the EC had misapplied this provision because it relied on data from just one other producer. India essentially argued that the use of the plural form for the terms 'amounts', 'exporters' and 'producers', as well as the fact that the provision in question explicitly required a 'weighted average' were both factors in support of its interpretation.

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[20] Note that Michael J. Finger has defined dumping as 'whatever you can get the government to act against under the anti-dumping law'. Although Dr. Finger made this statement with his tongue in his cheek, an examination of the way the European Commission conducted its anti-dumping investigation in the present case will inevitably leave the reader with the impression that he may not have been too far from the truth. See J. Michael Finger (ed.) *Antidumping How it Works and Who gets Hurt*, The University of Michigan Press, Ann Arbor, 1993, p. viii of the preface.

[21] This is because the EC Regulation implementing the Anti-Dumping Agreement, Council Regulation (EC) No 384/96, (Official Journal No L 56 of 6 March 1996, p. 1), actually inverts the order of (i) and (ii), which is in keeping with the Commission's predisposition for comparing the overhead costs of competing producers selling the like product. See Pierre Didier *WTO Trade Instruments in EU Law*, Cameron May, London, 1999, pp. 29 f.

[22] The last words of this sentence, which also appear at the end of para 6.50 of the Panel Report ('as applied in the bed linen proceeding') are, of course, of the most critical importance, as a challenge of the EC Regulation itself, would not be within the Panel's terms of reference, something which the Panel itself noted in footnote 29 of its Report.

Quite surprisingly the Panel found against India on this point. With regard to the use of the plural the Panel stated:

> 'In both common speech and legal texts, it is accepted that the ordinary meaning of the plural form may include the singular case'[23]

With regard to the requirement of using a weighted average, the panel stated:

> 'we are of the opinion 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.'[24]

The Panel criticized India's interpretation because it felt that it

> 'would limit the analytical options available to investigating authorities for determination of the profit rate and SG&A in a constructed normal value in a manner we cannot see as mandated by the text'[25]

It would seem that the Panel did not feel mandated by the *economic* reasoning underlying the provision. In support of its interpretation the Panel referred to other provisions in the AD Agreement which it felt also used the plural form when they clearly included instances when solely the singular form would apply. The Panel also drew on the negotiating history of Article 2.2.2 in an effort to provide further support of its interpretation of this provision.

As could be expected, this finding was appealed by India. The Appellate Body questioned the logic employed by the Panel and found, in no uncertain terms, that the Panel had erred on this point.[26] The use of the term 'weighted average' was particularly decisive for the Appellate Body in interpreting this provision to be solely applicable when dealing with more than one producer or exporter.

c. Article 2.2.2 (ii) actual amounts incurred and realized: the ordinary course of trade

Still under the article, India criticized the Commission's approach in basing its calculations on actual amounts incurred and realized to the exclusion of transactions which were undertaken below cost, i.e. outside the ordinary course of trade.

India argued that Article 2.2.2 (i) provided that SG&A should be calculated on the basis of the actual amounts incurred and realized, and thus on the basis of *all* transactions undertaken, particularly on the ground that the term 'ordinary course of trade' does not appear in Article 2.2.2 (ii).

Whereas before – in its interpretation of the terms 'amounts', 'exporters', 'producers' and 'weighted average'– the Panel had refrained from delving into the provision's underlying economic reasoning, it now went on to base its analysis almost entirely on economic and market-reality considerations, thereby making itself vulnerable to charges of inconsistency in its overall methodology:

> 'In our view, to require the calculation of constructed normal value including such sales would not be in keeping with the overall object and purpose of the provision – to

[23] Panel Report, para. 6.70
[24] Panel Report, para. 6.71. Emphasis in the original.
[25] Ibid.
[26] The Panels finding was thus reversed by the Appellate Body on this point. See para. 77 of the Appellate Body Report (WT/DS141/AB/R).

> establish methodologies for the determination of a reasonable amount for profit to be used in the calculation of a constructed normal value.'[27]

The Panel found against India on this point, and considered that to interpret Article 2.2.2 (ii) in a manner which would exclude sales not in the ordinary course of trade (when determining profit in order to calculate a constructed normal value) to be permissible.

This was another interpretation, which India chose to appeal before the Appellate Body. The latter, basing its analysis on a more textual examination of the provision, reasoned that because the term 'in the ordinary course of trade' appeared in the chapeau of Article 2.2.2, the drafters of the text had made it clear that sales below cost and thus not in the ordinary course of trade were to be excluded when making calculations under this provision. The Appellate Body equally reasoned that because the term 'in the ordinary course of trade' did *not* appear in Article 2.2.2 (ii), calculations made under this provision must include transactions made both in and outside of the ordinary course of trade, and thus must also include those transactions which took place below cost:

> 'Article 2.2.2 (ii) provides for an alternative calculation method that can be employed precisely when the method contemplated by the chapeau (i.e. in the ordinary course of trade – ed.) cannot be used'[28]

The Appellate Body thus reversed the findings of the Panel on this point, concluding that the EC had acted inconsistently with its obligations under Article 2.2.2 (ii) of the AD Agreement in its method of calculating SG&A and profits in the anti-dumping investigation at issue.

d. Article 2.2. reasonability

Article 2.2 of the Anti-Dumping Agreement provides that, when calculating a constructed normal value, the investigating authority in question may base its calculations on production costs plus a reasonable amount for SG&A. India's claim on this point, was that the EC's constructed normal value was based on amounts for SG&A and profits that were far from reasonable, particularly in regard to profit.

India argued that the use of reasonable in Article 2.2 established an 'independent and overarching requirement' or a 'reasonable test', which any results arrived at in application of 2.2.1 (i) and (ii) had to measure up to. According to India's argument Article 2.2.1 (iii) contained a definition of 'reasonable' against which any results reached under Article 2.2, and Article 2.2.1 (i) and (ii) could be tested.

The EC, in calculating a constructed normal value, had chosen to apply a profit margin of 18.65%. The average profit margin for other Indian producers of the same category of product was 7.04%. The average overall profit margin for Indian producers was 5.41%. The average profit margin for bed linen in Egypt and Pakistan was 6.1%. In the EC, this figure was alleged to be 5%. Whereas it was true that the EC did find one company, Bombay Dyeing, with a 18.65% profit margin[29] and whereas this company did have 80% of the domestic market for bed linen, this figure certainly represented somewhat of an anomaly and thus India felt moved to challenge this figure as unrepresentative and unreasonable within the meaning of Article 2.2 of the AD Agreement.[30]

In defending its methodology before the Panel, the EC argued that Articles 2.2.2 (i) to (iii) established criteria and methods for calculating amounts for SG&A and profits which, if adhered to, would by definition produce

[27] Panel Report, para. 6.86.
[28] Appellate Body Report, para. 83.
[29] However, even this figure was only obtained after excluding sales below cost.
[30] Panel Report, para. 6.89 and 6.92.

results that were reasonable. The EC further argued that, considering its market share, it would have been unreasonable not to select Bombay Dyeing when estimating a profit margin that reflected market realities.

The Panel essentially limited its analysis, again, to a textual examination of the provision in question and followed, to a great extent, the arguments put forward by the EC. It stated that:

> 'We consider that no purpose would be served by testing the results obtained under the chapeau and subparagraphs (i) and (ii) against some arbitrary or subjective standard of reasonability.'

In what could be construed as a fairly summary dismissal of India's line of argumentation on this point, the Panel stated:

> 'There is no objective basis we can discern for concluding that these amounts (referring to the above cited average profit margins – ed.) are more reasonable than the amount determined on the basis of the actual data, The only factor common to these figures is that they are all lower than 18.65%...'[31]

The Panel found that:

> '... Article 2.2.2 (ii), when applied correctly, necessarily yields reasonable results for profits, and that the AD Agreement does not require consideration of a separate reasonability test in respect of results arrived at through the use of that methodology.'[32]

Of course, this finding was qualified by the important rider, 'when applied correctly'. Since the Appellate Body found, on appeal, that Article 2.2.2 (ii) had not been applied correctly by the EC, it no longer had to rule on whether there was a separate reasonability test imposed by Article 2.2 of the Agreement. In any event, this finding by the Panel was not the subject of separate appeal by India.[33]

e. Article 2.4.2, the EC's practice of 'zeroing'

Article 2.4.2 of the Agreement provides detailed rules as to how an investigating authority is to conduct a fair comparison between the export price and the normal value of the product under investigation as required under Article 2.4. of the Agreement. Article 2.4.2 provides that the existence of margins of dumping be established by 'comparing 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'.

India's claim on this point goes into the intricacies of calculating dumping margins in an anti-dumping investigation. The precise workings of how the EC's practice of zeroing works, is described in very lucid terms, in both the Panel and the Appellate Body Report.[34] In short, it can be described as follows:

The European Commission as the investigating authority in the present dispute categorized cotton type bed linen into several subgroups designated as 'models' or 'types', and then proceeded to calculate a weighted average normal value and a weighted average export price for each of the types it had defined. For some of the models thus defined, normal value, as constructed by the Commission under Article 2.2 of the Agreement (see above), was higher than the export price. By subtracting export price from the normal value for these models of cotton type bed linen, the Commission was able to establish a positive dumping margin. However,

[31] Panel Report, para. 6.100.
[32] Panel Report, para. 6.101.
[33] India, being fairly content with the findings of the Panel in general, was not intending to appeal the Report at all, until the EC stated it would appeal certain of the Panel's finding at the DSB Meeting held on December 2000.
[34] Panel Report, para. 6, and para. 47 of the Appellate Body Report.

with regard to other types, normal value was lower than the export price and subtracting the latter from the former yielded a negative dumping margin for these models. The Commission then proceeded to add up the separate amounts it had calculated as dumping margins for each model in order to calculate an aggregate or overall dumping margin for cotton type bed linen as a whole. This is were the technique of zeroing came into play. Instead of taking the negative dumping margin arrived at when normal value was lower than export price, the Commission simply chose to treat these values as zero. Put simply, faced with a dumping margin of 22% for one type or model, and minus 18% for another, the Commission would have arrived at an 'average' dumping margin of 11% (instead of just 2%).[35]

India argued that the practice of zeroing was not consistent with the requirements of Article 2.4.2, as the latter explicitly required consideration of a weighted average. India could see no justification in excluding certain amounts when calculating an average.

The Panel also found the practice of zeroing was a most unorthodox method of conducting what must essentially culminate in a fair comparison of normal value and export price:

> 'It is, in our view, impermissible to "zero" such "negative" margins in establishing the existence of dumping for the product under investigation, since this has the effect of changing the results of an otherwise proper comparison.'[36]

The Panel also challenged the EC's practice of establishing a dumping margin for particular models or types of the product under investigation and not for the product as a whole.

The Panel concluded its examination on this point by finding that the EC had acted inconsistently with Article 2.4.2 of the AD Agreement by using a methodology which 'included zeroing negative price differences calculated for some models of bed linen'.[37]

On appeal the Appellate Body upheld the findings of the Panel on this point, firstly by declaring the practice of zeroing as incompatible with Article 2.4.2, and secondly by ruling that the Commission's practice of categorizing the bed linen products under investigation into subgroups of models or types was impermissible under Article 2.4.2 of the Agreement. The Appellate Body also stated quite openly, that the practice of zeroing violated the principle of fair comparison[38].

2. Claims under Article 3, determination of injury.

Article 3 of the Anti-Dumping Agreement is concerned with how the investigating authority is to establish injury to the domestic industry.

a. Article 3.1, scope of the term 'dumped imports'

Pursuant to Article 3.1, such a determination is to be based on positive evidence and must include an objective examination of (a) the volume of dumped imports and their effect on prices of like products in the domestic market, as well as (b) the impact these imports are having on the domestic producers of such products. India made a number of claims under Article 3.

Firstly it argued that in its determination of injury the EC had not restricted its examination to the volume of imports that had been dumped, but rather assumed that all imports of cotton type bed linen during the investigation period were dumped. This was not disputed by the EC. To do so, was in India's opinion, inconsistent with Article 3.1 of the AD Agreement.

[35] Provided that both types have the same weight. This example taken from an article by Brian Hindley and Edwin Vermulst 'Zeroing In on Zeroing' in *The Wall Street Journal Europe,* 9 of August 2001, p. 38.
[36] Panel Report, para. 6.115.
[37] Panel Report, para. 6.119.
[38] Appellate Body Report, para. 55.

In its defense, the EC argued that it considered the term 'dumped imports', as found in Article 3 of the AD Agreement, to mean all imports of the product under investigation from the country that is found to be dumping, and thus not limited to those transactions that are dumped.

Despite criticism of the EC's interpretation from India, Egypt, Japan and the United States, the Panel was obviously swayed by the EC's line of argumentation, that to distinguish those imports that had been dumped from those that had not, on a transaction by transaction basis, was asking too much of any investigating authority. However it did not adopt the EC's argument in total but found that:

> 'Dumping is a determination made with reference to a **product** from a particular producer exporter and not with reference to individual transactions'[39]

Again letting itself be guided by economic reasoning and market realities, as well as what it felt to be the purpose of the AD Agreement, rather than proceeding according to the methodology it had set out for itself at the beginning of its Report, the Panel defended its finding on this point by stating:

> 'Our conclusion that investigating authorities may treat all imports from producers/exporters for which an affirmative determination of dumping is made as "dumped imports" for purposes of injury analysis under Article 3 is bolstered by our view that the interpretation proposed by India, which entails the conclusion the phrase "dumped imports" refers **only** to those imports attributable to **transactions** in which export price is below normal value, would lead to an unworkable result in certain cases.'[40]

The Panel thus upheld the EC's interpretation of 'dumped imports' on this point and did not make a finding of inconsistency with Article 3.1 of the AD Agreement as requested by India. This finding was not appealed by India before the Appellate Body.

b. Article 3.4, evaluation of 'all relevant economic factors and indices having a bearing on the state of the industry'

As mentioned above, Article 3 sets out rules for the investigating authority when trying to determine whether or not the domestic injury has suffered injury due to dumped imports. Article 3.4 requires that the investigating authority examine 'all relevant factors and indices having a bearing on the state of the industry' and provides an exemplary list of factors which such an examination must include.

India's claim on this point is that the Commission failed to consider all the injury factors mentioned in Article 3.4. The EC essentially argued that Article 3.4 did not always require an examination of all of the factors listed.

The Panel's examination on this point was based on a textual analysis of the provision at issue, as well as the case-law which had already been established in cases like *Korea – Dairy Safeguard*[41], *Argentina – Safeguard Measures on Imports of Footwear,*[42] and *Mexico – HSFC.*[43] The Panel concluded that each of the factors designated in Article 3.4 of the Agreement must be evaluated by the investigating authority and that the latter is not free to disregard some factors which it may consider irrelevant to the course of a particular investigation.

[39] Panel Report, para. 6.136. Emphasis in original.
[40] Panel Report, para. 6.139. Emphasis in original.
[41] Supra note 6.
[42] WT/DS121/AB/R
[43] Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States, Report of the Panel WT/DS132/R.

The Panel then went on to examine whether the EC's determination was consistent with the obligations laid down in Article 3.4 and found that 'data was not even collected for all the factors listed in Article 3.4, let alone evaluated by the EC investigating authorities'.[44]

The Panel concluded its findings on this point by stating:

> 'Based on the foregoing, we conclude that the European Communities did not conduct "an evaluation of all relevant economic factors and indices having a bearing on the state of the industry" and, therefore, failed to act consistently with its obligation under Article 3.4 of the AD Agreement.'[45]

This finding was not appealed by the EC before the Appellate Body.

c. Article 3.4 The domestic industry

Under this claim, India attacked the EC's methodology in selecting which producers were to form the domestic industry in its injury analysis under Article 3.4. India argued that the EC had defined the 'Community Industry' as a set of 35 producers and then went on to select a sample of 17 of these 35 producers in order to conduct its injury investigation. However India alleged that the EC had been less than consistent in sticking with the 17 producers it had selected, and had in fact resorted to 'picking-and choosing' among and outside the scope of the larger group of 35 producers in order to achieve the results it was aiming for, namely a finding of injury.

On this point the Panel made two findings. It's first finding was that by examining data from producers outside the reduced sample of 17 producers, but within the larger grouping of 35 producers defined at the 'Community Industry' the EC did not act inconsistently with the AD Agreement.

The Panels second finding, however, stated that in examining data outside the 'Community Industry' and thus from producers that were neither part of the group of 17 sample of producers or the larger group of 35 producers, the EC had relied on data from producers that were not part of the domestic industry. In making a determination of injury on the basis of data from such producers the EC had failed to act consistently with Article 3.4 of the AD Agreement.[46]

Neither of these finding were appealed by either the EC or India before the Appellate Body.

3. Claims under Article 5, initiation and subsequent investigation

Article 5 sets out certain minimum formal and substantive requirements for the initiation of an anti-dumping investigation and is intended to provide a minimum standard of protection to those that will inevitably suffer most from the initiation of an investigation such as exporters and producers.

India essentially made two claims under Article 5. Its first claim alleged a violation of Article 5.3. Under this claim India maintained that the Commission had failed to verify the accuracy and adequacy of the allegations in the complaint prior to initiating its anti-dumping investigation.

India's second claim under Article 5 was that the EC failed to determine whether the domestic industry enjoyed standing in a manner which was consistent with Article 5.4 of the Agreement.

[44] Panel Report, para. 6.167.
[45] Panel Report, para. 6.169.
[46] Panel Report, para. 6.183.

a. Article 5.3

On this point the panel found against India for several reasons. One was because it failed to see, in the wording of Article 5.3, any 'specific process requirement'[47] as to how the Commission would have been required to examine evidence. The second reason the Panel gave for finding against India on this point, was that the latter had 'failed to present a *prima facie* case that the European Communities erred in concluding that there was sufficient evidence to justify initiation (of an anti-dumping investigation)'[48]

The Panel concluded its findings with the following statement:

> 'We therefore conclude that the European Communities did not violate Article 5.3 of the AD Agreement by failing to examine the accuracy of the information in the application'[49]

This finding was not appealed by India before the Appellate Body.

b. Article 5.4

India's claim under this provision essentially comprises two arguments. The first is that the Commission was not entitled, when assessing the level of support among Community producers under Article 5.4, to take support expressed by producer's associations into consideration, rather than that expressed by the producers themselves.

The second argument India advanced in the context of its claim under this provision, was that the Commission actually failed to examine the level of support before initiating its anti-dumping investigation. In this regard India alleged inconsistencies in the dates of letters and fax headers submitted to Eurocoton and the Commission in support of the anti-dumping petition and asked the Panel to conclude that these letters were not, in fact, received by the Commission prior to its initiation of the anti-dumping investigation.

The Panel side-stepped the issue of whether industry associations could express support instead of the actual producers making up the domestic industry, and thus declined to provide a more detailed interpretation of Article 5.4. Instead the Panel focused its attention on whether or not the Commission had sought to establish whether the minimum amount of support as set out in Article 5.4, existed in favor of the anti-dumping petition. It found that:

> '...counting only those (expressions of support) submitted by individual producers directly to the EC investigating authority, that authority had before it expressions of support from producers accounting for more than the necessary 25 per cent of total EC production of bed linen.'[50]

The Panel further declared itself satisfied with the documents provided by the EC, and found that in any event, there was a presumption of good faith in the context of dispute settlement proceedings. India had, in the Panel's view, failed to present a *prima facie* case in this context which would have rebutted this presumption.

The Panel concluded its findings by stating that the EC had not violated Article 5.4 of the AD Agreement as alleged by India. India did not challenge this finding before the Appellate Body.

4. Claims under Article 15, developing country members

Article 15 of the AD Agreement provides that special regard shall be had to the particular situations of developing country Members when a developed country Member is deciding whether or not to impose anti-

[47] Panel Report, para. 6.198.
[48] Panel Report, para. 6.200.
[49] Panel Report, para. 6.201.
[50] Panel Report, para. 6.217.

dumping duties on products originating on such a developing country Member. This Article particularly provides that both parties shall explore the possibilities of so-called ‘constructive remedies’.

Under this provision India claimed that the EC had failed to explore the possibilities of such constructive remedies, despite the fact that India was a developing country, and despite the fact that India had repeatedly argued its status as a developing country before the Commission. India alleged that it had actively sought a price undertaking with the Commission, but that this offer had been rejected out of hand by the Commission without any substantive consideration.

Interestingly enough, this point literally split the developing and developed country parties to the dispute down the middle, with Egypt and India arguing in favor of a specific obligation on the part of developed countries to explore the possibilities of constructive remedies and Japan, the US and the EC all arguing against the wording of the provision imposing a specific obligation of this nature.

The Panel first undertook a textual analysis of the provision and arrived at the conclusion that:

> ‘...in our view Article 15 imposes no obligation to actually provide or accept any constructive remedy that may be identified and/or offered. It does, however impose an obligation to actively consider, with an open mind, the possibility of such a remedy prior to imposition of an anti-dumping measure that would affect the essential interests of a developing country.’[51]

In its subsequent examination of whether the EC had actively considered, with an open mind, the possibility of price undertakings as proposed by the Indian exporters prior to the imposition of the measure at issue, the Panel found that the Commission had limited its consideration of this possibility to a statement to the effect that bed linen was ‘too complicated a product for undertakings’.[52] In the Panel’s view the EC had therefore failed to explore possibilities of constructive remedies and thus acted in a manner which was inconsistent with Article 15 of the AD Agreement.

This finding was not appealed by the EC before the Appellate Body.

5. Claims under Article 12.2.2, public notice and explanation of determination with regard to the definitive duty

Under this title, essentially the last part of the Report before the Panel’s final summary of its findings, the Panel dealt with a whole range of claims by India, alleging that the EC had repeatedly failed to provide sufficient explanation of its methodologies and determinations, and thus failed to fulfill the transparency requirements Art 12.2.2 provides for the benefit of affected producers of the product under investigation.

Having well and truly reached the limit of its patience with India’s carpet bombing approach, the Panel made short thrift of these claims, summarily dismissing them with the thinnest of reasoning. Without saying as much, the Panel clearly felt that in the interest of judicial economy it could afford not to enter into a detailed discussion of these claims, as it had already made enough substantive findings in regard to the measure at issue, in order to allow the DSB to make the necessary recommendations.

All of India’s claims under this title were denied by the Panel. Something which was not appealed by India before the Appellate Body.

[51] Panel Report, para. 6.2233. Footnote omitted.
[52] Panel Report, para. 6.2236.

IV. CONCLUSIONS

The bed linen dispute represented a long and hard battle of attrition, with the European Communities playing hardball at every stage of the game and refusing to give an inch, despite the fact that it was faced by a developing country Member battling for the survival of one of its most important export industries.

The dispute provided a welcome and long overdue opportunity to throw some light, and perhaps reign in some of the more blatant and excessive abuses of the European Commission's anti-dumping practices, which over the years, have come under repeated attack by a broad range of legal and economic commentators.

Whereas there is little doubt that this dispute can be qualified as a hands-down victory for India, it seems a shame that more work was not put into the appeal stage. Some of the findings of the Panel on such issues as the EC's definition of dumped imports under Article 3.1 of the Agreement were the subject of lengthy submissions by all parties to the dispute and were handled by the Panel in a manner than can only be described as haphazard. However, India, after having seen the dispute drag on for so long, presumably due in great part to the EC's stalling tactics, had no stomach for any further prolongation of hostilities by the time the dispute reached the Appellate Body stage. With India happy to take its win and run, and with the EC looking to contain the political fall-out from having its anti-dumping practices so unambiguously criticized before a body such as the WTO, this case leaves a lot of work still to be done on the interpretation of certain provisions of the AD Agreement.

The negotiation and drafting of the AD Agreements as it appears to us today following the Uruguay Round of Multilateral Trade Negotiations was a painstakingly long and laborious process. The interpretation of the Agreement's ambiguities, as well as the dismantling of some of the more objectionable excesses that are perpetrated by national anti-dumping authorities under its auspices, is also an ongoing process that will inevitably require a considerable amount of time as well as numerous battles: Rome was neither built nor destroyed in a day!

Further Reading

For those who wish to obtain further information on the issued raised in this Commentary or do further reading on some of the subjects raised therein (the WTO Agreement on Antidumping, WTO dispute settlement), the table below provides a non-exhaustive list of further sources.

Author(s)	Title	Place	Publisher / Source	Year
Judith Czako, Johann Human and Jorge Miranda	*A Handbook on Anti-Dumping Investigations*	Cambridge, UK	Cambridge University Press	2003
Pierre Didier	WTO Trade Instruments in EU Law	London, UK	Cameron May	1999
Edwin Vermulst	*The WTO Anti-Dumping Agreement*	Oxford, UK	Oxford University Press	2005
Peter van den Bossche	*The Law and Policy of the World Trade Organization* (2nd edition)	Cambridge, UK	Cambridge University Press	2008
WTO	*A Handbook on the WTO Dispute Settlement System*	Cambridge, UK	Cambridge University Press	2004