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

(WT/DS141)

Third Party Submission of the United States

August 5, 2002

Table of Contents

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I. INTRODUCTION

1. The United States welcomes this opportunity to present its views to the Panel in this proceeding initiated by India to review the consistency with the covered agreements of a measure taken by the EC to comply with the rulings of the Dispute Settlement Body ("DSB") regarding the EC antidumping measure on bedlinens from India.

II. ARGUMENT

A. A Member Can Take Measures After the End of the Reasonable Period of Time to Comply with the Recommendations and Rulings of the DSB, and Such Measures May Fall Within the Mandate of a Panel under Article 21.5 of the DSU

2. A Member's chance to comply with the recommendations and rulings of the DSB does not end with the reasonable period of time for compliance. Nothing in the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") prevents a Member from modifying a compliance measure taken during the reasonable period of time, replacing it with another measure, or even taking its compliance measure for the first time after the end of the reasonable period of time. Furthermore, any of these measures could be subject to review by a panel under Article 21.5 of the DSU.

3. The EC took its initial measure to comply, Regulation 1644/2001, within the reasonable period of time, and amended that measure in Regulation 696/2002, outside the reasonable period of time. The DSU clearly does not support India's position that the EC may not demonstrate its compliance based on Council Regulation 696/2002, because the measure was taken after the end of the reasonable period of time. India itself provides no legal support for this contention. Its most thorough explanation, appearing in paragraph 82 of its written submission, states simply that "[i]n any event Regulation 696/2002 took place outside the reasonable period of time and is therefore also for that reason a non-permissible justification."

4. India has pointed to no provision of the DSU in support of its position, and indeed its view is not consistent with the DSU. Nothing in the text of the DSU prohibits a Member from bringing a measure into compliance with its WTO obligations after the expiration of the reasonable period of time established under Article 21.3. To the contrary, several DSU provisions appear to presume the possibility of a Member's bringing its measure into compliance after the reasonable period of time has expired. For example, Article 21.6 of the DSU provides for continued surveillance by the DSB "until the issue is resolved," without regard as to whether

that occurs before or after the end of the reasonable period. Article 22.8 requires the termination of suspension of concessions (which can only begin after the end of the reasonable period) when, *e.g.*, a Member removes the measure that was found to be inconsistent with a covered agreement.

5. It may be that India is, in essence, arguing that an obligation to comply with recommendations and rulings of the DSB before expiration of the reasonable period of time defines the bounds of the mandate of a panel proceeding under DSU Article 21.5. Once again, the text of the DSU belies this view. The ordinary meaning of Article 21.5 authorizes a panel to consider the "existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings [of the DSB]." The text does not limit the Panel's mandate to examining measures taken before the reasonable period of time expired, or in any other way place a time limit on taking such measures.

6. An examination of the context of Article 21.5 confirms that measures to comply with the recommendations and rulings might occur after the end of the reasonable period of time. Article 21.6 provides for continued surveillance by the DSB until a matter is resolved, without regard as to whether that occurs after the end of the reasonable period. Article 22.8 requires the termination of compensation or suspension of concessions (which can only begin after the end of the reasonable period) if a Member implements the recommendations and rulings.

7. We note that the EC states as a general principle that "the relevant date for assessing the consistency of the measures 'taken to comply' with the covered agreements is the date of establishment of the panel."[1] Regulation 696/2002 predates both the request for establishment and the establishment of the Panel, so there is no need in this proceeding to reach the issue of which is the proper benchmark.

B. Article 2.2.2(ii) of the ADA is Silent with Regard to the Weighting Factor Used to Calculate SG&A and Profit Figures

8. In its first written submission to this Panel, India claims that, contrary to Article 2.2.2(ii) of the *Agreement on Implementation of Article VI of GATT 1994* ("ADA"), the EC applied an improper weighting factor in calculating the weighted average of SG&A and profit figures used to adjust the constructed normal value. Specifically, India claims that the EC improperly overstated the dumping margin by using sales value as the weighting factor, rather than sales volume.

9. The United States disagrees with India's position on this question. Article 2.2.2(ii) specifies that a weighted average is to be utilized; however, it does not specify the manner in which the weighting is to be performed. Article 2.2.2(ii) is silent with respect to this question,

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[1] EC first written submission, para. 35.

providing no guidance, express or implied, as to whether the weighting should be done on the basis of sales value or sales volume.

10. The United States likewise disagrees with India's claim that the "context" of Article 2.2.2(ii) indicates that only a quantity-based weighted average is permissible. The fact that several distinct sections of the ADA refer to sales volume and quantity cannot be taken as evidence that Article 2.2.2(ii) requires a quantity-based weighted average. As noted above, Article 2.2.2(ii) is silent as to the type of weighting factor to be used. If anything, India's argument regarding "context" indicates that Members knew how to insert references to volume or quantity when they wanted to require a calculation to be performed on that basis. Thus, where they have omitted such a reference, it should be considered equally relevant. The Panel should conclude from the silence of Article 2.2.2(ii) that the Members intended the choice of weight-averaging factor to be discretionary.

11. The Panel should also be mindful of Article 17.6(ii) of the ADA, which provides that "[w]here 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." In this case, Article 2.2.2(ii) merely dictates that the amounts in question should be weight-averaged; it does not prescribe that a value-based weighting factor must be used, nor does it prescribe that a volume-based weighting factor must be used. Because Article 2.2.2(ii) is silent in this respect, clearly either method would be a permissible interpretation of the ADA. Therefore, the United States submits that the Panel should not disturb the EC's reliance on a value-based weight-averaging in this instance.

C. Article 21.2 Is Not Mandatory

12. The United States concurs with the EC's conclusion that Article 21.2 is not mandatory. We would emphasize that, as used in the covered agreements, "should" is a hortatory term, and not a mandatory term.[2] Moreover, if the use of "should" were to create an obligation, it would have the same meaning as "shall." This would deprive all significance from the decision by the drafters of the covered agreements to use one term rather than the other, thus violating the principle that "words must not be read into the Agreement that are not there."[3]

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[2] The Appellate Body has on one occasion interpreted "should" as mandatory, but only in the context of a DSU provision concerning a panel's "right" to seek information from the parties to a dispute, and then only because it believed such an interpretation necessary to give meaning to this right. *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, para. 187. Even in this situation, the Appellate Body recognized that "should" often indicates an exhortation and that any implied "obligation" is "usually no more than an obligation of propriety or expediency, or moral obligation." *Id.*, para. 187, note 120.

[3] *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002, para. 250.

D. India's Assertion That the EC Improperly Cumulated Imports from India with Non-dumped Imports from Pakistan Is Mistaken

13. The United States notes that measures not "taken to comply with the recommendations and rulings" are not within the scope of Article 21.5 of the DSU. Thus, to the extent that the EC's re-examination of its application of antidumping duties to Pakistan in Regulation 160/2002 was independent of the measure it took to comply with the recommendations and rulings of the DSB, it is not subject to this Article 21.5 review.[4]

14. India appears to rely on the EC's independent examination of imports from Pakistan, which occurred after the measures taken to comply, to assert that the EC improperly cumulated imports from India with non-dumped imports from Pakistan.[5] However, the EC indicates it found in the original investigation that the imports from Pakistan were dumped, and India did not in the original Panel proceeding challenge that finding or the cumulation of imports from India with those from Pakistan. Under those circumstances, the EC did not act inconsistently with the ADA or the DSU by continuing to treat the imports from Pakistan as dumped for the purposes of making its redetermination with regard to imports from India.

15. Further, India's reliance on Article 5.7 of the ADA to show noncompliance by the EC is unavailing.[6] As the EC explains, Article 5.7, which addresses the simultaneous consideration of both dumping and injury, applies only to the initiation and the "course of the [original] investigation."[7] Neither Article 5.7 nor any other provision of the Agreement requires investigating authorities to revisit aspects of the determination that were upheld or were not subject to the dispute. For example, the DSB might recommend that a Member bring an antidumping measure into conformity with its obligations based on a finding that one discrete aspect of an injury determination, such as the evaluation of one relevant factor reflecting the condition of the domestic industry, was inconsistent with those obligations. Nothing in Article 5.7 or elsewhere in the Antidumping Agreement would support a view that the Member in those circumstances had an obligation to perform the entire investigation anew, including reaching a new dumping determination.

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[4] EC first written submission, paras. 15-16. The EC makes the same point with respect to imports from Egypt. EC first written submission, paras. 17-18. However, since we are limiting our discussion to certain arguments raised by India in this proceedings, we refer only to those imports from Pakistan.

[5] India's first written submission, para. 71.

[6] India's first written submission, paras. 73-84.

[7] EC first written submission, paras.105-107.

E. The Competent Authorities' Evaluation of Each of the Factors Enumerated in Articles 3.2 and 3.4 of the ADA Should Be Discernible in Their Report, but There Need Not Be a Specific Finding on Each of Those Factors

16. To a large extent, India and the EC disagree as to the facts underlying the EC's evaluation of a number of industry factors. The United States takes no view on the facts, but wishes to make several general observations about the EC's obligations under Article 3.4 of the ADA as it relates to the direction of the Panel in its original Report. In this respect, India cites, at paragraph 151 of its first written submission, to the initial observation of the Panel that "the text of Article 3.4 indicates that the listed factors are *a priori* 'relevant' factors 'having a bearing on the state of the industry,' and therefore must be *evaluated* in all cases."[8] The Panel's discussion that followed that comment, however, set the actual framework for what the Panel believes a Member's obligations are under Article 3.4, and, in particular what the EC was obligated to do to bring its measure into compliance.

17. In particular, the Panel recognized that, depending on facts and circumstances of the industry in question, a particular factor "either is or is not relevant to the determination of whether there is injury."[9] The Panel did not determine that every enumerated factor was relevant nor did it impose an obligation on the EC to *rely* on any particular factor. Rather, the Panel simply found that because the EC's determination did not even refer to certain of the Article 3.4 factors, there was nothing in the determination to indicate that the authorities considered them not to be relevant.[10]

18. Article 12.2 of the ADA requires only that the authorities set forth "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities." In light of Article 12.2, investigating authorities are not required in each case to make a specific finding on each enumerated factor in Articles 3.2 and 3.4, but, as the Panel here found, it should be discernible from the authorities' determination that they evaluated each of the enumerated factors.

F. Article 3.5 of the ADA Does Not Limit Antidumping Relief to Situations in Which Imports Are Increasing in Absolute or Relative Terms

19. India asserts that the EC acted inconsistently with Article 3.5 of the ADA by failing to establish a causal link between the imports and the injury to the industry, and by disregarding the non-attribution language.[11] As the EC has emphasized, Article 3.5 does not require that the

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[8] *European Communities–Antidumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted 12 March 2001, para. 6.155 (emphasis added).

[9] *Id.*, para. 6.168.

[10] *Ibid.*

[11] India's first written submission, paras. 230-257.

dumped imports be the sole cause of injury, or that the dumped imports alone have caused the injury.[12]

20. To the extent India suggests that the absence of absolute or relative increases in the volume of subject imports defeats an affirmative determination, the United States agrees with the EC that the ADA does not require that there be an increase in import volume in order to find that the dumped imports caused material injury to the domestic industry.[13] As the EC notes, the Agreement recognizes that in some investigations, the causal effects of the dumped imports may be manifested through price effects, notwithstanding small or stable volumes of imports.[14] Further, in certain market conditions even declining import volumes can produce injurious effects.

III. CONCLUSION

21. The United States thanks the Panel for providing an opportunity to comment on the important interpretive issues at stake in this proceeding.

[12] EC first written submission, para.226.
[13] EC first written submission, paras. 231-234.
[14] Article 3.2 of the ADA.