BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

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

(AB-2003-1)

Third Participant Submission of the United States

February 3, 2003

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THIRD PARTICIPANT SUBMISSION OF THE UNITED STATES OF AMERICA

Service List

APPELLANT

H.E. Mr. K.M. Chandrasekhar, Permanent Mission of India

APPELLEE

H.E. Mr. Carlo Trojan, Permanent Delegation of the European Commission

THIRD PARTIES

H.E. Mr. Shotaro Oshima, Permanent Mission of Japan
H.E. Mr. Chung Eui-Yong, Permanent Mission of Korea

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I. INTRODUCTION

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

II. EXECUTIVE SUMMARY

A. Examination of the Volume of Dumped Imports

2. The Panel correctly concluded that investigating authorities may treat all imports from producers/exporters for which an affirmative determination has been made as "dumped imports" for the purposes of the injury analysis. Article 2.1[1] of the *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") defines *dumped* products "[f]or the purpose of [the AD] Agreement," on a countrywide basis. Therefore, the references to "dumped imports" in Articles 3.1 and 3.2 and throughout Article 3 refer to all imports of the product from the countries subject to the investigation.[2]

3. Article 9.4 confirms this conclusion. It does not provide for any separation of imports from each non-examined producer or exporter into two categories – dumped and not dumped. Rather, it provides for a calculated duty to apply to *all* of the subject imports from each non-examined producer. The AD Agreement should not be interpreted so as to give the term *dumped imports* one meaning in Article 3.1 and then give a different meaning in Article 9.4 to the imports upon which the antidumping duties are imposed.

B. India's Assertion of New Arguments Related to a Claim Rejected in the Original Panel Report

4. The Panel correctly found that when an adopted report rejects a complaining party's arguments regarding a claimed inconsistency with WTO rules, that party cannot raise new

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[1] *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, Report of the Panel, WT/DS141/R, adopted as modified by the Appellate Body in other respects on March 12, 2001, paras. 6.121–141 ("*Bed Linens*").

[2] Unless indicated otherwise, all references to Articles are to the AD Agreement.

arguments on the same claim in an Article 21.5 proceeding. The Panel took guidance from the Appellate Body's findings in *US – Shrimp (Article 21.5 – Malaysia)*, in which the Appellate Body rejected the possibility that "an Article 21.5 panel must re-examine, for WTO consistency, even those aspects of a new measure that were part of a previous measure that was the subject of a dispute, and were found by the Appellate Body to be *WTO-consistent* in that dispute."[3]

5. India argues that Regulation 1644/2001, through which the EC complied with the DSB recommendations, is in fact "a *new* measure that is separate and distinct from the original measure. We disagree with India's view that the mere inclusion of a finding in the legislative or administrative vehicle that implements a DSB recommendation makes it one of the "measures taken to comply with the recommendations and rulings" subject to Article 21.5 review. The text of that Article premises a Panel's jurisdiction over a claim under Article 21.5 on whether they were taken to comply with DSB recommendations and rulings.

C. The Non-Attribution Provision of Article 3.5 of the Antidumping Agreement

6. In its written submission, India argues that the Panel incorrectly found that the EC properly considered the domestic bedlinen industry's rising raw materials costs and inflationary price trends to be symptoms of the injury being suffered by the EC's bedlinens industry. In the view of the United States, India's arguments are premised on a misunderstanding of the language of the Antidumping Agreement. The United States believes that the Panel correctly recognized that, under the Agreement, an investigating authority may appropriately draw a distinction between the economic factors and indicia that indicate whether an industry's overall condition is declining and "other factors" that may be causing such declines, which are subject to the non-attribution provisions of Article 3.5 of the Agreement.

7. Under the AD Agreement, an investigating authority may reasonably make a distinction between "causal" factors (i.e., either dumped imports or the "other" injury causing factors set forth in the third and fourth sentences of Article 3.5) and the "affected" indicia of an industry's condition that will be "impacted" by "causal" factors, like dumped imports. The United States believes that the Panel – and the EC – reasonably concluded that raw material cost increases and inflationary price trends were more appropriately considered economic factors and indicia evidencing the overall condition of the industry, rather than "other factors" causing injury to the industry, as that term is used in Article 3.5.

8. Even if the Appellate Body were to conclude that these factors should have been considered "other factors" subject to the provisions of Article 3.5 of the Agreement, the United States believes that the EC's analysis of the effect of the factors on the industry represents a reasoned and adequate discussion that does not attribute to imports the effects, if any, of these

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[3] *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted 21 November 2001, para. 89 (emphasis in original), quoted in Article 21.5 Panel Report, para. 6.50.

two factors.[4] The United States believes that the EC's analysis of the effects of rising materials costs and inflationary price pressures satisfies the EC's non-attribution obligation under Article 3.5 of the Agreement, as that obligation has been articulated by the Appellate Body.

III. ARGUMENT

A. Examination of the Volume of Dumped Imports Under Article 3.1

9. The United States agrees with the Panel's findings in the original report and the Article 21.5 report concerning the meaning and nature of the term "dumped imports" as used in the AD Agreement. In its original report, the Panel in this dispute thoroughly addressed the meaning of the term "the dumped imports" as used throughout Article 3[5] of the *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"). The Panel found that the dumping determination is made with reference to a *product*, not with reference to individual transactions.[6] Consequently, the Panel correctly concluded that investigating authorities may treat all imports from producers/exporters for which an affirmative determination has been made as "dumped imports" for the purposes of the injury analysis.[7]

10. The Panel correctly interpreted the AD Agreement when it found that the injury analysis under Article 3 may include a consideration of the volume and price effects of all imports from unexamined producers. Article 2.1 defines *dumped* products "[f]or the purpose of [the AD] Agreement," on a countrywide basis. The references to "dumped imports" in Articles 3.1 and 3.2 and throughout Article 3 therefore refer to all imports of the product from the countries subject to the investigation. In this respect, the Agreement requires investigating authorities to examine, on one hand, the volume and price effects of *the dumped imports*, and on the other, all relevant economic factors having a bearing on the state of the domestic industry. Through this examination of both *the dumped imports* and the domestic industry factors, the investigating authorities examine the "consequent impact" of those *dumped imports* on the domestic industry.[8]

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[4] *United States – Anti-Dumping Measures on Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, para. 226 *("US – Hot-Rolled Steel").*

[5] *Bed Linens*, paras. 6.121–141

[6] *Bed Linens*, para. 6.136.

[7] *Bed Linens*, paras. 6.136 and 6.139.

[8] *See* Articles 3.1 and 3.3. The GATT panel decisions in the *Salmon* cases provide additional useful guidance for understanding which imports can be considered *dumped* for the purposes of the injury analysis. *Imposition of Anti-dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway* ("Salmon Anti-dumping Duty"), ADP/124, adopted on 26 April 1994, BISD 41S/228; *Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway* ("Salmon Countervailing Duty") SCM/153, adopted on 28 April 1994, BISD 41S/576. In considering the significance of the volume and volume increases of *dumped* imports, the United States had viewed *all* imports of salmon from Norway during the three year injury period of investigation as "dumped" or "subject" imports. In examining whether the United States had properly considered whether there had been a significant increase in the volume of *dumped* imports, the panels found that the United States had met the requirements of, and had not acted inconsistently with its obligations under, Articles 3:1 and 3:2

11. As the Panel recognized in the original *Bed Linens* report, "the dumped imports" referenced in Article 3 are neither confined to particular transactions that have been examined for dumping determinations nor limited temporally to the period covered by the dumping determination. Nor are they confined to particular companies that have been examined for dumping determinations. This interpretation is consistent with the AD Agreement's recognition that it will be impracticable in some cases to make individual dumping determinations for each known exporter or producer. In those cases, Article 6.10 allows the authorities to limit their dumping examination to either a sampled selection or the largest percentage of the volume of exports from the subject country which "can reasonably be investigated."

12. In addition, as the Panel recognized, Article 9.4 provides bases for determining the antidumping duty margin to be applied to the non-examined exporters or producers. In each of the circumstances illustrated above, the dumping determinations for examined companies would apply equally to the non-examined companies. Thus, all imports subject to either their own calculated margin or to a dumping margin for other imports should be treated as "dumped imports" for purposes of the injury determination.

13. Based on the fact that the imposition of duties addressed in Article 9.4 can only occur after the dumping and injury determinations under Articles 2 and 3, India argues that the Panel's reasoning is illogical.[9] The Panel relied on Article 9.4 for its textual support. Under customary rules of international law for the interpretation of treaties, the terms of the covered agreements are given their ordinary meaning in their context and in light of the object and purpose of the Agreement. India's reliance on the sequential distinctions between the determination of dumping and the imposition of an antidumping duty begs the question for which the Panel looked to Article 9.4, that is, to determine what the meaning of *dumped* imports means throughout the Agreement. Indeed, the Panel recognized that the findings of dumping, injury, and causation logically precede the imposition of any antidumping duty.[10] However, the fact that these findings chronologically precede imposition of a duty tells the treaty interpreter nothing about how the terms of the treaty should be interpreted. To the contrary, it is the text of the treaty that governs, and that text makes clear that there is a relationship between the provisions of Article 9.4 and Articles 2, 3.1, and 6.10. Since Article 9 applies to the collection of *antidumping* duties, Article 9.4 has meaning only if it refers to the assessment of duties on *dumped* imports – the same *dumped* imports that must be examined in the Article 3 injury analysis.

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of the Anti-dumping and Subsidies Codes. *Salmon Anti-dumping* at paras. 498-501; *Salmon Countervailing Duty* at paras. 264-267. It should be noted that the drafters of the Antidumping Agreement chose to use the same text in the Agreement as that used in the Tokyo Round Codes and interpreted by the *Salmon* panels.

[9] Appellant Submission of India, paras. 71-76.

[10] *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/RW, not adopted, para. 6.143 (29 November 2002) ("Article 21.5 Panel Report").

14. Relying on the "for purposes of this paragraph" reference within Article 9.4, India claims that Article 9.4 "expressly restricts itself to the purpose of that paragraph."[11] Article 9.4 cannot be so read. Rather, Article 9.4 expressly *applies* to the circumstances in which the authorities have relied on the procedures set out in the second sentence of Article 6.10 for determining dumping and margins of dumping. The language referred to by India merely requires the authorities, in using the Article 9.4 procedures for imposing duties on non-examined producers/exporters, to disregard – but only *for the purpose of this [Article 9.4] paragraph* – any margins that are zero, *de minimis*, or determined based on best information available.

15. The Agreement should not be interpreted so as to give the term *dumped imports* one meaning in Article 3.1 and then give a different meaning in Article 9.4 to the imports upon which the antidumping duties are imposed. Article 9.4 does not provide for any separation of imports from each non-examined producer or exporter into two categories – dumped and not dumped. Rather, it provides for a calculated duty to apply to *all* of the subject imports from each non-examined producer. Using India's interpretation, the term *dumped* imports would have different meanings in different parts of the Agreement: imports from non-examined producers would not be considered as *dumped* for the purposes of Article 3, but would be considered as *dumped* imports for the purposes of Article 9.4.

16. Contrary to India's characterization, the Panel did not "conclude[ ] that all non-examined producers have dumped and caused injury."[12] Rather, the Panel concluded that the Antidumping Agreement *permits* the investigating authorities to include the volume of subject imports from non-examined producers in the evaluation of volume effects for the purposes of the injury evaluation. Moreover, the Panel did *not* find that the fact that duties can be collected from non-examined producers establishes a causal link between imports from those producers and injury.

17. Article 3.3 provides further support for the Panel's conclusion. That Article provides that as long as the conditions of competition are appropriate and "the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible," the investigating authorities may cumulatively assess the effects of such imports of more than one country that are simultaneously subject to antidumping investigations. This provision clarifies that for the purposes of applying the Agreement's *de minimis* standard, the margins of dumping need only be established "in relation to the imports from each country."

18. If the interpretation urged by India were correct, that would mean that Article 3 created an anomaly. In multi-country investigations (provided under Article 3.3), investigating authorities could assess the volume and price effects of all imports from the subject country as long as each countrywide margin was more than *de minimis*. However, in single country investigations (under

[11] Appellant Submission of India, para. 74.
[12] Appellant Submission of India, para. 72.

India's theory), if the investigating authorities found no dumping for any individual company, they would be required to disregard some of the imports covered by the countrywide margin.

19. As the Panel correctly found, there is nothing in the Agreement obligating investigating authorities to separate out the unexamined producers' imports into dumped and not dumped for purposes of the injury analysis.[13] That Panel noted the distinction between imports from producers specifically found not to be dumping and imports from producers for which a dumping margin is not individually calculated. In the former case, there is no dumping, and the imports from the particular producer are not *dumped* imports; in the latter case, the imports are still *dumped.*

20. Under the Agreement it is clear that the determination of *dumping* and the assignment of *dumping margins* are distinct from the determination of *injury*. Thus, under Articles 2 and 6 the authorities make a determination as to whether the goods from the subject country are in fact being dumped into the commerce of the investigating country, and if so, what the margins are. If the authorities determine that the goods are dumped at higher than *de minimis* margins, they must determine whether those dumped imports are causing injury to the domestic industry.

21. Article 3.1 requires the authorities to base their injury determination on "positive evidence" and to conduct "an objective examination" of the "volume of the dumped imports," as well as of the price effects and impact of the dumped imports. Article 3.2 explains that "[w]ith regard to the volume of dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member." Nothing in these provisions specifies any specific methodology the authorities must use to determine "the volume of dumped imports." And in the absence of any specification of methodology, the investigating authorities may examine volume effects by any methodology that assures an unbiased and objective examination.[14]

22. Although India frames its argument as an attack on the objectivity of the EC methodology, India actually is urging the Appellate Body to impose on Members a different methodology preferred by India. The United States agrees with the Panel as to the reasonableness and consistency with the Agreement of a methodology for assessing volume that includes *all* imports from the subject country except for those attributable directly to any particular producer/exporter that has received a zero or *de minimis* margin.

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[13] Article 21.5 Panel Report, para. 6.139.

[14] *See* Articles 3.1 and 17.6(i). *See also United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, Appellate Body Report, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, para. 181 ("*US-Lamb Meat*").

B. Claims Relating to Aspects of the Measure Which the Original Panel Found Not Inconsistent With WTO Rules Are Not Subject to Consideration Under Article 21.5

23. The Panel correctly found that when an adopted report rejects a complaining party's arguments regarding a claimed inconsistency with WTO rules, that party cannot raise new arguments on the same claim in an Article 21.5 proceeding. The Panel noted that a responding party was entitled to assume that, for aspects of its measure that were not found to be inconsistent with WTO rules, it did not need to modify the measure to comply with the recommendations of the DSB. Allowing a complaining party to raise new arguments regarding those aspects of the measure would, among other things, deprive the responding party of its right under the DSU to have a reasonable period of time to comply with its WTO obligations without being subject to suspension of concessions.

24. The Panel took guidance from the Appellate Body's findings in *US – Shrimp (Article 21.5 – Malaysia)*. In that dispute, the measure taken to comply with the recommendations of the DSB consisted of three elements, one of which had been part of the original measure that the Appellate Body had found to be consistent with WTO rules. The Appellate Body rejected the possibility that "an Article 21.5 panel must re-examine, for WTO consistency, even those aspects of a new measure that were part of a previous measure that was the subject of a dispute, and were found by the Appellate Body to be *WTO-consistent* in that dispute"[15]

25. India does not disagree with this reasoning, and apparently accepts that only "new" measures taken to comply with DSB recommendations are subject to Article 21.5 review. It argues that Regulation 1644/2001, through which the EC complied with the DSB recommendations, is in fact "a *new* measure that is separate and distinct from the original measure."[16] Since the regulation reaffirmed the causation analysis in the original determination of the EC, India apparently views the causation analysis as "new" and, therefore, properly subject to new assertions of inconsistency with Article 3.5.

26. As a third participant, we take no position with regard to the facts of this case. As a conceptual matter, we disagree with India's view that the mere inclusion of a finding in the legislative or administrative vehicle that implements a DSB recommendation makes it one of the "measures taken to comply with the recommendations and rulings" subject to Article 21.5 review. Under this theory, the form of implementation would determine the scope of the review. If the Member amended an earlier measure without reference to the portions that remained the same, only the modifications needed to implement the recommendations would be subject to Article 21.5. But if, for its own internal legal reasons, the Member made the changes to comply

[15] *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted 21 November 2001, para. 89 (emphasis in original), quoted in Article 21.5 Panel Report, para. 6.50.

[16] Appellant Submission of India, para. 151 (emphasis in original).

with DSB recommendations and at the same time reaffirmed earlier findings that remained the same, both the modifications and the unchanged findings would be subject to Article 21.5. In fact, taken to its logical extreme, the principle advanced by India would bring under Article 21.5 even measures that were only incidentally included in the legislation implementing DSB recommendations.

27. This result is not only absurd. It is also inconsistent with the text of Article 21.5, which states:

> Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings, such dispute shall be decided through recourse to these dispute settlement procedures . . . .

This text premises a Panel's jurisdiction over a claim under Article 21.5 on whether they were taken to comply with DSB recommendations and rulings. The necessary corollary is that a measure *not* 'taken to comply' is *not* subject to review. The title of Article 21 – "Surveillance of Implementation of Recommendations and Rulings" – confirms that it focuses on *implementation* of the recommendations and rulings of the DSB, and not on the original measure.

28. The existence of a finding that the DSB has already concluded is not inconsistent with WTO rules, or the formal reaffirmation of such a finding, does nothing with respect to inconsistencies that the DSB found in connection with the original measure. Thus, the continuation or reaffirmation of such a finding would not be a "measure[] taken to comply with recommendations and rulings" that is subject to Article 21.5 review.

29. Article 21.5 does not require a different outcome if the reaffirmation of a finding found to be consistent with WTO rules is paired in a single piece of legislation with the implementation of a DSB recommendation with regard to the original measure. If simple packaging determined jurisdiction under Article 21.5, the substantive requirement of the article would become purely formal. That result would contradict the ordinary meaning of Article 21.5.

30. India also contends that raising a new argument related to the original measure would not prejudice the responding party in an Article 21.5 proceeding unless the new arguments on the unsuccessful claim were the only ones in the proceeding.[17] Again, we will not comment on the facts of this dispute. But, in general, it is easy to see how prejudice could result. For example, if the new arguments on the unsuccessful claim were combined with claims genuinely arising out of implementation of the measure, the responding party would still have to address the new arguments in a much shorter time frame than the DSU normally provides for defending against a claim. The absence of an implementation period under Article 21.5 would impair the responding

[17] Appellant Submission of India, para. 145.

party's ability to undertake the domestic work necessary to resolve that claim before suspension of concessions. Thus, the very existence of new arguments on old claims prejudices the responding party, without regard to the existence of other arguments properly subject to an Article 21.5 proceeding.

31. In short, India's efforts to raise in an Article 21.5 proceeding arguments that it raised, but lost, in the original dispute are inconsistent with the text and context of that Article. India has presented no reason for the Panel to have concluded otherwise.

C. The Panel Correctly Found the EC Was Not Required to Consider the Industry's Rising Raw Materials Costs and Inflationary Price Pressures as "Other Factors" Subject to the Non-Attribution Provision of Article 3.5 of the Antidumping Agreement

32. The United States agrees with the Panel that the EC appropriately found that the bedlinen industry's rising material costs and inflationary price pressures in the bedlinen market were not "other factors" causing injury to the domestic industry that were subject to the non-attribution provision of Article 3.5 of the Antidumping Agreement. The United States agrees with the Panel that the EC properly treated these two "factors" as evidence of whether the EC bedlinen industry was suffering material injury during the period investigated.[18]

1. The Panel Correctly Found That The Industry's Rising Raw Materials Costs and Inflationary Consumer Price Trends in the Overall Market were Not "Other" Causes of Injury Subject to the Non-Attribution Provisions of Article 3.5 of the Agreement

33. In its written submission, India argues that the Panel incorrectly found that the EC properly considered the domestic bedlinen's industry's rising raw materials costs and inflationary price trends to be symptoms of the injury being suffered by the EC's bedlinens industry. According to India, the EC should have treated these indicia as "other factors" causing injury to the bedlinens industry and should, therefore, have separated and distinguished the effects of these factors from those of dumped imports under Article 3.5 of the Antidumping Agreement.[19]

34. In the view of the United States, India's arguments are premised on a misunderstanding of the language of the Antidumping Agreement. The United States believes that the Panel correctly recognized that, under the Agreement, an investigating authority may appropriately draw a distinction between the economic factors and indicia that indicate whether an industry's overall condition is declining and "other factors" that may be causing such declines, which are subject to the non-attribution provisions of Article 3.5 of the Agreement. India's argument fails to recognize that such a distinction is entirely appropriate under Article 3 of the Agreement.

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[18] Article 21.5 Panel Report, para. 6.240.
[19] Appellant Submission of India, paras. 168-88.

35. In this regard, it is clear that the Agreement contemplates that an investigating authority will evaluate several different types of "economic factors and indicia" when performing its causation analysis. For example, one aspect of an investigating authority's analysis under the Agreement is an examination of the individual economic indicia of an industry's condition, including such factors as an industry's capacity levels, shipment and production levels, employment and capital investment levels, and its pricing, profitability and cost levels.[20] By way of contrast, the Agreement also contemplates that certain factors, such as dumped imports, reduced demand, or changes in technology, may actually be *causing* any declines in the indicia of an industry's condition.[21]

36. To put it another way, under the Agreement, an investigating authority may reasonably make a distinction between "causal" factors (i.e., either dumped imports or the "other" injury causing factors set forth in the third and fourth sentences of Article 3.5) and the "affected" indicia of an industry's condition that will be "impacted" by "causal" factors, like dumped imports.

37. Given the foregoing, the United States believes that the Panel – and the EC – reasonably concluded that raw material cost increases and inflationary price trends were more appropriately considered economic factors and indicia evidencing the overall condition of the industry, rather than "other factors" causing injury to the industry, as that term is used in Article 3.5. In essence, increased costs and inflationary price trends will only have a negative impact on an industry when accompanied by some other factor that prevents the industry from increasing their prices, such as dumped imports or reduced domestic demand. In this situation, the Panel and the EC both correctly recognize that neither of these factors is, in and of itself, a factor that would inherently have a negative effect on the overall condition of the industry. Instead, the United States believes that both the Panel and the EC properly acknowledged that it is the price-suppressing factor, in the presence of these increasing costs or inflationary trends, that causes injury.

38. Accordingly, the United States believes that the Panel and the EC properly found that these two factors should not necessarily be considered an "other cause" of injury subject to the non-attribution provision set forth in Article 3.5 of the Agreement.

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[20] AD Agreement, Articles 3.2 and 3.4.

[21] AD Agreement, Article 3.5. Moreover, Article 3.5 specifically identifies as possible "other factors" such factors as: the "volume and prices of imports not sold at dumping prices", "contraction in demand or changes in patterns of consumption", "trade restrictive practices and competition between the foreign and domestic producers", "developments in technology," and the "export performance and productivity of the domestic industry" as being possible "other factors." The United States notes that this illustrative list does not include changes in the industry's cost structure or inflationary price trends as possible other causes of injury to an industry.

2. Even if the Industry's Increasing Raw Materials Costs or Inflationary Price Trends Should Be Considered "Other Factors" Causing Injury to the Industry, the EC's Analysis of These Factors Satisfies the Non-Attribution Provision of Article 3.5 of the AD Agreement

39. As indicated above, the United States agrees with the Panel's finding that the EC properly found that the industry's rising costs and inflationary price trends in the market were not "other factors" causing injury subject to the non-attribution provision of Article 3.5. However, even if the Appellate Body were to conclude that these factors should have been considered "other factors" subject to the provisions of Article 3.5 of the Agreement, the United States believes that the EC's analysis of the effect of the factors on the industry represents a reasoned and adequate discussion that does not attribute to imports the effects, if any, of these two factors.[22] Accordingly, the United States believes that the EC's analysis would satisfy its non-attribution obligation under Article 3.5.

40. In this regard, the United States notes that the Appellate Body has stated that, under Article 3.5 of the Agreement, the investigating authorities "must make an appropriate assessment of the injury caused to the domestic industry by the other known factors and . . . must separate and distinguish the injurious effects of the dumped imports from the injurious effects of those other factors."[23] According to the Appellate Body, "in the absence of such separation and distinction of the different injurious effects, the investigating authorities would have no rational

[22] *US – Hot-Rolled Steel*, para. 226.

[23] *US – Hot-Rolled Steel*, AB Report, para. 226. However, the United States notes that it has expressed its concerns to the Dispute Settlement Body about the Appellate Body report in the *US – Hot-Rolled Steel* dispute. When that report was considered for adoption, the United States said:

> . . .[t]he United States had presented a detailed analysis to the Appellate Body as to why the causation analysis reflected in the "Wheat Gluten" and "Lamb" Appellate Body Reports involving the Safeguards Agreement were different from that in the Anti-Dumping Agreement. These were two separate Agreements, with different objects and purposes and with wholly different texts pertaining to the question of causation and the manner of establishment of a causal link between imports and injury. The Appellate Body had made no reference to these important differences and appeared to have disregarded the interpretative principle that the use of distinct language connoted an intended difference in meaning. Instead, the Appellate Body's findings seemed to depend solely on the similarity of the non-attribution texts in the two Agreements, failing both to acknowledge the distinct context for that language and to ascribe any meaning or importance to the detailed direction regarding causation found in the Anti-Dumping Agreement, but absent from the Safeguards Agreement. Considering the importance of this issue to Members' rights under the Anti-Dumping Agreement, the Appellate Body should have explained why no consideration had been due to paragraphs 3.2 and 3.4 of the Agreement in establishing the relevant causation analysis.

Dispute Settlement Body, Minutes of Meeting Held on 23 August 2001, WT/DSB/M/108, para. 72 (footnotes omitted).

basis to conclude that the dumped imports are indeed causing the injury which, under the *Antidumping Agreement,* justifies the imposition of duties."[24]

41. However, the Appellate Body has specifically stated that this obligation under Article 3.5 requires the investigating authorities to provide "a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the dumped imports."[25] In other words, according to the Appellate Body, as long as the investigating authority explains the nature and extent of the injurious effect of these other factors in a clear, reasoned and adequate manner which distinguishes their effects from those of imports, the investigating authority will have satisfied its obligations under Article 3.5 of the Agreement.

42. The United States believes that the EC's analysis of the effects of rising materials costs and inflationary price pressures satisfies the EC's non-attribution obligation under Article 3.5 of the Agreement, as that obligation has been articulated by the Appellate Body. For example, in the case of the industry's rising raw materials costs, the EC reasonably and clearly explained that raw cotton prices had risen during the period between 1992 and the end of the period of investigation and that the domestic producers should normally have been able to pass these costs on to their customers in the form of increased prices during this period.[26] The EC also clearly and reasonably explained that the dumped imports had undersold EC-produced bedlinens throughout the period, that the price of bedlinens fell in correlation with this underselling, and that, as a result, the EC's bedlinens industry was not able to pass on some or all of its increased costs to its customers.[27] Although the United States takes no position with respect to whether the record evidence fully supports these factual findings, the United States believes that, on its face, this analysis is a clear, cogent and reasoned assessment of the nature and extent of the injurious effects of cost increases during the period that adequately distinguishes the effects of these increases from those of imports.

43. In the view of the United States, this analysis clearly satisfies the EC's non-attribution obligations under Article 3.5 of the Agreement. The United States believes that nothing more is required under Article 3.5 of the Agreement.

IV. CONCLUSION

44. The United States appreciates the opportunity to comment on the important interpretive issues at stake in this proceeding.

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[24] *US – Hot-Rolled Steel*, AB Report, para. 223.
[25] *US – Hot-Rolled Steel*, AB Report, para. 184.
[26] Article 21.5 Panel Report, para. 6.239.
[27] Article 21.5 Panel Report, para. 6.239.