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EUROPEAN COMMUNITIES – ANTI-DUMPING DUTIES ON IMPORTS OF COTTON-TYPE BED LINEN FROM INDIA RECOURSE TO ARTICLE 21.5 OF THE DSU BY INDIA

Report of the Appellate Body
WT/DS141/AB/RW

Adopted by the Dispute Settlement Body on 24 April 2003

India, *Appellant*
European Communities, *Appellee*
Japan, *Third Participant*
Korea, *Third Participant*
United States, *Third Participant*

Present:
Abi-Saab, Presiding Member
Bacchus, Member
Taniguchi, Member

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Australia – Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327
Australia – Salmon (Article 21.5 – Canada)	Panel Report, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada*, WT/DS18/RW, adopted 20 March 2000, DSR 2000:IV, 2035
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EC – Bed Linen (Article 21.5 – India)	Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/RW, 29 November 2002
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US – FSC	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, 1619

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US – Shrimp (Article 21.5 – Malaysia)	Appellate Body Report, *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
US – Wheat Gluten	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323

I. INTRODUCTION

1. India appeals certain issues of law and legal interpretations in the Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India* (the "Panel Report").[1] The Panel was established to consider a complaint by India with respect to the consistency with the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*") and the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") of the measures taken by the European Communities to comply with the recommendations and rulings of the Dispute Settlement Body (the "DSB") in *EC – Bed Linen*.[2]

[1] WT/DS141/RW, 29 November 2002.

[2] The recommendations and rulings of the DSB resulted from the adoption, by the DSB, of the Appellate Body Report and the panel report, as modified by the Appellate Body Report, in *EC – Bed Linen.*

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2. The original panel found that Council Regulation (EC) No 2398/97 of 28 November 1997[3], imposing definitive anti-dumping duties on imports of cotton-type bed linen from India, is inconsistent with Articles 2.4.2, 3.4, and 15 of the *Anti-Dumping Agreement*.[4] India and the European Communities appealed certain issues of law and legal interpretations developed by the original panel. The Appellate Body upheld the original panel's finding that "the practice of 'zeroing' when establishing 'the existence of margins of dumping', as applied by the European Communities in the anti-dumping investigation at issue" is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*.[5] In addition, the Appellate Body found that "the European Communities, in calculating amounts for administrative, selling and general costs and profits in the anti-dumping investigation at issue", had acted inconsistently with its obligations under Article 2.2.2(ii) of the *Anti-Dumping Agreement* and, therefore, reversed the findings of the original panel to the contrary in paragraphs 6.75 and 6.87 of the original panel report.[6]

3. On 12 March 2001, the DSB adopted the Appellate Body Report and the original panel report, as modified by the Appellate Body Report.[7] The parties to the dispute mutually agreed that the European Communities should have until 14 August 2001 to implement the recommendations and rulings of the DSB.[8] On 7 August 2001, the Council of the European Union adopted Council Regulation (EC) No 1644/2001, amending the original definitive anti-dumping measure on cotton-type bed linen from India.[9] Subsequently, on 28 January 2002 and 22 April 2002, the Council of the European Union adopted Council Regulations (EC) No 160/2002 and No 696/2002, respectively.[10] EC Regulation 160/2002 terminated the anti-dumping proceedings against cotton-type bed linen imports

[3] Council Regulation (EC) No 2398/97, 28 November 1997, imposing a definitive anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan, published in the Official Journal of the European Communities, 4 December 1997, L-series, No. 332 ("EC Regulation 2398/97").

[4] Original Panel Report, WT/DS141/R, adopted 12 March 2001, as modified by the Appellate Body Report, WT/DS141/AB/R.

[5] Appellate Body Report, *EC – Bed Linen*, adopted 12 March 2001, para. 86(1).

[6] *Ibid*., para. 86(2).

[7] WT/DS141/9, 22 March 2001.

[8] WT/DS141/10, 1 May 2001.

[9] Council Regulation (EC) No 1644/2001, 7 August 2001, amending Regulation (EC) No 2398/97 imposing a definitive anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan and suspending its application with regard to imports originating in India, published in the Official Journal of the European Communities, 14 August 2001, L-series, No. 219 ("EC Regulation 1644/2001").

[10] Council Regulation (EC) No 160/2002, 28 January 2002, amending Council Regulation (EC) No 2398/97 imposing a definitive anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan, and terminating the proceeding with regard to imports originating in Pakistan, published in the Official Journal of the European Communities, 30 January 2002, L-series, No. 26 ("EC Regulation 160/2002").

Council Regulation (EC) No 696/2002, 22 April 2002, confirming the definitive anti-dumping duty imposed on imports of cotton-type bed linen originating in India by Regulation (EC) No 2398/97, as amended and suspended by Council Regulation (EC) No 1644/2001, published in the Official Journal of the European Communities, 25 April 2002, L-series, No. 109 ("EC Regulation 696/2002").

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from Pakistan and established that the anti-dumping measures against Egypt would expire on 28 February 2002, if a review were not requested by that date. This review was not requested, and the anti-dumping measures against Egypt expired. EC Regulation 696/2002 established that a reassessment of the injury and causal link based on imports from India alone had revealed that there was a causal link between the dumped imports from India and material injury to the European Communities industry. Additional factual aspects of this dispute are set out in greater detail in the Panel Report.[11]

4. India was of the view that the European Communities had failed to comply with the recommendations and rulings of the DSB, and that EC Regulations 1644/2001, 160/2002, and 696/2002 were inconsistent with several provisions of the *Anti-Dumping Agreement* and Article 21.2 of the DSU. India, therefore, requested that the matter be referred to a panel pursuant to Article 21.5 of the DSU.[12] On 22 May 2002, in accordance with Article 21.5 of the DSU, the DSB referred the matter to the original panel. A member of the original panel was unable to participate in the proceedings and the parties therefore agreed on a new panelist on 25 June 2002.[13] The Panel Report was circulated to the Members of the World Trade Organization (the "WTO") on 29 November 2002.

5. Before making findings on India's claims, the Panel made the following rulings on four preliminary matters raised by the European Communities. The Panel:

(i) ruled that EC Regulations 160/2002 and 696/2002 are not "measures taken to comply" with the recommendation of the DSB, within the meaning of Article 21.5 of the DSU.[14] Thus, the Panel limited its examination to EC Regulation 1644/2001;

(ii) declined to assess whether the measures "taken to comply" were adopted within the "reasonable period of time" agreed by the parties under Article 21.3 of the DSU[15];

(iii) found that India's "claim 6" was not properly before the Panel, to the extent that it concerned the consistency of the European Communities' measure with the obligation under Article 3.5 of the *Anti-Dumping Agreement* to ensure that injuries caused by "other factors" not be attributed to the dumped imports, because it was disposed of by the original panel and not appealed.[16] The Panel, however, rejected the European Communities' request to exclude

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[11] Panel Report, paras. 2.1-2.11.
[12] WT/DS141/13/Rev.1, 8 May 2002.
[13] WT/DS141/14, 2 July 2002; WT/DS141/14/Corr.1, 10 July 2002.
[14] Panel Report, para. 6.22.
[15] *Ibid.*, para. 6.27.
[16] *Ibid.*, para. 6.53.

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India's "claim 5" because the Panel found that India could not have presented that claim in the original dispute [17]; and

(iv) rejected the European Communities' request that the Panel exclude India's claims relating to Article 4.1(i) of the *Anti-Dumping Agreement* and Article 21.3 of the DSU, given that India itself denied making such claims. [18]

6. The Panel then examined India's claims and found that:

(i) India had failed to demonstrate that the European Communities' calculation of a weighted average for administrative, selling, and general costs on the basis of sales value violates Article 2.2.2(ii) of the *Anti-Dumping Agreement* [19];

(ii) even assuming EC Regulations 160/2002 and 696/2002 properly formed part of the Panel's evaluation, the European Communities had not violated paragraphs 1 and 3 of Article 3 or Article 5.7 of the *Anti-Dumping Agreement* in conducting a cumulative assessment of the effects of dumped imports from India and Pakistan (and Egypt), in subsequently re-examining whether imports from Pakistan were being dumped, and subsequently in reassessing the effects of the dumped imports from India alone [20];

(iii) the European Communities had not acted inconsistently with paragraphs 1 and 2 of Article 3 of the *Anti-Dumping Agreement* in considering "dumped imports" [21];

(iv) the analysis and conclusions of the European Communities with respect to injury are not inconsistent with paragraphs 1 and 4 of Article 3 of the *Anti-Dumping Agreement* [22];

(v) the European Communities' finding of a causal link between the dumped imports and the injury is not inconsistent with Article 3.5 of the *Anti-Dumping Agreement* [23];

(vi) the European Communities had not acted inconsistently with Article 15 of the *Anti-Dumping Agreement* by failing to explore possibilities of constructive remedies before applying anti-dumping duties [24]; and

(vii) the European Communities had not violated Article 21.2 of the DSU. [25]

[17] Panel Report, para. 6.57. India's "claim 5" related to the assessment of whether the European Communities' reconsideration of injury was consistent with Article 3.4.
[18] Panel Report., para. 6.68.
[19] Panel Report, para. 6.94.
[20] *Ibid.*, para. 6.116.
[21] *Ibid.*, para. 6.144.
[22] *Ibid.*, para. 6.217.
[23] *Ibid.*, para. 6.233.
[24] *Ibid.*, para. 6.260.
[25] *Ibid.*, para. 6.271.

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7. Having excluded, as a preliminary matter, India's claim that the European Communities had failed to ensure that injuries caused by "other factors" was not attributed to the dumped imports pursuant to Article 3.5 of the *Anti-Dumping Agreement*, the Panel nevertheless made an alternative finding on this issue and determined that the European Communities had not acted inconsistently with Article 3.5 in this regard.[26]

8. For these reasons, the Panel concluded that EC Regulation 1644/2001 is not inconsistent with the *Anti-Dumping Agreement* or the DSU.[27] Therefore, the Panel found that the European Communities had implemented the recommendation of the DSB to bring its measure into conformity with its obligations under the *Anti-Dumping Agreement*.[28] In the light of these conclusions, the Panel did not make any recommendations under Article 19.1 of the DSU.[29]

9. On 8 January 2003, India notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the DSU, and filed a Notice of Appeal pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*").[30] On 20 January 2003, India filed an appellant's submission.[31] On 3 February 2003, the European Communities filed an appellee's submission.[32] On the same day, Japan and the United States each filed a third participant's submission.[33] Korea notified its intention to appear at the oral hearing as a third participant.[34]

10. The oral hearing in this appeal was held on 20 February 2003. The participants and third participants presented oral arguments and responded to questions put to them by the Members of the Division hearing the appeal.

11. We recall that the Panel found, as a preliminary matter, that only EC Regulation 1644/2001 was a measure "taken to comply" within the meaning of Article 21.5 of the DSU, and thus the Panel excluded EC Regulations 160/2002 and 696/2002 from the scope of its examination.[35] India has not appealed this finding. During the oral hearing, India and the European Communities agreed, moreover, that the measure at issue in this appeal is EC Regulation 1644/2001.[36] Therefore, we will confine our analysis in this appeal to EC Regulation 1644/2001.

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[26] Panel Report, para. 6.246.
[27] *Ibid.*, para. 7.1.
[28] *Ibid.*, para. 7.2.
[29] *Ibid.*, para. 7.3.
[30] WT/DS141/16, 9 January 2003.
[31] Pursuant to Rule 21(1) of the *Working Procedures*.
[32] Pursuant to Rule 22(1) of the *Working Procedures*.
[33] Pursuant to Rule 24(1) of the *Working Procedures*.
[34] Pursuant to Rule 24(2) of the *Working Procedures*.
[35] Panel Report, para. 6.22.
[36] India's and the European Communities' responses to questioning at the oral hearing.

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II. ARGUMENTS OF THE PARTICIPANTS AND THE THIRD PARTICIPANTS

A. *Claims of Error by India – Appellant*

1. *Article 21.5 of the DSU*

12. India asserts that the Panel erred in finding, as a preliminary matter, that India's claim, concerning the consistency of EC Regulation 1644/2001 with the obligation under Article 3.5 of the *Anti-Dumping Agreement* to ensure that injuries caused by "other factors" are not attributed to the dumped imports, was not properly before the Panel. India notes that the European Communities based its request for a preliminary ruling on two arguments: (i) that India should not be allowed to raise claims before the Article 21.5 Panel that it could have raised before the original panel; and (ii) that India was acting in bad faith. India submits that, although the Panel found that India's claim *was* raised during the original proceedings, and also that India *was* pursuing the matter in *good faith*, the Panel nevertheless granted the European Communities' request for a preliminary ruling.

13. According to India, instead of focusing on the facts of the case, the Panel based some of its conclusions on overarching considerations of the appropriate functioning of Article 21.5 panels and the dispute settlement system as a whole. For example, the Panel determined that defending Members in Article 21.5 proceedings would *always* be prejudiced by a finding in Article 21.5 proceedings of a violation made on the basis of a claim that could have been pursued in the original proceedings, but was not, because the defending member would not have a reasonable period of time for implementation. India submits that it had argued before the Panel that the European Communities would not, in this particular case, suffer any prejudice from lack of a reasonable period for implementation, since India's claim under Article 3.5 is not the only claim in these proceedings. However, according to India, the Panel "declined to address [India's] argument".[37]

14. India contends that the Panel failed to take into account the Appellate Body Report in *US – FSC (Article 21.5 – EC)*, where the European Communities raised a claim in the Article 21.5 proceedings that it had not raised in the original proceedings. The Article 21.5 panel and the Appellate Body, nevertheless, made findings with respect to that claim. In India's view, EC Regulation 1644/2001, like the measure before the Appellate Body in *US – FSC (Article 21.5 – EC)*, is a new and different measure from the measure subject to the original dispute.[38]

15. India argues that the Panel erred in considering the situation in *US – Shrimp (Article 21.5 – Malaysia)* to be analogous to the situation in the present case. India asserts that in *US – Shrimp (Article 21.5 – Malaysia)*, the complainant sought to challenge exactly the same measure that had been found to be WTO-consistent in the original proceedings, whereas in the present case, the measure

[37] India's appellant's submission, para. 145.
[38] India's response to questioning at the oral hearing.

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challenged by India is a *new* measure that is separate and distinct from the original measure. According to India, in *US – Shrimp (Article 21.5 – Malaysia)*, the "measure" consisted of several sub-measures, and the Appellate Body had found, in the original dispute, that one of these sub-measures, Section 609, was consistent with the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994").[39] Therefore, in those Article 21.5 proceedings, the Appellate Body declined to re-examine Section 609 because it had already found that it was consistent with the GATT 1994. In India's view, the issue in this appeal is different from that in *US – Shrimp (Article 21.5 – Malaysia)* because the "measure" cannot be divided into sub-measures. According to India, all the aspects of the original measure have been changed—there has been a redetermination of dumping and injury, as well as a re-examination of causation. India notes that the fact that the European Communities analyzed causation anew, makes that analysis part of the new implementation measure. In India's view, the European Communities should have similarly re-ensured that the injury caused by other factors was not attributed to the dumped imports.[40]

16. India also submits that the Panel should have followed the Appellate Body's conclusion in *Canada – Aircraft (Article 21.5 – Brazil)*, that Article 21.5 panels are not confined to examining the "measures taken to comply" from the perspective of the claims, arguments, and factual circumstances related to the measure that was the subject of the original proceedings.[41]

2. *Paragraphs 1 and 2 of Article 3 of the Anti-Dumping Agreement*

17. India appeals the Panel's finding that the European Communities did not act inconsistently with paragraphs 1 and 2 of Article 3 of the *Anti-Dumping Agreement* when determining the volume of "dumped imports" for purposes of making a determination of injury. According to India, the European Communities mistakenly concluded that 86 percent of the total volume of imports of bed linen from India were dumped. India argues that the proportion of imports attributable to *sampled* producers found to be dumping (47 percent) constitutes the only *positive evidence* that could have been used to *objectively examine* and determine the volume of *total* imports from India that are dumped. India contends that if the basis for determining dumped imports is the calculation of dumping margins for sampled producers, and that calculation reveals no dumping for producers representing 53 percent of the imports attributable to sampled producers, one cannot objectively reach the conclusion that 86 percent of the total volume of imports are positively dumped.

18. Second, India argues that the Panel erred in finding that Article 3 does not provide any guidance on how to determine the volume of *dumped imports* for purposes of making a determination of injury. In India's view, Article 3.1

[39] India's response to questioning at the oral hearing.
[40] *Ibid.*
[41] Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 41.

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