WORLD TRADE ORGANIZATION

WT/DS141/3
8 September 1999

(99-3789)

Original: English

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

Request for the Establishment of a Panel by India

The following communication, dated 7 September 1999, from the Permanent Mission of India to the Chairman of the Dispute Settlement Body is circulated pursuant to Article 6.2 of the DSU.

On 3 August 1998 India requested consultations with the European Community pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXIII of the General Agreement on Tariffs and Trade, 1994 (GATT 1994) and Article 17 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (hereinafter: "ADA") concerning the anti-dumping proceedings against the import of cotton-type bedlinen from India, including the initiation of these proceedings, imposition of provisional duties as well as the imposition of definitive duties. This request was notified to the Dispute Settlement Body and was circulated to WTO Members (WT/DS141/1 of 7 August 1998). Pursuant to this request, consultations were held in Geneva on 18 September 1998 and 15 April 1999. Since the consultations have failed to settle the dispute, India, in conformity with Article XXIII:2 of GATT 1994, Article 6 of the Dispute Settlement Understanding, and Article 17 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 respectfully requests the establishment of a panel to examine the matter.

The EC initiated anti-dumping proceedings against the import of cotton-type bedlinen from India by publishing a notice of initiation in September 1996 (in the Official Journal of the European Communities C266/2 of 13 September 1996). Provisional anti-dumping duties were imposed by EC Commission Regulation No. 1069/97 dated 12 June 1997. This was followed by the imposition of definitive duties by the EC Council Regulation No. 2398/97 of 28 November 1997. All of these measures, including the imposition of provisional duties had a significant impact on India's export of cotton-type bedlinen to the EC and has resulted in the nullification and/or impairment of benefits accruing to India under the ADA and GATT 1994. India believes that the initiation of anti-dumping proceedings, the imposition of provisional duties, and the imposition of definitive duties in the said case are inconsistent with the following provisions of the ADA and of GATT 1994.

Provisions of ADA

(a) Article 2, including Article 2.2.2,
(b) Article 3, especially, but not exclusively Articles 3.1, 3.2, 3.4 and 3.5,
(c) Article 4.1(i), and Article 5.4, alone and both in conjunction with Article 3,
(d) Article 5, especially but not exclusively Articles 5.2, 5.3, 5.4 and 5.8,
(e) Article 15,
(f) (a) to (e), each alone and in conjunction with Article 12
(g) Article 12.

Provisions of GATT 1994

(i) Article I
(ii) Article VI

India considers the following actions or determinations to be inconsistent with the ADA and/or the GATT 1994:

A. PROCEDURAL ISSUES

The procedure leading up to Regulation 2398/97, including the imposition of provisional anti-dumping duties, suffered from among others the following shortcomings and inconsistencies:

1. The EC did not properly examine the standing of the complainant, and/or failed to make a proper standing determination as required by Article 5.4 of the ADA. Such information as has been made available in the non-confidential file appears to contradict the published findings. The EC thus acted inconsistently with Article 5.4. Moreover, the EC has never during the investigation or in the published Regulations adequately responded to detailed queries from Indian exporters on this issue, and thus acted inconsistently with Articles 12.1 and 12.2.

2. Inconsistently with Article 5, and especially Article 5.3 of the ADA the EC did not examine the allegations in the complaint. Moreover, and also inconsistently with Article 5.3, the EC failed to take into account information available to it at the time of initiation pointing to lack of material injury caused by dumped imports. In any event, even if the EC made such examination, no record has been made available in the file or in the notice of initiation or in the published Regulations attesting to this, even though Indian exporters had raised this issue. This is inconsistent with Article 12.1 and 12.2.

3. The EC never indicated in its public notice or made available through separate report that it judged whether provisional measures were necessary to prevent injury being caused during the investigation, and thus acted inconsistently with Article 12.2.

B. DUMPING ISSUES

4. In the calculation of the dumping margins the EC has, in the Regulation imposing provisional measures, as confirmed by the Regulation imposing definitive measures, applied Article 2.2.2(ii) of the ADA. However, the method foreseen in Article 2.2.2(ii) was not open to the EC since its requirements were not met. Nevertheless, this option was applied instead of Article 2.2.2(i), which was available to the investigating authorities. This is inconsistent with, and violates the spirit and structure of, Articles 2.2.2 and 2.2. This particular choice of calculation has had a direct and considerable detrimental effect on the dumping margins and anti-dumping duties imposed in the Regulation imposing definitive duties. Moreover, despite the fact that the EC's choice was heavily contested, the EC has nowhere provided a sufficient explanation in the public notice or made available in a separate report as to why it applied option 2.2.2(ii) instead of 2.2.2(i), in contradiction with Article 12.2.

5. The EC misapplied Article 2.2.2(ii) in calculating the dumping margins. The EC resorted to applying administrative, selling and general costs (ASG) and profits for the whole Indian bedlinen industry on the basis of the data of <u>one</u> peculiar single company. This is in direct contravention of the strict requirements for the use of a weighted average of actual amounts realized by other exporters or producers, as mandated in Article 2.2.2(ii). This misapplication had a direct effect on the dumping margins and anti-dumping duties imposed in the Regulation imposing definitive duties. In contradiction to Article 12.2, the EC has not provided a sufficient explanation as to why it decided to apply an option for which the requirements were not fulfilled.

6. The EC has not checked whether the application of Article 2.2.2(ii) has led to the addition of a *reasonable* amount of ASG and for profits and thus acted inconsistently with Article 2.2. In this regard, the oral reasoning provided by the EC during the consultations failed to convince. The use of an unreasonably high profit margin has directly affected the dumping margins and anti-dumping duties in question. Moreover, despite extensive and detailed arguments from the Indian Trade Association and Exporters the EC did not sufficiently explain in the public notice, or make available through separate report, as to why it considered the uniquely established and exceptionally high profit margin *reasonable.* This is inconsistent with Article 12.2.

7. In a further misapplication of Article 2.2.2(ii), the EC has *"determined"* an amount for ASG and profit instead of the amounts "*incurred and realized"* by other producers. Since the amount which was *"determined"* was on the basis of the EC's domestic anti-dumping legislation, it set a standard different from Article 2.2.2(ii) of the ADA. The issue is a material violation since the amount "*determined"* for profit was 18.65 per cent while the amount "*incurred and realized"* was only 12.09 per cent. Moreover, in contradiction with Article 12.2 the EC did not explain why it resorted to the determining the amount for the ASG and profit instead of to taking the actual amount "*incurred and realized*"'.

8. The EC's justification for refusing a level of trade adjustment, repeated and explained by the EC during the consultations, is irrelevant under WTO law, incorrect and incomplete, and imposed inconsistently with Article 2.4 an unreasonable burden of proof on the Indian exporter concerned. Moreover, on this issue the EC failed to make a proper establishment of the facts and to make an unbiased and objective evaluation of those facts within the meaning of Article 17(6)(i) of the ADA.

9. By comparing similar sales channels for the determination as to whether ASG expenses are similar, while comparing different sales channels for the determination as to whether the profits on branded goods were higher, the EC has not acted objectively and unbiased in the determination as to whether the application of the profit margin of non-branded goods would indeed be lower. India believes this to be inconsistent with Article 2.4.2.

10. Inconsistently with Article I of GATT 1994, the EC discriminated between India and another country subject to the *Bedlinen II* proceeding by treating State-owned companies in that country differently than one State-owned company in India, The EC further failed to make an appropriate adjustment to deal with the special situation of the Indian State-owned company concerned. Last, the EC failed to sufficiently explain its position on this issue as required by Article 12.2 ADA.

11. The EC zeroed any negative dumping when comparing weighted average normal values with weighted average export prices on a per-type basis, inconsistently with Article 2.4 and 2.4.2 of the ADA. This practice has had a direct effect on the dumping margins and anti-dumping duties as imposed by the Regulation imposing definitive anti-dumping measures. The arguments of the EC, discussed in detail during both rounds of consultations, such as that Article 2.4.2 does not mandate weighted average to weighted average comparison of the "like product", but only of the "comparable"' product, implies an interpretation of the ADA which is legally untenable. Moreover, the EC has failed to provide in the public notice, or make available through a separate report, a sufficient explanation for its method despite extensive and detailed arguments submitted in this respect. This is inconsistent with Article 12.2.

C. INJURY AND CAUSALITY ISSUES

12. Contrary to the wording of Article 3.1 and the provisions that follow Article 3.1, the EC automatically and without further explanation assumed that *all* imports of the product concerned during the investigation period were dumped. This assumption as well as the EC's failure to explain this determination properly is inconsistent with Article 12.2.

13. Contrary to the wording of Article 3 and especially Article 3.5 of the ADA, the EC automatically and without any further explanation assumed that *all* imports of the product concerned during the years immediately preceding the investigation period were dumped. Consequently, the causality finding between imports from India and the alleged injury caused to the domestic industry is tainted and inconsistent with Article 3.5. The EC's failure to explain this determination properly is inconsistent with Article 12.2.

14. The EC has chosen a sample from the domestic industry, but did not consistently base its injury determination on this sample, In addition, the EC has explicitly determined that the domestic industry consists of 35 companies, but relied in its injury determination on companies outside this group in order to determine injury. In both cases, separately, the EC acted inconsistently with Article 3.4. The EC's failure to explain its determination properly is inconsistent with Article 12.2.

15. The EC failed to consider all injury factors mentioned in Article 3.4 of the ADA for its determination on the state of the domestic industry, including productivity, return on investments, utilization of capacity, the magnitude of the margin of dumping, cash flow, inventories, wages, growth, ability to raise capital or investments. The EC thus acted inconsistently with Article 3.4. As far as the EC would argue that it did in fact consider all factors in Article 3.4, it failed to disclose or make public its findings thereon and thus acted inconsistently with Article 12.2.

16. The EC failed to make an unbiased and objective analysis of the development of market share of the domestic industry and insufficiently explained its position, as required by Article 3.4 of the ADA. As far as the EC would argue that it did in fact make such analysis, it has insufficiently explained it, and thus acted inconsistently with Article 12.2.

17. The causality finding made by the EC is inherently flawed and unintelligible. The EC has failed to appropriately determine to what extent injuries caused by other factors (such as, for example, contraction in demand or changes in the patterns of consumption) were responsible for the injury allegedly suffered by the domestic industry. As such, the establishment of the facts for the determinations required by Article 3.5 of the ADA was not proper and/or the evaluation of those facts was not unbiased and objective.

D. OTHER ISSUES

18. Inconsistently with Article 15, the EC failed even to consider India's special situation as a developing country Member before imposing provisional anti-dumping duties. Even if the EC would have considered India's special status as a developing country it did not explain this in the public notice, or make available through a separate report that it did so. This is inconsistent with Article 12.2. The EC did not explain in the public notice, or make available through a separate report, that it even considered the arguments brought forward in this respect on behalf of the Indian exporters. This is inconsistent with Article 12.2.