Defending Market Access — Bed Linen from India[1]

Introduction

Can David defeat Goliath? Is it possible for a poor, developing country member of the World Trade Organization (WTO) to take on one of the WTO's biggest members and bring its policies and practices into line with internationally agreed rules? In an important WTO dispute settlement case, India set out to test whether it is possible to protect hard-won rights to market access in the face of an intransigent European Union (EU)[2] and a determined EU textile lobby. To succeed, however, India would need to deploy its scarce resources strategically and well, prove that it would and could defend its rights, and persevere against formidable odds.

The story has its origins in two of the less attractive dimensions of the international trade regime: the special rules governing trade in 'low-cost' textiles and clothing (See Exhibit 1), and the rules governing procedures and penalties to offset injurious 'dumping', i.e., the sale of goods in the export market at lower prices than they are offered for sale in the home market (See Exhibits 2 and 3). Both sets of rules have proven very attractive to mature textile and clothing industries in the industrialized world competing against low-cost imports from developing countries exploiting their comparative advantage of low labour costs.

From the perspective of India, exports of textile and clothing products are an important part of the benefits to be derived from participation in the international trading system. With a population of a billion people, many of them poor and unskilled, the production of standard-technology, labour-intensive products such as textiles and clothing is a natural and important contributor to employment and economic development. Given the high volumes and wide range of qualities of cotton grown in India, it is little wonder that cotton textiles constitute the largest part of the Indian textile industry. As a result, India has become one of the world's major exporters of these products and, together with Pakistan and Egypt, major suppliers of lower-end bed linen to the markets of EU members.

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1 This case was prepared by Michael Hart, Simon Reisman professor of trade policy in the Norman Paterson School of International Affairs at Carleton University, and a distinguished fellow of its Centre for Trade Policy and Law. Research assistance was provided by Francis MacDonnell.

2 The EU emerged out of the European Communities in 1993. All fifteen member states of the EU are members of the WTO; consistent with the treaties establishing the EU, the EU Commission has competence over trade policy and speaks for the EU in WTO affairs. For technical reasons, however, the EU continues to be referred to as the European Communities in WTO documents.

The Indian Cotton Textile Industry

The Indian Cotton Textile Industry is one of the largest segments of the Indian economy, accounting for over one-fifth of industrial production and employing 15 million people. In the year 2000, India was the third largest exporter of textiles after Turkey and China. Exports of textiles and clothing to the EU amounted to US $2.2 billion in the year 2001.

Bombay Textiles and Dyeing is one of the largest Indian exporters of textiles. In operation since 1879, the company currently exports nearly half of its production. Primary export markets include the EU, Australia, and New Zealand. Sales revenues for the fiscal year ending 31 March 2002 were US $193 million.

Sources: www.bombaydyeingindia.com and www.texprocil.com

From the perspective of the EU, on the other hand, low-cost textile imports raise some sensitive political issues. EU consumers may welcome these products, but well-organized lobbies of textile manufacturers and workers have mounted powerful campaigns to slow down the inroads of these products, arguing that such imports amount to unfair competition, driving EU firms out of business, and leading to unemployment for some of Europe's most vulnerable workers. EU firms have made some adjustments, restructuring and modernizing to remain competitive, but in the 1990s, firms were still closing, each time throwing hundreds of workers on the streets.

The special rules governing textiles and clothing, first introduced in the GATT in 1961, have been one response, arguably providing industries in developed countries more time to adjust to the new competition from developing countries. Resort to anti-dumping procedures is a second, and one that began to be used more frequently following the implementation of the WTO Agreement on Textiles and Clothing, which provides for the phased elimination of the special regime for textiles and clothing by the end of 2004. By the end of 2001, for example, EU industries had successfully launched 26 complaints about dumping from India, many of them in the textiles sector.

This case focuses on India's complaint to the WTO, pursuant to the procedures of the WTO's Dispute Settlement Understanding (See Exhibit 4) that a series of antidumping orders affecting its exports of cotton-type bed linen to the EU relied on procedures and methods that were inconsistent with the EU's obligations under the WTO's Agreement on Antidumping (the 'ADA').

Eurocoton

Eurocoton, the Committee of Cotton and Allied Textile Industries of Europe, is a Brussels-based professional federation. It was established in 1954 in order 'to influence policy decisions to help its industry adapt to market globalization and improve international competitiveness. Eurocoton defends the industrial cotton system textile chain's trade interests of its members before European and international private and public institutions.' Its membership is comprised of 13 national apex bodies from EU member states (two of which are from Spain), as well as one from Turkey.

Chronology of India-EU Dispute Re: Trade in Cotton-type Bed Linen

Time (0 = start of case)	Date	Action
- 2 years	30 July 1996	Eurocoton files a complaint with EU Commission.
- 23 months	13 Sept 1996	EU publishes notice of anti-dumping investigation on cotton-type bed-linen.
- 14 months	14 June 1997	EU imposes provisional anti-dumping duties on cotton-type bed-linen from India, Egypt, and Pakistan.
- 8 months	5 December 1997	EU imposes definitive anti-dumping duties on cotton-type bed-linen from India, Egypt, and Pakistan.
0	3 August 1998	India complains to DSB and requests bilateral consultation.
+ 2 weeks/ + 8 months	17 August 1998/ 15 April 1999	Consultations take place, but fail.
+13 months	7 September 1999	India requests a panel.
+14 months	27 October 1999	DSB establishes a panel.
+ 21 months	10-11 May 2000/ 6 June 2000	Panel meets with parties.
+ 27 months	30 October 2000	Panel report is circulated.
+ 28 months	11 December 2000	EU submits request for an appeal.
+ 29 months	24 January 2001	Oral hearing of the appellant body.
+ 31 months	1 March 2001	Report of the Appellate Body.
+ 3 years	14 August 2001	EU claims to be in full compliance with DSU ruling.
+ 43 months	8 March 2002	India seeks consultations with EU
+ 45 months	7 May 2002	India requests DSU to establish an Article 21.5 panel to determine whether EU has complied With earlier ruling.
+ 45 months/ 2 weeks	22 May 2002	DSU refers issue to original panel
+ 51 months	10-11 September	Panel meets with parties, and third parties.
+ 53 months/ 2 weeks	29 November 2002	Panel rules that the EU is now in full compliance, dismisses India's complaint.

The main facts of the case

The EU initiates a dumping investigation against cotton-type bed linen from India, Pakistan, and Egypt

The story begins in August 1996 with a complaint from European producers of cotton-type bed linen that imports of these products from India, Pakistan, and Egypt were being imported into the markets of the European Union at dumped prices, causing material injury to domestic production. The complaining industry, European producers of cotton textile products, represented by Eurocoton, had already pursued a number of earlier dumping complaints and had bitterly contested before the European Court of Justice decisions reached by the Commission. Three complex and unresolved cases against importers of 'grey' i.e., unbleached or unfinished, cotton textiles from Turkey, India, Egypt, China, Indonesia, and Pakistan over the period 1993-98 were already straining relations between foreign suppliers and the European industry. Global excess capacity and declining prices and profits had put the industry in a combative mood, and placed European politicians and officials in a defensive position.

That defensive mood was evident in the foot-dragging approach of the Commission to implementing the WTO Agreement on Textiles and Clothing (ATC). The ATC required importing countries to remove quotas on at least 16 percent of their textile and clothing imports in the first three years. In its draft schedule, however, the Commission included items such as hats, umbrellas, car seat belts, and parachutes (mostly exempt from earlier MFA quotas), but no mass-market products such as cotton garments or household linens. Some critics of the EU charged that this amounted to lifting restrictions on only 0.1 percent of the products subject to quotas. Quotas on cotton products, in particular, were not significantly enlarged in the first phase.

The EU (and particularly its Southern member states) worried about the consequences of removing protective barriers without reciprocal concessions from developing countries. India, Egypt, Thailand, Pakistan, Argentina, Turkey, Indonesia, China, and South Korea, to name but a few, all maintained various restrictions including prohibitive tariffs, import licenses, standards, foreign exchange restrictions, and certificates of origin. To increase pressure on developing countries, Sir Leon Brittan, then the Commission's vice-president and commissioner for external affairs, announced in 1996 that the EU would speed up its timetable only if its trade partners agreed to liberalize their own markets, and proposed opening negotiations on reciprocal market access with textile-exporting countries. But they declined even to open talks, accusing the EU of trying to wrangle concessions from them as the price for fulfilling its own obligations under the ATC.

The EU's approach, while politically attractive was, of course, little more than a diversionary tactic. None of the developing countries owed the EU better market access for EU textile and clothing products, whereas the EU had made commitments to phase out the MFA quota regime and had 'bound' its tariffs on textile and clothing products at sufficiently low levels to make the ordinary tariff little more than a nuisance factor in conditioning exports to the EU market. High tariffs and other barriers to EU exports to these countries, while perhaps economically unwise and one of the reasons dumping from these countries is easier to find, are not illegal under WTO terms.

India's experience with EU antidumping procedures

India has a long experience with EU antidumping investigations. Since 1997, Indian producers have been subject to more EU investigations than producers from any other country. And European complaints account for the lion's share of all such proceedings launched against India.

- Of 69 anti-dumping cases initiated against India since 1980, 26 of them were initiated by the EU. This is approximately 38 percent of all such cases.
- As a percent of the total number of antidumping cases initiated against India since 1980, no other country comes close to matching the European total. The next closest is the United States, with 12 cases.

It does not appear that India is reacting to this trend by targeting European producers with allegations of dumping on a similar scale. Only 23 percent of a smaller number of Indian AD cases involve imports from Europe.

Two industries figure most prominently in European investigations of dumping by Indian producers: natural and synthetic fibers and products derived from these fibres; and the steel industry. Eleven of the 26 European cases (42 percent) involve products from natural and synthetic fibres.

Source: www.commin.nic.in/doc/dgad/contents.ht

The Commission was also prepared to use antidumping investigations to send positive signals to the European industry, even if this required some questionable analysis and decisions. The bed linen case offered a clear example of this tactic. On 13 September 1996, the European Commission, satisfied that the complainants had established that they represented the major part of the industry in the EU[3] — as required by the ADA — and that they had provided *prima facie* evidence of dumping, material injury, and a causal link between the dumping and the injury — again, as required by the ADA — formally initiated an antidumping investigation of the subject goods.[4]

It is against this embattled background that, over the course of the next nine months, Commission officials investigated both the allegations of dumping and material injury on the basis of well-established patterns, including:

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3 As it turned out, industry support was much less than is normally the case. Over the course of the investigation, Eurocoton officials had to scramble to ensure sufficient indications of industry support. Evidence placed before the subsequent WTO panel indicated the industry barely met the minimum level of required support.

4 While the Commission is responsible for the conduct of investigations, it does so under the supervision of the member states, which must approve decisions to initiate and to impose preliminary and definitive antidumping duties. Until the 1990s, member states routinely approved most Commission recommendations. By the 1990s, however, many more antidumping recommendations were contested, with the Council split, largely along North-South lines, into a liberal block and a more protectionist block. It was becoming harder to get the Council to approve dumping duties, with only two countries (France and Portugal) consistently endorsing them. Others increasingly voted in line with their national interest (although Britain almost systematically voted against). See INSEAD case *Confronting EU Anti-Dumping Measures: The Grey Cotton Case Seen from Turkey,* accessed at www.hec.unil.ch/ocadot/dumping.doc.

- sending detailed questionnaires to the EU importers and the principal Indian, Pakistani, and Egyptian exporters in order to establish the necessary data to compare export and domestic prices;
- making visits to the offices of these firms to verify the information provided;
- sending detailed questionnaires to EU producers in order to gather the information needed to determine material injury;
- again, making visits to the offices of these firms to verify the information provided;
- holding hearings to provide representatives of the competing parties opportunities to advance their cases;
- analyzing the information in order to reach conclusions about the margins, if any, of dumping, the existence of material injury, and a causal link between the dumping and the material injury; and
- holding disclosure meetings with the parties to inform them of preliminary and final determinations.

Dumping is established by comparing export and domestic prices. The ADA requires that the authorities make a fair comparison, for example, by comparing weighted average export prices and weighted average domestic prices (or normal value), of the same goods over the same representative time period. If there are insufficient domestic sales to establish normal value, the authorities may construct such a price, again based on clearly established guidelines. Material injury is determined by examining the economic health of the domestic industry by looking at such factors as changes in levels of employment, shipments, prices, profits, and similar facts. The ADA requires that authorities examine the full list of factors and make a determination that takes them all into account.

While the basic concepts involved are relatively straightforward, the information gathered is usually sufficiently voluminous and complex to allow for a wide range of interpretations of the data and the use of various methodologies to arrive at the required conclusions. There is also sufficient scope for discretion and judgment to allow for contested conclusions. The breadth of discretion also adds to the scope for using antidumping investigations as an effective tool for harassing foreign competitors. The need to satisfy detailed requests for information and to engage expert assistance can pose a major burden for foreign suppliers, particularly those located in developing countries. The process clearly favours the domestic complaining industry. Not surprisingly, antidumping authorities, charged with determining whether there is dumping, can often find it and, in systems in which injury findings are made by the same officials, findings of injury usually follow.[5]

Over the years, as a result of both the volume of cases and the increasingly detailed requirements of the ADA, procedures have become more and more complex and legalis-

[5] In the EU, where officials determine both dumping and injury, the likelihood of a determination favouring the complaining party is somewhat higher than in jurisdictions such as Canada or the United States, where the issues are determined by separate bodies; injury determinations in Canada and the United States are made by quasi-judicial bodies that rely, in part, on evidence presented in adversarial hearings.

tic, requiring the involvement of lawyers, accountants, and economists. Both complaining and responding parties are now well-advised to avail themselves of expert assistance to ensure that their interests are protected. In Brussels, as in other major capitals, the trade bar has grown exponentially over the years, with most firms earning their bread and butter from antidumping and antisubsidy cases. India made extensive use of one such firm in pursuing its interests, Vermulst Waer & Verhaeghe. Other private parties to the dispute, such as the complainant, Eurocoton, used other firms. The European Commission relies on the expertise of hundreds of officials in its Antidumping and other Directorates to pursue and defend its interests.

Vermulst Waer & Verhaeghe is an independent international law firm based in Brussels. The firm specializes in providing advice and rendering assistance on all aspects of international, EU, and Belgian law. The firm's clients consist of major multinational corporations, international business organizations, and governments.

The firm advises and assists clients in all areas of international and Belgian corporate, corporate finance, commercial, banking, and tax law. The firm has significant expertise in cross-border joint ventures, mergers & acquisitions, corporate restructurings, project finance and capital markets work, including IPO, privatization, and securitization work.

The firm is internationally recognized for its expertise in customs law, anti-dumping and other commercial defence laws, and WTO law work. This practice consists of:

- Advising clients on EU trade regulations and policy, and representing them before the Community institutions in anti-dumping litigation, anti-subsidy investigations, and other EU trade litigation disputes. Advising clients on legal and practical options with respect to EU import restrictions such as quantitative restrictions and safeguard measures.
- Advising clients on EU customs law.
- Advising multilateral trade organizations, such as WTO, UNCTAD, OECD.
- Advising clients on and participating in WTO dispute settlement proceedings.

Source: http://www.vwv-law.be/page2.htm

In the case of cotton-type bed linen, in June of 1997 Commission officials made a preliminary affirmative determination of dumping. In December 1997 they made a final determination of dumping and of material injury and calculated margins of dumping for imports from five Indian suppliers ranging from 2.6 percent to 24.7 percent, with the average of 13.8 percent being assessed for all other Indian suppliers of the subject goods.

A critical element in realizing these margins was the EU practice of 'zeroing.' US law professor Joel Trachtman describes the issue as follows:

> The practice of zeroing involves establishing a set of categories of the product under investigation. Within each category, a weighted average normal value is calculated by reference to home-country sales, third-country sales or a constructed value. This normal value is then compared with a weighted-average export price for that category. Then the normal value is compared with the export price. If the normal value is higher, the difference is a positive dumping margin: the goods are being exported at less than their normal value. If the normal value is lower than the export price, a negative dumping margin would exist. Under EC practice, in calculating a total weighted average for all categories of the product

under investigation, the negative dumping margins are changed to zero. This is "zeroing."[6]

The EU had come to rely on this practice after the changes made in the ADA during the Uruguay Round of GATT negotiations (1986-1993) had made some earlier methodologies favoured by the EU, such as comparing weighted averages to individual transactions and vice versa, no longer acceptable.

Similarly, since there were a large number of individual exporters from India, the EU had based its analysis on a sample. For purposes of establishing 'normal value', it selected one Indian exporter (Bombay Dyeing) as representative of domestic sales of such linen. There were five types of products comparable to those exported to the EU sold on the domestic market, which the EU 'found' to be not sold in the ordinary course of trade. It calculated constructed value for all types of bed linen sold by Bombay Dyeing; for others, administrative, selling and general (SG&A) costs and profits used in the 'constructed normal value' of Bombay Dyeing was applied. The export price, on the other hand, was established by reference to the prices actually paid or payable on the EU market. On this basis, the weighted average normal constructed value by type was then compared with weighted average export price by type for the investigated Indian producers, and a dumping margin was calculated for each producer.

Zeroing, constructed value, and other borderline practices gave rise to legitimate questions about the fairness of the EU proceedings and the basis upon which EU officials had reached their decisions about dumping and material injury.

India and Indian producers contest the EU's findings of dumping and material injury

Both the Indian government and Indian suppliers expressed outrage at the decision. From the perspective of the Indian government, India had negotiated in good faith in previous rounds of GATT negotiations and Indian officials believed Indian suppliers were entitled, like suppliers from all other members of the GATT, to the most-favoured-nation tariff rate. The new, additional dumping duty seriously undermined the competitiveness of Indian bed linen on the EU market. Indian officials were convinced that if any Indian suppliers were dumping, the margins of dumping were significantly lower. They were already convinced that any evidence of injury was not directly attributable to such dumping but due to a host of other factors.

More generally, Indian officials shared the view that EU manufacturers of cotton-type bed linen were fighting a losing battle in trying to keep the much more competitive imported products out of their market. Cotton-type bed linen is exactly the type of product that should be imported from countries like India, benefiting from lower labour and other input costs, and with access to a ready supply of various grades of cotton. In their view, the European industry was no longer cost competitive, particularly in the utility and lower segments of the market, and should adjust out of the industry or concentrate on higher value products. They were determined to contest the application of antidumping duties with all the tools at the government's disposal.

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6 Joel P. Trachtman, 'Decisions of the Appellate Body of the World Trade Organization: EU Antidumping duties on imports of cotton-type bed linen from India,' *European Journal of International Law,* vol. 13:3, accessed at http://www.ejil.org/journal/curdevs/sr15-01.html.

Two contrasting views of antidumping

Antidumping is not public policy, it is private policy. It is a harnessing of state power to serve a private interest: a means by which one competitor can use the power of the state to gain an edge over another competitor. … antidumping is an instrument that one competitor can use against another — like advertising, product development, or price discounting. The only constraint is that beneficiary interest must be a domestic one and the apparent victim a foreign one.

A considerable level of expertise is needed even to see which technical alternatives exist, much less to exploit them. The general public and the news media do not possess this expertise; the result is an environment made to order for special-interest power politics.

Antidumping is the fox put in charge of the hen house: trade restrictions certified by GATT: the fox is clever enough not only to eat the hens but also to convince the farmer that this is the way it ought to be. Antidumping is ordinary protection with a grand public relations program.

World Bank economist J. Michael Finger

… the perfect world of free trade and fair competition is at best a dim mirage today. In the reality of a global marketplace riddled with market distortions, antidumping laws are a necessary and logical measure for a relatively open, subsidy-free, and trust-free market. Antidumping laws, by insulating US industries from the negative impact of foreign protection, are a necessary safety measure to allow the US economy to remain relatively open to trade. Rather than treating antidumping laws as the unwanted stepchild, advocates of free trade should embrace these laws as a necessary condition for the United States to continue its commitment to free trade.

US trade lawyer Greg Mastel

Indian suppliers shared this view and were even more familiar with the weak state of the European industry and the artificial nature of the dumping investigation. European distributors, including manufacturers, wholesalers, and retailers, were among their best customers, eager to buy lower priced goods from India to remain competitive. Even manufacturers bought from their Indian competitors to fill out their lines and compete at all price points. Indian suppliers regarded the dumping suits as pure harassment, part of a long line of efforts by the European industry to maintain market share in the face of declining competitiveness.

While understandable, both Indian officials and Indian firms had to accept that under the rules of the WTO, EU firms are entitled to complain about dumping and EU officials are entitled to investigate, make determinations, and impose penalty duties. If India wanted to reverse the case or reduce the margins of dumping, it had to address issues within the rules of the WTO's ADA or within the rules of the EU. On this point, Indian officials and their legal counsel in Brussels were confident that EU officials were vulnerable to a legal challenge because they were convinced that EU officials had played fast and loose with the rules in order to arrive at a politically acceptable result.

A number of options were available to the Indian side:

- During the course of the investigation, Indian firms were entitled to request that they be allowed to enter into an 'undertaking', i.e., negotiate an arrangement with EU officials, subject to consent by the EU industry, to raise prices or limit quantities for a specified period. Given the extent to which Indian exports of textile products are already subject to various constraints under the succession of special arrangements negotiated to govern international trade in textiles, Indian ex-

porters were well-experienced in working within such constraints. The Cotton Textiles Export Promotion Council of India (Texprocil), acting on behalf of Indian producers and exporters, did at one point indicate to EU officials its desire, and that of its members, to offer price undertakings. The offer was not taken up and became an issue in the subsequent dispute settlement case.

- Indian firms, with or without the help of their government, could appeal any errors in law or procedure to the European Court; EU experience, however, indicates that the grounds for appeal are very narrow and the chances of success slim. Neither the Indian government nor Indian firms chose to pursue this option. Eurocoton, on the other hand, was well-experienced in pursuing such cases, a fact EU officials may well have had in mind in their conduct of this case.
- At the end of a year, Indian firms could seek an administrative review with a view to reducing the margin of dumping or even vacating the order. Experience had demonstrated, however, that such reviews could as easily increase duties; meanwhile, the punitive duties in place would continue.
- The Indian government could contest various aspects of the procedures, methodologies, and determinations used by EU officials under the terms of the Dispute Settlement Understanding (DSU) of the WTO. This is what India chose to do. At the same time, Indian officials were aware that this was not an option without costs and consequences. Quality legal advise is expensive, dispute settlement cases require significant resources to prosecute successfully, and dispute settlement cases take time, time during which the duties stay in place.

India takes its complaint to the WTO

Under the terms of the DSU, any member is entitled to request consultations with any other member with a view to rectifying or removing a measure, practice, or policy of the second member that the complaining member believes to be inconsistent with the rules of the WTO and that 'nullifies or impairs' (i.e., harms) benefits that it would gain but for that measure, practice, or policy. In rare instances, it is even possible to complain about practices that may not be inconsistent with the rules but still cause nullification and impairment. This was not the case here. India was confident that the EU had engaged in numerous illegal practices The responding member must honour the request for consultations, enter into them on a timely basis, and give 'sympathetic' consideration to the complaint. Both parties are required to make their best effort to resolve the issue on a bilateral, and amicable, basis.

India requested consultations with the EU on 3 August 1998 and consultations took place in Geneva on 17 August and again the following 15 April, but without resolving the issues under dispute. Pakistan joined India in the consultations as an interested third party, but chose not to pursue the case any further. The time between the two formal consultations afforded the parties time for informal discussions and for developing their approach to the issues. During the course of the consultations, India set out its arguments that the methodologies used by EU officials to arrive at both their determinations of dumping and material injury were flawed and inconsistent with the requirements of the ADA. The EU, for its part, maintained that there was sufficient scope within the rules of the ADA to justify the methodologies employed and the conclusions reached. The chances of a successful resolution of the issues through consultations were slim, given

the stakes and the interest of other parties. Indeed, in its submissions to the subsequent panel, India claimed that the EU had consulted in bad faith, and took the unusual step of providing the panel with verbatim records of the consultation proceedings. Even unsuccessful consultations, however, can prove of value to both members in thinking through the issues and in addressing the concerns of the private parties affected by the issue.

Under the terms of the DSU, if the disputing members fail to reach a mutually acceptable solution, the complaining member is entitled to seek the help of either the Director General of the WTO, the other members as a whole through the Dispute Settlement Body (DSB), or both. The Director General has the authority to appoint an impartial arbitrator to work with the two members with a view to facilitating resolution of the issue(s). Developing countries, in particular, are encouraged to pursue this option because it is less expensive and may prove more timely. Alternatively, the complaining member can seek the establishment of a panel to hear the case and make recommendations to the DSB on the issue under dispute and the necessary steps to resolve it. India chose not to pursue the arbitration option; the issues were too important to be settled on the basis of an arbitration that would establish no lasting legal standards to discipline future EU conduct.

The WTO dispute settlement procedures represent the nearly fifty-year cumulative experience of GATT members in developing procedures to resolve disputes on a basis that respects not only the rights and obligations of individual member states but also the collective interest of all in the enforcement of the agreed rules. The DSB meets regularly to address complaints from members, to deal with requests for the establishment of panels, to consider reports from panels, and to address issues arising from compliance with DSB decisions. In pressing situations, a member can ask for a special meeting. Any member can request the establishment of a panel and such a request is automatically granted at the second meeting. It can be acted upon at the first meeting if the responding party does not object.

India requested establishment of a panel at the September 1999 meeting of the DSB. The DSB established the panel at its next meeting in October in accordance with India's request, stipulating that the panel 'examine, in the light of the relevant provisions of the covered agreements cited by India in document WT/DS141/3, the matter referred to the DSB by India in document WT/DS141/3, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.'

At this stage, it is important that the complaining party has a good idea of the case it wants to pursue, because the terms of reference basically define a case along the lines of the official complaint lodged by the complaining party. As India learned, elements that it had inadvertently left out of its complaint but which were important to its case could not be added later. The panel ruled that its jurisdiction was limited to the issues set out in its terms of reference. If India wanted to add elements, it would need to start a new process. Even so, India had a long list of issues for the panel to address; in its view, the EU's abuse of the rules was extensive and pervasive.

The WTO establishes a panel to hear India's complaint

Panels are constituted by the Director General in consultation with the parties to the dispute. If such consultations prove difficult, the complaining party can ask the Director

General to proceed on the basis of consultations with 'the Chairman of the DSB and the Chairman of the relevant Council or Committee.' India made such a request on 12 January 2000 and the Director General consequently constituted a panel made up of three senior diplomats: Dariusz Rosati, former Foreign Minister of Poland, Marta Lemme (from the Brazilian Permanent Mission to the WTO), and Paul O'Connor (from the Australian Permanent Mission to the WTO). The panel would be assisted in its work by WTO staff, including a legal advisor from the Legal Division and an analyst from the division responsible for the matters at issue, in this case the Trade Remedies Division.

The DSU provides that other members of the WTO, who believe that they have an interest in the issues to be examined by the panel, can reserve their rights to participate in the proceedings and make submissions to the panel. Egypt, the United States, and Japan reserved their rights as third parties to the India-EU proceedings.

Once the panel is constituted, the disputing members are invited to provide the panel with briefs setting out their view of the issues, including the facts at issue, the interpretation of the rules, and rebuttals of the arguments raised by the other member. If third parties submit briefs, the disputing members are also given an opportunity to address the arguments raised in these briefs. Typically, these briefs can run into hundreds of pages.

In its briefs to the panel, the government of India's task was to establish that EU officials had abused the provisions of the WTO's Agreement on Antidumping in making its findings. As is typical in such pleadings, India pursued as many claims as possible — 31 in this case, involving violations of Articles 2.2, 2.2.2, 2.4.2, 3.1, 3.4, 3.5, 6, 6.10, 6.11, 5.3, 5.4, 15, and 12.2.1 and 12.2.2. The most important of these included:

- Claim 4: Inconsistency with Article 2.2, by applying the profit amount determined for Bombay Dyeing in calculating constructed value for other producers, even though that amount was clearly not "reasonable";
- Claim 7: Inconsistency with Article 2.4.2, by zeroing negative dumping amounts in calculating dumping margins;
- Claim 8: Inconsistency with Article 3.1, by assuming that all imports of the product concerned during the investigation period were dumped;
- Claims 11 and 14: Inconsistency with Article 3.4, by failing to consider all injury factors mentioned in that provision for the determination of the state of the domestic industry; and by failing to disclose or make public findings thereon, which violates the rights of defence contained in Article 6;
- Claims 15 and 16: Inconsistency with Article 3.4, by relying in the injury determination on companies outside the domestic industry, by not consistently basing the injury determination on the chosen sample and by relying on different "levels" of industry for different injury indices; and with Articles 6.10 and 6.11, by selecting a sample of the domestic industry that was not representative;
- Claim 29: Inconsistency with Article 15, by failing to explore possibilities of constructive remedies before imposing anti-dumping duties;

India argued that, as a result of these inconsistencies, the EU had nullified and impaired benefits accruing to India under the WTO Agreement and requested that the Panel recommend that the EU bring its measures into conformity with its WTO obligations by immediately repealing the Regulation imposing definitive anti-dumping duties and refunding anti-dumping duties paid.

The EU, for its part, needed to establish that each of the 31 complaints raised by India was without merit and that EU officials had conducted their investigation and made their findings in a manner fully consistent with the provisions of the ADA. It also argued that many of India's claims were beyond the scope of the panel's terms of reference either because they had not been included in India's original complaint or because they referred to the provisional finding that had since been vacated and replaced by the definitive finding, which was properly the focus of the panel's proceedings.

Once the panel has had an opportunity to absorb the written briefs, it meets with the parties to the dispute. The India-EU panel met with officials from India and the EU on 10-11 May 2000 and again on 7 June. Officials from Egypt, the United States, and Japan joined the hearings on 11 May. These hearings, held at WTO headquarters in Geneva, afford panel members an opportunity to hear oral presentations of the arguments of the parties and to question them on aspects that panel members are not clear on. Unlike domestic court proceedings, there is no opportunity for cross examination, no rules of evidence, and similar procedural safeguards. Rather, the hearings betray their diplomatic origin and the underlying intent of the proceedings: to find a mutually acceptable resolution of the issues in dispute. Given the mass of evidence and argumentation advanced by the parties,[7] three days of hearings can do no more than scratch the surface. In effect, panel proceedings rely largely on paper briefs and argumentation.

Once the panel is satisfied that it understands the arguments of the parties, it sets to work to assess these arguments in light of its own reading of the relevant provisions of the WTO and its constituent agreements. With the help of WTO staff, the panel summarizes the arguments of the parties, prepares its own analysis of the issues, and reaches conclusions. The panel is not required to make findings on all the claims. Indeed, as a result of the oral hearings, India vacated a number of its claims. Additionally, under the principle of judicial economy, the panel needs to make only those determinations it judges necessary to resolve the dispute.

Conclusions of the Panel

7.1 … the European Communities did not act inconsistently with its obligations under Articles 2.2, 2.2.2, 3.1, 3.4, 3.5, 5.3, 5.4, and 12.2.2 of the ADA in:

(a) calculating the amount for profit in constructing normal value (India's claims 1 and 4),

(b) considering all imports from India (and Egypt and Pakistan) as dumped in the analysis of injury caused by dumped imports (India's claims 8, 19, and 20),

(c) considering information for producers comprising the domestic industry but not among the sampled producers in analyzing the state of the industry (India's claim 15, in part),

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7 In its report, the panel notes: 'With the agreement of the parties, the Panel has decided that, in lieu of the traditional descriptive part of the Panel report setting forth the arguments of the parties, the parties' submissions will be annexed in full to the Panel report. Accordingly, the parties' first and second written submissions and oral statements, along with their written responses to questions, are attached at Annex 1 (India) and Annex 2 (the European Communities). The written submissions, oral statements and responses to questions of the third parties are attached at Annex 3.' The panel's report runs to nearly a hundred pages, while the three annexes run to several hundred more pages.

(d) examining the accuracy and adequacy of the evidence prior to initiation (India's claim 23),

(e) establishing industry support for the application (India's claim 26), and

(f) providing public notice of its final determination (India's claims 3, 6, 10, 22, 25 and 28).

7.2 … the European Communities acted inconsistently with its obligations under Articles 2.4.2, 3.4, and 15 of the ADA in:

(g) determining the existence of margins of dumping on the basis of a methodology incorporating the practice of zeroing (India's claim 7),

(h) failing to evaluate all relevant factors having a bearing on the state of the domestic industry, and specifically all the factors set forth in Article 3.4 (India's claim 11),

(i) considering information for producers not part of the domestic industry as defined by the investigating authority in analyzing the state of the industry (India's claim 15, in part), and

(j) failing to explore possibilities of constructive remedies before applying anti-dumping duties (India's claim 29).

7.5 The Panel recommends that the Dispute Settlement Body request the European Communities to bring its measure into conformity with its obligations under the Anti-Dumping Agreement.

Source: WTO document WT/DS141/R of 30 October 2000

The panel rules on the issues before it

Once the panel has finished its analysis, it prepares an interim report that is circulated to the parties in order to provide them an opportunity to identify any errors, particularly relating to the arguments they have placed before the panel. On 31 July 2000, the Indian bed linen panel provided its interim report to the parties. The parties submitted their comments on the interim report on 7 August 2000. Neither party requested that the panel hold an interim review meeting, and as a consequence no meeting was held.

On that basis, the panel proceeded to prepare its final report, which it circulated to the parties and to all the members of the DSB on 30 October 2000 (See the panel's conclusions in the box below). The panel rejected 12 of India's claims, upheld 4, and did not rule on the remaining 15, either because India had withdrawn the claim or the panel did not consider it necessary, pursuant to the principle of judicial economy, to make a finding. On the surface, the panel appears to have ruled largely in favour of the EU. In fact, however, it provided India with a major victory. It is normal for complaining parties to make as many claims as possible, in the hope that a few of them will stick. Additionally, many of the claims could have gone in either direction. In this particular case, the evidence presented in the panel's report makes clear that EU officials conducted an investigation highly prejudicial to the interests of Indian suppliers of cotton-type bed linen to the EU, stretching the discretion allowed them under the ADA and EU law to the limit. The issue before the panel, therefore, was to determine the extent to which EU officials had crossed the line between what is permissible and what is not. It was in India's interest to identify as many instances of impermissible conduct as possible and up to the EU to defend its conduct.[8]

[8] Interestingly, US submissions to the panel indicated that US authorities shared the view that various EU practices stretched the language of the ADA, but nevertheless they were prepared to defend EU practices. US politicians are deeply committed to maintaining as flexible an antidumping regime as possible, disposing US officials to defend any and all practices that

The four instances in which the panel ruled that the EU had crossed the line were enough to discredit the EU's determinations of dumping and material injury. The panel ruled that the practice of zeroing, which had been critical to the calculation of margins of dumping, was illegal. It further made clear that the EU determination of material injury had been based on a very superficial and inadequate analysis of all the factors set out in the ADA, and that EU officials had ended up comparing apples and oranges in using different definitions of the industry for the purposes of determining dumping and injury. Finally, in ruling that the EU had failed in addressing its duty to explore alternative remedies, the panel breathed new life into a requirement that the WTO's developed members deal more sympathetically with products from developing countries. The panel report thus constituted a major rejection of EU policy and practice.

The EU appeals the panel's findings

Normally, panel reports are adopted by the DSB 60 days after they are circulated unless there is a consensus not to adopt it — a consensus that does not include the parties to the dispute — or one of the parties launches an appeal to the WTO's Appellate Body (AB). In this case the EU, despite being vindicated on all but 27 of the 31 claims against it by India, decided to appeal. EU officials were well aware that the panel's findings had major implications for EU policy and practice. On 1 December 2000, the EU notified the DSB of its intention to appeal certain issues of law covered in the panel report and certain legal interpretations developed by the panel. On 11 December 2000, the EU filed its appellant's submission. On 18 December 2000, India filed its own submission and on 4 January 2001, Egypt filed a third participant's submission. On 8 January 2001, India and the EU each filed an appellee's submission. On the same day, Japan and the United States each filed a third participant's submission.

The Appellate Body was established by WTO members as a safety valve and to ease US acceptance of the rule that panel reports would be automatically adopted unless there was a consensus not to adopt it. Initially, the expectation was that appeals to the AB would be relatively rare and limited to intricate issues of law, procedure, and interpretation. As it turned out, most panel reports are appealed and the AB has become a very busy part of the dispute settlement process. It is made up of seven permanent members, appointed for fixed four-year terms, of whom three hear individual cases. Most have had extensive previous experience in international law or trade policy or as national judges. It is served by its own legal staff. The AB's work has, over the first eight plus years of its existence, served to make WTO law more predictable and consistent.

An Indian press story

India scores victory after WTO asks EU to lift anti-dumping duty

New Delhi, Nov 1: India has scored a victory over the European Union in the dispute settlement body (DSB) of the world trade organisation in the anti-dumping duty case relating to cotton bed linen for exports to EU.

might prove useful in the future. US officials, for example, used zeroing as part of their approach to the investigation of dumping of softwood lumber from Canada, an issue on which a subsequent panel would be asked to rule.

Consequently, Indian cotton bed-linen will have an access to the EU market without attracting an unfair anti-dumping duties ranging from 11 per cent to 24 per cent imposed since 1994.

"DSB decision will be a landmark judgement as it will affect other EU cases on anti-dumping", Union Minister of textiles, Kashiram Rana said.

EU has already been asked to not only implement the DSB decision but also refund the duties collected earlier in the recently concluded meeting of the joint working group on textiles held in Brussels on October 23 and October 24, 2000.

Despite bed-linen being under a quota, EU has been consistently taking up the case to impose anti-dumping duties on imports from countries like India, Pakistan and Egypt. Initially, the anti-dumping proceedings were initiated on January 25, 1994 but on withdrawal of the complaint by the complainant, Eurocoton, these proceedings were terminated in July, 1996.

However, they were soon initiated on a fresh complaint by Eurocoton, just 20 days after the withdrawal of the first complaint. As the EC did not agree to withdraw the anti-dumping duties during the bilateral consultative process, the matter was taken to the WTO.

It has now ruled that the EC acted inconsistently with its obligations under article 2.2, 3.4 and 15 of the anti-dumping agreement in (a) determining the existence of margins of dumping on the basis of a methodology incorporating the practice of zeroing ; (B) failing to evaluate relevant factors having a bearing on the state of the domestic industry; (C) considering information for producers not part of the domestic industry as defined by the investigating authority in analysing the state of the industry , and; (D) Failing to explore possibilities of constructive remedies before applying anti-dumping duties.

The panel concluded that under article 3.8 of the DSU, the action is prima facie a case of nullification or impairment of benefits under that agreement. It has recommended that the EC should bring its rules in conformity with its obligations under the agreement.

Source: http://www.financialexpress.com/fe/daily/20001102/fco02083.html

Appellate reviews do not entail a rehearing of the whole case. Rather, they are limited to considering errors of law and procedure at the original panel stage. Submissions to the AB, therefore, are limited to addressing where, in the opinion of the parties, the original panel erred in its interpretation of WTO law. The AB had before it one claim from the EU, appealing the panel's rejection of the EU practice of zeroing, and one from India, appealing the panel's rejection of India's claim against the EU's practice of using information from only one producer as the basis for findings about all.

Similar to the panel proceedings, most of the process is consumed by the submission of briefs by the parties to the dispute and from third parties that participated in the original proceedings. An oral hearing — held on 24 January 2001 in this case — provides the parties an opportunity to present their views directly to the AB panel and for the AB members to question the parties. Similarly to the original panel proceedings, once the AB members are seized of the claims advanced by the parties, they — with the help of the legal officers assigned to the case — analyze the issues and reach a finding. On 1 March 2000, the AB panel circulated its report. The AB sustained the finding of the original panel that the EU practice of 'zeroing' was inconsistent with EU obligations, thus rejecting the EU's appeal. It further ruled that the EU's practice in constructing normal values on the basis of information limited to one supplier was inconsistent with the ADA, thus sustaining India's appeal and reversing the original panel's findings.

As with original panel reports, AB reports are automatically adopted by the DSB at its next meeting or 30 days after they are circulated, whichever comes first, unless the DSB rejects the report on the basis of a consensus exclusive of the parties to the dispute. To date, the DSB has yet to reject either an original panel report or an AB report, although it has expressed its displeasure with details of a number of AB reports. The DSB adopted the AB's report on 12 March and gave the EU until 12 April 2001 to comply.

The rulings become WTO law

In effect, therefore, by the middle of March 2001, some eighteen months after India had first requested a panel, or some 30 months following India's request for consultations, binding WTO decisions had clearly established that certain EU practices were inconsistent with its obligations under the ADA, requiring the EU to bring its practice into line or face retaliation from India and further censure from the DSB. Most of the delays had been the result of EU tactical maneuvering. The original panel, once constituted, completed its work in less than nine months, and the AB in less than three. The practical effect was that the EU needed to recalculate and adjust its findings of dumping and material injury in the case of bed linen from India, Pakistan, and Egypt, as well as in any other case in which it had relied on the same interpretations of the ADA.[9]

The legal argumentation in both the AB's report and the original panel's report are complex, detailed, and repetitive, making it difficult for non-lawyers to interpret the results. The original panel had before it exhaustive argumentation presented by the two disputing parties, as well as briefs from third parties. The AB, in turn, considered argumentation by the two parties, and again third parties, setting out competing views on the narrower legal issues under appeal. For our purposes, the final result can be summarized as follows:

- Both the original panel and the AB found the practice of 'zeroing' to be inconsistent with ADA article 2.2.4; i.e., they rejected the EU practice of inflating margins of dumping by taking account of the average of 'positive' dumping margins in investigated products, but ignoring the cases where there are 'negative' margins and giving a zero value to them instead.
- The AB additionally found the EU methodology in calculating the administrative, selling, and general (SG&A) costs and profits, in which it used a method where data applicable to one other exporter or producer is used to apply to all others, to be inconsistent with article 2.2.2(ii).
- The original panel ruled that the EU 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 obligations under Article 3.4 of the AD Agreement in making a finding of material injury.

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9 While the panel and AB rulings were limited to the facts in the case before them, the practical effect is that any other member which believes that antidumping findings against its exporters relied on zeroing and other illegal methodologies used in the bed linen determination, can seek an expedited panel review to make similar rulings. The DSB's adoption of the report of the panel as amended by the AB in effect established an agreed interpretation of the relevant provisions of the ADA.

- The original panel additionally ruled that the EU erred in using all types of bed-linen products: bed sheets, duvet covers and pillow cases, packaged for sale either separately or in sets, and made of cotton-type fibres, pure or mixed with man-made fibres or flax, and bleached, dyed or printed — as a single product competing with 'like' products of the domestic industry, for certain purposes of investigation, but using the various components of the imported product for calculating export price and normal value and averaging them, to establish dumping, again prejudicing the interests of Indian suppliers and favouring the interests of domestic suppliers.
- Finally, the original panel ruled that the EU had failed to explore possibilities of constructive alternative remedies before applying anti-dumping duties, as it is required to do in cases involving developing countries consistent with article 15 of the ADA.

The cumulative impact of these rulings was a major vindication of India's complaint, and set a critically important precedent: India had successfully challenged the highly prejudicial approach of both the EU and the United States in prosecuting antidumping cases. The case put the authorities in both of the major users of trade remedies on notice that exporting countries, whether poor or not, were prepared to avail themselves of the procedures of the DSU to hold trade remedy officials to account. Ironically, both the United States and the EU had used dispute settlement proceedings to discipline what they considered to be sloppy applications of antidumping proceedings in, for example, Mexico. With the shoe on the other foot, it appeared that both the original panel and the AB were prepared to hold EU and US officials to the same standard.

An EU Press Release

Brussels, 8 May 2002

In a notice published 8 May, the European Commission announced it will review, on request, all the anti-dumping measures based on methodologies found to be incompatible with WTO rules in the case 'bed linen from India'. The European Union has already fully implemented the WTO ruling in the case concerned. Such reviews are an additional implementation step, to confirm WTO compliance of all other existing anti-dumping measures.

In March 2001, the WTO Appellate Body concluded that some methodologies used by the European Union to calculate dumping in the case concerning imports of cotton-type bed linen from India were not in line with the WTO Anti-dumping Agreement.

The EU fully implemented the WTO ruling, by reassessing its initial findings and by suspending the measures concerning India. It also went beyond, by suspending the measures applicable to imports of bed linen from Egypt and by removing those applicable to imports of bed linen from Pakistan.

Other existing measures, concerning other products and other countries, may also be based on the methodologies found to be incompatible with current WTO rules. Therefore, the European Commission has decided to invite exporters in third countries to request reviews of measures should they consider that such methodologies have been used. The European Union considers that this additional step is a necessary action for a complete compliance to WTO requirements.

The actual impact of these reviews will vary according to the particulars of each case. It is unlikely that the overall effect will be significant.

The EU expects that other WTO members that apply the methodologies ruled out by the Appellate Body will also amend their practices, and where necessary will carry out reviews of existing measures, to bring themselves into line with WTO rules.

Source: europa.eu.int/comm/trade/goods/textile/pr080502.htm

The dispute continues

India was not satisfied that the EU's amended measures brought its antidumping practices fully into line with the rulings of the DSB, and decided to continue to press its claims. The Council of the European Union amended the original definitive anti-dumping duties on bed linen from India on 7 August 2001, but it simultaneously suspended its application. India strongly disagreed that this re-determination complied with the recommendations of the panel and Appellate Body. The EU decision also provided for the expiry of the amended measures within six months after entry into force of the amended determination, unless a review had been initiated before that date. As a result, India concluded that the illegal measure would finally expire by 14 February 2002. Unfortunately, on 13 February 2002, the EU initiated a so-called 'partial interim review,' thereby perpetuating the problem by basing a partial review on, in India's view, a flawed re-determination. Duties, however, remained suspended. In effect, the case had now become one of legal interpretation rather than commercial interest.

India considered that the EU had failed to comply with the recommendations and rulings of the DSB and therefore requested, as it was entitled to do, that the EU enter into consultations under Articles 4 and 21.5 of the DSU. On 8 May 2002, India reported that consultations had not been satisfactory, and sought the establishment of a panel to consider its complaint that the EU had failed to comply with the rulings of the panel and the AB.

At its meeting on 22 May 2002, the DSB referred this dispute to the original panel, in accordance with Article 21.5 of the DSU, to examine the matter. The DSB meeting also agreed that the panel should have standard terms of reference, as follows:

> To examine, in the light of the relevant provisions of the covered agreements cited by India in document WT/DS141/13/Rev.1, the matter referred by India to the DSB in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.

One member of the original panel was unable to participate in these proceedings. As a result, Mr. Virachai Plasai (Permanent Mission of Thailand) was appointed to replace Ms. Marta Lemme.

On 22 August 2002, the chair of the panel informed the DSB that, due to the inability of one of the original panelists to participate, the panel would not be able to complete its work in the required 90 days in light of the delay resulting from the need to re-compose the panel. He indicated that the panel expected to complete its work in November 2002.

On 10-11 September the panel met with the parties and on 11 September with third parties — Japan, Korea, and the United States. By this time it was once again faced with a mountain of very detailed legal argumentation setting out the competing views of the two parties in dispute, as well as the third parties.

On 29 November 2002, the panel issued its report,[10] dismissing all of the complaints raised by India and ruling that the EU was now in full compliance with its earlier rulings and those of the Appellate Body. Throughout this period, the EU suspended the application of its antidumping measures on bed linen from India, underlining that the issues were legal rather than economic.

It is for consideration whether India's decision to make one more effort at dispute resolution was well thought through. The legal argumentation presented to the panel appears extremely argumentative, focusing on very fine points of law and interpretation. In many respects, India revisited issues that had been considered in the first panel proceedings or that, as explained earlier, had been dismissed on grounds of judicial economy or due to India's failure to raise them in the original complaint. The fact that the panel, of which two members had heard all the original arguments, dismissed all of India's complaints, is suggestive that India may have pressed its luck. At the same time, political considerations may have disposed the Indian government to proceed as a demonstration of its commitment to defending the interests of its exporters. For our purposes, this final phase of the case holds little interest other than as an illustration of the right of members to litigate the issue of compliance.

Lessons learned

This case, which focuses on what was involved in settling the dispute between India and the EU, sought to explain and achieve the following objectives:

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[10] The panel's 71-page report can be found in WTO document WT/DS141/RW of 29 November, to which are appended five appendices setting out in exhaustive detail the arguments of the two parties and three third parties.

- Governments need not only to gain, but also to defend, access to foreign markets for national exporters, using every means at their disposal.
- Antidumping measures, while permitted under the WTO, must comply with the procedures set out in the WTO Antidumping Agreement.
- International rules — as set out in the WTO and similar agreements — are only as good as the willingness of member governments to enforce them by availing themselves of procedures to settle dispute arising from the implementation and application of the rules.
- Developing country members of the WTO have the same rights as industrialized members to use dispute settlement to defend their rights and interests.
- Governments need to maintain their focus on the specific issues in dispute from the many extraneous issues, and deploy their arguments strategically and well.

As the case unfolded, it is not difficult to understand why so many commentators conclude that antidumping proceedings are heavily skewed by political considerations. Antidumping exists as a safety valve, providing governments with more scope to liberalize trade than might otherwise be the case. Most economists consider the economic rationale for antidumping procedures to be deeply flawed. Domestic industries, on the other hand, view these procedures as an important tool in addressing inroads by foreign competitors and, with the help of lawyers engaged in pursuing such cases, have developed elaborate rationales to justify them. Politicians in large economies like the procedures because they provide a 'technical' response to complaints from domestic constituents about foreign competition. Expecting a wholly fair approach by national officials is thus highly unlikely. Antidumping officials are charged with finding dumping and material injury and, given the wide latitude allowed by the ADA, they usually do find both.

At the same time, antidumping officials must operate within the rules and procedures set out in the ADA. These rules are the product of arduous negotiations and represent compromises between competing export and import interests. Some of the language is ambiguous and the underlying concepts complex. Access to dispute settlement is, therefore, a critically important right for both sides in an antidumping dispute. Maintaining balance between competing exporting and importing interests, therefore, is more than a matter of negotiation; it is also a matter of litigation. Failure to use that right can result in erosion of hard-won access and a skewing of the balance between competing interests.

Developing countries have in the past been reluctant to exercise their rights to dispute settlement, citing expense and the need for a high level of technical competence. Improvements in the procedures and the availability of resources at the WTO to help developing countries have somewhat mitigated this concern. More fundamentally, however, smaller countries are reluctant to exercise their franchise for fear of retaliation on other fronts. Such an attitude, understandable as it may be, is short-sighted and undermines the proper functioning of the regime and the fuller integration of developing countries into the trading system. As this case, and others, demonstrate, developing countries can take on the major members of the WTO and hold them to account, but they need to be patient, insist on their rights, use the best advice available, and follow through.

Issues for Discussion

Definition of the Problem

- Defending Indian access for bed linen to the EU market, curtailed by various antidumping procedures and rulings, by using the procedures of the DSU.

Analysis

- Economic — dumping and market access
- Political — India, EU, other WTO members
- Commercial — Indian suppliers, EU distributors and customers, EU competitors
- Policy — India, EU, other WTO members

Alternative Solutions

Preferred Solution

Required Means

- Who does what
- Who makes decisions
- Who influences those decisions and how

The players and their perspectives

- Complaining parties — EU producers of bed linen
- Defending parties — Indian suppliers of bed linen
- EU Commission officials
- Indian government officials
- WTO members and officials, particularly third parties to dispute
- Intermediaries: shippers, brokers, etc.
- EU consumers

Background Issues for Discussion

Object and purpose of GATT/WTO

- Role and interests of developing countries

Market access

- Economics
- Gaining and keeping it
- Politics

'Low-cost' imports, particularly textiles

Dumping and anti-dumping measures

- Economic issues
- Procedural issues
- Legal issues
- Challenges for developing countries

Dispute settlement

- Who and what's involved
- The record under GATT and the WTO
- What's required to initiate or defend a case
- Particular problems for developing countries

Exhibit 1

Trade in textiles and the WTO[11]

Multifibre Arrangement (MFA) 1974-94

Up to the end of the Uruguay Round, textile and clothing quotas were negotiated bilaterally and governed by the rules of the Multifibre Arrangement (MFA). This provided for the application of selective quantitative restrictions when surges in imports of particular products caused, or threatened to cause, serious damage to the industry of the importing country. The Multifibre Arrangement was a major departure from the basic GATT rules and particularly the principle of non-discrimination. On 1 January 1995 it was replaced by the WTO Agreement on Textiles and Clothing which sets out a transitional process for the ultimate removal of these quotas.

The WTO Agreement on Textiles and Clothing (ATC) 1995-2004

The ATC is a transitional instrument, built on the following key elements: (a) the product coverage, basically encompassing yarns, fabrics, made-up textile products and clothing; (b) a programme for the progressive integration of these textile and clothing products into GATT 1994 rules; (c) a liberalization process to progressively enlarge existing quotas (until they are removed) by increasing annual growth rates at each stage; (d) a special safeguard mechanism to deal with new cases of serious damage or threat thereof to domestic producers during the transition period; (e) establishment of a Textiles Monitoring Body ("TMB") to supervise the implementation of the Agreement and ensure that the rules are faithfully followed; and (f) other provisions, including rules on circumvention of the quotas, their administration, treatment of non-MFA restrictions, and commitments undertaken elsewhere under the WTO's agreements and procedures affecting this sector.

The product coverage, listed in the Annex to the ATC, covers all products which were subject to MFA or MFA-type quotas in at least one importing country.

The integration process is laid down in ATC Article 2 and stipulates how Members shall integrate the products listed in the Annex into the rules of GATT 1994 over the 10-year period. This process is to be carried out progressively in three stages (3 years, 4 years, 3 years) with all products standing integrated at the end of the 10-year period. The first stage began on 1 January 1995 with the integration by Members of products representing not less than 16 per cent of that Member's total 1990 imports of all the products in the Annex. At stage 2, on 1 January 1998, not less than a further 17 per cent was integrated. At stage 3, on 1 January 2002, not less than a further 18 per cent will be integrated. Finally at the end, on 1 January 2005, all remaining products (amounting up to 49 per cent of 1990 imports into a Member) will stand integrated and the Agreement terminates. Each importing Member decides itself which products it will integrate at each stage to reach these thresholds. The only constraint is that the integration list must encompass products from each of the four groupings: tops and yarns, fabrics, made-up textile products and clothing.

The four WTO Members which maintained import restrictions under the former MFA (Canada, EC, Norway and the US) were required to undertake this integration process and to notify to the TMB the first phase of their programmes of integration by 1 October 1994. Other WTO Members were required, first, to notify the TMB if they

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[11] Source: http://www.wto.org/english/tratop_e/texti_e/texintro_e.htm

wished to retain the right to use the transitional safeguard mechanism in the ATC (Article 6.1) and, if so, to provide their first stage integration lists. Fifty-five Members chose to retain this right and most of them provided lists of products for integration. Nine Members, Australia, Brunei Darussalam, Chile, Cuba, Hong Kong, Iceland, Macau, New Zealand and Singapore decided not to maintain the right to use the ATC safeguard mechanism. They are deemed to have integrated 100 per cent at the outset.

Concurrent with the integration process, there is a programme for liberalizing the existing restrictions, that is, for enlarging the bilateral quotas carried over from the former MFA on 1 January 1995 (Article 2.1) until such time as the products are integrated into GATT, at which time the quotas terminate. These former MFA quotas, when carried over into the ATC on 1 January 1995, represented the starting point for an automatic liberalization process set out in Article 2, paragraphs 12-16. The former MFA growth rates applicable to each of these quotas were increased on 1 January 1995 by a factor of 16 per cent for the first stage of the Agreement and the new growth rate was applied annually. The stage 1 growth rate was further increased by a factor of 25 per cent for the second stage on 1 January 1998; and will be increased by a further 27 per cent for the last stage beginning 1 January 2002. To illustrate this process, a 6 per cent growth rate under the MFA in 1994 became 6.9 per cent under the ATC and applied each year 1995/96/97; then it was increased to 8.7 per cent for each year 1998/99/2000/01; and then will be increased to 11.05 per cent for 2002/3/4. For small suppliers (as defined in Article 2.18) the growth factors (16 per cent, 25 per cent, 27 per cent) are to be advanced by one stage. Quotas will be eliminated either when the products concerned are integrated into GATT at one of the stages or at the end of the transition on 1 January 2005. There are additional provisions in Article 2 for early removal of quotas and integration of products.

Article 3 deals with quantitative restrictions (or measures with similar effect) other than those under the MFA. Members which had such restrictions in place, which could not be justified under a GATT provision, were required either to bring them into conformity with GATT rules or phase them out within the ten year transitional period, according to a plan to be submitted by the restraining Member to the Textiles Monitoring Body. There is no obligation to eliminate restrictions that are permitted under GATT rules.

A key aspect of the ATC is the provision in Article 6 for a special transitional safeguard mechanism intended to protect Members against damaging surges in imports during the transition period from products which have not yet been integrated into GATT and which are not already under quota. This clause is based on a two-tiered approach - first, the importing Member must determine that total imports of a specific product are causing serious damage, or actual threat thereof, to its domestic industry and second, it must then decide to which individual Member(s) this serious damage can be attributed. Specific criteria and procedures are set out for each step. The importing Member must then seek consultations with the exporting Member(s). Such safeguard measures may be applied on a selective, country-by-country basis by mutual agreement or, if agreement is not reached through the consultation process within 60 days, by unilateral action. The quota may not be lower than the actual level of imports for that exporting country during a recent 12 month period, and the action taken may remain in place for up to three years only. If the measure is in place for more than one year, growth shall, with one exception, be no less than 6 per cent. In practice, the special safeguard was invoked on 24 occasions in 1995 by the United States, 8 times in 1996 (Brazil 7, US 1), 2 times in 1997 by the United States, and 10 times in 1998 (Colombia 9, US 1).

Article 5 of the ATC contains rules and procedures concerning circumvention of the quotas through transshipment, re-routing, false declaration of origin, or falsification of official

documents. These require, *inter alia*, consultation and full cooperation in the investigation of such practices by Members concerned. When sufficient evidence is available, possible recourse might include the denial of entry of goods. There is also a provision whereby all Members should establish, consistent with their domestic laws and procedures, the necessary legal provisions and/or administrative procedures to address and take action against circumvention.

Administration of restrictions during the transition period will remain with the exporting Members and any changes in practices, rules or procedures shall be subject to consultations with a view to reaching mutually acceptable solutions (Article 4).

Provisions relating to the commitments undertaken in all areas of the Uruguay Round as they relate to textiles and clothing require that all Members "shall take such actions as may be necessary" to abide by these rules and disciplines so as to achieve improved market access, to ensure the application of fair and equitable trading conditions and to avoid discrimination against textiles and clothing imports (Article 7). If an exporting Member is found not to be complying with its obligations, the Dispute Settlement Body or the Council for Trade in Goods may authorize an adjustment to the quota growth for that country which is otherwise an automatic growth.

The Textiles Monitoring Body has been established to supervise the implementation of the ATC and to examine all measures taken under it, to ensure that they are in conformity with the rules. It is a quasi-judicial, standing body which consists of a Chairman and ten TMB members, discharging their function on an *ad personam* basis and taking all decisions by consensus. The ten members are appointed by WTO Member governments according to an agreed grouping of WTO Members into constituencies. There can be rotation within the constituencies. These characteristics make the TMB a unique institution within the WTO framework. In January 1995, the General Council decided upon the composition for the TMB for the first stage. In December 1997, the General Council decided upon the composition for the second stage (1998-2001) with TMB members to be appointed by WTO Members designated from the following constituencies: (a) the ASEAN Member countries; (b) Canada and Norway; (c) Pakistan and China (after accession); (d) the European Communities; (e) Korea and Hong Kong, China; (f) India and Egypt/ Morocco/ Tunisia; (g) Japan; (h) Latin American and Caribbean Members; (i) the United States; and (j) Turkey, Switzerland and Bulgaria/Czech Republic/Hungary/ Poland/Romania, Slovak Republic/Slovenia. Provisions were made for alternates to be appointed by the members in each of the constituencies and in some cases second alternates; there are also two non-participating observers from Members not already represented in this structure, one from Africa and one from Asia.

Exhibit 2

EU trade policy instruments: Anti-dumping[12]

Protection against dumped imports

European Community rules to deal with dumping date back to the organisation's earliest days. They are targeted at dumped imports which cause significant injury to Community producers. If left unchallenged, dumping gives the third country exporter an unfair competitive advantage which could be exploited with considerable negative consequences for Community industry.

Existing Community rules were replaced by a new Anti-Dumping regulation which came into force on 1 January 1995. This in turn was updated by Regulation 384/96, which came into force on 6 March 1996. This Regulation incorporates measures agreed in the Uruguay Round of the GATT. It also imposes strict time limits for the completion of investigations and decision-making to ensure that complaints are dealt with rapidly and efficiently.

Dumping is often seen to relate to any cheap or below-cost imports, but the reality is more complicated. The 1996 Anti-Dumping Regulation provides for the imposition of anti-dumping duties, but only when the following conditions are met:

- a finding of dumping: the export price at which the product is sold on the Community market is shown to be lower than the price on the producer's home market;
- a material injury to Community industry: the imports have caused or threaten to cause damage to a substantial part of the industry within the EC, such as loss of market share, reduced prices for producers and resulting pressure on production, sales, profits, productivity etc.;
- the interests of the Community: the costs for the Community of taking measures must not be disproportionate to the benefits.

The European Commission is responsible for investigating complaints and assessing whether they are justified. The Commission can also impose provisional measures, and definitive measures for coal and steel products. In all other cases, it is the Council of Ministers which imposes definitive anti-dumping duties.

When an industry in the Community considers that dumped imports from non-EU countries are causing it material industry, it may submit a complaint to the European Commission, either directly or through its national government. The Commission then has 45 days to examine the complaint, consult the member states (represented on an Advisory Committee) and decide whether or not there is enough evidence to merit a formal investigation. The case will be rejected if there is not enough evidence or if the complainants do not represent at least 25 % of the total EC production of the product in question.

The Commission's investigation will cover whether or not dumping is taking place, which can be a complex calculation, and also whether dumped imports are causing mate-

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[12] Source: europa.eu.int/comm/trade/policy/dumping/compl.htm.

rial industry to Community industry. Measures may also be imposes if imports are hindering the establishment of a new industry within the Community, or there is a clear and imminent threat of material injury. The investigation normally takes no more than a year, and in any case must be completed within 15 months.

Anti-dumping measures will only take place if they are shown to be in the broader Community interest. Producers, importers, users and consumers are able to present their views. The member states must then be consulted, and then the Commission may, within 60 days to nine months, impose provisional duties. They must not exceed the dumping margin (the difference between the price on the home market and the price charged on the EC market). These may last for six to nine months. After that, when the Commission has completed it's full investigation, it may, after further consultation with the member states, impose definitive duties. Only the Council of Ministers has the authority to decide upon these. Definitive duties are valid for five years before they expire. If, however, Community producers demonstrate that removal of duties is likely to lead to renewed duties and dumping, the Commission may reopen its investigation. This may also happen if the imposition of duties does not have the desired effect of removing the injury, for example because the exporter has absorbed the extra costs, or the pattern of trade has changed. This may result in changes in the level of duties. A Regulation imposing anti-dumping duties may be challenged in the European Court of First Instance, and the WTO dispute settlement procedure may be used to settle disputes between WTO signatories.

How to introduce an anti-dumping complaint

The anti-dumping legislation of the EU exists to counteract unfair dumping practices by third-country exporters. The EU legislation is based on an agreement reached in 1994 between all members of World Trade Organisation. This agreement condemns dumping as an unfair trade practice and allows remedial action to be taken.

If the Community industry feels injured by dumped imports, it can present an anti-dumping complaint to the Commission's Anti-dumping Service.

A "complaint" is a document which contains information showing that a certain product originating in a third country is being exported to the European Community at dumped prices, and that this dumped product is causing injury to the Community industry. Evidence (e.g. invoices, price offers, publications in specialised press, official statistics, etc..) will support the allegations made in the complaint.

Export prices are "dumped" when they are at a level below the domestic price in the exporting country. In other words, there is price discrimination: for similar products, a producer charges higher prices on his domestic market than for export sales to the EU. Export prices are also dumped when the exporter sells at a loss.

"Injury" (a deterioration in the state of the industry) can be shown in many ways (loss of market share, drop in prices, worsening financial results, etc). This deterioration must be material, i.e., not simply of a temporary or negligible nature (for example, sales at a loss by the Community industry for end-of-year stocks). Furthermore, the dumped imports must be a cause of this injury.

"Community industry" refers to European Community producers of the particular product being dumped that are being injured by this dumping. A complaint must be

supported by a significant amount of European Community producers. Collectively, these companies must produce at least 25% of the total European Community production of the product being dumped. In general, complainants would contact the producers in other Member States to seek support before filing the complaint.

In principle, any "product" can be the subject of a complaint. Anti-dumping legislation, however, does not include services.

In general, the dumped products may originate in any country outside the European Community. The only exceptions are Iceland, Liechtenstein and Norway, who, for most products, are excluded from the application of anti-dumping legislation1. If exports from several "third countries" are being dumped, all of the relevant third countries are normally examined in the complaint.

Confidentiality

Information can be provided to the Commission on a confidential basis. The Commission will not reveal any confidential information without specific permission from its supplier.

The investigation

If a complaint is deemed admissible, an investigation will be initiated 45 days after the complaint is formally lodged with the Commission. The investigation will establish whether remedial action should be taken.

The investigation may take up to a maximum of 9 months to come to a provisional determination (if warranted, provisional anti-dumping duties) and up to a further 6 months to come to a definitive determination (if warranted, definitive anti-dumping duties). Definitive anti-dumping measures normally have a duration of five years.

In addition, the Commission has prepared a "Guide on How to Draft an Anti-dumping Complaint", which provides detailed explanations and insights into the contents of anti-dumping complaints. The guide exists in all official Community languages. If you wish to consult this guide, go to: europa.eu.int/comm/trade/policy/dumping/compl.htm.

Exhibit 3

WTO Agreement on Implementation of Article VI (Anti-Dumping) — Description[13]

Article VI of the GATT provides for the right of contracting parties to apply anti-dumping measures, i.e. measures against imports of a product at an export price below its "normal value" (usually the price of the product in the domestic market of the exporting country) if such dumped imports cause injury to a domestic industry in the territory of the importing contracting party. More detailed rules governing the application of such measures are currently provided in an Anti-Dumping Agreement concluded at the end of the Tokyo Round. Negotiations in the Uruguay Round have resulted in a revision of this Agreement which addresses many areas in which the current Agreement lacks precision and detail.

In particular, the revised Agreement provides for greater clarity and more detailed rules in relation to the method of determining that a product is dumped, the criteria to be taken into account in a determination that dumped imports cause injury to a domestic industry, the procedures to be followed in initiating and conducting anti-dumping investigations, and the implementation and duration of anti-dumping measures. In addition, the new agreement clarifies the role of dispute settlement panels in disputes relating to anti-dumping actions taken by domestic authorities.

On the methodology for determining that a product is exported at a dumped price, the new Agreement adds relatively specific provisions on such issues as criteria for allocating costs when the export price is compared with a "constructed" normal value and rules to ensure that a fair comparison is made between the export price and the normal value of a product so as not to arbitrarily create or inflate margins of dumping.

The agreement strengthens the requirement for the importing country to establish a clear causal relationship between dumped imports and injury to the domestic industry. The examination of the dumped imports on the industry concerned must include an evaluation of all relevant economic factors bearing on the state of the industry concerned. The agreement confirms the existing interpretation of the term "domestic industry". Subject to a few exceptions, "domestic industry" refers to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products.

Clear-cut procedures have been established on how anti-dumping cases are to be initiated and how such investigations are to be conducted. Conditions for ensuring that all interested parties are given an opportunity to present evidence are set out. Provisions on the application of provisional measures, the use of price undertakings in anti-dumping cases, and on the duration of anti-dumping measures have been strengthened. Thus, a significant improvement over the existing Agreement consists of the addition of a new provision under which anti-dumping measures shall expire five years after the date of imposition, unless a determination is made that, in the event of termination of the measures, dumping and injury would be likely to continue or recur.

A new provision requires the immediate termination of an anti-dumping investigation in cases where the authorities determine that the margin of dumping is *de minimis* (which is defined as less than 2 per cent, expressed as a percentage of the export price of the product)

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13 Source: www.wto.org/english/docs_e/legal_e/ursum_e.htm#fAgreement

or that the volume of dumped imports is negligible (generally when the volume of dumped imports from an individual country accounts for less than 3 per cent of the imports of the product in question into the importing country).

The agreement calls for prompt and detailed notification of all preliminary or final anti-dumping actions to a Committee on Anti-Dumping Practices. The agreement will afford parties the opportunity of consulting on any matter relating to the operation of the agreement or the furtherance of its objectives, and to request the establishment of panels to examine disputes.

The WTO Anti-dumping Agreement — Explanatory Notes[14]

The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "AD Agreement") governs the application of anti-dumping measures by Members of the WTO. Anti-dumping measures are unilateral remedies which may be applied by a Member after an investigation and determination by that Member, in accordance with the provisions of the AD Agreement, that an imported product is "dumped" and that the dumped imports are causing material injury to a domestic industry producing the like product.

The AD Agreement sets forth certain substantive requirements that must be fulfilled in order to impose an anti-dumping measure, as well as detailed procedural requirements regarding the conduct of anti-dumping investigations and the imposition and maintenance in place of anti-dumping measures. A failure to respect either the substantive or procedural requirements can be taken to dispute settlement and may be the basis for invalidation of the measure. Unlike the Agreement on Subsidies and Countervailing Measures, the AD Agreement does not establish any disciplines on dumping itself, primarily because dumping is a pricing practice engaged in by business enterprises, and thus not within the direct reach of multilateral disciplines.

Substantive rules

Article 1 of the AD Agreement establishes the basic principle that a Member may not impose an anti-dumping measure unless it determines, pursuant to an investigation conducted in conformity with the provisions of the AD Agreement, that there are dumped imports, material injury to a domestic industry, and a causal link between the dumped imports and the injury.

Determination of dumping

Article 2 contains substantive rules for the determination of dumping. Dumping is calculated on the basis of a "fair comparison" between normal value (the price of the imported product in the "ordinary course of trade" in the country of origin or export) and export price (the price of the product in the country of import). Article 2 contains detailed provisions governing the calculation of normal value and export price, and elements of the fair comparison that must be made.

Determination of injury

Article 3 of the AD Agreement contains rules regarding the determination of material injury caused by dumped imports. Material injury is defined as material injury itself, threat of material injury, or material retardation of the establishment of a domestic in-

[14] Source: www.wto.org/english/tratop_e/adp_e/antidum2_e.htm

dustry. The basic requirement for determinations of injury, is that there be an objective examination, based on positive evidence of the volume and price effects of dumped imports and the consequent impact of dumped imports on the domestic industry. Article 3 contains specific rules regarding factors to be considered in making determinations of material injury, while specifying that no one or several of the factors which must be considered is determinative. Article 3.5 requires, in establishing the causal link between dumped imports and material injury, known factors other than dumped imports which may be causing injury must be examined, and that injury caused by these factors must not be attributed to dumped imports.

A significant new provision, Article 3.3, establishes the conditions in which a cumulative evaluation of the effects of dumped imports from more than one country may be undertaken. Under the rules, authorities must determine that the margin of dumping from each country is not *de minimis*, that the volume of imports from each country is not negligible, and that a cumulative assessment is appropriate in light of the conditions of competition among the imports and between the imports and the domestic like product.

Definition of industry

Article 4 of the AD Agreement sets forth a definition of the domestic industry to be considered for purposes of assessing injury and causation. The domestic industry is defined as producers of a "like product", which term is defined in Article 2.6 as a product that is identical to, or in the absence of such a product, one that has characteristics closely resembling those of, the imported dumped product under consideration. Article 4 contains special rules for defining a "regional" domestic industry in exceptional circumstances where production and consumption in the importing country are geographically isolated, and for the evaluation of injury and assessment of duties in such cases. Article 4 also establishes that domestic producers may be excluded from consideration as part of the domestic industry if they are "related" (defined as a situation of legal or effective control) to exporters or importers of the dumped product.

Procedural requirements

Overview

A principal objective of the procedural requirements of the AD Agreement is to ensure transparency of proceedings, a full opportunity for parties to defend their interests, and adequate explanations by investigating authorities of their determinations. The extensive and detailed procedural requirements relating to investigations focus on the sufficiency of petitions (through minimum information and "standing" requirements) to ensure that meritless investigations are not initiated, on the establishment of time periods for the completion of investigations, and on the provision of access to information to all interested parties, along with reasonable opportunities to present their views and arguments. Additional procedural requirements relate to the offering, acceptance, and administration of price undertakings by exporters in lieu of the imposition of anti-dumping measures. The AD Agreement requires investigating authorities to give public notice of and explain their determinations at various stages of the investigative process in substantial detail. It also establishes rules for the timing of the imposition of anti-dumping duties, the duration of such duties, and obliges Members to periodically review the continuing need for anti-dumping duties and price undertakings. There are detailed provisions guiding the imposition and collection of duties under various duty assessment systems, intended to ensure that anti-dumping duties in excess of the margin of dumping are not collected, and that individual exporters are not subjected to anti-dumping duties

in excess of their individual margin of dumping. Article 13 of the AD Agreement requires Members to provide for judicial review of final determinations in anti-dumping investigations and reviews. Other provisions establish that Members may, at their discretion, take anti-dumping actions on behalf of and at the request of a third country, and recognise that "special regard" must be given by developed country Members to the situation of developing country Members when considering the application of anti-dumping duties.

Specific Provisions

Initiation and conduct of investigations

Article 5 establishes the requirements for the initiation of investigations. The AD Agreement specifies that investigations should generally be initiated based on a written request submitted "by or on behalf of" a domestic industry. This "standing" requirement is supported by numeric limits for determining whether there is sufficient support by domestic producers to conclude that the request is made by or on behalf of the domestic industry, and thereby warrants initiation. The AD Agreement establishes requirements for evidence of dumping, injury, and causality, as well as other information regarding the product, industry, importers, exporters, and other matters, in written applications for anti-dumping relief, and specifies that, in special circumstances when authorities initiate without a written application from a domestic industry, they shall proceed only if they have sufficient evidence of dumping, injury, and causality. In order to ensure that meritless investigations are not continued, potentially disrupting legitimate trade, Article 5.8 provides for immediate termination of investigations in the event the volume of imports is negligible or the margin of dumping is *de minimis*, and establishes numeric thresholds for these determinations. In order to minimize the trade disruptive effect of investigations, Article 5.10 specifies that investigations shall be completed within one year, and in no case more than 18 months, after initiation.

Article 6 sets forth detailed rules on the process of investigation, including the collection of evidence and the use of sampling techniques. It requires authorities to guarantee the confidentiality of sensitive information and verify the information on which determinations are based. In addition, to ensure the transparency of proceedings, authorities are required to disclose the information on which determinations are to be based to interested parties and provide them with adequate opportunity to comment, and establishes the rights of parties to participate in the investigation, including the right to meet with parties with adverse interests, for instance in a public hearing.

Imposition of provisional measures

Article 7 relates to the imposition of provisional measures. Article 7 includes the requirement that authorities make a preliminary affirmative determination of dumping, injury, and causality before applying provisional measures, and the requirement that no provisional measures may be applied sooner than 60 days after initiation of an investigation.

Price undertakings

Article 8 establishes the principle that undertakings to revise prices or cease exports at dumped prices may be entered into to settle an investigation, but only after a preliminary affirmative determination of dumping, injury, and causality has been made. It also establishes that undertakings are voluntary on the part of both exporters and investigating authorities. In addition, an exporter may request that the investigation be continued

after an undertaking has been accepted, and if a final determination of no dumping, no injury, or no causality results, the undertaking shall automatically lapse.

Imposition and collection of duties

Article 9 establishes the general principle that imposition of anti-dumping duties is optional, even if all the requirements for imposition have been met, and establishes the desirability of application a "lesser duty" rule. Under a lesser duty rule, authorities impose duties at a level lower than the margin of dumping but adequate to remove injury. Article 9.3 establishes that anti-dumping duties may not exceed the dumping margin calculated during the investigation. In order to ensure that anti-dumping duties in excess of the margin of dumping are not collected, Article 9.3 requires procedures for determination of the actual amount of duty owed, or refund of excess duties paid, depending on the duty assessment system of a Member, normally within 12 months of a request, and in no case more than 18 months. Article 9.4 establishes rules for calculating the amount of duties to be imposed on exporters not individually examined during the investigation. Article 9.5 provides for expedited reviews to calculate individual margins of dumping for exporters or producers newly entering the market of the importing Member.

Article 10 establishes the general principle that both provisional and final anti-dumping duties may be applied only as of the date on which the determinations of dumping, injury, and causality have been made. However, recognizing that injury may have occurred during the period of investigation, or that exporters may have taken actions to avoid the imposition of an anti-dumping duty, Article 10 contains rules for the retroactive imposition of dumping duties in specified circumstances. If the imposition of anti-dumping duties is based on a finding of material injury, as opposed to threat of material injury or material retardation of the establishment of a domestic industry, anti-dumping duties may be collected as of the date provisional measures were imposed. If provisional duties were collected in an amount greater than the amount of the final duty, or if the imposition of duties is based on a finding of threat of material injury or material retardation, a refund of provisional duties is required. Article 10.6 provides for retroactive application of final duties to a date not more than 90 days prior to the application of provisional measures in certain exceptional circumstances involving a history of dumping, massive dumped imports, and potential undermining of the remedial effects of the final duty.

Duration, termination, and review of anti-dumping measures

Article 11 establishes rules for the duration of anti-dumping duties, and requirements for periodic review of the continuing need, if any, for the imposition of anti-dumping duties or price undertakings. These requirements respond to the concern raised by the practice of some countries of leaving anti-dumping duties in place indefinitely. The "sunset" requirement establishes that dumping duties shall normally terminate no later than five years after first being applied, unless a review investigation prior to that date establishes that expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. This five year "sunset" provision also applies to price undertakings. The AD Agreement requires authorities to review the need for the continued imposition of a duty upon request of an interested party.

Public notice

Article 12 sets forth detailed requirements for public notice by investigating authorities of the initiation of investigations, preliminary and final determinations, and undertakings. The public notice must disclose non-confidential information concerning the

parties, the product, the margins of dumping, the facts revealed during the investigation, and the reasons for the determinations made by the authorities, including the reasons for accepting and rejecting relevant arguments or claims made by exporters or importers. These public notice requirements are intended to increase the transparency of determinations, with the hope that this will increase the extent to which determinations are based on fact and solid reasoning.

The committee and dispute settlement

Article 16 establishes the Committee on Anti-Dumping Practices, and sets forth requirements for Members to notify without delay all preliminary and final actions taken in anti-dumping investigations, and notify semi-annually all actions taken during the relevant reporting period.

Article 17 establishes that the Dispute Settlement Understanding is applicable to disputes under the AD Agreement. However, Article 17.6 establishes a special standard of review to be applied by panels in examining disputes in anti-dumping cases with regard both to matters of fact and questions of interpretation of the Agreement. This standard gives a degree of deference to the factual decisions and legal interpretations of national authorities, and is intended to prevent dispute settlement panels from making decisions based purely on their own views. A Ministerial Decision, which is not part of the AD Agreement, regarding this provision establishes that its operation will be reviewed after three years with a view to consideration whether it is capable of general application.

Final provisions

Article 18.3 establishes the effective date of the AD Agreement, providing that it is applicable to investigations and reviews of existing measures initiated pursuant to applications made on or after the entry into force of the AD Agreement. Article 18.4 requires Members to bring their laws into conformity with the AD Agreement by the date of entry into force of the AD Agreement. Under Article 18.5, Members are required to notify their anti-dumping laws and regulations to the Committee.

Annex I to the AD Agreement establishes procedures for "on-the-spot" investigations, which are generally undertaken in the territory of an exporting Member to verify information provided by foreign producers or exporters. Annex II to the AD Agreement sets forth provisions on the use of "best information available" in investigations, specifying the conditions under which investigating authorities may rely on information from a source other than the person concerned.

The Ministerial Decision on Anti-Circumvention, which is not part of the AD Agreement, noted that the negotiators had been unable to agree on a specific text dealing with the problem of anti-circumvention, recognized the desirability of applying uniform rules in this area as soon as possible, and referred the matter to the Committee for resolution. The Committee has established an Informal Group on Anti-Circumvention, which is open to participation by all Members, to carry out the task assigned by the Ministers.

Exhibit 4

Dispute Settlement: the WTO's 'most individual contribution'[15]

Without a means of settling disputes, the rules-based system would be worthless because the rules could not be enforced. The WTO's procedure underscores the rule of law, and it makes the trading system more secure and predictable. The system is based on clearly-defined rules, with timetables for completing a case.

First rulings are made by a panel and endorsed (or rejected) by the WTO's full membership. Appeals based on points of law are possible.

However, the point is not to make rulings. The priority is to settle disputes, through consultations if possible. By July 2000, 32 out of 203 cases had been settled "out of court", without going through the full panel process.

Principles: equitable, fast, effective, mutually acceptable

WTO members have agreed that if they believe fellow-members are violating trade rules, they will use the multilateral system of settling disputes instead of taking action unilaterally. That means abiding by the agreed procedures, and respecting judgements.

Typically, a dispute arises when one country adopts a trade policy measure or takes some action that one or more fellow-WTO members considers to be breaking the WTO agreements, or to be a failure to live up to obligations. A third group of countries can declare that they have an interest in the case and enjoy some rights.

A procedure for settling disputes existed under the old GATT, but it had no fixed timetables, rulings were easier to block, and many cases dragged on for a long time inconclusively. The Uruguay Round agreement introduced a more structured process with more clearly defined stages in the procedure. It introduced greater discipline for the length of time a case should take to be settled, with flexible deadlines set in various stages of the procedure. The agreement emphasizes that prompt settlement is essential if the WTO is to function effectively. It sets out in considerable detail the procedures and the timetable to be followed in resolving disputes. If a case runs its full course to a first ruling, it should not normally take more than about one year — 15 months if the case is appealed. The agreed time limits are flexible, and if the case is considered urgent (e.g. if perishable goods are involved), then the case should take three months less.

The Uruguay Round agreement also made it impossible for the country losing a case to block the adoption of the ruling. Under the previous GATT procedure, rulings could only be adopted by consensus, meaning that a single objection could block the ruling. Now, rulings are automatically adopted unless there is a consensus to reject a ruling — any country wanting to block a ruling has to persuade all other WTO members (including its adversary in the case) to share its view.

Although much of the procedure does resemble a court or tribunal, the preferred solution is for the countries concerned to discuss their problems and settle the dispute by themselves. The first stage is therefore consultations between the governments con-

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[15] Sources: http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm and www.wto.org/english/thewto_e/whatis_e/tif_e/disp3_e.htm.

cerned, and even when the case has progressed to other stages, consultation and mediation are still always possible.

How long to settle a dispute?

These approximate periods for each stage of a dispute settlement procedure are target figures — the agreement is flexible. In addition, the countries can settle their dispute themselves at any stage. Totals are also approximate.

60 days	Consultations, mediation, etc
45 days	Panel set up and panelists appointment
6 months	Final panel report to parties
3 weeks	Final panel report to WTO members
60 days	Dispute Settlement Body adopts report (if no appeal)

Total = 1 year (without appeal)

60-90 days	Appeals report
30 days	Dispute Settlement Body adopts appeals report

Total = 1year 3months (with appeal)

How are disputes settled?

Settling disputes is the responsibility of the Dispute Settlement Body (the General Council in another guise). The Dispute Settlement Body has the sole authority to establish "panels" of experts to consider the case, and to accept or reject the panels' findings or the results of an appeal. It monitors the implementation of the rulings and recommendations, and has the power to authorize retaliation when a country does not comply with a ruling.

- First stage: consultation (up to 60 days). Before taking any other actions the countries in dispute have to talk to each other to see if they can settle their differences by themselves. If that fails, they can also ask the WTO director-general to mediate or try to help in any other way.
- Second stage: the panel (up to 45 days for a panel to be appointed, plus 6 months for the panel to conclude). If consultations fail, the complaining country can ask for a panel to be appointed. The country "in the dock" can block the creation of a panel once, but when the Dispute Settlement Body meets for a second time, the appointment can no longer be blocked (unless there is a consensus against appointing the panel).

Officially, the panel is helping the Dispute Settlement Body make rulings or recommendations. But because the panel's report can only be rejected by consensus in the Dispute Settlement Body, its conclusions are difficult to overturn. The panel's findings have to be based on the agreements cited.

The panel's final report should normally be given to the parties to the dispute within six months. In cases of urgency, including those concerning perishable goods, the deadline is shortened to three months.

The agreement describes in some detail how the panels are to work. The main stages are:

- Before the first hearing: each side in the dispute presents its case in writing to the panel.
- First hearing: the case for the complaining country and defence: the complaining country (or countries), the responding country, and those that have announced they have an interest in the dispute, make their case at the panel's first hearing.
- Rebuttals: the countries involved submit written rebuttals and present oral arguments at the panel's second meeting.
- Experts: if one side raises scientific or other technical matters, the panel may consult experts or appoint an expert review group to prepare an advisory report.
- First draft: the panel submits the descriptive (factual and argument) sections of its report to the two sides, giving them two weeks to comment. This report does not include findings and conclusions.
- Interim report: The panel then submits an interim report, including its findings and conclusions, to the two sides, giving them one week to ask for a review.
- Review: The period of review must not exceed two weeks. During that time, the panel may hold additional meetings with the two sides.
- Final report: A final report is submitted to the two sides and three weeks later, it is circulated to all WTO members. If the panel decides that the disputed trade measure does break a WTO agreement or an obligation, it recommends that the measure be made to conform with WTO rules. The panel may suggest how this could be done.
- The report becomes a ruling: The report becomes the Dispute Settlement Body's ruling or recommendation within 60 days unless a consensus rejects it. Both sides can appeal the report (and in some cases both sides do).

Appeals

Either side can appeal a panel's ruling. Sometimes both sides do so. Appeals have to be based on points of law such as legal interpretation — they cannot reexamine existing evidence or examine new evidence.

Each appeal is heard by three members of a permanent seven-member Appellate Body set up by the Dispute Settlement Body and broadly representing the range of WTO membership. Members of the Appellate Body have four-year terms. They have to be individuals with recognized standing in the field of law and international trade, not affiliated with any government.

The appeal can uphold, modify or reverse the panel's legal findings and conclusions. Normally appeals should not last more than 60 days, with an absolute maximum of 90 days.

The Dispute Settlement Body has to accept or reject the appeals report within 30 days — and rejection is only possible by consensus.

The case has been decided: what next?

Go directly to jail. Do not pass Go, do not collect .... Well, not exactly. But the sentiments apply. If a country has done something wrong, it should swiftly correct its fault. And if it continues to break an agreement, it should offer compensation or suffer a suitable penalty that has some bite.

Even once the case has been decided, there is more to do before trade sanctions (the conventional form of penalty) are imposed. The priority at this stage is for the losing "defendant" to bring its policy into line with the ruling or recommendations. The dispute settlement agreement stresses that "prompt compliance with recommendations or rulings of the DSB [Dispute Settlement Body] is essential in order to ensure effective resolution of disputes to the benefit of all Members".

If the country that is the target of the complaint loses, it must follow the recommendations of the panel report or the appeals report. It must state its intention to do so at a Dispute Settlement Body meeting held within 30 days of the report's adoption. If complying with the recommendation immediately proves impractical, the member will be given a "reasonable period of time" to do so. If it fails to act within this period, it has to enter into negotiations with the complaining country (or countries) in order to determine mutually-acceptable compensation — for instance, tariff reductions in areas of particular interest to the complaining side.

If after 20 days, no satisfactory compensation is agreed, the complaining side may ask the Dispute Settlement Body for permission to impose limited trade sanctions ("suspend concessions or obligations") against the other side. The Dispute Settlement Body should grant this authorization within 30 days of the expiry of the "reasonable period of time" unless there is a consensus against the request.

In principle, the sanctions should be imposed in the same sector as the dispute. If this is not practical or if it would not be effective, the sanctions can be imposed in a different sector of the same agreement. In turn, if this is not effective or practicable and if the circumstances are serious enough, the action can be taken under another agreement. The objective is to minimize the chances of actions spilling over into unrelated sectors while at the same time allowing the actions to be effective.

In any case, the Dispute Settlement Body monitors how adopted rulings are implemented. Any outstanding case remains on its agenda until the issue is resolved.

Suggestions for Further Reading

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