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European Community – Antidumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil (WT/DS219/AB/R: DSR 2003:VI, 2613)

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1 Introduction

This chapter addresses the Appellate Body (AB) report on *European Community – Antidumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil.*[1] The underlying Panel determination was appealed by the complainant Brazil only. Following the approach it took before the Panel, Brazil raised a number of issues concerning the antidumping investigation by the European Community (EC). The five substantive issues were:

1. Whether the Panel correctly found that the EC acted consistently with its obligations under the Antidumping (AD) Agreement when not accounting for the devaluation of the Brazilian currency (see Section 2 of this chapter);
2. whether the Panel correctly found that the EC treated "low-volume" imports consistently with its international obligations (Section 3);

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[1] WTO Doc. WT/DS219/AB/R, 22 July, 2003.

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3. whether the Panel correctly found that the absence of separate findings of "growth" factors in the EC final determination is consistent with the EC's WTO obligations (Section 4);
4. whether the Panel correctly found that there is no need to examine individually the impact of factors for which the cumulative impact has been assessed (Section 5); and
5. whether the Panel correctly found that the EC fully respected its obligations in its treatment of the causality element (Section 6).

The main procedural issues raised concerned the Panel's finding that a certain document was properly before the EC investigating authority and also its finding concerning the EC's disclosure obligations with respect to this document (Section 7).

Before commencing our discussion of the AB determinations, let us emphasize that, when addressing the normative issue of what the AB in our view should have decided on the issues appealed, we will not put into question the purpose of the AD instrument, which we interpret to be to insulate an importing country from the effect of international price discrimination. As is often pointed out, it is not easy to reconcile this purpose with economic theory, and there is a significant empirical body of literature demonstrating various (from an economic–efficiency point of view, often adverse) "side effects" from, e.g. antidumping investigations. It is therefore not an easy task to determine economically desirable interpretations of provisions of such an agreement. Consequently, we simply take the desirability of counteracting international price discrimination for granted.

2 How should have devaluations been treated during the period of investigation (POI)?

The contested antidumping investigation lasted for a year and led to the establishment of a dumping margin of 34.8%.[2] Approximately three months before the investigation's conclusion, the Brazilian Real was devalued by 42%. The first substantive issue discussed in the dispute was how this devaluation should have been taken into account by the EC.

[2] For a more comprehensive account of the facts, see §§ 66ff of the AB report.

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2.1 The Panel's findings

Brazil argued before the Panel that the EC violated its obligations under the AD Agreement (Art. 2.4.2 AD) by not sufficiently accounting for the Real's devaluation. The Panel rejected this argument, holding that the EC had to choose one of the two methods for price comparison included in Art. 2.4.2 AD. In § 7.106 of its report, the Panel dismissed the Brazilian argument in the following terms:[3]

> [W]e see no foundation in the text of the Agreement . . . for a requirement that an investigating authority re-assess its own determination made on the basis of an examination of data pertaining to the [POI] prior to the imposition of an anti-dumping measure in the light of an event which occurred during the [POI]. We decline to read such a provision into the text.[4]

2.2 The issues before the AB

Brazil presented a somewhat different argument before the AB, emphasizing the wording of Art. VI.2 GATT, which states that the purpose of AD duties is to offset dumping. In Brazil's view, this wording makes it plain that what is being addressed through AD duties is current rather than past behavior, and that therefore the whole investigation process should be geared towards this end.

Brazil also argued that it did not have to establish the legal relevance of the GATT to the AD Agreement, since numerous panel and AB reports before had made it clear that AD duties must be imposed in accordance with both Art. VI.2 GATT, as well as various provisions of the AD Agreement. More specifically, Brazil claimed that, in order to fulfill the purpose of AD duties (to offset dumping), Art. VI.2 GATT should serve as a guide to select among the methodologies for price comparisons laid down in Art. 2.4.2 AD. In other words, investigating authorities are not *always* free to choose the methodology for price comparison. There could be cases where their discretion is prejudged. One such case is when devaluation has occurred in the

[3] The Panel report is reflected in WTO Doc. WT/DS218/R of 7 March 2003 (hereinafter the Panel report).

[4] POI stands for period of investigation (in this instance, the antidumping investigation).

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country of the exporter. In the instant case, Brazil maintained that the EC should have:

(i) used only post-devaluation data, since pre-devaluation data are irrelevant; and
(ii) compared the weighted average normal value, pre-devaluation, to specific export transactions, post-devaluation.

Brazil found support for its claim in the second sentence of Art. 2.4.2 AD, which reads:

> Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

In Brazil's view, in a devaluation scenario, an antidumping authority should only compare a weighted average to prices of individual transactions. Hence, in such cases, investigating authorities do not have the luxury to choose between the two methodologies embedded in the first sentence of Art. 2.4.2 AD; they must always opt for the methodology reflected in its second sentence.

In the AB's view, the argument by Brazil raises two issues (§ 74 of the AB report):

> First, we must determine whether Article VI.2 of the GATT 1994 imposes an *obligation* on an investigating authority to select a particular comparison methodology under Article 2.4.2 of the *Anti-Dumping Agreement*. Second, if we find such an obligation to exist in Article VI.2, we must determine whether the facts of this case required the European Commission, pursuant to Article 2.4.2, to compare weighted average normal value for the entire POI with prices of individual export transactions from the post-devaluation period of the POI. (emphasis in the original)

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Hence, the AB would examine whether the EC violated its obligations in this *specific* instance, only if it first found that as *a matter of principle* Art. VI.2 GATT imposes an obligation on WTO Members to select a particular methodology among those provided for in the first sentence of Art. 2.4.2 AD.

2.3 The AB's response

The AB upheld the Panel's findings in this respect for the following reasons (§ 84):

First, Art. VI.2 GATT does not, in the AB's view, lend support to the Brazilian argument. Art. VI.2 GATT, the AB notes, reads:

> In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product.

In the AB's view, this provision aims to ensure that the dumping margin will never be exceeded (§ 75). In fact, specific provisions of the AD Agreement are more explicit and underscore the *effet utile* of Art. VI.2 GATT: for example, Art. 9.3 AD makes it clear that if the duties imposed exceed the dumping margin, there is an obligation to refund, and duties cannot, according to Art. 11 AD, remain in place longer than necessary to counteract dumping (§ 81). In short, Art. VI.2 GATT aims to ensure that the dumping margin will constitute the ceiling of duties imposed and does not prejudge the methodology used to determine the dumping margin.

Second, as a matter of legislative technique, the AB noticed the level of detail in other provisions figuring in the AD Agreement. In the AB's view, had the founding fathers wanted to impose one methodology over another, be it only in specific cases, they would have done so in an explicit manner (§ 77).

Third, the AB played with a couple of counterfactuals. In one scenario, devaluation occurs on the last day of the POI. In the AB's view, in such a case, the argument put forward by Brazil would oblige the investigating authority to discard the vast majority of transactions and perhaps focus on only one in order to establish the dumping margin, an outcome the AB finds undesirable, since it would go against the obligation to employ representative data (§ 78). By the same token, if at the end of the POI there is re-evaluation of the currency of the exporter, one would end up with a different, paradoxical outcome (§ 79).

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2.4 Discussion

We disagree with the AB's determination, and instead believe that a major structural change in the conditions under which pricing decisions are made should be taken into account by the investigating authority, as explained below.

2.4.1 How does the exchange rate affect the calculated dumping margin?

Let us start by briefly examining whether a (significant) devaluation is likely to affect calculated dumping margins. To this end, we will use a highly stylized example in which a Brazilian firm sells its product at home and in the EC market. The price in the home market is 5 Reais, while the price in the EC market is 3 Euros. The exchange rate is 1 Real/Euro. The firm is thus dumping (5 Reais charged in the home market compared to 3 in the EC, or 5 Euros compared to 3).

The Real is now devalued, the new rate becoming 2 Reais/Euro. Suppose first that the firm retains prices constant in Reais. The price in Euros would then fall in direct proportion to the deterioration of the value of the Real, that is, from 3 to 1.50. In this case there would be *no* change in the dumping margin, since the price in Reais would remain the same as before.

In an alternative scenario, the Brazilian firm instead maintains its *local* price in the EC constant, that is, the Euro-denominated price. The price in the EC market, expressed in Reais, will then increase in direct proportion to the devaluation, from 3 to 6 Reais. Since this will exceed the price charged in the Brazilian market, dumping will have ceased to exist.

As can be seen from these two examples, the reaction of the Brazilian firm to devaluation matters crucially for the calculation of dumping margins. The two scenarios can be seen as polar cases. One should normally expect something in between to occur, that is, that the price in the EC market falls, but by less than the full amount of the devaluation – that there is less than full exchange rate "pass-through."[5] The price in the EC market, *expressed in Reais*, will then increase, thus partly reducing the dumping margin, as long as the local Brazilian price remains constant. More generally, the optimal reaction by the Brazilian firm will depend on the competitive conditions in the EC market.

[5] See, for instance, the survey by Goldberg and Knetter (1997).

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2.4.2 Could and/or should the EC have used only post-devaluation data?

The fact that a devaluation may importantly affect the incentives to dump raises the general question of how such changes should be taken into account, if they occur during the POI. In particular, will the purpose of the AD agreement be served if duties are imposed in a situation where dumping has occurred during part of the POI, but has ceased during the POI due to a structural change in market conditions?

It seems highly reasonable to view the general purpose of the AD to be to *affect market outcomes*: this much is clear from Art. VI.2, which states that the purpose is "to offset or prevent" dumping, and from Art. 11.1 AD, which states that

> [a]n anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.

By the same token, Arts. 11.2 and 11.3 AD make it plain that it is ongoing and not past injury that will be counteracted through the imposition of antidumping duties. Moreover, Art. 9.3 AD states that at no point in time will the level of antidumping duties exceed the dumping margin. Indeed, a WTO Member could be obliged to reimburse duties received if, as a result of changes in the normal value or other factors affecting the extent of the dumping margin, the duties imposed are higher than the actual dumping margin (Art. 9.3.3 AD).

Given that the purpose *is* to affect market outcomes, we can distinguish between the use of AD duties to offset ongoing dumping, or as retaliation for past dumping (this possibly serving as a deterrent against future dumping).

If the AD allows duties to be imposed as retaliation, the Brazilian argument does not seem to have much merit — having established dumping, the EC is correct to impose duties. But we do not see this as a plausible interpretation. It seems more appropriate to view AD duties as instruments for correcting ongoing dumping. Members should therefore not be allowed to impose duties when dumping no longer exists, since there is then nothing to "offset or prevent."[6]

[6] Indeed, if AD duties were meant to counteract already-incurred injury, then a lump-sum payment (equivalent to the amount of the injury suffered) would be most appropriate. This, of course, is not the case. In fact, the AD agreement includes a very elaborate scheme to ensure that variations in future dumping margins will not be over-penalized. Everything in the agreement indicates that duties are conceived to be a means to ensure that dumping will not occur in the future.

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Assuming that our understanding is correct, the next question is whether devaluation may be of such a nature as to make part of the POI simply irrelevant in determining whether antidumping duties serve their objective function, that is, to stop ongoing and future injurious dumping. This is how we understand the argument by Brazil in this respect: since devaluation occurred during the last three months of the POI, all previous comparisons are now irrelevant for the purpose of imposing antidumping duties. We have sympathy for this point, but before explaining why, we want to stress that we simply cannot tell whether in this dispute a dumping margin was actually established for the post-devaluation period. Brazil argued that this was indeed the case, but the Panel and the AB have neither endorsed nor rejected this point.

There are several reasons why we have sympathy for Brazil's claim. First, it could perhaps be argued that the practical significance of its claim is questionable, since, even if the duties are imposed with the full understanding that the dumping has ceased, they will eventually be reimbursed. However, we do not believe that such a reimbursement, even if made to the full amount of duties paid, would fully compensate the exporter. The exporting firm, when duties are imposed on it, typically cannot lower its price to keep the price in the importing country constant in terms of the local currency, and as a result will lose market share. It may be very costly for the firm to regain its market share when the duties are eventually lifted. It is therefore not at all immaterial (from the firms' perspective) whether the importing country is barred from imposing duties or is allowed to do so but required to reimburse the duties received at some future date. Hence, Brazil's claim does concern an issue of practical significance.

Second, to see the unreasonableness of the EC position, assume that a significant devaluation occurred in the second month of a one-year-long POI. Assume further that, after the devaluation, dumping has ceased. A very formalistic and, we dare say, contextual, reading of the POI would argue in favor of using both pre- and post-devaluation data to calculate the dumping margin. But is such a calculation consonant with *bona fides*? How can the EC authority, in the face of data suggesting that for the 11 most recent months of investigation no dumping has been found, still impose duties because a dumped transaction occurred at the beginning of the POI? How is the very purpose of antidumping duties served through such practices?

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The opposite scenario should of course also be addressed: what if the devaluation occurred in the last part of the POI? Indeed, this scenario is not that far from what actually occurred in the present case. We believe that in such a situation, an investigating authority should either continue investigating or drop the process altogether. The first alternative is very much an option: the length of the POI is not mandated in the AD Agreement; even assuming that the suggested length for the POI is legally binding (as it appears to be in an Antidumping Committee [ADP] Recommendation),[7] nothing in the ADP Recommendation obliges investigating authorities to stop investigating after six months. Indeed, the POI is but a tool to serve the overall objective that the

[7] See WTO Doc. G/ADP/6. On this issue, past case law is far from coherent. The panel report on *United States – Antidumping Measures on Certain Hot-Rolled Steel from Japan* (WTO Doc. WT/DS184/R of 28 February 2001) takes the view that the ADP Recommendation on the length of the POI on injury is a *nonbinding instrument*. Accordingly, in the Panel's view, all obligations of investigating authorities with respect to the length of the POI have to be found in the AD Agreement itself. We quote footnote 152 of the report:

> We note that the Committee on Anti-Dumping Practices recently adopted a recommendation which provides that "the period of data collection for injury investigation normally should be at least three years". Committee on Anti-Dumping Practices, Recommendation concerning the Periods of Data Collection for Anti-Dumping Investigations, adopted by the Committee on 5 May 2000, G/ADP/6. We note, however, that this recommendation was adopted after the investigation at issue in this dispute had been completed. Moreover, the recommendation is a non-binding guide to the common understanding of Members on appropriate implementation of the AD Agreement. It does not, however, add new obligations, nor does it detract from the existing obligations of Members under the Agreement. See G/ADP/M/7 at para 40, G/ADP/AHG/R/7 at para. 2. Thus, any obligations as to the length of the period of investigation must, if they exist, be found in the Agreement itself.

The Panel on *Argentina – Definitive Antidumping Duties on Poultry from Brazil* (WT/DS241/R of 22 April 2003), takes an opposite view, showing considerable *deference* towards the ADP Recommendation on the length of the POI when evaluating the injury:

> Furthermore, we note that the issue of periods of review has been examined by the Anti-Dumping Committee. It has issued a recommendation to the effect that, as a general rule, "the period of data collection for injury investigations normally should be at least three years, unless a party from whom data is being gathered has existed for a lesser period, and should include the entirety of the period of data collection for the dumping investigation" (emphasis added). It would appear, therefore, that the period of review for injury need only "include" the entirety of the period of review for dumping. There is nothing in the Anti-Dumping Committee's recommendation to suggest that it should not exceed (in the sense of including more recent data) the period of review for dumping.
>
> (§ 7.287, emphasis in the original).

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imposition of antidumping duties is intended to serve. It should be used for this purpose and for this purpose only. A significant devaluation is a strong indication, in and of itself, that dumping may cease. Extending the POI will allow an investigating authority to ensure that this has indeed been the case. At any rate, by not extending the POI, an authority risks punishing the exporter for behavior that is not current behavior, let alone future behavior. In other words, it risks using the AD Agreement for a purpose other than that which it is supposed to serve. This is *abus de droit* and should be explicitly discouraged.

Would the text of Art. VI.2 GATT and the AD then allow the interpretation proposed by Brazil, if found desirable on more general grounds? The AB did not address the question of whether the EC *could* have taken account of only the last part of the POI: The Brazilian claim concerned an obligation in Art. VI.2 for the EC to use a particular methodology, and not an obligation stemming from Art. 2.4.2 AD. Having dismissed the existence of such an obligation stemming from Art. VI.2 GATT, the AB did not have to deal with the question of whether the method suggested by Brazil was permitted under Art. 2.4.2 AD.

As far as we can see, however, nothing would *prevent* the EC from taking into account the devaluation if they so wanted. As stated in Art. 2.4.2 AD:

> A normal value established on a weighted average basis *may be compared to prices of individual export transactions* if the authorities find a pattern of export prices which differ significantly among *different*... *time periods* ... (emphasis added)

Then, was the EC *obliged* to take the devaluation into account? This is less clear. The AB asserts (§ 76) that the phrase "to offset or prevent dumping" in the Art. VI.2 sentence,

> In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping ...

should be read to mean only that duties cannot exceed the dumping margins. But this interpretation seems to make the phrase void of meaning. To illustrate, suppose that this phrase did not exist, and that the sentence in Art. VI.2 instead read:

> A contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping ...

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In our view, this would not make any difference to the ambit of the provision. The AB's interpretation thus seems to deprive the words "to offset or prevent" of any impact, and is therefore questionable as such. In addition, it seems reasonable to see the purpose of AD duties in the GATT to be to offset *existing* and future dumping (as opposed to past dumping), and the reading suggested by Brazil would be compatible with this.

Still, Art. 2.4.2 AD, first sentence, does not establish a hierarchy among the two methodologies that in principle can be used, and the second sentence clearly explains that the methodology embedded there should primarily be understood as an additional weapon in the arsenal of the investigating authority (as Brazil seems to suggest). Moreover, it is clear that, according to this provision, its use is a matter of discretion – it is stated that the second method "may" be employed.

Furthermore, even assuming that in the cases mentioned in this second sentence there is an obligation to use the transaction-to-weighted-average methodology, Brazil seems not to have explained why this should always be the case in a devaluation scenario. As noted above, it is not self-evident that a devaluation will affect dumping margins, even if it is likely to do this.

2.4.3 Specific remarks on the AB report

(1) The AB maintains in § 76 that:

> [t]he precise rules relating to the determination as to whether there is dumping … are set out in Article 2 of the *Antidumping Agreement* …

This is obviously correct insofar as it goes. However, this raises the question of what to do when the rules, detailed as they are, threaten to lead to the imposition of AD duties in a situation where dumping no longer occurs. As noted above, the AB asserts that this would violate Art. 11.1 AD. However, we fail to see what would prevent such duties from being imposed in any event, if only to be later reimbursed. A mechanical application of the methodology described in Art. 2 AD would lead to such imposition, regardless of whether it is obvious to anyone that there is no longer any dumping to offset or prevent.

(2) The AB discusses in §§ 74–77 whether Art. VI.2 GATT obliged the EC to use a specific methodology, and to use data only from the post-devaluation period, when determining the export prices.

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It concludes in § 77 that this is not the case. If it wanted to, the AB could have stopped here. But it continues with a discussion of what it sees as unreasonable implications if one were to adopt Brazil's suggestion of letting the POI be sensitive to changes in market conditions.

First, the AB claims that Brazil's proposal would lead to the unreasonable consequence that "... the determination would have to be based on the data of a very short period of time" (§ 78). An alternative and, in our view, a much more reasonable conclusion would be that, faced with a major structural change that is likely to have a major impact on any assessed dumping margins, the investigating authority would have to wait for some time to collect data to ensure that dumping also occurs after the structural change. After all, the data before it, limited as it is, might suggest that there is no longer dumping. It does not seem unreasonable to request the importing country to restrain its trigger-happiness in such a case.

Second, while noting that the AD does not stipulate any particular length of the POI, the AB emphasizes the importance of not opening a door for importing countries to manipulate its length. We fully agree with this, of course. But consistency is desirable only so long as it leads to reasonable outcomes, and that seems questionable in this case. The AB argues that in the case of a revaluation, the investigating authority could make an affirmative finding of dumping based on data covering a very short period of time. We are not convinced that this need occur, however. It does not seem unreasonable to request of an affirmative finding that the data on which it is based cover a sufficiently long period to be deemed representative of the current situation.

(3) The AB notes in § 82 that neither the EC nor the Panel had confirmed the Brazilian claim that any dumping that may once have existed had ceased with the devaluation. The AB here argues that one cannot take for granted the consequence of devaluation:

> The lasting impact of a devaluation will therefore have to be determined on the basis of objective and reliable post-devaluation data ...
>
> (§ 82)

This seems entirely sensible, in our view. But it raises the question of whether a Member, knowing that a very significant devaluation has occurred, and lacking data on its impact, should be permitted to impose

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AD duties based on older, and most likely not very informative, data. More data can be collected only through extra time in the POI.

2.5 Conclusion

The argument that the POI may have to be adjusted to take into consideration fundamental changes in market conditions seems highly reasonable, and doing so would not seem to violate the AD or the GATT. It should be noted, however, that accepting this general principle does not mean taking a stand on whether, in this specific dispute, any dumping had ceased to exist.

The adjudicating bodies were, in our view, probably right to dismiss Brazil's claim, since Brazil did not clearly make the point that devaluation, as such, should oblige an investigating authority to defer imposition of duties until more reliable data has been collected. But we would, on more principled grounds, have preferred to see a different outcome.[8]

3 How should data from periods with "low sales" be treated?

A second issue on appeal concerned the use of data from a period with "low sales." The relevant provisions in the AD follow. Article 2.2 AD reads:

> When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country,[2] such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.

Footnote 2, appearing in the body of Art. 2.2 AD, reads:

> Sales of the like product destined for consumption in the domestic market of the exporting country shall normally be considered a sufficient quantity for the determination of the normal value if such sales constitute 5 per cent or more of the sales of the product under consideration to the importing Member, provided that a lower ratio should be

[8] It seems to us that Brazil could have used a non-violation complaint as well to make this point.

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> acceptable where the evidence demonstrates that domestic sales at such lower ratio are nonetheless of sufficient magnitude to provide for a proper comparison.

Finally, Art. 2.2.2 AD deals with the calculation of selling, general and administrative (SG&A) costs and profit in the context of constructed price:

> For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:
>
> (i) the actual amounts incurred and realized by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products;
> (ii) the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;
> (iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.

3.1 The Panel's findings

In the dispute, the EC discarded actual normal prices, and instead employed constructed normal prices. The WTO Members are requested by Art. 2.2 AD to do this if, *inter alia*, the total volume of sales of the exporting firm is low in its domestic market (defined as such if sales in the home market are less than 5% of the sales destined to the market of the WTO Member investigating the allegations of dumping). However, when constructing the price, the EC used data from "low-volume" sales to calculate the SG&A costs as well as the profit margin.

The Panel found (§ 7.137, *op. cit.*) that the EC did not violate its obligations under the AD Agreement, since low-volume sales are made in the ordinary course of trade and the relevant provision (Art. 2.2.2, see *infra* in subsection 2.2.3) explicitly requires WTO Members,

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when constructing the normal value, to use data relating to transactions in the ordinary course of trade.

3.2 The AB's findings

Brazil contested this finding by the Panel. In its view, the EC could not use data it had previously discarded. Instead, when constructing the price, the EC should have used data other than that existing in the "low-volume" sales to calculate SG&A and profit:

> The issue before us, therefore, is whether an investigating authority must exclude data from low-volume sales when determining the amounts for SG&A and profits under the chapeau of Article 2.2.2, having disregarded such low-volume sales for normal value determination under Article 2.2.[9] (§ 92).

The AB summarizes its interpretation of Art. 2.2 AD as follows:

> Article 2.2 makes clear that an alternative basis for deriving "normal value" must be relied upon by an investigating authority where one of three conditions exists:
>
> (a) there are no sales in the exporting country of the like product in the ordinary course of trade; or
> (b) sales in the exporting country's market do not "permit a proper comparison" because of "the particular market situation"; or
> (c) sales in the exporting country's market do not "permit a proper comparison" because of their low volume.
>
> Where one of these conditions exists, Article 2.2 further specifies two alternative bases for the calculation of "normal value":
>
> (a) third-country sales, that is, the comparable price of the like product when exported to an "appropriate" third country, provided the price is "representative"; or
> (b) constructed normal value, that is, the sum of:
>
> (i) the cost of production in the country of origin;
> (ii) a "reasonable amount" for SG&A; and
> (iii) a "reasonable amount" for profits. (§§ 94-5)

[9] We should probably note here that, whereas the reader can admire the clarity of expression in the quoted paragraph, this is not likely the case with the remaining paragraphs of this subsection. In particular, § 86 of the report is a monument of self-contradiction.

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The AB upholds the Panel's findings concerning the use of "low-volume" sales data for the construction of a normal price, for the following reasons:

1. In the AB's view, the absence of explicit language in the body of Art. 2.2.2, second sentence, AD prohibiting the use of data taken from "low-volume" sales in the calculation of SG&A and profit when constructing the price must mean something: if such use is not prohibited, it is by inference allowed (§ 98).
2. The AB also finds support for its reading of Art. 2.2.2 by examining the absence of specific language in that Article within the context of the AD Agreement: the AD Agreement is characterized, in the AB's view, by its very detailed expression. Thus, the absence of specific language supporting Brazil's claim is evidence of the negotiators' intention not to disallow practices similar to those employed by the EC (§ 99).
3. Prior case law supports the AB's interpretation (§ 100).
4. "Low-volume" sales are sales in the ordinary course of trade and the EC action is hence in full compliance with Art. 2.2.2, first sentence, AD (§ 101).

3.3 Discussion

The adjudicating bodies' reasoning is logical so long as the relevant provisions are read in isolation from their context: Art. 2.2.2 AD refers only to the "ordinary course of trade" (OCT), and as long as the transactions are in the OCT, they should consequently be included in a calculation under this provision. But while this interpretation is logical when Art. 2.2.2 AD is read without regard to its context (the remaining provisions of the AD Agreement), it is somewhat unsatisfactory in that it sidesteps the more fundamental issue raised by Brazil: under what circumstances may information that is discarded under one provision be used under another?

Starting at a more technical level, the determination by the adjudicating bodies rests on their interpretation and application of the OCT concept. This concept is essentially treated as independent of the concept of "low sales." A highly textual reading of the AD supports

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this view: Art. 2.2 AD allows for the possibility of low sales volumes being in the OCT in its first sentence:

> When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country *or* when, because of. . . . the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison. . . (emphasis added, footnote omitted)

Furthermore, the only guidance the AD Agreement provides concerning the interpretation of OCT is reflected in Art. 2.2.1 AD, which states the minimum sales volume necessary for an investigating authority to be allowed to discard data showing (roughly speaking) pricing below cost in the domestic market, as being *not* in the OCT. Hence, as far as the text is concerned, any other situation would be in the OCT, including situations with low sales volume. One may even argue that Art. 2.2.1 AD, strictly speaking, implies that with sufficiently low sales volumes, the transactions *must* be regarded as being in the OCT, since the condition for discarding them is not fulfilled. Yet another argument to this effect would be that Art. 2.2. AD implies that transactions can *either* be non-OCT *or* be low-volume, but *not both*, since the Article does not include an "and." Hence, if the data is low-volume, it must be in the OCT.

In our view, this highly textual reading is not the appropriate way of evaluating Brazil's claim. By virtue of the principle of effective treaty interpretation (the guiding interpretative principle, as recognized by the AB in its case law in all reports since 1995), it simply cannot be that data which is not useful (reliable) under Art. 2.2 AD, suddenly becomes, without any further scrutiny, useful under Art. 2.2.2 AD.

Before describing this view in more detail, we want to point out that the issue at stake, more generally, concerns the incentives for the investigating authority to construct prices *based on* actual data, rather than to use actual data *as such*. The price-construction route has a couple of significant attractions for such authorities: once data on SG&A and profits are considered to be in low volumes, Art. 2.2 AD permits the export price to be compared with the cost of production in the country of origin, plus a reasonable amount for SG&A and for profits. The computation shall, with regard to the latter two price components, "*be based on*" actual data from the ordinary course

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of trade. Hence, the investigating authority can deviate from the data supplied and construct a price with all the discretion that the notion "be based on" allows. This is likely in practice to give an opportunity to manipulate the established dumping margin upwards and save administrative resources by avoiding the undertaking of a thorough determination of the actual price. But such a practice would violate the "object and purpose" of the AD to perform a fair price comparison (as explicitly enshrined in Art. 2.4 AD), and an interpretation of the provisions in Art. 2 AD must take these possibilities into account.

3.3.1 The purpose of the "low-volume" concept

According to a textual and contextual reading of the AD Agreement, once the requirements of any one of the three grounds (mentioned in Art. 2.2 AD) justifying a rejection of normal value have been met, an investigating authority can construct the price. In so doing, it must:

(i) respect the requirements of Art. 2.2.1.1 AD as far as the construction of the *production cost* is concerned; and
(ii) respect the requirements of Art. 2.2.2 AD as far as the construction of *SG&A* and *profit* are concerned.

These requirements are applicable here, since, according to Art. 2.2 AD, a constructed price is composed of the abovementioned three elements, that is, production cost, SG&A, and profit.

There are at least two possible reasons why the AD includes the "low-volume" provision. One is that an exporter may deliberately charge lower prices in the domestic market than what would be motivated from the point of view of demand and production cost considerations in this market, in order to escape a dumping finding in the export market. Such behavior is costly in itself, but if the profits in the domestic market are very small anyway relative to those in the export market, such behavior might be profitable.

The other reason that occurs to us for including the "low sales" provision is to prevent the use of data that is not representative due to a limited number of observations on transactions. Market prices are influenced by a number of factors, and for this reason, may fluctuate depending on the particular economic "shocks" that hit the market at any particular moment. When prices fluctuate, it is necessary to compute some form of average price to use as a comparison.

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This average can be computed with a high degree of confidence when the computation is done on the basis of a large number of observed transactions, collected from a period during which there are no structural changes affecting the industry, and when the data is applied to a subsequent period in which the structural factors remain the same. However, with very few transactions to base the calculation upon, random factors will have a large impact on the calculated normal price. Article 2.2 AD can be seen as recognizing this fact in its acknowledgment of the possibility that, because of low volumes, it may not be possible to compute a "proper" normal price.

We find it difficult to dismiss either of these two explanations for the "low sales" criterion completely. Speaking in favor of the first interpretation (which does as such not contradict the second), is the fact that a low volume is defined as a fraction of sales, rather than some absolute number, which would be more relevant with regard to the number of observations argument. However, we take for granted that the antidumping instrument in the WTO should only be used when there is a high degree of certainty concerning the existence of dumping (its imposition should be fair as *per* Art. 2.4 AD). To ensure that this is indeed the case, it is of paramount importance that, during the dumping investigation, the investigating authority employ reliable data. Indeed, the AD Agreement says as much when it states in the body of Art. 2.2 AD "... such sales do not permit a proper comparison." We thus tend to see the desire to base AD measures on statistically reliable calculations as an overriding concern of the AD, and that the specific provisions of the agreement must be read in light of this concern.

3.3.2 The AB's neglect of the term "like" in Art. 2.2.2 DSU

Viewing the purpose of the low-sales-volume concept as motivated by a desire to use statistically reliable data, the outcome of the dispute with regard to the low-volume argument by Brazil is clearly unsatisfactory. If data is of insufficient quality to be used for a certain purpose, the *very same data* cannot become reliable for the same purpose under another provision.

Technically speaking, the problem with the adjudicating bodies' determination is, as we see it, their neglect of the term "like product" in Art. 2.2.2 AD, which is highly suggestive of the circumstances

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under which the provision would be applied. To recall, the first sentence reads:

> For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the *like product* by the exporter or producer under investigation. (emphasis added)

In the GATT/WTO context, this concept invariably refers to a comparison of *separate* products. It is used to limit the ambit of provisions to situations where these distinct products have very similar (or possibly identical) features. Indeed, the term "like product" is defined in Art. 2.6 AD as follows:

> Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, *another* product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration. (emphasis added)

In the present dispute, the adjudicating bodies – the Panel offering a full analysis and the AB confirming – first examined what the term "like product" meant in the context of the AD Agreement. Then, the Panel and the AB adopted a very formal reading of this provision, maintaining that data from the same product, previously discarded under Art. 2.2 AD, could now be used in the context of an Art. 2.2.2 AD. Indeed, they might have argued, what could be more "like" than sheer identity? However, to the best of our knowledge, nowhere in WTO law is the concept used to refer to the *same physical item*.

Why is this of significance here? Because the methodology employed by the EC, and accepted by the AB, is to interpret the requirement in Art. 2.2.2 AD that the SG&A and profit data should stem from a like product to allow the EC to use data from the *very same* product. This fundamentally violates the notion that likeness involves a comparison of physically separate products. If negotiators intended the Art. 2.2.2 AD calculation to be done with data from the same transactions that were discarded under Art. 2.2 AD, would they not have made this explicit in the agreement? It is striking how differently the AB interprets silence in different provisions: sometimes it means something, and sometimes it means nothing, but the reasons for the particular position taken in this regard are not explained.

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Of course, one cannot exclude the possibility that some price-elements (like the SG&A and/or profit) can legitimately be used, even if the price (comprising, we repeat, production costs, SG&A, and profits) as such has been discarded. But whereas *all* information concerning all price elements of *another but like* product can be legitimately used (since information concerning a non-investigated transaction, by definition does not suffer from the flaws enshrined in Art. 2.2 AD), *only a sub-set* of the information can be used when it stems from the *physically identical product*. For, if one were to take the opposite point of view, one would have to *ipso facto* accept that improper data under Art. 2.2 AD suddenly becomes proper under one of its subparagraphs that aims to "flesh out" how investigating authorities should behave when making use of the institutional possibility offered to them under this provision. The more plausible interpretation is that negotiators understood Art. 2.2.2 AD to be applicable in situations where, because the use of certain data on transactions is likely to be beset with statistical problems due to the limited number of observations, or due to special circumstances, Members could use SG&A and profit data from *other* transactions, as long as these transactions involved products with sufficiently similar features (hence, the reference to the "like" good).

To conclude, when determining the SG&A as well as profits, the investigating authority cannot, in our view, use the same data discarded under Art. 2.2 AD. It has to use data from other transactions.

3.3.3 The AB's interpretation of the intent of negotiators

A central point in the AB's argument is the fact that Art. 2.2.2 AD lacks the reference to low-volume sales that is contained in Art. 2.2 AD, and that this difference cannot be disregarded:

> Considering that the treaty negotiators covered in great detail various aspects of the constructed value calculation, the omission of any reference to low-volume sales in the chapeau of Article 2.2.2 is telling.
>
> (§ 99)

To this paragraph there is a footnote stating that:

> [u]nlike the *Tokyo Round Anti-Dumping Code*, the present *Anti-Dumping Agreement* identifies low-volume sales as a basis for constructing normal value, including the footnote to Article 2.2 specifically defining low-volume sales in the home market in relation to a proportion of sales made in the importing Member. (Footnote 2 to Article 2.2 of the *Anti-Dumping*

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> *Agreement*) This reinforces our view that a reference to "low-volume" sales should not be implied when such reference is not expressly stated.

The AB here claims that the lack of explicit reference to low-volume sales in Art. 2.2.2 AD must signal a desire on the part of the negotiators of the agreement that the two situations be treated differently in this respect. But *why* would negotiators on the one hand expressly recognize the possibility that data collected during periods of low volume may be unreliable, and that therefore a different method may be used to find the normal value, but then allow that the same problem arises in this alternative method, which was chosen in order to prevent this problem? The AB might respond that it is bound by the text when ruling on Brazil's appeal, and this is what the text says (even though this might also be challenged). But to interpret the *intent* of the negotiators to allow for this illogical construction seems to go too far. A much more likely reason for the construction seems to be that the problem with poor data (which is a generic problem when the data only includes a few observations) is already addressed in Art. 2.2 AD.

3.3.4 What should the AB have done?

We do not know for certain what data Brazil supplied to the EC. One possibility is that the EC was first provided with data directly specifying prices, and when these were discarded, it obtained data that would allow the EC to construct the price on the basis of information on production costs, SG&A, and normal profits. If this is what actually occurred, the EC procedure could in principle be defended at least from a normative point of view. It could possibly be argued that the price data is less reliable from a statistical point of view than the constructed price data.[10]

On the other hand, the case would look very different if the EC denounced the *same* data as not useful for a computation directly under Art. 2.1 AD, as it employs for the calculation under Art. 2.2.2 AD. (There are other instances in the report that lead us believe this is what actually occurred, such as Recitals 170–172.) This would be a strong indication that the EC is choosing to construct a price,

[10] Such a situation may arise when the statistical problems with the data mainly stem from disturbances on the demand side, such as fluctuating demand. In such a situation, it is possible, at least in principle, that a more reliable "normal" price could be obtained by aggregating price elements, where the profits would be "normal" profits, as opposed to realized profits.

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rather than to use the price supplied by Brazil, for the abovementioned non-legitimate reasons. In order to determine the reason for the EC's choice, we would need to know exactly *which* data it retained, and which it discarded.

We emphasize again that we do not know why the EC chose to construct the price. What we miss in the AB's analysis, however, is a discussion of what is required for a price to be "constructed" in an appropriate fashion. There is a tension between data first being discarded under one provision, and then being used under another provision that is more attractive to the investigating authority. In our view, the AB did not appropriately take into account the possibility of an importing country misusing the constructed-price route.

More specifically, we believe that, had the AB sufficiently accounted for the rationale for, and the context of, Art. 2.2.2 AD, it would have been led to an opposite conclusion from what it decided. Should the AB, in light of Brazil's claim, have first examined *what* data was at stake? In this part of the discussion, it should have made a distinction between price and price elements. It should then have proceeded to examine whether the EC used some or all three of the elements discarded under Art. 2.2 AD. It would then naturally have moved to a discussion of whether previously discarded data could still be legitimately utilized, and if yes, under what conditions, in the context of an antidumping investigation. If this were indeed the case, the AB would have found that the only scenario which allows a WTO Member to use previously discarded data is the scenario we indicated *supra*: when a subset of the discarded data is used. Otherwise, under Art. 2.2.2 AD, a WTO Member would have to construct the price utilizing data from a non-investigated, but like product.

4 Did the EC take proper account of the "growth factor"?

Brazil complained before the Panel that the EC's final determination did not contain a separate examination of whether there was injury to industry *growth*. Article 3.4 AD mentions "growth" among the factors indicating injury, and, according to consistent case law, all factors mentioned in Art. 3.4 AD must be examined by an investigating authority. The EC counterargument was that *implicitly*, the EC had examined growth and this conclusion was obvious when reading the determination.

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4.1 The Panel's findings

The Panel held that, while investigating authorities must perform a substantive examination of all factors mentioned in Art. 3.4 AD, they do not have to provide separate findings for each individual factor. The Panel found that the test of Art. 3.4 AD could still be satisfied even in the absence of explicit separate findings, as long as an adjudicating body could conclude that a substantive review of all factors mentioned in Art. 3.4 AD had indeed occurred. In pertinent part, the Panel found:

> The facts on the record of the investigation and taken into account in the EC injury analysis indicate to us that, in its examination of other injury factors – in particular, sales, profits, output, market share, productivity and capacity utilisation – satisfy us that, in addressing developments in relation to these other factors in the manner that it did in this particular investigation, the European Communities implicitly addressed the factor of "growth."
>
> We therefore find that the European Communities did not violate its obligations under Article 3.4 in its treatment of "growth" and that it at least addressed each of the listed Article 3.4 factors.
>
> (§§ 7.310–311 of the Panel report, *op. cit.*)

4.2 The AB's findings

Brazil appealed the Panel's finding concerning the EC's treatment of the "growth factor." The AB explained its understanding of the issue before it as follows:

> The participants in this appeal do not dispute that it is mandatory for investigating authorities to evaluate all of the fifteen injury factors listed in Article 3.4 of the *Anti-Dumping Agreement*. One of the fifteen factors expressly listed in Article 3.4 is the "actual and potential negative effects on . . . growth." The issue raised by Brazil in this appeal is whether the requirements of Article 3.4 were satisfied in this case, even though the factor "growth" was evaluated only "implicitly" and no separate record of its evaluation was made.
>
> (§ 156, italics in the original)

The AB upheld the Panel's findings in this respect on two grounds (§ 166): on the one hand, it held the view that Art. 3.4 AD does not prejudge the *manner* in which the factors listed there will be examined.

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They all have to be examined, but an implicit, albeit verifiable, review suffices by and large (§§ 160–1); on the other hand, in the AB's view, growth is a *sui generis* factor anyway, in the sense that it is to be found implicitly in a series of other factors mentioned in Art. 3.4 AD (§ 162).

For example, when reviewing pertinent parts of the EC final determination, the AB mentioned specifically the following passage from the EC Provisional Regulation:

> The examination of the above mentioned injury factors shows that the situation of the Community industry deteriorated. In particular, the Community industry experienced a decline in production, production capacity, sales and market share. Moreover, the Community industry suffered a significant loss of employment and a decline in investments, as well as an increase of stocks. As to the capacity utilization, its increase depended on the reduced production capacity.
>
> (§ 165)

In the AB's view, the "declines" and "losses" observed in the final determination with respect to several of the factors examined in this case are necessarily related to "growth" as well. In the AB's view (§ 165):

> To put it more precisely, the negative trends in these factors point to a lack of "growth." This, in turn, supports the conclusion that the European Commission evaluated this injury factor.

4.3 *Discussion*

The purpose of Art 3.4 AD is presumably to ensure that anti-dumping duties are not imposed on the basis of a very narrow definition of injury, in a situation where most other effects of the dumping are positive for the importing country. This seems reasonable as such, as long as Members have not agreed on a more precise definition of the concept injury.

The difficulty with this approach, however, is that as long as no guidance is given for how to weigh the different components, it becomes rather useless to go through each and every one of them. The lowering of prices by foreign competitors should, except under very special circumstances, result in declines in domestic firms' sales, profits, output, market share, employment, wages, ability to raise capital, cash flow, etc. Do not these effects suffice for all practical purposes to establish injury? We are thus not convinced by the case law that makes it compulsory for an investigating authority to examine all factors listed in Art. 3.4 AD.

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There is also a redundancy in the list provided in Art. 3.4 AD in another respect: industry growth is obtained using data on industry production at two different points in time. The list already includes *actual* and *potential* output (and sales), and should therefore implicitly take account of the industry growth factor.

We therefore agree with the AB's determination from a more conceptual point of view. We are also broadly in agreement at a more textual level. The AD does not specify the manner in which the analysis of the 15 factors in Art. 3.4 AD is to be conducted and reported. On the other hand, in order for the requirement to examine all factors to have any practical bite, it is probably necessary that the findings with respect to each and every one be published. But this would be a pure formality, in the absence of rules for how such analysis should be conducted and, as mentioned above, for how the different findings are to be aggregated.

Finally, due to the nature of the list in Art. 3.4 AD, it does not serve any purpose to impose, as an obligation *per se*, a requirement of going through all the factors mentioned there, as the AB has time and again done in its case law, other than as some sort of an administrative (bureaucratic) checkup. The factors mentioned in Art 3.4 AD reveal their true purpose only when they are placed in the context of the non-attribution exercise: by virtue of Art. 3.5 AD, a WTO Member wishing to impose duties must first ensure that injury has been caused by dumped imports and not by factors other than dumped imports. The examination of the state of the industry, as mandated by Art. 3.4 AD, should hence serve this perspective.

5 Individual examination of the impact of cumulated factors

A third substantial issue raised by Brazil was its claim that an investigating authority, when opting for cumulation in accordance with Art. 3.3 AD, first had to assess the impact of imports from each and every WTO Member individually before reviewing their combined effect.[11]

[11] Under this provision, an investigating authority can cumulate the effect of dumped imports from various sources and lawfully impose duties, even if, had the investigation's assessment had been conducted on a state-by-state, individual basis, the *de minimis* thresholds established in the agreement would not have been met.

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5.1 *The Panel's findings*

The Panel rejected Brazil's claim as follows:

> The text of this provision [Article 3.3] contains no additional requirement that authorities shall also consider whether there has been a significant increase in imports country-by-country before progressing to a cumulative assessment.[12]

5.2 *The issue before the AB*

Brazil appealed this Panel finding on two grounds:

First, according to Brazil, the Panel erred in its interpretation of Art. 3.3 AD. Brazil maintained its original point that for cumulation to be lawfully carried out under the AD Agreement, an investigating authority had to first examine the impact of imports from each and every WTO Member under investigation individually. Brazil found supporting evidence for such a reading of the pertinent legal provision (Art. 3.3 AD) in its immediate context, i.e. in Art. 3.2 AD (§ 105). The AB reformulated the Brazilian claim in the following terms:

> The issue before us is whether an investigating authority must first analyze the volumes and prices of dumped imports on a country-by-country basis under Article 3.2 as a pre-condition to cumulatively assessing the effects of the dumped imports under Article 3.3.
>
> (§ 107)

Second, Brazil also argued that import volumes and prices could not be cumulated: in its view, as expressed by the AB,

> . . . import volumes and prices cannot be considered as "effects" of imports; on the contrary, import volumes and prices "are precisely the factors which may cause the effects envisaged by Article 3.4." Brazil therefore argues that import volumes and prices cannot be cumulated under Article 3.3. It submits that the Panel's contrary interpretation of Articles 3.2 and 3.3 would permit an investigating authority to impose anti-dumping duties on products from a country when those products, in contrast to those from other countries, may not be causing injury to the domestic industry.
>
> (§ 105)

[12] See § 7.234 of the Panel report, *op. cit.*

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5.3 The AB's response

The AB rejected *in toto* Brazil's arguments in this respect (§ 118). With regard to the question of whether for cumulation to be lawfully performed, an assessment of the impact of the exports of individual firms is required, the AB started its analysis by first laying out the relevant legal framework, that is Art. 3.3 AD:

> Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that *(a)* the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible and *(b)* a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product. (italics in the original)

The AB disagreed with Brazil's claim on both textual and contextual grounds. With respect to the text, the AB noted that there is no explicit requirement in the body of Art. 3.3 AD requesting investigating authorities to perform individual assessment of imports before cumulating them (§ 110). As the AB noted:

> The text of Article 3.3 expressly identifies three conditions that must be satisfied before an investigating authority is permitted under the *Anti-Dumping Agreement* to assess cumulatively the effects of imports from several countries. These conditions are:
>
> (a) the dumping margin from each individual country must be more than *de minimis*;
> (b) the volume of imports from each individual country must not be negligible; and
> (c) cumulation must be appropriate in the light of the conditions of competition
>
> (i) between the imported products; and
> (ii) between the imported products and the like domestic product.
>
> By the terms of Article 3.3, it is "only if" the above conditions are established that an investigating authority "may" make a cumulative assessment of the effects of dumped imports from several countries.
>
> (§ 109)

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With respect to the contextual argument, the AB examined Art. 3.2 AD, the provision cited by Brazil in support of its argument, which reads as follows:

> With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

Once again, in the AB's eyes, nothing in the body of Art. 3.2 AD supported the conclusion drawn by Brazil that an individual assessment before cumulation was required.

As to the second claim advanced by Brazil, the AB essentially rejected it because, in its view, throughout Art. 3 AD, the terms "effects" and "factors" seemed to have been used interchangeably.

5.4 Discussion

Brazil's claim that an individual assessment is required for cumulation to lawfully take place is unsupported by the text of the Agreement — The body of Art. 3.3 AD clearly reflects one obligation only: to cumulatively assess the effect of imports. There is no prerequisite to first individually assess them as well. Hence, as a matter of positive law, we agree with the AB.

As to Brazil's second claim, that import volumes and prices cannot be cumulated, we can observe that the plain language of Art. 3.5 AD (which lays out the injury factors) contradicts the claim advanced in this respect: import volumes and prices are among the "factors" explicitly laid down.

At a more normative and general level, the question of how to deal with cumulation would be of no concern if *any* dumping margin could be targeted through an antidumping duty. However, the first sentence of Art. VI.1 GATT lays down the reason for an antidumping measure — to prevent injury to a domestic industry. There are thus *two* factors limiting the maximum permitted size of the

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antidumping duty: the dumping margin, as well as the injury *caused by this exporter's dumping*. It is then necessary not to attribute to a particular exporter injury that is caused by other exporters (or by other factors). But how to attribute such harm to individual exporters is not a straightforward matter.

For instance, suppose that a firm in country A and a firm in country B each sell a highly substitutable product to country C, and that the cost and demand conditions in the two countries are the same, so that they sell at the same price in their respective home markets. Suppose that the injury to C is measured in terms of jobs lost. If only one exporter dumps, domestic employment in the sector is reduced by 500 jobs, but if both dump, the reduction in jobs is 800. How would the attribution be done in such a case? Or suppose that it suffices that only *one* country dump for the entire domestic industry to be wiped out, and both dump. One might then possibly argue that one of the firms is not adding to the injury. But which one? As can be seen, the question of attribution is far from trivial.

It is far beyond the scope of this chapter to suggest how to undertake an individual attribution analysis. The more general point, however, is that it is often not possible to perform an analysis on a country-by-country basis. As is so often the case when conducting an economic/statistical analysis, it is necessary to include all factors at the same time in order to determine how they interact, and the contribution to injury by each.

6 Causality analysis

Brazil complained before the Panel that the EC did not honor the causality requirement laid down in Art. 3.5 AD, in two important respects:

First, the EC did not take into account the relatively higher cost of production for EC producers (compared to that of Brazilian producers) as a cause of injury. In Brazil's view, the EC should have taken this factor, which was "known" to the investigating authority, into account.

Second, the EC did not perform a cumulative assessment of how all factors other than dumped imports contributed to injury. Although the EC did examine such factors individually and reached the conclusion that they were not responsible for the injury caused, in Brazil's view, the EC was further required to perform a cumulative assessment in addition to the individual assessment of such factors.

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6.1 The Panel's findings

The Panel rejected both claims by Brazil. The first claim was rejected on two grounds: Brazil had raised the "high-production-cost" factor during a stage of the investigation other than the stage during which the causality requirement was being discussed. As a result, the factor was not "known" to the EC investigating authority when it should have been, i.e. during the stage when the causality requirement was being discussed. Second, when this factor was raised, the EC had indeed examined it and dismissed its relevance in light of the marginal difference in production costs between Brazilian and EC producers (§ 7.362 of the Panel report, *op. cit.*).

As to the second claim, it may be appropriate to cite *verbatim* the Panel's findings:

> In its determination, the European Communities identified certain factors, other than dumped imports, that were potentially causing injury to the domestic industry including imports from third countries not subject [to] the investigation; decline in consumption and substitution. *With respect to each of these factors individually*, the European Communities conducted a separate examination and found either that it "is not such as to have contributed in any significant way to the material injury suffered by the Community industry" (decline in consumption); that it made "no significant contribution" (export performance) or that "no significant influence" could have resulted (own imports of the product concerned), that it cannot have significantly contributed to injury (substitution), or (in the case of imports from the countries not subject to the investigation) "even if imports from other third countries may have contributed to the material injury suffered by the Community industry, it is hereby confirmed that they are not such to have broken the causal link between the dumping and the injury found." The European Communities concluded that any other factors that may have contributed to the injury to the domestic industry were "not such as to have broken the casual link" between dumped imports and injury.
>
> These aspects of the EC determination indicate to us that the European Communities *analysed individually the causal factors concerned and identified the individual effects of each of these causal factors*. With respect to each of the factors, the European Communities concluded that the extent of the contribution to injury was not significant, or, in one case, extrapolated that, even if the effect were significant, it would not be such as to "break the causal link" between dumped imports and

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> material injury. The European Communities' overall conclusion was that none of these factors had an effect that was such to have broken the causal link between dumped imports and material injury.
> We are certainly aware of the theoretical possibility that a causation methodology which separates and distinguishes between individual injury factors may not accommodate the possibility that multiple "insignificant factors" might *collectively* constitute a significant cause of injury such as to sever the link between dumped imports and injury. However, the EC methodology – which we understand to separate and distinguish between the effects of each of these causal factors and the dumped imports including through an examination as to whether the extent of the effects of each causal factor are such that it is necessary to separate and distinguish its effects – does not leave the effects of those factors entirely lumped together and indistinguishable.
>
> (§§ 7.367–369 of the Panel report, emphasis in the original)

Brazil appealed both findings.

6.2 *The AB's findings*

The AB understood the first issue before it to be as follows:

> The issue before us is whether, under Article 3.5, the alleged higher cost of production of the European Communities industry, raised by the Brazilian exporter solely in the context of the European Commission's dumping and injury determinations, was a "known factor[] other than the dumped imports which at the same time [was] injuring the domestic industry," thereby requiring examination by the European Commission.
>
> (§ 173)

And the AB described the second issue thus:

> The issue before us, therefore, is whether the non-attribution language of Article 3.5 requires an investigating authority, in conducting its causality analysis, to examine the effects of the other causal factors *collectively* after having examined them *individually*.
>
> (§ 187, emphasis in the original)

The AB rejected both claims advanced by Brazil, albeit on different grounds than those of the Panel. The AB discarded the Panel's conclusion that, unless Brazil raised the factor at each and every stage of the investigation, the factor at hand was not "known" to the investigating authority. In the AB's view, the fact that the factor was raised at some stage made the factor known throughout the investigation (§ 177).

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However, since the EC had dismissed its relevance (in light of the aforementioned minute differences in cost structure among Brazilian and EC producers), the AB held that the EC no longer had to account for this factor during the investigation process.

The issue of whether there was an obligation to cumulate was more complicated. The AB rejected the claim advanced by Brazil on burden-of-proof grounds (§ 195); the AB accepted that, in principle, there could be cases where a cumulative assessment of the injury from factors other than dumped imports might be necessary (§§ 191–2). In its view, however, Brazil had not demonstrated why this was indeed the case in the instant matter. In the absence of specific proof to this effect, the AB upheld the Panel's findings (§ 194).

To reach this conclusion, the AB first recalled the pertinent part of Art. 3.5 AD, which is the applicable legal provision in this context:

> The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and *the injuries caused by these other factors must not be attributed to the dumped imports.* (emphasis added by the AB in its report)

In the AB's view, this language was necessary for non-attribution purposes, and non-attribution was the objective of the causality requirement (§ 188). The AB interpreted the non-attribution requirement in the following way:

> Non-attribution therefore requires separation and distinguishing of the effects of other causal factors from those of the dumped imports so that injuries caused by the dumped imports and those caused by other factors are not "lumped together" and made "indistinguishable."
> (§ 188, footnote omitted)

At the same time, however, the AB noted that although the AD Agreement was explicit as to the *ends* sought through Art. 3.5 AD (non-attribution), it was silent as to the *means* to be used in pursuance of the stated ends:

> We underscored in *US – Hot Rolled Steel*, however, that the *Anti-Dumping Agreement* does not prescribe the *methodology* by which an investigating authority must avoid attributing the injuries of other causal factors to dumped imports:
>
> We emphasize that the particular methods and approaches by which WTO Members choose to carry out the process of separating and distinguishing the injurious effects of dumped imports from the

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> injurious effects of the other known causal factors are not prescribed by the *Anti-Dumping Agreement*. What the Agreement requires is simply that the obligations in Article 3.5 be respected when a determination of injury is made.
>
> Thus, provided that an investigating authority does not attribute the injuries of other causal factors to dumped imports, it is free to choose the methodology it will use in examining the "causal relationship" between dumped imports and injury.
>
> (§ 189)

The AB did not delve into details of the methodology the EC employed in the present case. Having established the purpose of the causality requirement, as well as the absence of an obligation to use a specific methodology to reach the stated purpose, the AB went on to accept that, in principle, the Brazilian claim was valid. In the absence, however, of any specific arguments to substantiate its claim, the AB upheld the Panel's findings, albeit on different grounds: while the Panel saw no obligation to cumulate at all, the AB saw an obligation to cumulate in some unspecified situations. Implicitly, therefore, the AB admitted that there was no generic obligation imposed on WTO Members to cumulate the effects of factors other than dumped imports when performing their causality analysis; an individual examination of the effects of known factors sufficed.

6.3 Discussion

With respect to Brazil's first claim, we believe that the AB decision is correct, but could have been taken one step further. The Panel's finding that factors have to be raised in each separate stage of the investigation to be known to the investigating authority makes no sense, and it imposes a considerable burden on exporters who might not even know at which precise stage of the investigation they are since the AD Agreement does not impose any specific obligations in this respect. As a result, the "staging" of the procedure is a matter within the discretion of the investigating authority, and diversified practice among jurisdictions in this respect cannot *a priori* be excluded.

But the decision's shortcoming, as we see it, is that it does not address the fact that, after years and years of antidumping practice, GATT/WTO case law still accepts the notion that only factors raised by the parties are "known" to the investigating authority. This approach serves only to make life easy for investigating authorities and might throw into

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question the soundness of the findings as such. Take, for example, the present case: should not the EC authority, even in the absence of a submission by the Brazilian exporter, *motu proprio* ask its own domestic industry questions concerning its cost structure? It is remarkable that case law turns a blind eye to the fact that an investigating authority must first *investigate* before it judges the appropriateness of the imposition of antidumping duties. The AB, strictly speaking, did not have to deal with this issue, so we raise it simply as an *obiter dictum*.

On the second issue, however, a number of points can be raised. One can first note that Brazil was apparently arguing that, with respect to *other* factors that may explain injury, the EC should have taken into account not only their individual impact, but also their *aggregate* effect on injury.

First, we can note here that it is necessary in an economic/statistical analysis to take into account the interaction between different explanatory variables, for the reason indicated in our discussion of the "cumulation" issue.

Second, there are problems with the reliance on the inherently difficult concept of "causality" in several of the WTO agreements; indeed, legal analysis outside the confines of WTO law is typically quite weak in its treatment of causality: Roman law distinguished between *causa adequata* (where the issue is to what extent a factor by itself is sufficient to cause injury) and *conditio sine qua non* (where the issue is to what extent a particular factor is necessary for injury to occur). In legal practice, both tests have found application within qualitative narratives. Some laws (like, for example, the EC antitrust law) *sometimes* require very demanding causality tests: in its *Wood Pulp* judgment for example, the Court of Justice of the EC imposed a "but for" test on anyone wishing to demonstrate that a certain practice had its origins in a cartel type of behavior. According to this test, unless all other factors potentially explaining the behavior had been previously rejected, no explanation based on a cartel theory would have been demonstrated.[13]

The WTO case law is taking its first steps on this (quintessentially philosophical) issue. In the present dispute, the AB (probably wisely) refused to lay out how it understands causality in precise, operational

[13] This test is, of course, very demanding on the investigating authority and, if taken to its logical extreme, might lead to a proliferation of too few findings of illegalities, and hence underenforcement of the contract.

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terms. What we find troubling, however, is the AB's argument that the EC methodology is acceptable, since the AD does not specify any particular methodology to follow:

> In contrast, we do not find that an examination of *collective* effects is necessarily required by the non-attribution language of the *Anti-Dumping Agreement*. In particular, we are of the view that Article 3.5 does not compel, *in every case*, an assessment of the *collective* effects of other causal factors, because such an assessment is not always necessary to conclude that injuries ascribed to dumped imports are actually caused by those imports and not by other factors.
>
> (§ 191, emphasis in original)

What we fail to see is how it can be known that an analysis of "collective" effects would not add information concerning the sources of injury *without conducting the analysis*.

In the AB's defense, it can be said that Brazil did not seem to explain in its appeal the *reasons* why the EC methodology was deficient. The AB, applying the *in dubio mitius* principle, was not prepared to question the EC action in the absence of at least a presumption that what the EC did was not enough. This may be correct from a formal point of view. But the AB here escaped the need to address the causality issue more fully by hiding behind a rather small tree.

7 The handling of documents in AD proceedings

The Panel faced two claims by Brazil concerning the handling of documents: first, that a certain document (called "EC-12") was not properly before the EC investigating authority, and second, that the EC was under the obligation to disclose it anyway. Document EC-12 was an internal note for file and included evidence that the EC had properly examined the injury factors enshrined in Art. 3.4 AD.

7.1 The Panel's findings

The Panel rejected both claims by Brazil (§§ 7.45–46 of the Panel report, *op. cit.*). The Panel found that the document was properly before the investigating authority and that the EC was under no obligation to disclose it. The Panel reached its first conclusion following a series of questions that it addressed to the EC on the matter. The Panel reached the second conclusion by finding that, since the EC had made available to interested parties the raw data used to

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prepare EC-12, the EC's position that disclosure of EC-12 would be unwarranted in the absence of additional information was legitimate. Brazil appealed both Panel findings.

7.2 The AB's findings

The AB faced two complaints by Brazil:

First, Brazil appealed the Panel's finding that EC-12 was properly before the investigating authority, claiming that this finding constituted an erroneous interpretation of Arts. 17.6, 3.1 and 3.4 AD.

Second, Brazil appealed the Panel's finding that the EC was under no obligation to disclose EC-12, claiming that this finding constituted an erroneous interpretation of the EC's obligations under Arts. 6.2 and 6.4 AD.

We address each claim in turn.

7.3 Discussion

7.3.1 When is a document properly before an investigating authority?

Brazil made three claims in this respect: the first was that the Panel's finding constituted an erroneous interpretation of Art. 17.6. The second and the third claims concerned violations of Arts. 3.1 AD and 3.4 AD, respectively. But these were in effect one and the same claim (since Art. 3.4 is a specification of the generic obligation embedded in Art. 3.1 AD). Following the AB's approach, we will examine them jointly.

We start with Brazil's claim under Art. 17.6 AD, which reads in relevant part:

> In examining the matter referred to in paragraph 5:
>
> (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned . . .

The issue before the AB was whether the Panel's assessment of the facts was proper, under Article. 17.6(i) of the *AD Agreement*, when it found that Exhibit EC-12 formed part of the record of the underlying antidumping investigation.

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The AB first noted that the standard of review it applied to such claims was quite deferential towards the Panel's and, as its prior case law made clear, the AB would not interfere lightly with the Panel's discretion to act as the assessor of facts. This standard of review entailed, *ipso facto*, a high burden of proof for the complainant to meet in alleging that the Panel did not lawfully exercise its discretion when it found that the establishment of facts by the EC was proper (by including EC-12 in the record before the investigating authority).

The AB then described in detail Brazil's claim in this respect. In the AB's view, Brazil found fault with the Panel's position because the Panel relied solely on the EC assertion that EC-12 was properly before it (§ 126). Hence, in essence, Brazil reproached the Panel for laxity when dealing with this issue.

The AB rejected the Brazilian claim. In its view, ample record evidence demonstrated that the Panel did not rely solely on the EC assertion; it asked the EC a series of questions, and the EC offered evidence demonstrating that, throughout the investigation, it had relied on EC-12 (§§ 126–7). In the absence of any contrary evidence supplied by Brazil, which, as stated above, bore the burden of proof in this respect, the AB felt that it should not disturb the Panel's findings (§ 128).

Turning to Brazil's claims under Arts. 3.4 and 3.1 AD, Brazil argued that the information included in EC-12 was not contemporaneous with the investigation. In the AB's words:

> [Brazil] asserts that the issue here is that there was no verifiable evidence of the contemporaneous character of Exhibit EC-12 and, therefore, the European Communities was not entitled to rely on that document to evidence its compliance with Articles 3.1 and 3.4 of the *Anti-Dumping Agreement*.
>
> (§ 129, italics in the original)

In line with its prior findings in its *Thailand – H Beams* report (to which we refer *infra*), the AB dismissed Brazil's argument.[14] In the AB's view, Art. 3.4 AD did not at all prejudge the manner in which the information (i.e. the injury factors laid down one by one in the body of this provision) was to be reviewed: investigating authorities were

[14] Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001.

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required by virtue of this information to review certain information, and there was no additional obligation.[15]

7.3.2 Should EC-12 have been disclosed to interested parties?

The AB upheld Brazil's claim that the EC-12 document should have been disclosed to interested parties. To reach this conclusion, the AB first referred to Art. 6.4 AD, which reads:

> The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.

The AB critically distanced itself from the Panel's findings in this respect when it dismissed the rationale offered in support of the final finding in the Panel report, namely that it was for the investigating authority to judge whether the information at hand was relevant and, if so, to disclose it. In the AB's view, it was for the interested parties to do this (§ 145). Moreover, the AB stated that since the investigating authority's evaluation of certain injury factors was set out exclusively in EC-12, this information was in fact used by the EC in its investigation, and the EC was thus obligated to disclose it to interested parties (§ 147).

Finally, the AB agreed with the argument presented before it that a violation of Art. 6.4 AD leads *ipso facto* to a violation of Art. 6.2 AD (§ 149). For these reasons it reversed the Panel's findings and held that the EC, by not disclosing EC-12, violated its obligations under Arts. 6.2 and 6.4 AD (§ 150).

7.3.3 The AB did not address the core issue

We believe that the AB essentially avoided responding to the core of the Brazilian claim, by adopting an overly formalistic reading of some AD provisions, and by failing to offer an overall approach as to what needs to be done, in light of current legislative constraints, when similar claims are being formulated. Let us first recount the facts:

1. Art. 3.4 AD lays down all factors demonstrating injury that must be reviewed by an investigating authority;

[15] As we will try to develop in Art. 2.6.4, the AB, through this finding, essentially avoided responding to the real issue.

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2. EC-12 is the sole evidence that the EC did, in fact, examine the factors reflected in Art. 3.4 AD;
3. The EC did not disclose EC-12 to the Brazilian exporters under investigation.

Brazil, for all practical purposes, alleges that EC-12 has been "cooked." It also complains that the document has not been disclosed to its exporters. The AB agrees with the second claim because, in its view, anything that the exporter claims is relevant should be disclosed to the exporter. The AB avoids responding to the former allegation by asserting that all Art. 3.4 AD requires WTO Members to do is to examine the list of factors mentioned there, without prejudging the manner of examination.

But, of course, the real issue is whether the EC actually examined those factors or whether it simply produced an *ex post facto* justification under the name EC-12. The AB did not respond to the allegation that the EC did the latter.

7.3.4 How could Brazil have known the content of EC-12?

This is not the first time that WTO adjudicating bodies have faced similar claims. In *Thailand – H Beams*, Poland complained before the Panel that it was indiscernible from Thailand's final determination how that country had complied with the various requirements of the AD Agreement. Thailand then produced a document that explained in excruciating detail what had happened during the investigation that led Thailand to believe that an imposition of duties was in good order. The Panel in this dispute dismissed the document's relevance on the ground that absence of production equals absence of examination. Thailand appealed, and the AB (in our view, probably rightly so) rejected the Panel's finding. In the AB's view, the possibility that this information had indeed been used by the Thai authorities could not, as a matter of principle, be excluded outright simply because the document reflecting it had not been produced to the interested parties. In other words, the AB dissociates the obligation to notify from the obligation to review, without delving into the question whether, in the AD's institutional balance, interested parties should be notified of the content of a review, or to what extent an investigating authority can use information, relating to a review of the factors mentioned in Art. 3.4 AD, that at the same time can legitimately be kept away from interested parties.

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What is the institutional balance embedded in this interpretation of the AD Agreement? On the one hand, an investigating authority must publish a final determination that contains in sufficient detail all issues of law and fact *considered material* by the investigating authority (Art. 12.2 AD). Clearly, the words "considered material" leave room for discretion, and therefore it cannot be ruled out that some information used in the proceedings to reach the final determination may be excluded from the public announcement.[16] On the other hand, Art. 6.4 AD obliges investigating authorities to disclose all information requested by interested parties.[17]

Assuming that parties had access to the same information, one could possibly argue that, to the extent that some information was not requested under Art. 6.4 AD, it was not judged material by the interested party at hand, and therefore all such subsequent claims on this score should fail on this ground. But access to information is in practice not symmetric, and such symmetry is nowhere reflected in the institutional balance of the AD Agreement. Instead, AD investigations take place within an adversarial system, where the umpire (the investigating authority) will be asked to administer conflicting information in a due-process manner. The AD Agreement nowhere imposes on the authority the obligation to immediately disclose to the exporter, for example, information submitted by the domestic industry. One should thus expect that the parties often have very different access to information.

Hence, an interested party can protect its rights under Art. 6.4 AD only in a limited manner: it can request information on issues about which, in one way or another, it has knowledge. With respect to the other issues, the only information it will (eventually) get will be through the public notice. But, as argued, an investigating authority does not have to disclose all information, by virtue of Art. 12.2 AD. Hence some relevant information might never be transmitted. Article 6.9 AD is not of much help either: according to this provision, an

[16] For the purposes of our argument here, we do not need to deal with the situation where the excluded information, in the case of a challenge, is subsequently judged material by a WTO Panel. We will return to this point when discussing our suggested approach.

[17] For the purposes of our argument here, we do not need to deal with disclosure obligations in regard to submitted confidential information. Indeed, in the case at hand, there was no such argument advanced by Brazil.

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investigating authority must always, before a decision is made, inform interested parties of the *essential facts* on which the decision is based. Once again the term "essential facts" leaves room for discretion.

So, the AB was effectively beating around the bush when ruling under Art. 6.4 AD. On the one hand, the AB finding in this respect is one step toward making the due-process clause more effective. Regrettably, however, it does not go the full nine yards. To do that, we submit, the AB would have to address Art. 12.2 AD in a meaningful, contextual manner.

The *Pipe Fittings* Panel essentially wholeheartedly adopted the AB's *Thailand – H Beams* determination. The AB upheld the Panel's finding and, as mentioned *supra*, reversed only the Panel's findings with respect to the disclosure requirement.

If there were an excuse for the AB determination in the *Thailand – H Beams* case (since Poland did not argue that the Thai document was indeed "cooked"), there is no such excuse here: Brazil did, in fact, argue that EC-12 was not properly before the EC investigating authority because, in all likelihood, it did not exist at the time of the investigation. Brazil also argued that this conclusion was warranted by the fact that the document was not produced to Brazil: the disclosure obligations are thus, in Brazil's eyes, the institutional safeguard to guarantee that documents will not be "cooked."

Viewed against this background, the AB rulings are a half-measure: on the one hand, the AB emphasized the importance of Art. 6.4 AD, insisting that it is not up to the investigating authority to decide which information is relevant. But the AB failed to take the bigger picture into account: how is Brazil to know exactly what has been used as input in the investigation, other than through communications/notifications to its exporters? The AD, as we established above, does not require that *all* information be transmitted by the investigating authority. But the AD approach could have been substantially helped, had the AB re-thought its findings in *Thailand – H Beams* and elaborated on its reasoning there. In short, we believe that through a more appropriate allocation of the burden of proof, concerns similar to those of Brazil in the present case can be taken care of.

8 Concluding remarks

To conclude, let us just note that in line with our prior writings in this context, our main source of discontent with this AB report is

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the often acontextual interpretation of some of the key terms of the AD Agreement. We believe that, read in their context, several provisions should have been interpreted differently than what was done by the AB. Consequently, in our view, the AB, in this case following unpersuasive reasoning, ended up with the wrong outcome.

References

Goldberg, P. K. and Knetter, M. M. 1997. "Goods markets and exchange rates: what have we learned?" *Journal of Economic Literature* **35**: 1244–1272.

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