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EUROPEAN COMMUNITIES – ANTI-DUMPING DUTIES ON MALLEABLE CAST IRON TUBE OR PIPE FITTINGS FROM BRAZIL

AB-2003-2

Report of the Appellate Body

TABLE OF CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation of Case
EC – Tube and Pipe	*European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, 7 March 2003 (the "Panel Report")
EC – Bed Linen	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001
EC – Bed Linen (Article 21.5 – India)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003
Egypt – Steel Rebar	Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted 1 October 2002
Guatemala – Cement II	Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, DSR 2000:XI, 5295
India – Patents (US)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9
India – Quantitative Restrictions	Appellate Body Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/AB/R, adopted 22 September 1999, DSR 1999:IV, 1763
Korea – Alcoholic Beverages	Appellate Body Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I, 3
Thailand – H-Beams	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
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001
US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001
US – Wheat Gluten	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001

WORLD TRADE ORGANIZATION
APPELLATE BODY

European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil

Brazil, *Appellant*
European Communities, *Appellee*

Chile, *Third Participant*
Japan, *Third Participant*
Mexico, *Third Participant*
United States, *Third Participant*

AB-2003-2

Present:

Ganesan, Presiding Member
Baptista, Member
Sacerdoti, Member

I. Introduction

1. Brazil appeals certain issues of law and legal interpretations in the Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil* (the "Panel Report").[1] The Panel was established to consider a complaint by Brazil concerning the consistency with the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*") and the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994") of the imposition of anti-dumping duties by the European Communities on imports of malleable cast iron tube or pipe fittings from Brazil.

2. On 29 May 1999, the European Communities announced the initiation of an anti-dumping investigation on the imports of malleable cast iron tube or pipe fittings originating in Brazil and seven other countries. One Brazilian producer (Indústria de Fundição Tupy Ltda.) was subject to the anti-dumping investigation.[2] The European Communities imposed provisional anti-dumping duties on the

[1]WT/DS219/R, 7 March 2003.

[2]Panel Report, para. 2.2.

imports on 28 February 2000[3] and definitive anti-dumping duties on 11 August 2000.[4] On 21 December 2000, Brazil requested consultations with the European Communities concerning the imposition of anti-dumping duties on its exports of malleable cast iron tube or pipe fittings to the European Communities.[5] After consultations failed to resolve the dispute, Brazil requested the establishment of a panel on 7 June 2001 to examine the matter.[6] The factual aspects of this dispute are set out in greater detail in the Panel Report.[7]

3. Before the Panel, Brazil claimed that the European Communities had acted inconsistently with Article VI of the GATT 1994 and with a number of provisions of the *Anti-Dumping Agreement*, specifically, Articles 1, 2.2, 2.4, 2.4.1, 2.4.2, 3.1, 3.2, 3.3, 3.4, 3.5, 6.2, 6.4, 6.6, 6.9, 9.3, 11.1, 11.2, 12.2, 12.2.2, and 15.[8]

4. In the Panel Report, circulated to Members of the World Trade Organization (the "WTO") on 7 March 2003, the Panel found that the European Communities had acted inconsistently with its obligations under:

(a) Article 2.4.2 of the *Anti-Dumping Agreement* in "zeroing" negative dumping margins in its dumping determination; and

(b) Articles 12.2 and 12.2.2 of the *Anti-Dumping Agreement* in that it is not directly discernible from the published Provisional or Definitive Regulation that the European Communities had addressed or explained the lack of significance of certain injury factors listed in Article 3.4 of the *Anti-Dumping Agreement*.[9]

The Panel rejected all other claims raised by Brazil against the anti-dumping measure.

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[3]Commission Regulation (EC) No 449/2000 of 28 February 2000, imposing a provisional anti-dumping duty on imports of malleable cast iron tube or pipe fittings originating in Brazil, the Czech Republic, Japan, the People's Republic of China, the Republic of Korea and Thailand and accepting an undertaking offered by an exporting producer in the Czech Republic, published in the Official Journal of the European Communities, 29 February 2000, L-series, No. 55 ("Provisional Regulation").

[4]Council Regulation (EC) No 1784/2000 of 11 August 2000, imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain malleable cast iron tube or pipe fittings originating in Brazil, the Czech Republic, Japan, the People's Republic of China, the Republic of Korea and Thailand, published in the Official Journal of the European Communities, 18 August 2000, L-series, No. 208 ("Definitive Regulation").

[5]WT/DS219/1, 9 January 2001.

[6]WT/DS219/2, 8 June 2001.

[7]Panel Report, paras. 2.1-2.7.

[8]*Ibid*., para. 3.1 and footnote 15 thereto.

[9]*Ibid*., para. 8.1(a).

5. The Panel accordingly recommended that "the Dispute Settlement Body request the European Communities to bring its measure into conformity with its obligations under the *Anti-Dumping Agreement*."[10]

6. On 23 April 2003, Brazil notified the Dispute Settlement Body of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed a Notice of Appeal pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*").[11] On 5 May 2003, Brazil filed an appellant's submission.[12] Stated briefly, Brazil alleged on appeal that the Panel had erred in finding that the imposition of anti-dumping duties by the European Communities was not inconsistent with Article VI:2 of the GATT 1994 and Articles 1, 2.2.2, 3.1, 3.2, 3.3, 3.4, 3.5, 6.2, or 6.4 of the *Anti-Dumping Agreement*. Brazil additionally alleged that the Panel had acted inconsistently with Article 17.6(i) of the *Anti-Dumping Agreement*, with respect to the admission of Exhibit EC-12, by failing to assess whether the investigating authority's establishment of the facts was proper. On 19 May 2003, the European Communities filed an appellee's submission, requesting that the Appellate Body reject all of Brazil's claims on appeal.[13] On the same day, Japan and the United States each filed a third participant's submission[14], and Chile and Mexico notified their intention to appear and make statements at the oral hearing as third participants.[15]

7. The oral hearing in this appeal was held on 10 June 2003. The participants and third participant Japan presented oral statements. The participants and all the third participants also responded to questions put to them by the Members of the Division hearing the appeal.

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[10]Panel Report, para. 8.8.

[11]The issues appealed by Brazil are set forth in its Notice of Appeal, WT/DS219/7, 29 April 2003, which is attached as Annex 1 to this Report.

[12]Pursuant to Rule 21(1) of the *Working Procedures*.

[13]Pursuant to Rule 22(1) of the *Working Procedures*.

[14]Pursuant to Rule 24(1) of the *Working Procedures*.

[15]Pursuant to Rule 24(2) of the *Working Procedures*.

II. Arguments of the Participants and the Third Participants

A. *Claims of Error by Brazil – Appellant*

1. Devaluation of the Brazilian Real During the Period of Investigation: Article VI:2 of the GATT 1994 and Article 1 of the *Anti-Dumping Agreement*

8. Brazil appeals the Panel's finding that the European Commission was neither required nor permitted by Article VI:2 of the GATT 1994 or the *Anti-Dumping Agreement* to base its dumping determination solely on export price data from the last quarter of the period of investigation ("POI")—that is, data subsequent to the devaluation of the Brazilian Real that occurred in January 1999.

9. Brazil maintains that the reason for using a POI in a dumping determination is to acquire a finite data set relating to a recent historical period, which can be extrapolated to make a "reasonable assumption" about the future. According to Brazil, the 42 percent devaluation of the Brazilian Real constituted a fundamental and lasting change in the trading conditions of Brazilian exports, and the magnitude of the devaluation was greater than the dumping margin of 34.8 percent. The dumping was totally eliminated by the devaluation, and if the data subsequent to devaluation had been used, no "reasonable assumption" could be made that dumping would occur in the future.

10. According to Brazil, the Panel erred in finding that Article 2.4.2 of the *Anti-Dumping Agreement* requires investigating authorities to use *all* the data from throughout the POI. Brazil explains that the first sentence of Article 2.4.2 provides that dumping margins are *normally* to be established using the average of prices of *all* export transactions. However, the second sentence of Article 2.4.2 expressly recognizes that situations may arise where this methodology would not be appropriate, for example, where a pattern of export prices differs significantly among different *time periods*. Data from the POI show that, although the devaluation did not affect the normal value of Brazilian exports, the patterns of export prices in Brazilian Real were completely different in the periods before and after the devaluation. Therefore, pursuant to Article 2.4.2, the European Commission was entitled to use in its dumping determination only the export price data relating to the last three months of the POI, being the period following the devaluation.

11. Moreover, Brazil argues that the European Commission had an obligation, under Article VI:2 of the GATT 1994, to make its dumping determination in accordance with the second sentence of Article 2.4.2. Article VI:2 allows a WTO Member to levy anti-dumping duties *only* "[i]n order to

offset or prevent dumping". To satisfy this fundamental condition, Brazil argues, the European Commission was required to make a "*reasonable assumption* for the future" from data collected in the POI in order to "anticipate the level of anti-dumping duty that [was] strictly necessary to prevent dumping in the future."[16] The European Commission was therefore required to choose the methodology under Article 2.4.2 that best fulfilled this obligation, which is the methodology prescribed in the second sentence of Article 2.4.2, in particular a comparison of the weighted average normal value (based on data from the entire POI) with the prices of individual export transactions that took place in the POI after the devaluation. According to Brazil, in failing to adopt this methodology and in imposing duties despite the impact of the devaluation, the European Communities acted inconsistently with Article VI:2 of the GATT 1994 and, consequently, Article 1 of the *Anti-Dumping Agreement*.

12. Brazil considers that this conclusion is not affected by the Panel's observation that the *Anti-Dumping Agreement* provides mechanisms to address situations where dumping decreases or terminates following an affirmative determination of dumping (through refunds under Article 9.3 and reviews under Article 11), because the availability of corrective mechanisms does not justify the imposition of anti-dumping duties in excess of what is necessary to prevent dumping. According to Brazil, corrective mechanisms are intended to take account of fundamental changes taking place *after* the investigation, but as the devaluation occurred *during* the POI, the authorities were obliged to take it into account in a proper way at the time of the initial dumping determination.

13. Brazil therefore requests the Appellate Body to reverse the Panel's findings on this issue and to find instead that the European Communities acted inconsistently with its obligations under Article VI:2 of the GATT 1994 and Article 1 of the *Anti-Dumping Agreement*.

2. Data for SG&A and Profits: Article 2.2.2 of the *Anti-Dumping Agreement*

14. Brazil appeals the Panel's finding that the chapeau of Article 2.2.2 of the *Anti-Dumping Agreement* compels investigating authorities to use actual administrative, selling and general costs ("SG&A") and profit data from *all* sales in the ordinary course of trade, including those sales found under Article 2.2 to be low-volume sales.

[16]Brazil's appellant's submission, para. 58. (original emphasis)

15. Brazil submits that the chapeau of Article 2.2.2 of the *Anti-Dumping Agreement* does not expressly require that *all* actual data be used, or that only certain data be excluded from the determination of SG&A and profits. Brazil further argues that the Panel's reading of Article 2.2.2, which allows authorities to include sales that were found to be "unrepresentative" in constructing the normal value, nullifies the purpose of Article 2.2.[17] According to Brazil, interpreting one treaty provision so as to nullify the effects of another provision is inconsistent with the rules of treaty interpretation under the *Vienna Convention on the Law of Treaties*.[18] Article 2.2 imposes on Members an obligation to construct normal value when the product concerned is sold in the domestic market in low volumes deemed not to "permit a proper comparison" with the export price. The purpose of this provision, in Brazil's view, is to avoid basing normal value on prices that may not represent normal trading conditions. Brazil submits an example seeking to demonstrate that this purpose is undermined by the Panel's interpretation of the chapeau of Article 2.2.2. Under this example, according to Brazil, if data pertaining to low-volume sales are included in the calculation of SG&A and profits under Article 2.2.2, the same result is reached as if "normal value" (that is, selling prices in the domestic market) had been used, and there was no need for "constructing" a normal value. The Panel's interpretation of the chapeau of Article 2.2.2 is thus contrary to the customary rules of treaty interpretation.

16. Brazil therefore requests the Appellate Body to reverse the Panel's finding that the chapeau of Article 2.2.2 compels investigating authorities to use actual SG&A and profit data from *all* sales in the ordinary course of trade, including those sales found under Article 2.2 to be of insufficient quantities to permit a proper comparison. Brazil requests that the Appellate Body find instead that the chapeau of Article 2.2.2 requires the exclusion of actual data from sales found under Article 2.2 to be of insufficient quantities to permit a proper comparison, and therefore, that the European Communities acted inconsistently with this obligation.

3. Cumulation: Articles 3.2 and 3.3 of the *Anti-Dumping Agreement*

17. Brazil appeals the Panel's finding that country-by-country analyses of volumes and prices under Article 3.2 of the *Anti-Dumping Agreement* are not pre-conditions to the cumulative assessment of the effects of dumped imports under Article 3.3.

18. In Brazil's view, Article 3.2 requires investigating authorities to consider, *on a country-by-country basis*, whether there has been an absolute or relative increase in dumped imports and whether

[17]Brazil's appellant's submission, para. 83.

[18]Done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679.

the prices of those imports are lower than the actual or target prices of the domestic industry. Only where these analyses identify the imports from a *particular* country as a likely source of negative effects on the domestic industry is cumulation of that country's imports permitted under Article 3.3. Brazil submits that if Article 3.3 were intended to "derogate" from the obligation to analyze volumes and prices on a country-by-country basis under Article 3.2, this would have been clearly mentioned in Article 3.3.[19] Moreover, according to Brazil, the requirement of a vague "conditions of competition" analysis under Article 3.3 cannot replace the precise analyses of prices and volumes required under Article 3.2.

19. Brazil argues that Article 3.2 requires an analysis of the "factors" that may be causing injury (namely, the volumes and prices of the dumped imports), whereas Article 3.3 allows cumulation of the "effects" of the dumped imports (and not the imports themselves). These "effects" are found through recourse to Article 3.4. Thus, according to Brazil, the logical order of Article 3 requires that investigating authorities first assess the factors that may cause injury (Article 3.2), then whether the conditions for cumulation are fulfilled (Article 3.3), and finally the impact of the dumped imports on the domestic industry (Article 3.4). Interpreting Article 3.3 to allow cumulation of "factors" causing injury would involve reading into the *Anti-Dumping Agreement* words that are not there, contrary to the rules of interpretation under public international law.

20. Brazil submits that the Panel's interpretation of Article 3 would lead to absurd results and would undermine the requirements of Article 3. In particular, the Panel's interpretation would allow injury to be attributed to sources that are not actually causing injury. For example, where imports from countries X and Y are being dumped, but the factors causing injury are the rapid increase in market share and the low price of imports from country Y, anti-dumping duties would be imposed on both countries, even though the imports from country X are not causing injury. In addition, the Panel's interpretation would undermine the requirement in Article 3.1 that the determination of injury be based on an "objective examination", because it makes a finding of injury more likely and renders a country liable to pay anti-dumping duties when its dumped imports cannot be said to be causing injury. Brazil submits that such results are contrary to "basic principles of fundamental fairness."[20]

21. Brazil therefore requests the Appellate Body to reverse the Panel's finding that country-specific analyses of volumes and prices under Article 3.2 are not pre-conditions to cumulation under Article 3.3, and to find that the European Communities acted inconsistently with Articles 3.2 and 3.3 of the *Anti-Dumping Agreement*.

[19]Brazil's appellant's submission, para. 105.

[20]*Ibid*., para. 113.

4. Exhibit EC-12: Articles 3.1, 3.4, and 17.6(i) of the *Anti-Dumping Agreement*

22. Brazil appeals the Panel's finding that an internal note for the investigation file, containing an analysis of certain of the injury factors listed in Article 3.4 and submitted by the European Communities to the Panel as Exhibit EC-12, was properly before the Panel. First, Brazil argues that this finding is based on an erroneous legal interpretation of Articles 3.1 and 3.4. Second, Brazil argues that the Panel failed to comply with its obligations under Article 17.6(i) of the *Anti-Dumping Agreement* in not ensuring that Exhibit EC-12 was made *during* the investigation.[21]

23. According to Brazil, Article 3.4 requires that there be a "contemporaneous and verifiable indication that Exhibit EC-12 existed during the investigation", and this requirement was not met.[22] In the absence of such a requirement, Brazil argues, Article 3.4 would be deprived of its meaning because an investigating authority could make a finding of injury on the basis of an incomplete analysis. Citing Article 3.1, Brazil submits further that the "evidence contained in Exhibit EC-12" cannot be regarded as "positive evidence" because its contemporaneous character is not established and is "questionable"[23], and the evaluation in Exhibit EC-12 cannot be regarded as "objective" because it is not established that it was actually made during the investigation.[24]

24. In relation to the Panel's alleged failure to comply with Article 17.6(i), Brazil argues that the Panel improperly exercised its discretion in basing its findings "exclusively on a mere assertion" from the European Communities that Exhibit EC-12 was made during the investigation, and on an unsupported presumption of good faith, rather than on positive facts.[25] According to Brazil, the obligation on the European Communities to present evidence could not be substituted by a

[21]In its Notice of Appeal, Brazil also claimed that the Panel had breached its obligations under Article 11 of the DSU because of its reliance on the presumption of good faith. (Notice of Appeal, p. 3, attached as Annex 1 to this Report) During the oral hearing, however, Brazil clarified that it was not pursuing its claim under Article 11. (Brazil's response to questioning at the oral hearing) Brazil also states that, to the extent that the Panel failed to examine properly the contemporaneous character of Exhibit EC-12, the Panel did not examine the matter based upon "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member", in accordance with Article 17.5(ii) of the *Anti-Dumping Agreement.*

[22]Brazil's appellant's submission, para. 124. See also, *ibid*., para. 125, quoting Panel Report, *Egypt – Steel Rebar*, para. 7.49.

[23]*Ibid*., para. 130.

[24]*Ibid*., paras. 129-130, quoting Appellate Body Report, *US – Hot-Rolled Steel*, paras. 192-193.

[25]*Ibid*., para. 146.

presumption of good faith. The principle of good faith, as mentioned in Article 3.10 of the DSU, cannot be regarded as an evidentiary principle. Rather, it relates to due process and requires parties to cooperate in dispute settlement proceedings, including by placing material evidence before the tribunal. Finally, Brazil argues that the confidentiality of information cannot be an obstacle to a proper examination of the facts as required under Article 17.6(i), especially as Article 18.2 of the DSU provides a specific mechanism to protect such information.

25. Brazil therefore requests the Appellate Body to reverse the Panel's finding that Exhibit EC-12 was properly before it and consequently find that the European Communities acted inconsistently with Articles 3.1 and 3.4 of the *Anti-Dumping Agreement*.

5. Disclosure of Information: Articles 6.2 and 6.4 of the *Anti-Dumping Agreement*

26. Brazil appeals the Panel's finding that the European Communities was not required under Articles 6.2 and 6.4 of the *Anti-Dumping Agreement* to disclose to the interested parties, during the anti-dumping investigation, the information on certain injury factors contained in Exhibit EC-12, because the European Commission had determined that the data contained in Exhibit EC-12 were in line with other data (which had been disclosed) and did not add any value to its analysis of the injury factors listed in Article 3.4 of the *Anti-Dumping Agreement*.

27. According to Brazil, when making an injury determination, investigating authorities must assess the role, relevance, and relative weight of at least those factors listed in Article 3.4. Therefore, the findings of investigating authorities on each of these factors are necessarily "relevant" within the meaning of Article 6.4. Brazil submits that it cannot be left to investigating authorities to decide, on their own, which information is "relevant" under Article 6.4 and relates to the defence of parties' interests under Article 6.2. Brazil further argues that Article 6 is a "fundamental due process provision" seeking to ensure that interested parties can defend their interests *during* the investigation process itself, rather than be informed of relevant information only *after* the investigation is completed and its result reflected in the definitive determination, as required under Article 12.2.[26] In Brazil's view, the obligations set out in Articles 6.2 and 12.2 are distinct obligations relating to different periods of an anti-dumping investigation.

[26]Brazil's statement at the oral hearing.

28. Brazil therefore requests the Appellate Body to reverse the Panel's finding that the European Communities did not have to disclose the information contained in Exhibit EC-12 relating to the evaluation of certain injury factors listed in Article 3.4, and to find that the European Communities acted inconsistently with Articles 6.2 and 6.4 of the *Anti-Dumping Agreement*.

6. Implicit Analysis of the "Growth" Factor: Article 3.4 of the *Anti-Dumping Agreement*

29. Brazil appeals the Panel's finding that, in evaluating other injury factors, the European Commission had implicitly addressed the "growth" factor, and thereby did not act inconsistently with Article 3.4 of the *Anti-Dumping Agreement*.

30. According to Brazil, the evaluation of each injury factor listed in Article 3.4 must be explicit and it cannot simply be deduced from or found to be implicit in the evaluation of other factors. The Panel's contrary interpretation, in Brazil's view, is inconsistent with the principle of effectiveness as recognized by the Appellate Body, because it nullifies the obligation under Article 3.4 to evaluate each of the factors listed in that provision. The interpretation is also inconsistent with the requirement that it is the *investigating authority* (rather than the Panel) that must evaluate each factor, because Article 17.6(i) limits the Panel's role to assessing whether the authorities properly established the facts and evaluated them in an unbiased and objective manner.

31. As a result, Brazil requests that the Appellate Body reverse the Panel's finding that the European Communities did not act inconsistently with Article 3.4 of the *Anti-Dumping Agreement* in its treatment of the factor of "growth".

7. Causality: Article 3.5 of the *Anti-Dumping Agreement*

32. Brazil claims that the Panel erred in concluding that the European Communities did not act inconsistently with Article 3.5 of the *Anti-Dumping Agreement* in conducting its causality analysis. First, Brazil appeals the Panel's finding that a factor "known" to the European Commission in the context of its dumping and injury analyses was not a factor "known" to it in the context of its causality analysis. Second, Brazil appeals the Panel's finding that the European Commission did not improperly attribute to the dumped imports injury to the domestic industry caused by other factors, even though it analyzed the effects of those other factors only individually and not collectively.

33. In relation to other "known" factors under Article 3.5, Brazil argues that the relatively high cost of production of the European Communities industry compared to that of the Brazilian industry was a causal factor "known" to the European Commission in its causality analysis.[27] According to Brazil, this difference in cost of production is reflected in the "margins analysis"; that is, in the fact that the dumping margin found for the Brazilian exporter was 34.8 percent, whereas the underselling margin was 82.06 percent of the export price. Brazil argues that this cost disadvantage was known to the investigating authority because the European Commission itself had calculated the dumping and underselling margins and had full information on the production costs of the different producers. Furthermore, the Brazilian exporter had raised this issue in the context of the dumping and injury determinations. As the elimination of dumping by the Brazilian producer would not have substantially improved the condition of the European Communities industry, Brazil submits that a significant part, if not all, of the injury could have been caused by the domestic industry's high cost of production. The European Commission was therefore under an obligation to conduct a non-attribution analysis with respect to this factor.

34. Brazil maintains that the European Commission was obliged to examine this factor even though the Brazilian producer did not expressly raise it as a causal factor. In Brazil's view, a textual interpretation of Article 3.5 shows that an investigating authority cannot limit itself to evaluating only those factors that were specifically raised in the context of the causality analysis. Article 3.5 requires that investigating authorities examine "all relevant evidence before the authorities" and that they "*also* examine *any known factors* other than the dumped imports". Finally, Brazil argues that the Spanish version of Article 3.5 requires the authorities to examine "*cualesquiera otros factores de que tengan conocimiento*", making it clear that the authorities must examine any factor known to them, regardless of whether such factor was raised by an interested party.

35. In relation to the collective analysis of other known factors under Article 3.5, Brazil argues that the European Commission's methodology in this case involved an evaluation of causal factors *individually*, but it did not involve an evaluation of their collective impact. Brazil challenges the application of this methodology to this case on the basis that it deprives Article 3.5 of its aim to ensure that other causal factors are not themselves the cause of the injury found. Although individual factors may each have an insignificant effect on injury, multiple insignificant factors may together

[27]Brazil's response to questioning at the oral hearing. In Brazil's appellant's submission, it described the relevant "factor" in various ways, such as "margins analysis", the Brazilian exporter's "comparative advantage", and the Brazilian exporter's "cost efficiency". (Brazil's appellant's submission, paras. 181, 184, 198, 199, and 204)

contribute significantly to injury. A methodology that assesses other injury factors only individually does not address the possibility that such factors may collectively "sever the causal link between the dumping and the injury."[28] According to Brazil, in examining each known factor only individually, an investigating authority automatically attributes to the dumped imports the injurious effects of all the other known factors. As such, the European Commission in this investigation failed to identify, isolate, and analyze the effects of such factors as required by Article 3.5 and the Appellate Body's decision in *US – Hot-Rolled Steel*.[29] Finally, Brazil claims that the individual factor analysis employed in this case may lead to the absurd result that the greater the number of causal factors, the less likely those factors will be found to constitute a significant cause of injury, regardless of their collective effect.

36. Brazil therefore requests the Appellate Body to reverse the Panel's findings that (a) the cost of production differential between the European Communities industry and the Brazilian exporter was not a "known" factor other than dumped imports that the European Commission was required to examine; and (b) the non-attribution obligation under Article 3.5 did not require in this case an examination of the collective effects of other causal factors. Brazil consequently requests the Appellate Body to find that the European Communities acted inconsistently with its obligations under Article 3.5 of the *Anti-Dumping Agreement*.

B. *Arguments of the European Communities – Appellee*

1. Devaluation of the Brazilian Real During the Period of Investigation: Article VI:2 of the GATT 1994 and Article 1 of the *Anti-Dumping Agreement*

37. The European Communities agrees with the Panel that the methodologies specified in the first sentence of Article 2.4.2 of the *Anti-Dumping Agreement* "would seem to require, in general, that data *throughout* the entire investigation period would necessarily consistently be taken into account."[30] According to the European Communities, the standards of objective and unbiased action in determining the existence of dumping and the dumping margin are implicit in the specific rules of Article 2 of the *Anti-Dumping Agreement*, because if these standards did not exist the rules would be rendered ineffective. The European Communities maintains that its system assures objectivity by

[28]Brazil's statement at the oral hearing.

[29]Appellate Body Report, *US – Hot-Rolled Steel*, para. 228.

[30]Panel Report, para. 7.104. (original emphasis)

using, in the determination of injurious dumping and in the determination of the definitive dumping margin, all data pertaining to a sufficiently lengthy period, which is applied on a regular basis in anti-dumping investigations.

38. In contrast, according to the European Communities, Brazil's notion of a "reasonable assumption for the future" is inherently vague and introduces into the *Anti-Dumping Agreement* an element of subjectivity on the part of the investigating authority. The European Communities states, furthermore, that there was no guarantee that the Brazilian producer would maintain the same pricing policy in the immediate aftermath of the devaluation. It also points out that the *Anti-Dumping Agreement* has a provision for addressing exchange rate movements (Article 2.4.1), thereby suggesting that the proper response to currency devaluation is not the exclusion of certain data from the POI.

39. The European Communities, citing the Appellate Body Report in *EC – Bed Linen*[31], argues that nothing in Article 2.4.2 indicates that an investigating authority may select among the export transactions within the POI. The second sentence of Article 2.4.2, in the European Communities' view, specifically addresses "targeted dumping", meaning dumping concentrated in sales to certain regions, customers, or time periods. The European Communities therefore submits that this sentence does not allow an investigating authority to select transactions within the POI on the basis of a "reasonable assumption for the future". Furthermore, investigating authorities are not required to adopt any particular methodology under Article 2.4.2. Rather, in the European Communities' view, investigating authorities should in principle use one of the two methodologies in the first sentence. They may resort to the methodology in the second sentence only when certain circumstances mentioned therein are present, which was not the case in this anti-dumping investigation.

40. In response to Brazil's arguments that the mechanisms provided by the *Anti-Dumping Agreement* for refunds and reviews operate only in relation to events occurring after the POI, the European Communities contends that the corrective mechanisms would also operate in relation to changes of an "enduring" character that occur during the POI.

[31]Appellate Body Report, *EC – Bed Linen*, para. 55.

2. Data for SG&A and Profits: Article 2.2.2 of the *Anti-Dumping Agreement*

41. The European Communities argues that Brazil's interpretation of Articles 2.2 and 2.2.2 of the *Anti-Dumping Agreement* is incorrect. The text of Article 2.2 separately identifies "low-volume" sales and sales not made "in the ordinary course of trade", thereby distinguishing the two types of sales. The chapeau of Article 2.2.2, however, expressly excludes data relating to sales not made "in the ordinary course of trade", but makes no mention of data relating to low-volume sales, indicating that it places no restriction on the inclusion of such sales. Similarly, the European Communities states that sub-paragraphs (i) and (ii) of Article 2.2.2, which relate to the construction of normal value, do not mention the exclusion of data relating to low-volume sales.

42. The European Communities argues that there is a rational explanation for excluding non-representative sales from a normal value based on sale *prices*, while at the same time including them in a normal value that is *constructed*. Typically, the dumping margin for a product is calculated by determining a weighted average of the dumping margins for different versions of the like product on the basis of the volume and the price of *export* sales. If the domestic sales volume for a particular version is small, there is a greater risk of atypical prices affecting the calculation, because prices from those low-volume sales will be weighted according to the *export* sales of the product rather than the domestic sales. In contrast, the relative volume of *domestic* sales (in the exporting country) of different versions of a like product is taken into account in the construction of normal value because SG&A and profit data from all versions of the like product are weight-averaged according to domestic sales. Thus, the fact that a small volume of one version of the product is sold at atypical prices will have a correspondingly small effect on the profit margin used in constructing normal value. The European Communities argues that this rationale for the different treatment of low-volume sales under Articles 2.2 and 2.2.2 is illustrated by the present case, where the effect of including the data in question would be to alter the profit margin, and therefore the dumping margin, by only one hundredth of one percent.

43. The European Communities concedes that, in the particular set of circumstances of Brazil's example, (involving only one product type that is sold almost entirely for export, with only a low-volume quantity being sold, profitably, in the domestic market), the price resulting from a constructed normal value, based on the Panel's interpretation, would be the same as if the price had been derived from domestic sales originally rejected as not permitting a "proper comparison". However, the European Communities submits that this example does not show that the Panel's interpretation renders Article 2.2 ineffective. According to the European Communities, the circumstances posited by Brazil are somewhat unusual. The European Communities states that, in most cases (such as the present

case), the problem of arriving at the same price through constructed value as through reliance on low-volume domestic sales prices would not arise.

44. Finally, the European Communities emphasizes that the inclusion of actual data from low-volume sales entails no inherent bias either for or against the exporter. In fact, according to the European Communities, Brazil's interpretation seems to imply that an investigating authority could pick and choose among the data collected, which would introduce a subjective element into the anti-dumping procedure, contrary to the objectivity intended under the *Anti-Dumping Agreement*.

3. Cumulation: Articles 3.2 and 3.3 of the *Anti-Dumping Agreement*

45. The European Communities argues that the ordinary meaning of the terms of Article 3.3 of the *Anti-Dumping Agreement* in their context indicates that volumes and prices under Article 3.2 may be cumulatively assessed. The requirement under Article 3.3 of a calculation of individual countries' export volumes to establish that they are "not negligible" indicates, in the European Communities' view, that there is no requirement that investigating authorities consider whether imports have increased from each individual country before conducting a cumulative assessment. The European Communities submits that the obligation to consider prices and volume in accordance with Article 3.2 still exists, although Article 3.3 modifies this rule to permit their consideration on a cumulated, rather than on a country-by-country, basis.

46. The European Communities argues that a proper consideration of the object and purpose of Article 3.3 demonstrates that it must provide for the cumulative assessment of volume and prices because it is precisely the cumulated effects of volume and prices with which domestic producers are confronted on the domestic market. If an investigating authority had to establish that imports from each country were causing injury, cumulation under Article 3.3 would be redundant.[32] In response to Brazil's example demonstrating that failure to carry out a country-by-country consideration under Article 3.2 would inappropriately attribute injury, the European Communities argues that a country (such as country X in Brazil's example) may be both a "victim" and a "cause" of injury.[33]

47. The European Communities challenges Brazil's notion that "effects" and "factors" are used in Article 3 of the *Anti-Dumping Agreement* as "terms of art", or terms having precise and different meanings.[34] The European Communities notes that the last sentence of Article 3.4 refers to the "effects" also as "factors", and Articles 3.1 and 3.4 refer to these effects collectively as the "impact".

[32]European Communities' response to questioning at the oral hearing.

[33]European Communities' appellee's submission, para. 90.

[34]*Ibid*., paras. 81 and 83.

Articles 3.1 and 3.2 also identify the "effect" of the dumped imports on prices as the second of two topics for investigating authorities to consider. The European Communities acknowledges that the first of these topics is described as "the volume of the dumped imports", with no explicit mention of effects. However, the European Communities argues, because Article 3.5 refers to "the effects of dumping, as set forth in paragraphs 2 and 4", it would be a "strained interpretation" of Article 3.5 to read this as referring only to the price effects under Article 3.2.[35]

4. Exhibit EC-12: Articles 3.1, 3.4, and 17.6(i) of the *Anti-Dumping Agreement*

48. The European Communities contends that no rule of evidence exists in the WTO that precludes panels from accepting as evidence a document that was produced during an anti-dumping investigation unless accompanied by a "contemporaneous and verifiable written indication" that it actually existed during the investigation. According to the European Communities, the requirement of "positive evidence" in Article 3.1 "is not a rule governing the evidence that panels may take into account."[36]

49. The European Communities maintains that no rule of law limits a panel's reliance on a presumption of good faith, and the extent to which a panel relies on such a presumption is a matter within the panel's discretion. Nevertheless, the European Communities disputes Brazil's suggestion that the sole justification given by the Panel for accepting the genuine nature of Exhibit EC-12 was that the European Communities had asserted that it was genuine. The European Communities notes that it provided responses to questions by the Panel regarding the sources of information and the methodology on which Exhibit EC-12 was based. The genuineness of the document was demonstrated by the consistency between the raw data that had been collected and the consideration of that data in Exhibit EC-12, as well as the similar consistency between the conclusions described in Exhibit EC-12 and those stated in the Definitive Regulation.

5. Disclosure of Information: Articles 6.2 and 6.4 of the *Anti-Dumping Agreement*:

50. The European Communities argues that, although the Panel was correct to reject Brazil's claim under Articles 6.2 and 6.4 of the *Anti-Dumping Agreement*, its reasoning was not appropriate because it implicitly presumed that these provisions required the European Commission to inform the

[35]European Communities' appellee's submission, para. 85.

[36]*Ibid*., para. 116.

Brazilian producer about the *conclusions* (as opposed to *information*) it had reached on the basis of the data obtained during the investigation.[37]

51. The European Communities contends that the term "information" used in Article 6.4 does not extend to investigating authorities' conclusions from, or reasoning applied to, data obtained in the course of their enquiries. This view, according to the European Communities, is supported by the ordinary meaning of the text of Article 6.4, in its context. The European Communities submits that where the *Anti-Dumping Agreement* refers to "information" with the intention of imposing an obligation to provide notification of the authorities' reasoning, it does so explicitly (as, for example, in Article 12.2.2). The European Communities claims that an examination of the object and purpose of Article 6.4 supports this interpretation, because the disclosure requirements are intended to give parties an opportunity to influence the conclusions of investigating authorities. According to the European Communities, it had no obligation to disclose Exhibit EC-12 because it contains its investigating authority's conclusions with respect to some of the injury factors listed in Article 3.4; any data published in Exhibit EC-12 had previously been disclosed to the interested parties to the extent that it was compatible with confidentiality requirements.

52. Citing the panel report in *Guatemala – Cement II*, the European Communities also argues that the *general* nature of Article 6.2 is not such as to impose a *specific* obligation on the European Commission to inform the Brazilian exporter in *the course of the investigation* about matters that are specifically required to be conveyed at the *end* of the investigation by virtue of Article 12.2.[38]

6. Implicit Analysis of the "Growth" Factor: Article 3.4 of the *Anti-Dumping Agreement*:

53. The European Communities argues that the obligation under Article 3.4 of the *Anti-Dumping Agreement* to consider each of the factors listed in that provision is distinct from other obligations under the *Anti-Dumping Agreement* to disclose or publish information about an investigating authority's consideration of a particular factor. In the present case, the Panel found that the examination of "growth" was "implicit" in that it was carried out in the course of examining other factors, which examination was clearly evident in the record (including in the Provisional Regulation). In the European Communities' view, allowing the implicit examination of a factor avoids a formalistic

[37]Although the European Communities disagrees with the reasoning relied upon by the Panel, it did not bring a cross-appeal on this point.

[38]Panel Report, *Guatemala – Cement II*, para. 8.238.

approach to Article 3.4, without rendering ineffective the substantive requirement that each factor be examined. Moreover, according to the European Communities, there is no rule in Article 17.6(i) of the *Anti-Dumping Agreement* or elsewhere in the covered agreements that prevents panels from determining whether a factor was properly evaluated on the basis of the evaluation of other factors. The European Communities submits that such a determination is therefore within the discretion of the Panel.

7. Causality: Article 3.5 of the *Anti-Dumping Agreement*

54. The European Communities argues that the high cost of production of the European Communities industry, relative to the Brazilian industry, was not raised as a *causal factor* before the investigating authorities, and therefore, it was not "known" to the investigating authorities in that context. The European Communities notes that the factors that the Panel described as being known to the investigating authorities in the context of the dumping and injury analyses were the alleged differences in cost of production and market perception between "white" and "black heart" variants of the product under investigation. As the Panel reported, the European Commission had determined during the investigation that the difference in cost of production was minimal and, therefore, such difference could not have been a causal factor. The European Communities submits that this determination by the European Commission is an issue of fact and, therefore, not within the Appellate Body's jurisdiction. Finally, the European Communities argues, even if the difference in cost of production as described by Brazil were known to the European Commission, the investigating authorities would not have been required to consider it in a causality determination under Article 3.5, because a difference in cost of production of the product being examined is not a factor "other than dumped imports".

55. The European Communities asserts that Brazil's arguments regarding the European Communities' methodology of analyzing each causal factor only individually are not properly before the Appellate Body because Brazil did not argue before the Panel that the European Commission failed to consider the collective effect of the "other factors". Therefore, the European Communities submits, in so far as the Panel's finding involved a legal interpretation of the obligations of investigating authorities in regard to the collective effect of "other factors", the Appellate Body should declare it to be of no effect as this was not an issue in dispute. Similarly, the European Communities argues that the Appellate Body should also declare any factual findings of the Panel on this issue irrelevant to the determination.

56. Notwithstanding its objection as to the admissibility of Brazil's claim on this issue, the European Communities agrees with the Panel's finding that the European Commission's consideration of all the possible causal factors satisfied the requirements of Article 3.5. According to the European Communities, Brazil fails to recognize that an injury can have two causes, each of which would have been sufficient to cause the injury. Therefore, the European Communities claims that the requirement of a collective examination would serve no further purpose in ensuring that a sufficient causal link existed between dumped imports and injury. The European Communities further notes that Article 3.5 specifies no methodology for an investigating authority's causality analysis, as the Appellate Body recognized in *US – Hot-Rolled Steel*.[39] In requiring an examination of the collective impact of other factors, Brazil is extending the legal requirements of Article 3.5 beyond the limits determined by the Appellate Body, and is effectively prescribing the particular methods and approaches that investigating authorities must adopt.

C. *Arguments of the Third Participants*[40]

1. Japan

57. Japan argues that the Panel erred in concluding that the European Communities did not act inconsistently with Article 6.2 of the *Anti-Dumping Agreement* by not disclosing to interested parties Exhibit EC-12 or a non-confidential summary of Exhibit EC-12. In Japan's view, all the evidence used by investigating authorities to evaluate the factors under Article 3.4 constitutes "essential facts" under Article 6.9, and the "full opportunity" guaranteed by Article 6.2 exists only where investigating authorities disclose such facts to interested parties in sufficient time to respond and defend their interests. Contrary to these requirements, the European Communities based its definitive determination on data that were available only in Exhibit EC-12 and were not disclosed. In Japan's view, if the Panel's interpretation were correct, the investigating process could be "skew[ed]" and could prevent interested parties from fully defending their interests.[41]

58. Japan also disagrees with the Panel's conclusion that the European Communities did not act inconsistently with Article 3.5 of the *Anti-Dumping Agreement* and, in particular, the Panel's finding that the comparative advantage of foreign producers over European Communities producers was not a

[39]Appellate Body Report, *US – Hot-Rolled Steel*, para. 224.

[40]Neither Chile nor Mexico filed written submissions, and they did not make oral statements at the hearing.

[41]Japan's third participant's submission, para. 25.

"known" causal factor. Japan claims that Article 3.5 requires that the causal relationship between dumped imports and injury be established "through the effects of dumping". Understood in this context, Japan argues, "known" factors under Article 3.5 are not limited to factors external to the dumped imports. Any factor other than the magnitude of the margin of dumping could be a "known factor[] other than the dumped imports", in terms of Article 3.5. Japan submits that "known" factors also include factors that may not necessarily have been raised by a party during a certain stage of the anti-dumping investigation, particularly given Members' obligations of good faith in applying the *Anti-Dumping Agreement*. In Japan's view, an exporter's comparative advantage (whether minimal or not) is a causal factor that is "the crux" of foreign and domestic competition and domestic productivity as listed in Article 3.5.[42] Thus, according to Japan, the comparative advantage of the Brazilian exporter was a factor known to the European Commission, which it was consequently required to examine under Article 3.5.

2. United States

59. The United States submits that the Panel was correct in finding that investigating authorities are not required to consider whether the volume and price effects of imports from each individual country are significant before considering whether to cumulate imports under Article 3.3 of the *Anti-Dumping Agreement*. In the United States' view, the only prerequisites to cumulation under Article 3.3 are as set out in the text: first, that the dumping margin for each country is more than *de minimis*; second, that the volume of imports from each country is not negligible; and third, that a cumulative assessment is appropriate in the light of the conditions of competition both between the imported products and between the imported products and the like domestic product. According to the United States, Brazil's contrary interpretation would render Article 3.3 "meaningless".[43]

60. The United States agrees with the Panel's conclusion that the European Communities acted inconsistently with Articles 12.2 and 12.2.2 of the *Anti-Dumping Agreement* by failing to set forth in a discernible manner how it evaluated certain factors listed in Article 3.4 of the *Anti-Dumping Agreement*. In the light of this conclusion, and in view of the fact that this finding is not appealed, the United States maintains that it is not necessary for the Appellate Body to decide whether the European Communities also acted inconsistently with Articles 3.1 and 3.4 of the *Anti-Dumping Agreement*.

[42]Japan's third participant's submission, para. 15.

[43]United States' third participant's submission, para. 19.

61. The United States agrees with Brazil that the Panel erred in concluding that the European Communities did not act inconsistently with Articles 6.2 and 6.4 of the *Anti-Dumping Agreement* with respect to the information on injury factors referred to exclusively in Exhibit EC-12. According to the United States, this information was relevant, was used by the investigating authority, and was not confidential, yet the European Commission did not disclose it in any form to interested parties during the investigation. Nor did the European Commission give interested parties an opportunity to present arguments or provide information in response to Exhibit EC-12. The United States submits that the European Communities has provided no reasonable explanation as to why it did not do so.

62. The United States agrees with the Panel that the "margins analysis" was not a "known" causal factor that the European Communities was required to examine as part of its causality analysis under Article 3.5. In the United States' view, investigating authorities are not required under Article 3.5 to examine on their own initiative all possible factors that may be causing injury. According to the United States, the burden was on Brazil to establish a *prima facie* case that the margins analysis was a "known" factor that was injuring the domestic industry, and Brazil failed to discharge this burden.

63. The United States agrees with the Panel that the European Communities did not act inconsistently with Article 3.5 of the *Anti-Dumping Agreement* in examining other factors individually. The United States submits that nothing in the text of Article 3.5 requires investigating authorities to determine whether other injury factors are themselves a sufficient cause of injury or to determine that the injurious effects of the dumped imports are more significant than the combined effects of other factors. Therefore, the United States argues, in the absence of such specific language in the *Anti-Dumping Agreement*, investigating authorities have discretion to determine their own causality methodologies.

III. Issues Raised in this Appeal

64. The following issues are raised in this appeal:

(a) whether the Panel erred in finding that:

(i) the European Communities did not act inconsistently with Article VI:2 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994") or Article 1 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*") in imposing anti-dumping duties in this case following the devaluation of the Brazilian Real at the beginning of the fourth quarter of the period of investigation ("POI"); and

(ii) under Article 2.4.2 of the *Anti-Dumping Agreement*, the European Commission "could not have based its dumping analysis on the export prices relating to the period after the devaluation only";

(b) whether the Panel erred in finding that the European Communities did not act inconsistently with Article 2.2.2 of the *Anti-Dumping Agreement* by including actual data from "low-volume" sales in determining the amounts for administrative, selling and general costs ("SG&A") and profits for the construction of normal value;

(c) whether the Panel erred in finding that the European Communities did not act inconsistently with Articles 3.2 or 3.3 of the *Anti-Dumping Agreement*, even though the European Commission did not analyze the volume and prices of dumped imports from Brazil individually, pursuant to Article 3.2, as a pre-condition to cumulatively assessing the effects of dumped imports under Article 3.3;

(d) whether the Panel erred in finding that Exhibit EC-12 was properly before it for purposes of assessing the European Commission's evaluation of the injury factors listed in Article 3.4 of the *Anti-Dumping Agreement*, and, in particular, whether, in so finding, the Panel:

(i) failed to assess whether the European Commission's establishment of the facts was proper under Article 17.6(i) of the *Anti-Dumping Agreement*; and

(ii) incorrectly interpreted the requirements of Articles 3.1 and 3.4 of the *Anti-Dumping Agreement*;

(e) whether the Panel erred in finding that the European Communities did not act inconsistently with Articles 6.2 or 6.4 of the *Anti-Dumping Agreement* by failing to disclose to interested parties during the anti-dumping investigation the information on the injury factors listed in Article 3.4 that is contained in Exhibit EC-12;

(f) whether the Panel erred in finding that the European Communities did not act inconsistently with Article 3.4, in respect of the injury factor "growth"; and

(g) whether the Panel erred in finding that the European Communities did not act inconsistently with Article 3.5 of the *Anti-Dumping Agreement* in the assessment of the causal relationship between injury and the dumped imports, and, in particular, whether the Panel erred in finding that:

(i) the difference in the cost of production between the Brazilian exporter and the European Communities industry was not a "known factor[ ] other than the dumped imports which at the same time [was] injuring the domestic industry"; and

(ii) the causality methodology applied in this investigation, which did not include an examination of the collective impact of other known causal factors, did not attribute the injuries caused by those other factors to the dumped imports.

IV. Devaluation of the Brazilian Real During the Period of Investigation: Article VI:2 of the GATT 1994 and Article 1 of the *Anti-Dumping Agreement*

65. Brazil claims that the European Communities acted inconsistently with Article VI:2 of the GATT 1994 and Article 1 of the *Anti-Dumping Agreement* by making its dumping determination on the basis of the data from the entire one-year period of investigation ("POI"), including the period prior to the devaluation of the Brazilian Real. In resolving this claim, we will address Brazil's arguments that:

(a) Article VI:2 of the GATT 1994 and Article 1 of the *Anti-Dumping Agreement* compel the selection of a particular methodology under Article 2.4.2 of the *Anti-Dumping Agreement*; and

(b) Article 2.4.2 permits a comparison of normal value and export price based on data solely from a subset of the POI.[44]

66. We recall that, in its examination of whether there was dumping by the Brazilian exporter under investigation, the European Commission conducted its examination using a POI of one year from 1 April 1998 to 31 March 1999.[45] The Brazilian Real was devalued by 42 percent towards the end of this period in January 1999.[46] Using the data from the *entire* one-year POI, and making a comparison of weighted average normal values with weighted average export prices for the entire period, the European Commission found a dumping margin for the Brazilian exporter of 34.8 percent.[47]

67. Brazil claimed before the Panel that the European Commission's dumping determination was based on an inappropriate comparison of normal value and export prices. Brazil asserted that

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[44]Brazil appeals "the Panel's finding that the EC could not have based its dumping analysis on the export prices relating to the period after the devaluation only." (Notice of Appeal, p. 2, attached as Annex 1 to this Report) This finding, according to Brazil, is inherent in the Panel's view that "an investigating authority would generally be precluded from limiting its dumping analysis to a selective subset of that data from only a temporal sub-segment of the [POI]." (Panel Report, para. 7.104)

[45]Panel Report, para. 2.3. We note that the European Commission's selection of the POI from 1 April 1998 to 31 March 1999 is not challenged by Brazil.

[46]*Ibid*., para. 2.4.

[47]Commission Regulation (EC) No 449/2000 of 28 February 2000, imposing a provisional anti-dumping duty on imports of malleable cast iron tube or pipe fittings originating in Brazil, the Czech Republic, Japan, the People's Republic of China, the Republic of Korea and Thailand and accepting an undertaking offered by an exporting producer in the Czech Republic, published in the Official Journal of the European Communities, 29 February 2000, L-series, No. 55 ("Provisional Regulation"), recital 31; Council Regulation (EC) No 1784/2000 of 11 August 2000, imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain malleable cast iron tube or pipe fittings originating in Brazil, the Czech Republic, Japan, the People's Republic of China, the Republic of Korea and Thailand, published in the Official Journal of the European Communities, 18 August 2000, L-series, No. 208 ("Definitive Regulation"), recitals 62-63.

Article VI:2 of the GATT 1994 permits imposition of anti-dumping duties "only against and in order to offset *present* dumping".[48] According to Brazil, the "mechanical approach"[49] of the European Commission, in using export price data from the *entire* POI to make a weighted average-to-weighted average comparison, "however compatible with the technical requirements of the *Anti-Dumping Agreement*"[50], resulted in a dumping determination that did not accurately reflect whether dumping existed *in the present*. Because the devaluation of the Real had eliminated dumping by the Brazilian exporter, Brazil argued, the European Commission was obligated to compare normal values with export prices solely from the post-devaluation period.[51]

68. When evaluating Brazil's claim, the Panel first examined the requirements imposed by the *Anti-Dumping Agreement* with respect to the methodology to be employed by an investigating authority in comparing normal value with export prices. The Panel noted that two methodologies are prescribed in the first sentence of Article 2.4.2, either of which is "generally" to be used when comparing normal value and export price.[52] The first sentence of Article 2.4.2 provides:

> 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.

The Panel found as follows:

> Either of these methodologies would seem to require, in general, that data *throughout* the entire investigation period would necessarily consistently be taken into account. That is, an investigating authority would generally be precluded from limiting its dumping analysis to a selective subset of that data from only a temporal sub-segment of the [POI].[53] (original emphasis)

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[48]Panel Report, para. 7.87, quoting Brazil's second submission to the Panel, para. 27. (original emphasis) Brazil also claimed that the European Communities acted inconsistently with the Article 1 of the *Anti-Dumping Agreement*, as a consequence of its failure to fulfil its obligation under Article VI:2 of the GATT 1994. (Request for the Establishment of a Panel, WT/DS219/2, 8 June 2001, reproduced in Panel Report, Section IX, p. 120)

[49]Panel Report, para. 7.103, quoting Brazil's second submission to the Panel, para. 31.

[50]*Ibid*., para. 7.106, quoting Brazil's second submission to the Panel, para. 33.

[51]*Ibid*., para. 7.103-7.104.

[52]*Ibid*., para. 7.104. A third methodology, prescribed in the second sentence of Article 2.4.2, is put forward by Brazil as the methodology the European Commission should have employed in this investigation. See *infra*, paras. 71-72.

[53]Panel Report, para. 7.104.

69. The Panel rejected Brazil's argument that the methodology selected by the European Commission in this investigation "defeat[ed] the 'object and purpose'"[54] of the *Anti-Dumping Agreement*, because the Panel did not find the obligation claimed by Brazil in the text:

> [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.[55] (footnotes omitted)

70. Brazil's arguments on appeal are nuanced somewhat differently from those advanced before the Panel. On appeal Brazil identifies Article VI:2 of the GATT 1994, and specifically, the phrase "[i]n order to offset or prevent dumping", as the source of the obligation allegedly breached by the European Communities with respect to the selection of the appropriate methodology prescribed by Article 2.4.2 of the *Anti-Dumping Agreement*.[56] Brazil emphasizes that, from the phrase "[i]n order to offset or prevent dumping" contained in Article VI:2, there flows an obligation for investigating authorities to "anticipate the level of anti-dumping duty that is strictly necessary to prevent dumping in the future [by making] a *reasonable assumption* for the future on the basis of the data collected in the [POI]."[57] In Brazil's view, only the export price data from the post-devaluation period within the POI could have formed the basis for a "reasonable assumption" as to what level of duty was necessary "*to prevent* future dumping" in this case.[58] The European Commission should therefore have relied solely on the post-devaluation export prices in making its dumping determination. By failing to do so, Brazil argues, the European Communities acted inconsistently with its obligation under Article VI:2 of the GATT 1994. Brazil acknowledges that Article 2.4.2 of the *Anti-Dumping Agreement* provides an investigating authority with discretion to select from among the three comparison methodologies prescribed in that provision. Such discretion, however, is subject in Brazil's view to the basic obligation under Article VI:2 of the GATT 1994 to impose duties only when necessary to "offset or prevent dumping".[59] Brazil argues that in order to arrive at a "reasonable assumption for the future",

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[54]Panel Report, para. 7.106, quoting Brazil's second submission to the Panel, para. 33.

[55]*Ibid*., para. 7.106.

[56]Brazil's appellant's submission, para. 54.

[57]*Ibid*., para. 58. (original emphasis)

[58]*Ibid*., para. 59. (original emphasis)

[59]Brazil's response to questioning at the oral hearing.

an investigating authority is *compelled* to select, among the three comparison methodologies prescribed in Article 2.4.2, the one that is most appropriate to prevent future dumping.[60] In particular, Brazil argued during the oral hearing that Article VI:2 required the European Commission to "choose among the three comparison methodologies foreseen by Article 2.4.2 [of the *Anti-Dumping Agreement*], the one that best takes into account the disappearance of any previous dumping after the devaluation of the Brazilian Real."[61]

71. In this case, Brazil finds that methodology in the second sentence of Article 2.4.2. The second sentence of Article 2.4.2 provides:

> 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.

72. Brazil submits that, contrary to the Panel's legal interpretation of Article 2.4.2, this sentence explicitly recognizes that export prices that "differ significantly" in a particular time-period within the POI may need to be examined on their own. Thus, in the light of the aforementioned obligation in Article VI:2, the European Commission was *required* to perform its dumping determination in this case by comparing weighted-average normal values (based on data from the entire one-year POI) with prices of individual export transactions from the time within the POI *subsequent* to the devaluation of the Real.[62] Brazil submits that such a comparison, based on export price data solely from the *post-devaluation time-period* within the POI, is specifically permitted by the second sentence of Article 2.4.2. Thus, according to Brazil, because the European Commission performed a weighted average-to-weighted average comparison based on data from the entire POI (specified in the first sentence of Article 2.4.2), instead of comparing weighted average normal value with post-devaluation export transactions (permitted by the second sentence of Article 2.4.2), the European Communities acted inconsistently with the obligation, contained in Article VI:2 of the GATT 1994, to impose anti-

[60]Brazil's response to questioning at the oral hearing.

[61]Brazil's statement at the oral hearing.

[62]Brazil does not object to the weighted average calculation using the data from the *entire* POI for *normal values* because, according to Brazil, the devaluation had not affected the normal values. (Brazil's appellant's submission, footnote 8 to para. 52) For the purpose of *export prices*, however, export transactions preceding the devaluation should have been excluded from the data set because, according to Brazil, the devaluation constituted a "fundamental and lasting change in the trading conditions of Brazilian exports." (Brazil's statement at the oral hearing)

dumping duties only when it is necessary "to offset or prevent dumping".[63] Furthermore, in Brazil's view, this violation of Article VI:2 of the GATT 1994 leads to a consequential violation of Article 1 of the *Anti-Dumping Agreement*[64], which provides that "[a]n anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994".[65] We note that Brazil does not characterize the error of the European Communities on this issue as a violation of Article 2.4.2 *per se*.

73. The European Communities rejects Brazil's challenge, under Article VI:2 of the GATT 1994, to the European Commission's use of a weighted average-to-weighted average comparison of normal value and export prices on the basis of all data from the one-year POI. According to the European Communities, Article 2 of the *Anti-Dumping Agreement*, rather than Article VI:2 of the GATT 1994, establishes the rules for an objective and unbiased dumping determination to be made by an investigating authority.[66] The European Communities submits that its authorities have complied with the requirements of the *Anti-Dumping Agreement* by using all data from the POI, as contemplated by Article 2, and have thereby ensured objectivity in arriving at the dumping determination in this investigation.[67] The European Communities further argues that, consistent with the emphasis on objectivity rather than subjectivity in Article 2, Article 2.4.2 does not permit an investigating authority to select among export transactions in making the margin calculation for the purposes of a dumping determination.[68]

74. Brazil's claim on appeal thus raises two related issues. 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

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[63]Brazil's response to questioning at the oral hearing.

[64]*Ibid*.

[65]Article 1 of the *Anti-Dumping Agreement* in its entirety provides:

> An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement. The following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations. (footnote omitted)

[66]European Communities' appellee's submission, paras. 10 and 12.

[67]*Ibid*., paras. 15-17.

[68]*Ibid*., paras. 21-22.

value for the entire POI with prices of individual export transactions from the post-devaluation period of the POI.

75. We begin our analysis with the text of the provision cited as the source of the obligation claimed by Brazil. Article VI:2 of the GATT 1994 provides, in relevant part:

> 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.

76. Brazil focuses exclusively on the phrase "[i]n order to offset or prevent dumping" to substantiate its claimed obligation that a dumping determination must be made on the basis of whether dumping will occur in the future. As noted above, Brazil seeks to import a "reasonable assumption for the future" standard into Article VI:2 of the GATT 1994 and, consequently, into Article 2.4.2 of the *Anti-Dumping Agreement*. We fail to see how Article VI:2, by stating that the purpose of anti-dumping duties is "to offset or prevent dumping", imposes upon investigating authorities an obligation to select any particular methodology for comparing normal value and export prices under Article 2.4.2 of the *Anti-Dumping Agreement* when calculating a dumping margin. As we see it, the obligation that flows from the purpose of "offset[ing] or prevent[ing] dumping" is clear from the text of Article VI:2 itself, namely, that an anti-dumping duty shall "not [be] greater in amount than the margin of dumping in respect of [the dumped] product".[69] This limitation of anti-dumping duties to the margin of dumping is the only requirement imposed on investigating authorities by the first sentence of Article VI:2.[70] The precise rules relating to the determination as to whether there is dumping and, if dumping exists, how the dumping margin is to be calculated, are set out, not in Article VI:2 of the GATT 1994, but rather in Article 2 of the *Anti-Dumping Agreement*, which is the agreement on the implementation of Article VI of the GATT 1994. In our view, therefore, Article 2 is a more appropriate source than the opening phrase "[i]n order to offset or prevent dumping" of Article VI:2, for ascertaining specifically what is required for the proper determination of dumping by an investigating authority. We are unable to see an obligation flowing from the opening phrase of Article VI:2 of the GATT 1994 to Article 2 of the *Anti-Dumping Agreement* that the determination

[69]Indeed, to accept Brazil's reading of an obligation in Article VI:2 that limits an investigating authority's selection of comparison methodology under Article 2.4.2 "would require us to read into the text words which are simply not there. Neither a panel nor the Appellate Body is allowed to do so." (Appellate Body Report, *India – Quantitative Restrictions*, para. 94)

[70]That the amount of an anti-dumping duty shall not exceed the margin of dumping, and that it should preferably be less than the margin of dumping if such lesser duty would be adequate to remove the injury to the domestic industry, are further stipulated in Articles 9.1, 9.3, and 9.3.2 of the *Anti-Dumping Agreement*. This obligation to limit the amount of the anti-dumping duty is also reflected in a different manner with respect to price undertakings in Article 8.1.

of dumping must be based on the standard of a "reasonable assumption for the future", or that this, in turn, would require that a particular methodology be chosen under Article 2.4.2.

77. Thus, the rules for ensuring that an anti-dumping duty is imposed only on the basis of a proper determination that there is dumping as defined in Article VI:1 of the GATT 1994 are set out in Article 2 of the *Anti-Dumping Agreement*. Article 2 sets forth, in great detail, the rules governing various aspects of an investigating authority's dumping determination. That provision defines dumping, details the precise comparison to be made between prices, provides flexibility for exporters to respond in their pricing to fluctuations in exchange rates, and stipulates the data to be relied upon in performing many of the necessary calculations in an anti-dumping investigation. We are of the view that, if negotiators had intended to include in the covered agreements an obligation for an investigating authority to select a particular methodology when comparing normal value and export prices, such an obligation would be found in Article 2 itself and not, as Brazil argues, in Article VI:2 of the GATT 1994.

78. We also consider that certain anomalous results would flow from Brazil's assertion that when a major change, such as in this case a steep and lasting devaluation, occurs at a late stage of the POI, the dumping determination should be confined to and based on the data following that major change. If such a change were to take place at the very end of the POI, Brazil's approach would imply that the determination would have to be based on the data of a very short period.[71] By the same logic, if the major change were to occur after the end of the POI, but before the provisional determination of the investigating authority (in this case, for example, after 1 April 1999 but before 28 February 2000), the investigating authority, under Brazil's approach, should ignore the analysis based on the data of the entire POI and review or reassess the determination on the basis of post-POI data. Indeed, this could imply an obligation on the investigating authority to select a new POI starting from the time of the major change.[72]

79. We can also foresee the opposite situation. Suppose, for example, that the major change is not devaluation, but revaluation or appreciation of the currency of the exporting country. Suppose further that the investigating authority finds no dumping on the basis of the data pertaining to the first

[71]Although in this case Brazil asserts that the devaluation had affected only the "export price" and not the "normal value", we can visualize situations where a devaluation may affect both the export price and the normal value, if not immediately, after a time-lag. This would mean that the calculation of both normal value and export price would have to be based on data pertaining to a very short period of the POI.

[72]The European Communities pointed to these implications of Brazil's argument during the oral hearing. (European Communities' statement at the oral hearing)

three quarters of the POI, but the revaluation in the last quarter has resulted in a situation where only sales in that last quarter were made at less than normal value. Brazil's assertion in this case could open up the possibility of the investigating authority making an affirmative dumping determination based solely on the data of the last quarter of the POI.

80. Permitting such discretionary selection of data from a period of time within the POI would defeat the objectives underlying investigating authorities' reliance on a POI for the purposes of a dumping determination.[73] As the Panel correctly noted, the POI "form[s] the basis for an objective and unbiased determination by the investigating authority."[74] Like the Panel and the parties to this dispute, we understand a POI to provide data collected over a sustained period of time, which period can allow the investigating authority to make a dumping determination that is less likely to be subject to market fluctuations or other vagaries that may distort a proper evaluation.[75] We agree with the Panel that the standardized reliance on a POI, although not fixed in duration by the *Anti-Dumping Agreement*, assures the investigating authority and exporters of "a consistent and reasonable methodology for determining present dumping", which anti-dumping duties are intended to offset.[76] In contrast to this consistency and reliability, Brazil's approach would introduce a significant level of subjectivity on the part of the investigating authority to determine when data from a subset of the POI may be a reliable indicator of an exporter's future pricing behaviour. As the European Communities points out, the "broad judgmental role" accorded investigating authorities by Brazil's approach is not consistent with the detailed nature of the rules and obligations of the *Anti-Dumping Agreement* governing various aspects of the dumping determination.[77]

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[73]Numerous provisions in the *Anti-Dumping Agreement* refer to the concept of a "period of investigation". (Panel Report, para. 7.100) See for example, Article 2.2.1, Article 2.2.1.1, footnote 6 to Article 2.2.1.1 and Article 2.4.1. The *Anti-Dumping Agreement* does not establish, however, what time-period must be utilized in every case for the selection of data to be relied upon in making a dumping determination. A recent recommendation adopted by the World Trade Organization Committee on Anti-Dumping Practices recognizes that the *Anti-Dumping Agreement* does not prescribe a specific period of investigation, but recommends "[a]s a general rule" that "the period of data collection for dumping investigations normally should be twelve months, and in any case no less than six months, ending as close to the date of initiation as is practicable". (Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations, G/ADP/6, 16 May 2000) (footnote omitted)

[74]Panel Report, para. 7.101.

[75]Brazil states that it "does not contest the role of the [POI] for the purposes of the dumping determination." It further "agrees with the Panel that the data relating to a historical period of investigation should be used." (Brazil's appellant's submission, para. 46)

[76]Panel Report, para. 7.102.

[77]European Communities' statement at the oral hearing.

81. In our view, the *Anti-Dumping Agreement* takes into account the possibility of such major changes occurring at a late stage of the POI, or even after the POI, not by allowing investigating authorities to pick and choose a subset of data or sub-periods of a POI according to their subjective considerations, but by review mechanisms. Article 11.1 of the *Anti-Dumping Agreement* is categorical 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." In furtherance of this general rule, Article 11.2 requires investigating authorities in certain circumstances, including at the request of an interested party after a reasonable period of time, to "review the need for the continued imposition of the duty". The *Anti-Dumping Agreement*, in sub-paragraphs 1 through 3 of Article 9.3, also lays down that the anti-dumping duty collected shall at no point in time exceed the dumping margin and that any such excess shall be refunded. Therefore, if a major change that occurs during or after the POI has reduced the margin of dumping or eliminated the dumping altogether, these provisions of the *Anti-Dumping Agreement* ensure that the exporter's legitimate interests are safeguarded.[78]

82. Brazil has also made a factual assertion that, the devaluation of January 1999 being of the order of 42 percent, and the dumping margin found by the investigating authorities being of the order of 34.8 percent, the devaluation had eliminated dumping altogether. This is based on the assumption that the Brazilian exporter's domestic price (in Reals) and export price (in the currency of the importing country) would remain the same after the devaluation. Firstly, we note that neither the Panel nor the European Communities has made a factual finding that the devaluation of the Brazilian Real had eliminated dumping. Secondly, it is not inherent or automatic that the consequence of a steep devaluation is the elimination of dumping. The consequences of a devaluation in the short and long terms on the normal value and export prices of an exporter depend on a number of factors, including, in particular, the pricing behaviour of the exporter post-devaluation. These will inevitably vary from case to case. The lasting impact of a devaluation will therefore have to be determined on the basis of objective and reliable post-devaluation data and not on the basis of *a priori* assumptions.

83. Lastly, we observe that Brazil has not challenged, either before the Panel or before us, that the European Communities acted inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement* in its

[78]During the oral hearing, Brazil stated that it was not contesting the Panel's statement that "the Agreement provides mechanisms to address situations where dumping decreases or terminates following an affirmative determination of dumping on the basis of historical data from a recent past [POI], for example, in Articles 9.3 (full or partial refund of duties paid) and 11 (review)." (Panel Report, para. 7.106) However, Brazil contends that the availability of a review or refund mechanism cannot be a ground for allowing the imposition of an anti-dumping duty that is *ab initio* inconsistent with the obligation Brazil claims to exist in Article VI:2 of the GATT 1994. (Brazil's response to questioning at the oral hearing)

selection of the appropriate methodology to compare normal value and export prices.[79] As noted earlier, Brazil's claim rests on the argument that there is a fundamental obligation flowing into Article 2.4.2 from the phrase "[i]n order to offset or prevent dumping" contained in Article VI:2 of the GATT 1994, and that this obligation compelled the European Communities to choose in this particular case the comparison methodology contained in the second sentence of Article 2.4.2, rather than one of the methodologies contained in the first sentence of that Article. We are therefore not called upon in this appeal to express any findings on the consistency of the European Communities' methodology selection with the requirements of Article 2.4.2. Furthermore, with respect to Brazil's challenge to the Panel's interpretation of Article 2.4.2, our finding that the obligation claimed by Brazil does not exist in Article VI:2 of the GATT 1994 resolves Brazil's appeal with respect to the comparison methodology employed by the European Commission in its dumping determination. As such, it is not necessary for us to rule on whether, under Article 2.4.2 of the *Anti-Dumping Agreement*, the European Commission "could not have based its dumping analysis on the export prices relating to the period after the devaluation only."[80]

84. In the light of the preceding analysis, we uphold the finding of the Panel, in paragraphs 7.106 and 7.108 of the Panel Report, that the European Communities did not act inconsistently with its obligations under Article VI:2 of the GATT 1994 in imposing anti-dumping duties in this case following the devaluation of the Brazilian Real at the beginning of the fourth quarter of the POI. Given this finding, and because Brazil's allegation as to the European Communities' failure to comply with Article 1 of the *Anti-Dumping Agreement* was premised entirely on a finding of inconsistency with respect to Article VI:2, we also uphold the Panel's finding, in paragraphs 7.107 and 7.108 of the Panel Report, that the European Communities did not act inconsistently with Article 1 of the *Anti-Dumping Agreement.*

[79]Brazil did claim before the Panel that the European Communities had acted inconsistently with its obligations under Article 2.4.2 on the basis of the European Commission's "zeroing" of negative dumping margins calculated for certain Brazilian product types. (Panel Report, para. 7.209) The Panel found the European Commission's application of its "zeroing" methodology to be inconsistent with the obligation in the first sentence of Article 2.4.2 to "consider the weighted average of 'all comparable export transactions'." (*Ibid*., para. 7.216, quoting Article 2.4.2) This particular Article 2.4.2 challenge before the Panel, however, did not put in question the European Commission's selection of the methodology used in this investigation.

[80]Notice of Appeal, p. 2, attached as Annex 1 to this Report. The European Communities agreed with the Panel's interpretation of Article 2.4.2, arguing that the "specific purpose" of the second sentence of Article 2.4.2 is "to address instances of so-called 'targeted dumping'". (European Communities' statement at the oral hearing)

V. Data for SG&A and Profits: Article 2.2.2 of the *Anti-Dumping Agreement*

85. We turn now to examine Brazil's claim that the European Communities acted inconsistently with the chapeau of Article 2.2.2 by relying, in the calculation of constructed normal value, on actual data from "low-volume" sales for purposes of determining the amounts for selling, general and administrative costs ("SG&A") and profits.

86. In the anti-dumping investigation, the European Commission determined that the normal values of certain types of the like product could not be based on the price at which they were sold in the domestic market because of the low quantity of sales in Brazil.[81] The European Commission therefore resorted to constructing normal values for these products in accordance with Article 2.2.[82] When calculating constructed normal value, the European Commission used actual SG&A and profit data from the Brazilian exporter to the extent the data were based on production and sales in the ordinary course of trade.[83] As a result, the actual data relied upon by the European Commission in constructing normal values included data from sales of those types of products deemed to be sold in insufficient quantities for the purpose of deriving normal value.[84]

87. Brazil argued before the Panel that the European Commission's reliance on data from these low-volume sales, already deemed by the European Commission not to "permit a proper comparison" of prices under Article 2.2, was inconsistent with the European Communities' obligation under Article 2.2.2 of the *Anti-Dumping Agreement*. According to Brazil, once the European Commission had found the sales to be of such a low volume that their prices could not be used for determining normal values under Article 2.2, the European Commission was precluded from using data from those same sales to calculate constructed normal value in accordance with Article 2.2.2.

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[81]The European Commission found the Brazilian sales to be in insufficient quantities for determining those sales prices to constitute normal value, based on its standard that only sales in the exporting market of five percent or more of the total sales volume exported to the European Communities would be "sufficiently representative". (Provisional Regulation, recital 22)

[82]*Ibid*., recitals 25 and 36.

[83]Definitive Regulation, recital 31; Provisional Regulation, recitals 26, 27, 36, and 39. See also, Council Regulation (EC) No 384/96 of 22 December 1995, on protection against dumped imports from countries not members of the European Community, published in the Official Journal of the European Communities, 6 March 1996, L-series, No. 56, Article 2(6).

[84]Definitive Regulation, recitals 30-31.

88. The chapeau of Article 2.2.2 provides, in relevant part:

> 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.

89. The Panel found that this text allows investigating authorities to exclude only data from production and sales that were not made in the ordinary course of trade.[85] The Panel then reasoned that, because low-volume sales are included in the "ordinary course of trade", such sales had to be included in the actual data relied upon in the construction of normal value.[86] The Panel therefore found that the European Communities had not acted inconsistently with its obligation under Article 2.2.2 by including data from low-volume sales in constructing normal value.

90. On appeal, Brazil challenges the Panel's legal interpretation of the chapeau of Article 2.2.2 of the *Anti-Dumping Agreement*. Brazil points out that the chapeau of Article 2.2.2 requires the use of *actual* data, but not *all* actual data. Brazil claims that the text of Article 2.2.2 does not compel the use of actual data from sales previously determined by an investigating authority not to "permit a proper comparison" under Article 2.2. Emphasizing that the purpose of Article 2.2.2 is to arrive at a constructed value where normal value could not be based on "unrepresentative" domestic sales prices, Brazil claims that using data from those previously excluded sales would result in a constructed value that is as "unrepresentative" as the domestic sales prices rejected for normal value determination under Article 2.2.[87] Interpreting Article 2.2.2 to permit such a result would render Article 2.2 a nullity.

91. The European Communities argues that while Article 2.2 refers specifically to sales in the ordinary course of trade as well as to low-volume sales, the chapeau of Article 2.2.2 refers only to sales in the ordinary course of trade.[88] The omission of low-volume sales from the chapeau of Article 2.2.2, therefore, must be considered significant and held to have meaning.[89] In addition, the European Communities observes that using actual data from low-volume sales for the construction of normal value, when prices from those sales were rejected for normal value determination under Article 2.2, does not distort constructed normal values, because the sales are weighted differently in

[85]Panel Report, para. 7.137.

[86]*Ibid*., para. 7.138.

[87]Brazil's appellant's submission, para. 89.

[88]European Communities's appellee's submission, para. 56.

[89]*Ibid*., para. 57.

the calculations under the respective provisions.[90] Therefore, in the European Communities' view, actual data from low-volume sales must be included in the calculation of constructed normal value in accordance with the chapeau of Article 2.2.2.

92. 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.

93. We begin our analysis with a review of the provisions that lead to the calculation of constructed normal value. Article 2.1 of the *Anti-Dumping Agreement* identifies a product as "dumped" where the product is introduced into the commerce of another country at "less than its normal value". "Normal value" is understood by virtue of that provision to be the "price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country". Where the price of the product in the home (exporting country) market is not "comparable" to the export price of the like product, Article 2.2 provides alternative bases for deriving "normal value":

> 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.
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> [2] 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 acceptable where the evidence demonstrates that domestic sales at such lower ratio are nonetheless of sufficient magnitude to provide for a proper comparison.

[90] European Communities's appellee's submission, paras. 74-76.

94. 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.

95. 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.

96. Article 2.2.2 establishes, in the following terms, criteria for determining "reasonable amount[s]" for SG&A and profits when calculating constructed normal value pursuant to Article 2.2:

> 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.

97. Examining the text of the chapeau of Article 2.2.2, we observe that this provision imposes a general obligation ("shall") on an investigating authority to use "actual data pertaining to production and sales in the ordinary course of trade" when determining amounts for SG&A and profits. Only "[w]hen such amounts cannot be determined on this basis" may an investigating authority proceed to employ one of the other three methods provided in sub-paragraphs (i)-(iii). In our view, the language of the chapeau indicates that an investigating authority, when determining SG&A and profits under Article 2.2.2, must first attempt to make such a determination using the "actual data pertaining to production and sales in the ordinary course of trade". If actual SG&A and profit data for sales in the ordinary course of trade do exist for the exporter and the like product under investigation, an investigating authority is obliged to use that data for purposes of constructing normal value; it may not calculate constructed normal value using SG&A and profit data by reference to different data or by using an alternative method.

98. As the Panel correctly observed, it is meaningful for the interpretation of Article 2.2.2 that Article 2.2 specifically identifies low-volume sales *in addition to* sales outside the ordinary course of trade.[91] In contrast to Article 2.2, the chapeau of Article 2.2.2 explicitly excludes only sales outside the ordinary course of trade. The absence of any qualifying language related to low volumes in Article 2.2.2 implies that an exception for low-volume sales should not be read into Article 2.2.2. As we explained in *India – Patents (US)*:

> [t]he duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the *Vienna Convention*. But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.[92]

Accordingly, we conclude that a requirement that low-volume sales be excluded from the calculation of SG&A and profits cannot be read into the text of Article 2.2.2.

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[91]Panel Report, para. 7.138.

[92]Appellate Body Report, *India – Patents (US)*, para. 45, quoted in Appellate Body Report, *EC – Bed Linen*, para. 83.

99. We also observe the very detailed nature of the provisions of the *Anti-Dumping Agreement* under Article 2.2 in respect of the calculation of constructed normal value. In comparison with the corresponding provisions in the *Tokyo Round Anti-Dumping Code*[93], the present *Anti-Dumping Agreement* outlines with significantly greater precision the manner in which an investigating authority is to calculate constructed normal value. For example, Article 2.2.1.1 identifies the "records kept by the exporter or producer under investigation" to be the preferred source for cost of production data. Similarly, as discussed, Article 2.2.2 establishes that SG&A and profit data are to be determined on the basis of actual data for production and sales in the ordinary course of trade, and further provides three alternatives (in sub-paragraphs (i)-(iii)) to be followed when such data are unavailable. 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.[94]

100. Brazil rejects this reading of the text, arguing instead that Article 2.2.2 only requires the use of "actual" data in the ordinary course of trade, not *all* data in the ordinary course of trade, and that the purpose of Article 2.2 would be nullified unless data from low-volume sales were excluded from the calculation of constructed normal value.[95] As the European Communities correctly observes[96], we faced a similar interpretive argument when construing another provision of the *Anti-Dumping Agreement* on constructed value in *EC – Bed Linen*. In that case, the relevant provision to be clarified was Article 2.2.2(ii), which provides:

> … When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:
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> …
>
> (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[.]

[93]Articles 2.4-2.6 of the *Tokyo Round Anti-Dumping Code* contained similarly-worded predecessor provisions to the present Articles 2.2-2.4 of the *Anti-Dumping Agreement*. The *Tokyo Round Anti-Dumping Code*, however, did not contain a definition of "ordinary course of trade", or a standard for determining when sales are of such a low volume to warrant resort to constructed normal value, or any detailed instruction on how an investigating authority should derive cost of production, SG&A, and profit data.

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

[95]Brazil's appellant's submission, paras. 81, 83, and 89.

[96]European Communities' appellee's submission, paras. 58-59.

It was argued in that case that the reference to "actual amounts incurred and realized" did not preclude exclusion of sales outside the ordinary course of trade. This reading was put forward as the proper understanding of Article 2.2.2(ii), despite the fact that sales outside of the ordinary course of trade were expressly excluded in the chapeau of Article 2.2.2, but not mentioned in sub-paragraph (ii).[97] We rejected that argument and found as follows:

> There is no basis in Article 2.2.2(ii) for excluding *some* amounts that were actually incurred or realized from the "actual amounts incurred or realized". It follows that, in the calculation of the "weighted average", *all* of "the actual amounts incurred and realized" by other exporters or producers must be included, *regardless* of whether those amounts are incurred and realized on production and sales made in the ordinary course of trade or not.
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> …
>
> The exclusion in the chapeau leads us to believe that, where there is no such explicit exclusion elsewhere in the same Article of the *Anti-Dumping Agreement*, no exclusion should be implied. And there is no such explicit exclusion in Article 2.2.2(ii). Article 2.2.2(ii) provides for an *alternative* calculation method that can be employed precisely when the method contemplated by the chapeau cannot be used. Article 2.2.2(ii) contains its own specific requirements. On their face, these requirements do not call for the exclusion of sales not made in the ordinary course of trade. Reading into the text of Article 2.2.2(ii) a requirement provided for *in the chapeau* of Article 2.2.2 is not justified either by the text or by the context of Article 2.2.2(ii).[98] (original italics; underlining added).

101. We are of the view that our reasoning in *EC – Bed Linen* supports our interpretation in this case. We find it significant that Article 2.2.2 specifies the data to be used by an investigating authority when constructing normal value. The text of that provision excludes actual data outside the ordinary course of trade, but does not exclude data from low-volume sales. The negotiators' express reference to sales outside the ordinary course of trade *and* to low-volume sales in Article 2.2, and the omission of a reference to low-volume sales in the chapeau of Article 2.2.2, confirms our view that low-volume sales are not excluded from the chapeau of Article 2.2.2 for the calculation of SG&A profits. We therefore disagree with Brazil's argument that the absence of the word "all" before the word "actual" in the chapeau of Article 2.2.2, coupled with the rationale for the construction of normal value under Article 2.2, implicitly incorporates an obligation to exclude data from low-volume

[97]Appellate Body Report, *EC – Bed Linen*, paras. 33 and 44.

[98]*Ibid*., paras. 80 and 83.

sales.[99] In our view, where, as in this investigation, low-volume sales are in the ordinary course of trade, an investigating authority does not act inconsistently with the chapeau of Article 2.2.2 by including actual data from those sales to derive SG&A and profits for the construction of normal value.

102. For all these reasons, we uphold the Panel's finding, in paragraphs 7.138 and 7.139 of the Panel Report, that the European Communities did not act inconsistently with Article 2.2.2 of the *Anti-Dumping Agreement* by including actual data from "low-volume" sales in determining the amounts for SG&A and profits for the construction of normal value.

VI. Cumulation: Articles 3.2 and 3.3 of the *Anti-Dumping Agreement*

103. We next examine Brazil's claim that the European Communities acted inconsistently with Articles 3.2 and 3.3 of the *Anti-Dumping Agreement* by cumulatively assessing the effects of dumped imports from several countries, including Brazil, without analyzing the volume and prices of dumped imports from Brazil individually, pursuant to Article 3.2.

104. The Panel began its analysis by observing that the "threshold issue" it was required to determine in addressing Brazil's claim was whether an investigating authority is permitted to conduct a cumulative assessment after having concluded that the conditions of Article 3.3 are fulfilled, or whether the investigating authority must first conduct an assessment of imports from each individual country in order to determine whether it may conduct a cumulative assessment at all.[100] The Panel found, on the basis of the text in Article 3.3, and citing contextual support in Articles 3.4 and 3.5, that the conditions identified in Article 3.3 are the *sole* conditions that must be satisfied by an investigating authority in order to undertake a cumulative assessment of the effects of dumped imports.[101] In particular, with respect to Brazil's allegation that an investigating authority must first consider whether country-specific import volumes have significantly increased before cumulating them, the Panel found as follows:

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[99]In this context, we note that Brazil further argues, by way of an example, that the Panel's interpretation of the chapeau of Article 2.2.2 implies that a constructed normal value would be identical to a normal value that is based on low-volume sales prices under Article 2.2. As a result, in Brazil's view, Article 2.2 is rendered ineffective, contrary to the principles of treaty interpretation in public international law. (Brazil's appellant's submission, paras. 89-90) We note, as does the European Communities, that the example posited by Brazil is premised on certain factual assumptions. (European Communities' appellee's submission, paras. 63-65) We are not convinced that these factual assumptions necessarily hold true for most anti-dumping investigations. We are of the view that the *possibility* of the outcome suggested by Brazil, based on a certain set of circumstances, cannot overcome the specific text of the chapeau of Article 2.2.2.

[100]Panel Report, para. 7.231.

[101]*Ibid*., paras. 7.234-7.235.

> [T]he 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.[102]

105. Brazil argues on appeal that the volume and price analyses prescribed by Article 3.2 must first be performed on a country-by-country basis as a pre-condition to cumulative assessment under Article 3.3. According to Brazil, only if such a country-specific analysis has identified the imports of the particular country as a likely source of negative effects on the domestic industry, is it permissible under Article 3.3 for an investigating authority to cumulatively assess the negative effects of all imports likely to have caused injury.[103] Because Article 3.3 does not expressly permit an investigating authority to "derogate" from the required analyses in Article 3.2, Brazil argues that such a derogation should not be read into the *Anti-Dumping Agreement*.[104] Brazil observes further that Article 3.3 only permits cumulative assessment of the "effects" of dumped imports. In Brazil's view, 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."[105] Brazil therefore argues that import volumes and prices cannot be cumulated under Article 3.3.[106] 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.[107]

106. The European Communities submits that the text of Article 3.3 refers only to negligible import volumes from each country and that, therefore, no further analysis of country-specific import volumes is required before cumulation is permitted.[108] The European Communities further argues that Brazil's alleged distinction between "factors" and "effects" cannot be reconciled with the text of various provisions of Article 3. In particular, the European Communities notes that Article 3.5 refers to the "effects" set forth in Article 3.2, which in turn prescribes analyses of volume and prices.[109] The European Communities also explains that Article 3.4 requires an examination of the "impact" of the

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[102]Panel Report, para. 7.234.

[103]Brazil's statement at the oral hearing.

[104]Brazil's appellant's submission, para. 105.

[105]Brazil's statement at the oral hearing.

[106]Brazil's appellant's submission, para. 99.

[107]*Ibid*., paras. 109 and 113.

[108]European Communities' appellee's submission, para. 88.

[109]*Ibid*., para. 85.

dumped imports (which the European Communities considers to be synonymous with the "effects" of the dumped imports) on the basis of an evaluation of fifteen "factors". This shows, according to the European Communities, that "effects" and "factors" are treated in the same way in Article 3.[110] The European Communities asserts that the legal interpretation provided by the Panel properly recognizes that a country-by-country examination of import volumes would be inconsistent with the object and purpose of cumulation, which is to permit investigating authorities to impose anti-dumping duties on dumped imports from several countries if they cause injury.[111]

107. 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.

108. We begin our analysis with the text of Article 3.3, which is the only provision in the *Anti-Dumping Agreement* that specifically addresses the practice of cumulation.[112] That Article provides:

> 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.

109. 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

[110]European Communities' appellee's submission, para. 83.

[111]European Communities' response to questioning at the oral hearing.

[112]The *Tokyo Round Anti-Dumping Code* contained no provision regarding cumulation, and the consistency of the practice of cumulation with the Code was an issue of disagreement. Article 3.3 of the *Anti-Dumping Agreement* clarifies the permissibility of the practice of cumulation.

(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.[113]

110. We find no basis in the text of Article 3.3 for Brazil's assertion that a country-specific analysis of the potential negative effects of volumes and prices of dumped imports is a pre-condition for a cumulative assessment of the effects of all dumped imports. Article 3.3 sets out expressly the conditions that must be fulfilled before the investigating authorities may cumulatively assess the effects of dumped imports from more than one country. There is no reference to the country-by-country volume and price analyses that Brazil contends are pre-conditions to cumulation. In fact, Article 3.3 expressly requires an investigating authority to examine country-specific volumes, not in the manner suggested by Brazil, but for purposes of determining whether the "volume of imports from each country is not negligible".

111. Nor do we find a basis for Brazil's argument in Article 3.2, which reads:

> 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.

In stipulating how to undertake the analyses of volume and prices, Article 3.2 refers consistently to the "dumped imports". There is no indication in the text of Article 3.2 that the analyses of volume

[113]Brazil does not contest the fulfilment by the European Commission in this investigation of the Article 3.3 conditions relating to dumping margins and volume negligibility. (Panel Report, footnote 218 to para. 7.230) Brazil also does not appeal the findings of the Panel with regard to Brazil's challenge to the European Commission's evaluation of the conditions of competition. (*Ibid.*, paras. 7.237-7.266) Therefore, no challenge has been made before us to the European Commission's conclusion that the conditions of Article 3.3 had been met.

and prices must be performed on a country-by-country basis where an investigation involves imports from several countries.[114]

112. Examining the general structure of Article 3, we note that the requirement to analyze volumes and prices under Article 3.2 stems from Article 3.1, which we have said is "an overarching provision that sets forth a Member's fundamental, substantive obligation" with respect to the determination of injury and that "informs the more detailed obligations in [the] succeeding paragraphs" of that provision.[115] Article 3.1 provides:

> A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both *(a)* the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and *(b)* the consequent impact of these imports on domestic producers of such products.

Here again we find that the text of this provision refers to the "dumped imports" and gives no indication that the analyses of volume and prices of the "dumped imports" must be country-specific in multiple-country investigations. Article 3.4, which contains requirements also stemming from Article 3.1 and that relate to the examination of the impact of the "dumped imports" on the domestic industry, is equally consistent in referring broadly to the "dumped imports". Therefore, in our view, Brazil's argument that country-specific analyses of volumes and prices are a pre-condition for cumulation in multiple-country investigations, has no basis in either the text or the immediate context of Articles 3.2 and 3.3.

113. We also believe that cumulation without a country-specific analysis does not result in a "derog[ation]" of Article 3.2, as Brazil has asserted.[116] We wish to emphasize that Article 3.2 plays a central role in the determination of injury and is a necessary step in any anti-dumping investigation.[117]

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[114]Brazil's thesis is further predicated on the assumption that if no significant increase in dumped imports (either in absolute terms or relative to production and consumption in the importing Member) were found originating from a specific country under Article 3.2, then those imports would have to be excluded from cumulative assessment under Article 3.3. (Brazil's response to questioning at the oral hearing) However, we find no support for this argument in the text of Article 3.2 itself: significant increases in imports have to be "consider[ed]" by investigating authorities under Article 3.2, but the text does not indicate that in the absence of such a significant increase, these imports could not be found to be causing injury.

[115]Appellate Body Report, *Thailand – H-Beams*, para. 106.

[116]Brazil's appellant's submission, para. 105.

[117]In this regard, we recall our statement in *EC – Bed Linen (Article 21.5 – India)*, that "the right under Article 3.3 to conduct anti-dumping investigations with respect to imports from different exporting countries does not absolve investigating authorities from the requirements of paragraphs 1 and 2 of Article 3 to determine the volume of dumped imports on the basis of 'positive evidence' and an 'objective examination'." (Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 145)

As the Panel correctly observed, it is possible for the analyses of volume and prices envisaged under Article 3.2 to be done on a cumulative basis, as opposed to an individual country basis, when dumped imports originate from more than one country.[118]

114. We now turn to Brazil's argument based on the fine distinction that it sees between "factors" and "effects". According to Brazil, volumes and prices are "factors" that cause the "effects" envisaged by Article 3.4, but they cannot be considered in themselves as *effects* of imports which may be cumulatively assessed under Article 3.3.[119]

115. We are unable to see such a fine distinction in Article 3 of the *Anti-Dumping Agreement*. First, we cannot overlook the fact that Article 3.5 refers to the "*effects* of dumping, as set forth in paragraphs 2 and 4". (emphasis added) This reference directly contradicts Brazil's contention that volumes and prices are contemplated solely as "factors" under Article 3.2.[120] In addition, Article 3.1 and the succeeding paragraphs of Article 3 clearly indicate that volume and prices, and the consequent impact on the domestic industry, are closely interrelated for purposes of the injury determination. These provisions, moreover, do not suggest that a strict labelling of volume and prices as "factors", as opposed to "effects", is intended, because the terms "factors" and "effects" appear to be used interchangeably in Article 3. For example, Article 3.4 uses the term "factors" when referring to variables that must be examined in the context of the examination of the "impact" of the dumped imports on the domestic industry, and Brazil recognizes that there is no distinction between the terms "impact" and "effects" as they are used in Article 3.[121] Therefore, the text of Article 3 does not support Brazil's contention that volume and prices are deemed exclusively to be "factors", and not "effects", for the purposes of Article 3.3 of the *Anti-Dumping Agreement*.

116. The apparent rationale behind the practice of cumulation confirms our interpretation that both volume and prices qualify as "effects" that may be cumulatively assessed under Article 3.3. A cumulative analysis logically is premised on a recognition that the domestic industry faces the impact of the "dumped imports" as a whole and that it may be injured by the total impact of the dumped

[118]Panel Report, para. 7.231.

[119]Brazil's statement at the oral hearing.

[120]European Communities' appellee's submission, para. 85.

[121]We understand that the participants in this appeal do not dispute that the determination of the "impact" of dumped imports on the domestic industry must be done on a collective basis taking the dumped imports as a whole. We also understand that they consider the words "impact" and "effects" occurring in Article 3 to be synonyms or equivalents.

imports, even though those imports originate from various countries. If, for example, the dumped imports from some countries are low in volume or are declining, an exclusively country-specific analysis may not identify the causal relationship between the dumped imports from those countries and the injury suffered by the domestic industry. The outcome may then be that, because imports from such countries could not *individually* be identified as causing injury, the dumped imports from these countries would not be subject to anti-dumping duties, even though they are in fact causing injury. In our view, therefore, by expressly providing for cumulation in Article 3.3 of the *Anti-Dumping Agreement*, the negotiators appear to have recognized that a domestic industry confronted with dumped imports originating from several countries may be injured by the cumulated effects of those imports, and that those effects may not be adequately taken into account in a country-specific analysis of the injurious effects of dumped imports. Consistent with the rationale behind cumulation, we consider that changes in import volumes from individual countries, and the effect of those country-specific volumes on prices in the importing country's market, are of little significance in determining whether injury is being caused to the domestic industry by the dumped imports as a whole.[122]

117. By seeking to place additional obligations on investigating authorities beyond those specified in Article 3.3, namely, that investigating authorities first determine *on a country-specific basis* the existence of significant increases in dumped imports, and their potential for causing injury to the domestic industry, Brazil ignores the role of cumulation in ensuring that each of the multiple sources of "dumped imports" that cumulatively contribute to a domestic industry's material injury be subject to anti-dumping duties.[123] We therefore agree with the Panel that Brazil's interpretation of the relationship between Articles 3.2 and 3.3 "would undermine the very concept of a cumulative analysis."[124]

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[122]We do not suggest that trends in country-specific volumes are always irrelevant for an investigating authority's consideration. For example, such trends may be relevant in the context of an investigating authority's evaluation of the conditions of competition between imported products, and between imported products and the domestic like product, as provided for in Article 3.3(b). Brazil raised the relationship between import volumes and conditions of competition as the basis for a claim under that provision before the Panel. (Panel Report, para. 7.252) The Panel found that the divergences in volume trends between Brazilian imports and those of other countries did not compel a finding by the European Commission that the effects of Brazilian imports could not be appropriately assessed on a cumulated basis with the effects of imports from other countries. (*Ibid*., paras. 7.253-7.256) Brazil has not appealed the Panel's finding in this respect.

[123]In any event, a determination of import volumes on a country-by-country basis appears to be necessary in the process of assessing "negligibility" of volumes from each country and in summing up those volumes to arrive at the total volume of dumped imports. In fact, the European Communities claimed before the Panel that it "did effectively consider the issue of significant volume increase of imports from Brazil in isolation." (Panel Report, para. 7.222) The Panel made no finding on this issue, however.

[124]Panel Report, para. 7.234.

118. For these reasons, we uphold the finding of the Panel, in paragraphs 7.234-7.236 of the Panel Report, that the European Communities did not act inconsistently with Articles 3.2 or 3.3 of the *Anti-Dumping Agreement*, even though the European Commission did not analyze the volume and prices of dumped imports from Brazil individually, pursuant to Article 3.2, as a pre-condition to cumulatively assessing the effects of the dumped imports under Article 3.3.

VII. Exhibit EC-12: Articles 3.1, 3.4, and 17.6(i) of the *Anti-Dumping Agreement*

119. We turn next to Brazil's claims relating to Exhibit EC-12, an "internal 'note for the file'" submitted by the European Communities to the Panel in the context of the Panel's assessment of the evaluation of the injury factors listed in Article 3.4 of the *Anti-Dumping Agreement*.[125] Exhibit EC-12 sets out the European Commission's consideration of certain injury factors listed in Article 3.4, namely return on investments, wages, productivity, cash flow, ability to raise capital, and magnitude of the margin of dumping.[126] The document was not disclosed to the interested parties during the course of the anti-dumping investigation.[127]

120. Brazil expressed doubts before the Panel about whether Exhibit EC-12 formed part of the record of the underlying anti-dumping investigation and requested the Panel to find that Exhibit EC-12 was not properly before it.[128] The Panel found that:

> Given the EC responses, we find no basis to question whether Exhibit EC-12 forms part of the record of the underlying investigation and we must consequently take its contents into account in our examination of the relevant substantive claims made by Brazil.[129]

The Panel therefore "decline[d] Brazil's request … to rule that Exhibit EC-12 [was] not properly before [it]."[130] After examining other issues raised by Brazil in relation to the injury determination,

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[125]Panel Report, para. 7.42. Exhibit EC-12 is an unsigned, two-page document, attached to which are two pages of tables and graphs. The document is produced on European Commission letterhead. It is dated 14 April 2000. The Provisional Regulation is dated 28 February 2000, and the Definitive Regulation is dated 11 August 2000.

[126]Panel Report, para. 7.341.

[127]*Ibid*., para. 7.45.

[128]*Ibid*., para. 7.43.

[129]*Ibid*., para. 7.46. The Panel, however, "deplore[d] the fact that this information, or an accurate non-confidential summary of any confidential information contained therein, was not disclosed to interested parties during the investigation, and that the *fact* of consideration of the elements discussed in EC-12 is not directly discernible from the published documents." (*Ibid*., para. 7.45) (original emphasis)

[130]*Ibid*., para. 7.47.

the Panel concluded that the European Communities did not act inconsistently with its obligations under Articles 3.1 or 3.4 of the *Anti-Dumping Agreement* in the evaluation of the injury factors.[131]

121. Brazil claims that the Panel incorrectly interpreted Articles 3.1 and 3.4, and that the Panel failed to assess whether the European Commission's establishment of the facts was proper under Article 17.6(i) of the *Anti-Dumping Agreement*.[132]

A. *Article 17.6(i) of the Anti-Dumping Agreement*

122. We begin our examination with Brazil's claim under Article 17.6(i) of the *Anti-Dumping Agreement*. Brazil recognizes that, in assessing the facts of the matter, panels enjoy discretion as triers of facts.[133] Nevertheless, Brazil asserts that, in this case, the Panel did not properly exercise its discretion because "it based its findings as to the contemporaneous nature of Exhibit EC-12 exclusively on a mere unsubstantiated assertion from the EC which was accepted by the Panel on the basis of a presumption of good faith."[134] According to Brazil, "[n]o positive facts were available to support such a finding."[135]

123. The European Communities rejects Brazil's suggestion that the sole justification given by the Panel for accepting the validity of Exhibit EC-12 was the European Communities' assertion that the document was indeed valid.[136] The European Communities also contends that it was within the Panel's discretion to decide the extent to which it relied on the presumption of good faith.[137]

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[131]Panel Report, para. 7.342.

[132]In its Notice of Appeal, Brazil also included a claim that the Panel breached its obligations under Article 11 of the DSU. (Notice of Appeal, p.3, attached as Annex 1 to this Report) However, Brazil confirmed at the oral hearing that it is pursuing only its claim under Article 17.6(i) of the *Anti-Dumping Agreement.* Brazil also raised Article 17.5(ii) of the *Anti-Dumping Agreement*, arguing that, to the extent that the Panel failed to examine properly the contemporaneous character of Exhibit EC-12, the Panel did not examine the matter based upon "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member". Brazil's allegation under Article 17.5(ii) is thus part of its claim under Article 17.6(i) that the Panel erred in finding that Exhibit EC-12 formed part of the record of the underlying anti-dumping investigation. (Brazil's appellant's submission, paras. 135 and 153) Brazil made no separate arguments in its pleadings regarding Article 17.5(ii).

[133]Brazil's appellant's submission, para. 143.

[134]Brazil's statement at the oral hearing.

[135]*Ibid*.

[136]European Communities' response to questioning at the oral hearing.

[137]European Communities' appellee's submission, para. 124.

124. The issue before us is whether the Panel's assessment of the facts was proper, under Article 17.6(i) of the *Anti-Dumping Agreement*, when it found that Exhibit EC-12 formed part of the record of the underlying anti-dumping investigation.[138] Article 17.6 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[.]

125. We recently stated, in *EC – Bed Linen (Article 21.5 – India)*, that "we 'will not interfere lightly with [a] panel's exercise of its discretion' under Article 17.6(i) of the *Anti-Dumping Agreement*."[139] In that appeal, we also explained that "[a]n appellant must persuade us, with sufficiently compelling reasons, that we should disturb a panel's assessment of the facts or interfere with a panel's discretion as the trier of facts."[140] In this appeal, Brazil has not offered sufficiently compelling reasons to persuade us that we should disturb the Panel's finding that Exhibit EC-12 is part of the record of the underlying anti-dumping investigation.

126. Brazil's claim rests, in our view, on an incorrect characterization of the Panel's reasoning. Brazil asserts that, in reaching its finding on this issue, the Panel relied *solely* on the European Communities' assertion that Exhibit EC-12 was produced during the investigation.[141] We disagree. Indeed, we find in the following excerpt from the Panel Report evidence that the Panel inquired into the genuineness of Exhibit EC-12:

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[138]Brazil is not challenging on appeal the contents of Exhibit EC-12. (Brazil's response to questioning at the oral hearing)

[139]Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 169, quoting Appellate Body Report, *US – Wheat Gluten*, para. 151.

[140]*Ibid*., para. 170.

[141]Brazil's statement at the oral hearing.

> We asked the European Communities to indicate in the record of the investigation the sources of information and the methodology on which the statements and information in Exhibit EC-12 are based. The European Communities gave an account of the methodology and the sources of information on the basis of which the statements in Exhibit EC-12 were made. We further asked the European Communities to confirm and substantiate to us that Exhibit EC-12 was written within the time period of the investigation. The European Communities confirmed that this was the case. Given the EC responses, we find no basis to question whether Exhibit EC-12 forms part of the record of the underlying investigation and we must consequently take its contents into account in our examination of the relevant substantive claims made by Brazil.[142] (footnotes omitted)

127. This excerpt demonstrates that the Panel took into account the European Communities' responses to its questions before reaching its finding.[143] It also indicates that the Panel did not rely exclusively on the presumption of good faith, as Brazil suggests, given that some of the Panel's questions were directed at the *validity* of Exhibit EC-12. If the Panel had placed total reliance on the presumption of good faith, it would have simply accepted the European Communities' assertion that Exhibit EC-12 formed part of the record of the investigation and would not have posed questions to assess the consistency of Exhibit EC-12 with other evidence contained in the record. Therefore, we are satisfied that the Panel "took steps to assure [itself] of the validity of [Exhibit EC-12] and of the fact that it forms part of the contemporaneous written record of the EC investigation."[144]

128. In addition, to the extent that Brazil may be understood to be calling into question the value placed by the Panel on the responses given by the European Communities, relative to that accorded to Brazil's own assertions, these allegations can only be regarded as directed at the Panel's appreciation of the evidence. In making such a claim under Article 17.6(i), it is not sufficient for Brazil simply to disagree with the Panel's weighing of the evidence, without substantiating its claim of error by the Panel. As we have recently reiterated, "[i]t is not 'an error, let alone an egregious error', for the Panel to have declined to accord to the evidence the weight" that one of the parties sought to have accorded

[142]Panel Report, para. 7.46.

[143]At the oral hearing, Brazil suggested that the Panel had made two separate inquiries: one related to the "validity" of Exhibit EC-12, the other directed at whether the document formed part of the record of the anti-dumping investigation. According to Brazil, although the European Communities' responses about the methodology and sources of information that underlie Exhibit EC-12 could have been considered evidence of the document's validity, they do not support the European Communities' assertion that the document was produced *during* the anti-dumping investigation. (Brazil's response to questioning at the oral hearing) We do not agree with Brazil's contention that the Panel made separate inquiries as to the "validity" of Exhibit EC-12, on the one hand, and when it was produced, on the other. The Panel, in our view, conducted an overall inquiry into the genuineness of Exhibit EC-12, including whether it formed part of the record of the anti-dumping investigation, and arrived at an overall finding on the basis of the results of that inquiry.

[144]Panel Report, para. 7.307.

to it.[145] Based on our reading of the Panel Record, Brazil did not substantiate its allegation that Exhibit EC-12 was not contemporaneous with the investigation. In these circumstances, we are unable to conclude that the Panel's assessment was in error. Therefore, we reject Brazil's claim that the Panel failed to assess whether the establishment of the facts was proper pursuant to Article 17.6(i) of the *Anti-Dumping Agreement*, when it found that Exhibit EC-12 was part of the record of the underlying anti-dumping investigation.

B. *Articles 3.1 and 3.4 of the Anti-Dumping Agreement*

129. We proceed to Brazil's claim that the Panel incorrectly interpreted the requirements of Articles 3.1 and 3.4 of the *Anti-Dumping Agreement*. At the oral hearing, Brazil clarified that it is not alleging that the Panel erred by relying on our Report in *Thailand – H-Beams* in reaching its finding that it was "*required*" to include Exhibit EC-12 in its examination, despite the fact that Exhibit EC-12 was not disclosed to the interested parties during the anti-dumping investigation.[146] Rather, Brazil asserts that the issue here is that there was no verifiable evidence of the contemporaneous character of Exhibit EC-12[147] 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*.

130. Article 3.4 of the *Anti-Dumping Agreement* provides:

> The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

131. This provision requires an investigating authority to evaluate all relevant economic factors in its examination of the impact of the dumped imports. By its terms, it does not address the manner in which the results of this evaluation are to be set out, nor the type of evidence that may be produced before a panel for the purpose of demonstrating that this evaluation was indeed conducted.[148] The

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[145]Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 177, quoting Appellate Body Report, *Korea – Alcoholic Beverages*, para. 164. (footnote omitted)

[146]Panel Report, para. 7.45, citing Appellate Body Report, *Thailand – H-Beams*, paras. 107, 111, and 118. (original emphasis)

[147]Brazil's response to questioning at the oral hearing.

[148]See *infra*, paras. 157-159.

provision simply requires Members to include an evaluation of all relevant economic factors in its examination of the impact of the dumped imports. In this dispute, the European Communities submitted Exhibit EC-12 as the only evidence that its investigating authority evaluated certain of the factors listed in Article 3.4.[149] Upon satisfying itself that Exhibit EC-12 formed part of the record of the investigation—a finding that we have found to be consistent with the Panel's obligations under Article 17.6(i)—the Panel was entitled to rely on Exhibit EC-12 in assessing whether the European Communities evaluated all of the injury factors listed in Article 3.4.

132. Turning to Brazil's allegations relating to Article 3.1, we fail to see any basis for Brazil's allegations that the Panel incorrectly interpreted the requirement to determine injury on the basis of positive evidence and involving an objective examination. Once the Panel found that Exhibit EC-12 did form part of the record of the underlying anti-dumping investigation—a finding we do not disturb—there was no longer any reason for the Panel to find that Exhibit EC-12 did not constitute "positive evidence", in the sense of the evidence being of an "affirmative, objective and verifiable character, and … credible", or to find that the evaluation in Exhibit EC-12 did not constitute an "objective examination", in the sense of it being "unbiased".[150] Brazil has not put forward any reason to substantiate a violation of Article 3.1 other than the rejected allegation that Exhibit EC-12 did not form part of the contemporaneous record of the anti-dumping investigation.

133. For these reasons, we find that the Panel did not fail to assess whether the European Commission's establishment of the facts was proper under Article 17.6(i), and did not incorrectly interpret the requirements of Articles 3.1 and 3.4 of the *Anti-Dumping Agreement* by including Exhibit EC-12 within its assessment of the European Commission's evaluation of the injury factors listed in Article 3.4. We therefore uphold the finding, in paragraphs 7.46 and 7.47 of the Panel Report, that Exhibit EC-12 was properly before the Panel.

[149]Panel Report, para. 7.42. We recall that Brazil is not challenging on appeal the contents of Exhibit EC-12. See *supra*, footnote 138.

[150]Appellate Body Report, *US - Hot-Rolled Steel*, paras. 192-193.

VIII. Disclosure of Information: Articles 6.2 and 6.4 of the *Anti-Dumping Agreement*

134. We examine next Brazil's claim that the Panel erred in finding that the European Communities did not act inconsistently with Articles 6.2 and 6.4 of the *Anti-Dumping Agreement* by failing to disclose the information contained in Exhibit EC-12.

135. The Panel found that the information in Exhibit EC-12 "was considered not relevant and was not specifically relied upon by the EC in reaching the anti-dumping determination" and that, therefore, the Brazilian exporter was not "deprived of timely opportunities to see information relevant to its case nor of an opportunity for defence of its interests."[151] Thus, the Panel found that "the European Communities has not violated Articles 6.2 and 6.4 with respect to the information on injury factors referred to exclusively in Exhibit EC-12."[152]

136. On appeal, Brazil claims that the Panel based its finding on an incorrect interpretation of the obligations arising from Articles 6.2 and 6.4 of the *Anti-Dumping Agreement*. Brazil asserts that "the findings of the investigating authorities regarding each of these factors [listed in Article 3.4] are necessarily 'relevant' within the meaning of Article 6.4."[153] In Brazil's view, the Panel erred in finding that the European Commission could decide whether the information contained in Exhibit EC-12 had any "added value" for the parties and was relevant within the meaning of Article 6.4, and whether the information related to the defence of the parties' interests within the meaning of Article 6.2.[154]

137. The European Communities agrees with the Panel's ultimate conclusion on Article 6.4, but disagrees with the Panel's interpretation of that provision.[155] According to the European Communities, the term "information" in Article 6.4 does not include "the reasoning that the authorities applied to the data they have collected."[156] The European Communities asserts that it had no obligation to disclose Exhibit EC-12 because its contents do not constitute "information" in the sense of Article 6.4; rather, Exhibit EC-12 contains its investigating authority's conclusions with respect to the data that had been collected, and the "raw data" had been disclosed to the interested

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[151]Panel Report, para. 7.348.

[152]*Ibid*., para. 7.349. The Panel, however, found a violation of Articles 12.2 and 12.2.2 of the *Anti-Dumping Agreement* because "it is not directly discernible from the published Provisional or Definitive Determination that the European Communities addressed or explained the lack of significance of certain listed Article 3.4 factors." (*Ibid*., para. 7.435) This finding has not been appealed.

[153]Brazil's appellant's submission, para. 176. (underlining omitted)

[154]*Ibid*., para. 177.

[155]European Communities' appellee's submission, para. 153. However, the European Communities has not appealed this interpretation.

[156]*Ibid*., para. 146.

parties.[157] With respect to Article 6.2, the European Communities asserts that, although the first sentence contains a right that is "very general in nature", it does not "impose a specific obligation on investigating authorities to inform interested parties of the legal basis for its final determination on injury during the course of an investigation".[158]

138. At the outset, we wish to underscore the importance of the obligations contained in Article 6 of the *Anti-Dumping Agreement*. This Article "establishes a framework of procedural and due process obligations".[159] Its provisions "set out evidentiary rules that apply *throughout* the course of the anti-dumping investigation, and provide also for due process rights that are enjoyed by 'interested parties' *throughout* such an investigation".[160]

139. We begin our analysis of Brazil's claims with Article 6.4, 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.

140. At the oral hearing, the European Communities conceded that Exhibit EC-12 contains more than the conclusions or reasoning of its investigating authority because the document also contains "a summary of the raw data" on some of the injury factors listed in Article 3.4.[161] The European Communities did not deny that the data are "information" for purposes of the disclosure requirements of Article 6.4.[162] Instead, the European Communities asserted that, despite the fact that Exhibit EC-12 also contains data, it was under no obligation to disclose the document because the raw data used to prepare Exhibit EC-12 had been disclosed to the interested parties to the extent that it was compatible with confidentiality requirements.[163]

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[157]European Communities' response to questioning at the oral hearing.

[158]European Communities' appellee's submission, para. 149, quoting Panel Report, *Guatemala – Cement II*, para. 8.238.

[159]Appellate Body Report, *Thailand – H-Beams*, para. 109.

[160]Appellate Body Report, *EC – Bed Linen (Article 21.5 - India)*, para. 136. (emphasis added)

[161]European Communities' response to questioning at the oral hearing.

[162]We note also that the Panel refers to the "information" in Exhibit EC-12. See, for example, Panel Report, paras. 7.45 and 7.349.

[163]European Communities' response to questioning at the oral hearing.

141. We observe, however, that the European Communities' contention that the data in Exhibit EC-12 had been disclosed to the interested parties during the anti-dumping investigation cannot be reconciled with the Panel's finding of fact on this matter. The Panel noted that "the information in Exhibit EC-12 was not disclosed in *any form* to the interested parties in the course of the investigation."[164] This appears, to us, to be an unequivocal factual finding.[165] The European Communities has not challenged this finding on appeal and, therefore, we decline to review it, in conformity with Article 17.6 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*.

142. Thus, we turn to an examination of whether the Panel was correct in concluding that the European Communities was under no obligation to disclose Exhibit EC-12 during the anti-dumping investigation. Article 6.4 requires that, "whenever practicable", investigating authorities provide timely opportunities for all interested parties to see and prepare presentations on the basis of "all information" that meets the following criteria:

(a) the information is relevant to the presentation of the interested parties' cases;

(b) the information is not confidential as defined in Article 6.5; and

(c) the information is used by the authorities in an anti-dumping investigation.

143. The European Communities has not asserted in any of its submissions that it was not "practicable" to disclose Exhibit EC-12. In addition, the European Communities acknowledged at the oral hearing that Exhibit EC-12 did not contain confidential information covered by Article 6.5 of the *Anti-Dumping Agreement*.[166] We will therefore limit our examination to determining whether the information in Exhibit EC-12 was "relevant" to the interested parties and "used" by the European Commission.

144. We recall that the Panel found that the Brazilian exporter was "not deprived of timely opportunities to see information relevant to its case" because the "information [in Exhibit EC-12] was considered not relevant and was not specifically relied upon by the EC in reaching the anti-dumping determination."[167] In our view, the Panel incorrectly interpreted the requirement in Article 6.4 that

[164]Panel Report, para. 7.45. (emphasis added)

[165]In paragraph 7.348 of the Panel Report, the Panel states that the "European Communities also gathered and analysed data with respect to the injury factors referred to exclusively in Exhibit EC-12, but essentially concluded that this data was 'in line' with other data (that was disclosed)". The use of the adjective "other" to describe the data that were disclosed indicates, to us, that the Panel did not mean to imply that the disclosed data were the same as the data that are contained in Exhibit EC-12.

[166]European Communities' response to questioning at the oral hearing.

[167]Panel Report, para. 7.348.

the information be "relevant", and it incorrectly applied the requirement that the information be "used" by the investigating authorities.

145. We turn first to the requirement that the information be "relevant". From the Panel's reasoning, it is apparent that it read this requirement to mean "relevant" from the perspective of the *investigating authority*. We disagree. Article 6.4 refers to "provid[ing] timely opportunities for all interested parties to see all information that is relevant to the presentation of *their* cases". (emphasis added) The possessive pronoun "their" clearly refers to the earlier reference in that sentence to "interested parties". The investigating authorities are not mentioned in Article 6.4 until later in the sentence, when the provision refers to the additional requirement that the information be "used by the authorities". Thus, whether or not the investigating authorities regarded the information in Exhibit EC-12 to be relevant does not determine whether the information would in fact have been "relevant" for the purposes of Article 6.4.

146. This conclusion is supported by our reasoning in *US – Hot Rolled Steel*, where we explained that "Article 3.4 lists certain factors *which are deemed to be relevant in every investigation* and which must always be evaluated by the investigating authorities."[168] Thus, because Exhibit EC-12 contains information on some of the injury factors listed in Article 3.4, and the injury factors listed in that provision "are deemed to be relevant in every investigation", Exhibit EC-12 must be considered to contain information that is relevant to the investigation carried out by the European Commission. As such, the information in Exhibit EC-12 was necessarily relevant to the presentation of the interested parties' cases and is, therefore, "relevant" for purposes of Article 6.4.

147. We disagree also with the Panel's conclusion on whether the investigating authorities "used" the information in Exhibit EC-12. The Panel did not expressly determine that the European Commission did not "use" the information in Exhibit EC-12 as contemplated under Article 6.4. Instead, the Panel stated that the information in Exhibit EC-12 "was not specifically relied upon by the EC in reaching the anti-dumping determination".[169] It appears that the Panel arrived at this conclusion because, in its view, the European Commission had "essentially concluded that this data was 'in line' with other data (that was disclosed) and that there was no 'value added' to the substance of their investigation in the analysis of these factors."[170] In our view, however, the Panel's reasoning overlooks the fact that the European Commission was required to evaluate all the injury factors listed

[168]Appellate Body Report, *US – Hot-Rolled Steel*, para. 194. (emphasis added)

[169]Panel Report, para. 7.348.

[170]*Ibid*.

in Article 3.4, and the evaluation of some of these factors is set out exclusively in Exhibit EC-12.[171] In other words, Exhibit EC-12 relates to a required step in the anti-dumping investigation. The European Communities relies on Exhibit EC-12 as the *sole evidence* that it performed this required step. As we see it, this necessarily leads to the conclusion that the information in Exhibit EC-12 was in fact "used" by the European Commission in the anti-dumping investigation and that, therefore, Exhibit EC-12 also satisfies this criterion of Article 6.4. Thus, the European Communities was not entitled to exclude this information on the basis that it did not consider that it provided "value added" to the investigation.

148. Therefore, we are of the view that the information contained in Exhibit EC-12 should have been disclosed to the interested parties, pursuant to Article 6.4, because the information was relevant to the interested parties, used by the European Commission in the investigation, and not confidential.

149. The European Communities recognized during the oral hearing that a finding of violation in this case under Article 6.4 would necessarily entail a violation of Article 6.2.[172] We are also of the view that, by failing to meet its legal obligation to disclose Exhibit EC-12, the European Communities did not afford the Brazilian exporter "a full opportunity for the defence of [its] interests" as required under Article 6.2 of the *Anti-Dumping Agreement*. One of the stated objectives of the disclosure of information required under Article 6.4 is to allow interested parties "to prepare presentations on the basis of this information". The "presentations" referred to in Article 6.4, whether written or oral, logically are the principal mechanisms through which an exporter subject to an anti-dumping investigation can defend its interests. Thus, by failing to disclose Exhibit EC-12 and thereby depriving the Brazilian exporter of an opportunity to present its defence, the European Communities did not act consistently with Article 6.2.

150. For all these reasons, we reverse the Panel's finding in paragraphs 7.348 and 7.349 of the Panel Report and find, instead, that the European Communities acted inconsistently with Articles 6.2 and 6.4 of the *Anti-Dumping Agreement*, by failing to disclose to the interested parties during the anti-dumping investigation the information on the injury factors listed in Article 3.4 that is contained in Exhibit EC-12.

[171]These factors are productivity, return on investments, cash flow, wages, ability to raise capital, and magnitude of the margin of dumping.

[172]European Communities' response to questioning at the oral hearing.

IX. Implicit Analysis of the "Growth" Factor: Article 3.4 of the *Anti-Dumping Agreement*

151. We turn now to Brazil's claim relating to the European Communities' evaluation of the injury factor "growth" pursuant to Article 3.4 of the *Anti-Dumping Agreement*.

152. Before the Panel, Brazil claimed that the European Communities had not explicitly addressed "growth", one of the injury factors listed in Article 3.4.[173] The European Communities admitted that no separate record was made of the evaluation of actual and potential negative effects on "growth".[174] The European Communities argued, however, that "while no separate record was made of its evaluation of 'growth', its consideration of this factor is implicit in its analysis of the other factors."[175]

153. The Panel began its analysis of this issue by noting that, although a "formalistic 'checklist'" approach to the evaluation of the factors listed in Article 3.4 would be "highly desirable", it found "no such obligation in the text of the provision and consequently [did] not believe that this is a required approach to [the] analysis under Article 3.4."[176] According to the Panel, the "provision requires substantive, rather than purely formal, compliance", so that the "requirements of this provision will be satisfied where it is at least apparent that a factor has been addressed, if only implicitly."[177] The Panel thus found that:

> 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". [sic]
>
> 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.[178]

[173]Panel Report, para. 7.309.

[174]*Ibid*., para. 7.310.

[175]*Ibid*., para. 7.299.

[176]*Ibid*., para. 7.310.

[177]*Ibid*.

[178]*Ibid*., paras. 7.310-7.311. We understand that the Panel used the term "address" when referring to the requirements to "examine" and "evaluate" in Article 3.4 of the *Anti-Dumping Agreement*.

154. Brazil appeals from this finding of the Panel. It contends that Articles 3.1 and 3.4 require "explicit" analysis of each injury factor.[179] Thus, in Brazil's view:

> [e]ven if a checklist is not a required approach under Article 3.4, it must however be apparent somehow that *each* of the fifteen factors was indeed evaluated by the investigating authority. In other words, that a given factor was properly evaluated by an investigating authority cannot simply be *deducted* from the evaluation of other factors.[180] (original emphasis)

Brazil also asserts that if it were sufficient to deduce from the evaluation of other factors that a certain factor has been addressed, then the requirement that all fifteen of the injury factors listed in Article 3.4 be evaluated would lose effectiveness.[181]

155. The European Communities rejects Brazil's contentions because, in its view, our Report in *Thailand – H-Beams* "established that the obligation to consider the factors in Article 3.4 was quite distinct from the various obligations in the [Anti-Dumping] Agreement to disclose or publish information about that consideration."[182] The European Communities further explains that, in stating that "growth" was addressed implicitly, the Panel established as a factual matter that European Communities had properly considered the factor "growth".[183]

156. 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*.[184] 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.

157. Looking first to the text of Article 3.4, we find that it calls for "an evaluation of all relevant economic factors and indices having a bearing on the state of the industry". The text, however, does not address the *manner* in which the results of the investigating authority's analysis of each injury

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[179]Brazil's response to questioning at the oral hearing.

[180]Brazil's appellant's submission, para. 162.

[181]*Ibid*., para. 165.

[182]European Communities' appellee's submission, para. 132, referring to Appellate Body Report, *Thailand – H-Beams*, para. 117.

[183]*Ibid*., para. 138.

[184]Appellate Body Report, *Thailand – H-Beams*, para. 125; Appellate Body Report, *US – Hot-Rolled Steel*, para. 194.

factor are to be set out in the published documents.

158. The requirements of "positive evidence" and "objective examination" in Article 3.1 of the *Anti-Dumping Agreement* similarly do not regulate the *manner* in which the results of the analysis are to be set out. In *Thailand – H-Beams*, we examined a claim under Article 3.1, relating to the use of a confidential document for purposes of an injury determination under Article 3.4, and found that:

> … the requirement in Article 3.1 that an injury determination be based on "positive" evidence and involve an "objective" examination of the required elements of injury does *not* imply that the determination must be based only on reasoning or facts that were disclosed to, or discernible by, the parties to an anti-dumping investigation.[185] (original emphasis)

159. Our conclusion in that case regarding the obligations in Article 3.1 was premised on the notion that the *manner* in which the analysis of the injury factors and the results of the injury determination are to be disclosed to interested parties and set forth in the published documents is a matter regulated by other provisions of the *Anti-Dumping Agreement*. Thus, in that case, we explained that:

> [w]hether evidence or reasoning is disclosed or made discernible to interested parties by the final determination is a matter of *procedure* and *due process*. These matters are very important, but they are comprehensively dealt with in other provisions, notably Articles 6 and 12 of the *Anti-Dumping Agreement*.[186] (original italics; underlining added)

In our view, this same premise also indicates that Articles 3.1 and 3.4 do not regulate the *manner* in which the results of the "evaluation" of each injury factor are to be set out in the published documents.

160. Brazil argues that the Panel's interpretation of Article 3.4 would reduce that provision to inutility. It explains that:

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[185]Appellate Body Report, *Thailand – H-Beams*, para. 111.

[186]*Ibid*., para. 117.

> [i]f, as it is the case in the Panel's findings, it is sufficient to deduct from the examination of some factors that a third one has been addressed in order to comply with Article 3.4, then the requirements that each of the fifteen factors must be addressed loses effectiveness. Such an interpretation would have the effect of nullifying the obligation of Article 3.4 that *each* of the fifteen factors must be evaluated.[187] (original italics; original underlining)

We disagree. The obligation to evaluate all fifteen factors is distinct from the *manner* in which the evaluation is to be set out in the published documents. As the European Communities contends, that the analysis of a factor is implicit in the analyses of other factors does not necessarily lead to the conclusion that such a factor was not evaluated.[188]

161. Accordingly, because Articles 3.1 and 3.4 do not regulate the *manner* in which the results of the analysis of each injury factor are to be set out in the published documents, we share the Panel's conclusion that it is not required that in every anti-dumping investigation a separate record be made of the evaluation of each of the injury factors listed in Article 3.4. Whether a panel conducting an assessment of an anti-dumping measure is able to find in the record sufficient and credible evidence to satisfy itself that a factor has been evaluated, even though a separate record of the evaluation of that factor has not been made, will depend on the particular facts of each case. Having said this, we believe that, under the particular facts of this case, it was reasonable for the Panel to have concluded that the European Commission addressed and evaluated the factor "growth".

162. Having regard to the nature of the factor "growth", we believe that an evaluation of that factor necessarily entails an analysis of certain other factors listed in Article 3.4. Consequently, the evaluation of those factors could cover also the evaluation of the factor "growth". This relationship was recognized by Brazil during the oral hearing, when we inquired about the nature of the factor "growth" and whether it may be reflected in the performance of certain other factors listed in Article 3.4.[189]

163. Moreover, we note that the Panel explained that in analyzing certain of the other factors listed in Article 3.4—including sales, profits, output, market share, productivity, return on investment and capacity utilization—the European Commission "traced developments from 1995 through the end of the [POI]" and "[t]his examination touched upon the performance and relative diminution or expansion of the domestic industry."[190] The Panel then went on to give the following specific

[187]Brazil's appellant's submission, para. 165.

[188]European Communities' appellee's submission, para. 136.

[189]Brazil's response to questioning at the oral hearing.

[190]Panel Report, para. 7.310.

example: "… the Provisional Regulation (recital 150) indicates that there was a decrease in EC production in 1995 and 1996, and an increase between 1996 and the [POI], while EC production capacity, sales volume, profitability and market share decreased."[191]

164. Brazil argues that, even if the evaluation of "growth" implies examining other factors listed in Article 3.4, an investigating authority must still put them into context, weigh them against each other and draw an appropriate overall conclusion.[192] We note that the Panel did review whether the European Commission examined the factors "in context", as Brazil contends is required:

> We have examined the injury indicators which the European Communities found relevant and significant for its injury determination. The European Communities found material injury during the period of investigation on the basis, in particular, of declines in production, production capacity, sales and market share. Moreover, the European Communities stated that the Community industry suffered a "significant loss" of employment and a decline in investments, as well as an increase of stocks. It also determined that the increase in capacity utilisation depended on reduced production capacity. Furthermore, it placed its evaluation of factors affecting domestic prices in the context of developments in market share and profitability. *We have observed that the European Communities places its evaluation of each of these factors within the context of its own internal evolution and in terms of its relationship with movements in other injury factors* and that the record data with respect to those factors deemed relevant by the European Communities overall bears out the EC evaluation of these factors.[193] (emphasis added; footnote omitted)

165. Looking also at the regulation imposing provisional anti-dumping duties in this case, we find that it supports the conclusion that the European Commission evaluated "growth":

> 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 utilisation, its increase depended on the reduced production capacity.[194]

[191]Panel Report, para. 7.310.

[192]Brazil's statement at the oral hearing.

[193]Panel Report, para. 7.337.

[194]Provisional Regulation, recital 160.

From our perspective, the "declines" and "losses" observed with respect to several of the factors examined in this particular case necessarily relate to the issue of "growth" as well. 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.

166. For all these reasons, we uphold the Panel's finding in paragraph 7.311 of the Panel Report that the European Communities did not violate its obligations under Article 3.4 of the *Anti-Dumping Agreement* in respect of the injury factor "growth".

X. Causality: Article 3.5 of the *Anti-Dumping Agreement*

167. We turn now to Brazil's allegations of error under Article 3.5 of the *Anti-Dumping Agreement*. Brazil identifies two errors by the Panel related to the European Commission's causality analysis:

(a) the finding that the relatively higher cost of production of the European Communities' domestic industry did not constitute a "known factor [ ]other than dumped imports" under Article 3.5; and

(b) the finding that the European Commission's methodology in this investigation of analyzing causal factors other than dumped imports on an *individual* basis, without consideration of the *collective* effects of these factors, did not result in the attribution to dumped imports of injuries caused by other causal factors.

We address each of these alleged errors in turn.

A. "*Known Factors Other Than the Dumped Imports Which at the Same Time are Injuring the Domestic Industry*"

168. Brazil argued before the Panel that the relative cost efficiency of the Brazilian exporter under investigation vis-à-vis European Communities producers should have been examined by the European Commission as a "known factor[ ] other than the dumped imports" causing injury.[195] Before the European Commission, the Brazilian exporter under investigation had asserted that the fittings the

[195]The "known factor[ ] other than the dumped imports" at issue has been labelled in various ways throughout these proceedings, including "margins analysis" (Panel Report, para. 7.361; Brazil's appellant's submission, paras. 181, 192, and 198; European Communities' appellee's submission, paras. 156, 163, 171, and 172), "cost efficiency" (Panel Report, para. 7.361; Brazil's appellant's submission, paras. 184 and 191), and "comparative advantage" (*Ibid*., para. 7.361; Brazil's appellant's submission, para. 184; Japan's third participant's submission, paras. 12 and 15). At the oral hearing, Brazil confirmed that when it referred to the causal factor that the European Commission had failed to examine, Brazil was referring to "the cost of production difference [between the European Communities producers and the Brazilian exporter], especially the high cost of production of the European industry". (Brazil's response to questioning at the oral hearing)

exporter sold in the European Communities market ("black heart" fittings) had a lower cost of production than those sold by European Communities producers in the European Communities market ("white heart" fittings), although both were considered "like products" for purposes of the investigation.[196] The Brazilian exporter had also claimed that it was this lower cost of production that was reflected in the products' selling prices.[197] The Brazilian exporter had raised this cost efficiency issue before the European Commission in relation to the *dumping*- and *injury*-related segments of the investigation, but not with regard to the *causality* analysis.[198] Nevertheless, Brazil argued before the Panel that the European Commission should have examined this cost efficiency as a "known" factor in the causality analysis in the light of the significant difference between the dumping and underselling margins determined during the investigation (which difference Brazil terms the "margins analysis"), and because the European Commission had been alerted to this advantage of the Brazilian exporter in an earlier phase of the investigation.[199]

169. The Panel observed that the Brazilian exporter had identified this cost efficiency before the European Commission in the context of the dumping and injury determinations.[200] The Panel also found that the European Commission "did investigate the alleged differences in cost of production and market perception between white and black heart variants of the product concerned and *made factual findings* that the difference in cost of production was minimal and that there was no significant difference in market perception."[201] The Panel then went on to reject Brazil's claim:

> *In light of these findings*, these factors, although "known" to them in the context of the dumping and injury analysis, would not be a "known" causal factor, that is, a factor that the European Communities was aware would possibly be causing injury to the domestic industry. We therefore *find* that the European Communities did examine these factors, and, *in light of its findings*, did not perceive of them as "known" causal factors.[202] (emphasis added)

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[196]Panel Report, para. 7.361.

[197]*Ibid.* Brazil also identified before the Panel the difference in market perception as a "known factor[] other than the dumped imports" that required examination by the European Commission during the investigation. (*Ibid.*, paras. 7.350 and 7.357) Whether the European Commission should have examined the difference in market perception pursuant to Article 3.5 is not an issue appealed by Brazil.

[198]Panel Report, para. 7.362.

[199]*Ibid.*, paras. 7.350 and 7.361.

[200]*Ibid.*, para. 7.362.

[201]*Ibid.* (emphasis added)

[202]*Ibid.*

170. Brazil appeals the Panel's finding that the relatively higher cost of production for European Communities producers was not a "known" causal factor that the European Commission had to examine under Article 3.5. Brazil contends that the text of Article 3.5 does not support the Panel's interpretation that investigating authorities can limit their examination only to those factors raised by the parties in the context of the causality analysis.[203] In any event, Brazil notes that the cost of production data of the European Communities producers were required for a proper comparison between the Brazilian and European Communities producers. As such data was available only to the European Commission and not to Brazil (for reasons of confidentiality), Brazil submits that its exporter had sufficiently raised the cost of production difference before the European Commission on the basis of information available to it at the time of the investigation.[204]

171. Furthermore, according to Brazil, its so-called "margins analysis", which is based on data from the European Commission's disclosure documents released before publication of the definitive determination, confirms that the Brazilian exporter enjoys a lower cost of production than the European Communities domestic industry and that "a significant part" of the industry's injury was not due to the effects of dumping.[205] Thus, Brazil argues that the relatively higher cost of production of the European Communities industry is a "known factor" other than dumped imports, which the European Commission was required to examine under Article 3.5, and that, by failing to do so, the European Commission attributed to dumped imports those injuries that were caused by this unexamined causal factor.

172. The European Communities requests us to reject Brazil's arguments on appeal. The European Communities explains that the Brazilian exporter did not raise during the investigation the possible comparative advantage resulting from any difference in costs of production between the Brazilian exporter and the European Communities industry.[206] Rather, the alleged differences in the cost of production and market perception between the "white heart" and "black heart" variants of the product were raised by the Brazilian exporter when requesting an adjustment to its prices for purposes of the European Commission's calculation of the undercutting margin.[207] According to the European Communities, the fact that Brazil raised this factor in one phase of the investigation does not render the factor "known" by the European Commission to have caused injury to the domestic industry. In

[203]Brazil's appellant's submission, para. 195.

[204]Brazil's response to questioning at the oral hearing.

[205]Brazil's appellant's submission, para. 191; Brazil's response to questioning at the oral hearing. See also, *supra*, para. 33.

[206]European Communities' appellee's submission, para. 166.

[207]European Communities' response to questioning at the oral hearing.

any event, the European Communities argues, such a difference in costs of production is not a "factor other than the dumped imports" that the European Commission was required to "examine" in terms of the third sentence of Article 3.5.[208]

173. 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.

174. We begin our examination with the text of the provision governing an investigating authority's causality analysis. Article 3.5 of the *Anti-Dumping Agreement* provides:

> It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. 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. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry. (underlining added)

175. Article 3.5 requires that an investigating authority establish a "causal relationship" between dumped imports and the domestic industry's injury. In the course of identifying this causal relationship, investigating authorities are not permitted to attribute to dumped imports injuries caused by other factors. Critical to the effective operation of the non-attribution obligation, and indeed, the entire causality analysis, is the requirement of Article 3.5 to "examine any known factors other than the dumped imports which at the same time are injuring the domestic industry", for it is the "injuries" of those "known factors" that must not be attributed to dumped imports. In order for this obligation to be triggered, Article 3.5 requires that the factor at issue:

[208]European Communities' appellee's submission, paras. 171 and 174-176.

(a) be "known" to the investigating authority;

(b) be a factor "other than dumped imports"; and

(c) be injuring the domestic industry at the same time as the dumped imports.

176. We are mindful that the *Anti-Dumping Agreement* does not expressly state how such factors should become "known" to the investigating authority, or if and in what manner they must be raised by interested parties, in order to qualify as "known". We also recognize that the *Anti-Dumping Agreement* does not expressly state to what degree a factor must be unrelated to the dumped imports, or whether it must be extrinsic to the exporter and the dumped product, in order to constitute a factor "other than the dumped imports". We need not, however, resolve such questions in this appeal, given the factual findings of the European Commission in this investigation and the Panel in this case.

177. We note that Brazil's claim rests entirely on the assumption that there was a marked difference in the costs of production between the Brazilian exporter and the European Communities producers. Brazil's factual allegation regarding the difference in costs of production, however, was rejected by the European Commission. As the Panel noted, the "European Communities did investigate the alleged differences in cost of production and market perception … and made factual findings that the difference in cost of production was minimal and that there was no significant difference in market perception."[209] These factual findings of the European Commission were affirmed by the Panel[210], and as such, we do not inquire into them on appeal. Having rejected the Brazilian exporter's factual premise in the context of one phase of the investigation, the European Commission, in our view, had no reason to undertake an analysis in a subsequent phase of the investigation that would have been predicated upon the very correctness of the same premise. In other

[209]Panel Report, para. 7.362.

[210]Before the Panel, Brazil challenged the European Commission's refusal to adjust the Brazilian exporter's prices when evaluating the price effects of dumped imports. (*Ibid*., para. 7.286) While addressing this challenge, the Panel evaluated the factual conclusions of the European Commission with respect to the differences in cost of production and market perception between black heart (imported from Brazil) and white heart (produced by European Communities producers) variants of the product under investigation. (*Ibid*., paras. 7.294-7.295) The Panel rejected Brazil's challenge to the European Commission's factual findings, concluding as follows:

> Thus, the European Communities gathered and evaluated facts in respect of the alleged differences in cost of production and market perception between black and white heart variants of the products concerned, and came to the conclusion that differences in cost of production were not significant and that there was no significant difference in consumer perception. A reasonable and objective authority could have reached this determination on the basis of the record of this investigation. It is not our task to substitute our judgement for that of the investigating authority.

(Panel Report, para. 7.296)

words, once the European Commission had determined that the allegation of the difference in cost of production was unfounded, it had no obligation to examine its effects on the domestic industry under Article 3.5.

178. Thus, we agree with the Panel that "the European Communities did examine these factors, and, in light of its findings, did not perceive of them as 'known' causal factors."[211] However, we disagree with the Panel's apparent understanding of the term "known" in Article 3.5. We understand the Panel, in rejecting this aspect of Brazil's claim under Article 3.5, to have stated that the alleged causal factor *was* "known" to the European Commission in the context of its dumping and injury analyses, but that the factor was nevertheless *not* "known" in the context of its causality analysis.[212] In our view, a factor is either "known" to the investigating authority, or it is not "known"; it cannot be "known" in one stage of the investigation and unknown in a subsequent stage. This does not, however, affect our finding, which is premised on the fact that once the cost of production difference was found by the European Commission to be "minimal", the factor claimed by Brazil to be "injuring the domestic industry" had effectively been found *not* to exist.[213] As such, there was no "factor" for the European Commission to "examine" further pursuant to Article 3.5.

179. We therefore uphold the Panel's finding, in paragraph 7.362 of the Panel Report, that the difference in cost of production between the Brazilian exporter and the European Communities industry was not a "known factor[] other than the dumped imports which at the same time [was] injuring the domestic industry".

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[211]Panel Report, para. 7.362.

[212]The Panel found:

> In light of these findings, these factors, although "known" to them in the context of the dumping and injury analysis, would not be a "known" causal factor, that is, a factor that the European Communities was aware would possibly be causing injury to the domestic industry.

(*Ibid.*)

[213]It is of no consequence for our analysis in this case that the alleged difference in the cost of production between the Brazilian exporter and the domestic industry was found to be "minimal" rather than some other level, a factual issue decided by the Panel. See *supra* footnote 210. What is dispositive of this issue, in our view, is that the European Commission effectively *rejected* the claim of the Brazilian exporter (properly, in the view of the Panel) that there was a difference in the cost of production.

B. *Non-Attribution*

180. The Panel made the following findings regarding the non-attribution analysis undertaken by the European Commission in this investigation:

> 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 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.[214] (emphasis added; footnotes omitted)

181. Based on these findings, the Panel determined that, notwithstanding the European Commission's analysis of each causal factor solely on an individual basis, such analysis nevertheless ensured that the effects of causal factors other than dumped imports were not improperly attributed to dumped imports:

[214]Panel Report, paras. 7.367-7.368.

> 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.[215] (original emphasis; footnote omitted)

182. The Panel therefore determined that Article 3.5 does not require an evaluation of the collective impact of other causal factors. With respect to this particular case, the Panel found that, based on what it understood to be the operation of the European Communities' causality methodology, the effects of other causal factors were sufficiently separated and distinguished so as to avoid improper attribution of injuries to dumped imports.

1. European Communities' Procedural Objection

183. The European Communities raises an initial objection to our consideration of Brazil's claim regarding the European Commission's failure to examine the collective impact of other causal factors. The European Communities argues that the issue is not properly before us because it was never raised directly before the Panel, stating that, "although, in the arguments it presented to the Panel, Brazil criticized the EC authorities' handling of 'other factors', at no point did it accuse them of failing to consider properly the *collective effect* of those factors."[216] Because this issue was not raised before the Panel, the European Communities argues, the Panel should not have ruled on this issue, and by doing so, the Panel denied the European Communities a "fair hearing".[217] As a result, the European Communities requests us to declare the Panel's legal interpretation to be "of no effect"[218] and its factual findings "irrelevant to the determination".[219]

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[215]Panel Report, para. 7.369.

[216]European Communities' appellee's submission, para. 181. (emphasis added)

[217]*Ibid*., para. 182.

[218]*Ibid*.

[219]*Ibid*., para. 187.

184. We disagree with the European Communities' contention that Brazil never identified the collective effect of other causal factors as part of its Article 3.5 claim during the Panel proceedings. Before the Panel, the European Communities made the following statement:

> Furthermore, Brazil effectively asks that the *injuries from other factors be cumulated* and contrasted as such with those caused by dumped imports. Article 3.5 indicates that this is not the correct procedure since it requires the authorities to examine the "injuries", rather than the injury, caused by these other factors. The investigating authorities are therefore not obliged to identify the *cumulated effect of the individual "other" factors*.[220] (emphasis added)

We view this statement by the European Communities before the Panel to reflect accurately the precise point argued on appeal by Brazil, namely, that the European Commission was required in its causality analysis to examine the collective effects (what the European Communities referred to as "cumulated effect") of other causal factors vis-à-vis those of dumped imports. We also understand from this statement that the European Communities had opportunity to respond to Brazil's argument on this issue before the Panel and, in fact, did so. In the light of its apparent understanding of and response to Brazil's argument regarding the requirement to examine other causal factors collectively, the European Communities cannot be said to have had insufficient notice of this issue, or to have been denied a "fair hearing" before the Panel. We therefore find no due process concerns raised by our consideration of the merits of this issue and, consequently, we find the European Communities' objection to be without merit.

2. Merits of Brazil's Claim

185. Brazil challenges the European Communities' causality methodology, as applied in this investigation, because it fails to ensure that injury caused by any other factor is not attributed to the dumped imports. According to Brazil, an investigating authority that has separated and distinguished the injurious effects of other causal factors *individually* from the effects of dumped imports has not fully discharged its obligation under the non-attribution language of Article 3.5.[221] The investigating authority must also separate and distinguish the *collective* effects of the other causal factors from the effects of dumped imports by "evaluat[ing] the *collective* effect of those factors on the alleged causal

[220]European Communities' second oral statement before the Panel, para. 146.

[221]Brazil's appellant's submission, para. 214.

link between the dumped imports and the injury."[222] Only by separating the *collective* effects of these other causal factors from the effects of dumped imports can an investigating authority ensure that factors other than dumped imports are not a sufficient cause to sever the causal link between the dumped imports and injury.[223]

186. The European Communities argues that the causality methodology employed in this investigation is consistent with the obligations under Article 3.5. The European Communities recognizes that its investigating authority was required to separate and distinguish the injurious effects of the various causal factors so as to ensure that injuries caused by other factors were not attributed to dumped imports.[224] It points out, however, that the *Anti-Dumping Agreement* does not compel a particular methodology to be employed when fulfilling this requirement.[225] The European Communities therefore argues that Brazil seeks to impose a legal requirement that is not specified in the *Anti-Dumping Agreement*.[226]

187. 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*.

188. Article 3.5 provides, in relevant part:

> 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)

This obligates investigating authorities in their causality determinations not to attribute to dumped imports the injurious effects of other causal factors, so as to ensure that dumped imports are, in fact, "causing injury" to the domestic industry. In *US – Hot-Rolled Steel* we described the non-attribution obligation as follows:

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[222]Brazil's appellant's submission, para. 211. (emphasis added)

[223]Brazil's response to questioning at the oral hearing.

[224]European Communities' appellee's submission, para. 193.

[225]*Ibid*., paras. 195-196.

[226]*Ibid*., para. 199.

> … In order that investigating authorities, applying Article 3.5, are able to ensure that the injurious effects of the other known factors are not "attributed" to dumped imports, they must appropriately assess the injurious effects of those other factors. Logically, such an assessment must involve *separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports*. If the injurious effects of the dumped imports are not appropriately separated and distinguished from the injurious effects of the other factors, the authorities will be unable to conclude that the injury they ascribe to dumped imports is actually caused by those imports, rather than by the other factors. Thus, in the absence of such separation and distinction of the different injurious effects, the investigating authorities would have no rational basis to conclude that the dumped imports are indeed causing the injury which, under the *Anti-Dumping Agreement*, justifies the imposition of anti-dumping duties. (emphasis added)
>
> …
>
> … [I]n order to comply with the non-attribution language in [Article 3.5], investigating authorities must make an appropriate assessment of the injury caused to the domestic industry by the other known factors, and they must separate and distinguish the injurious effects of the dumped imports from the injurious effects of those other factors.[227]

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".[228]

189. 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:

[227]Appellate Body Report, *US – Hot Rolled Steel*, paras. 223 and 226.

[228]*Ibid*., para. 228.

> 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 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.[229]

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.

190. Turning to Brazil's arguments in this appeal, we do not read Article 3.5 as requiring, in each and every case, an examination of the *collective* effects of other causal factors *in addition to* examining those factors' individual effects. We observed in *US – Hot-Rolled Steel* that the non-attribution language of the *Anti-Dumping Agreement* necessarily requires that an investigating authority separate and distinguish the effects of other causal factors from the effects of dumped imports, because only by doing so can an investigating authority "conclude that the injury they ascribe to dumped imports is actually caused by those imports, rather than by the other factors."[230]

191. 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.

192. We believe that, depending on the facts at issue, an investigating authority could reasonably conclude, without further inquiry into *collective* effects, that "the injury … ascribe[d] to dumped imports is actually caused by those imports, rather than by the other factors."[231] At the same time, we recognize that there may be cases where, because of the specific factual circumstances therein, the

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[229]Appellate Body Report, *US – Hot Rolled Steel*, para. 224. We made a similar observation when discussing the non-attribution requirement under the *Agreement on Safeguards*:

> We emphasize that the method and approach WTO Members choose to carry out the process of separating the effects of increased imports and the effects of the other causal factors is not specified by the *Agreement on Safeguards*.

(Appellate Body Report, *US – Lamb*, para. 181)

[230]Appellate Body Report, *US – Hot-Rolled Steel*, para. 223.

[231]*Ibid*.

failure to undertake an examination of the collective impact of other causal factors would result in the investigating authority improperly attributing the effects of other causal factors to dumped imports.[232] We are therefore of the view that an investigating authority is not required to examine the collective impact of other causal factors, provided that, under the specific factual circumstances of the case, it fulfils its obligation not to attribute to dumped imports the injuries caused by other causal factors.

193. We now turn to the facts of this case to examine whether the European Communities has failed to discharge its non-attribution obligation under Article 3.5 by not conducting an examination of the collective impact of other factors. We begin by noting that the European Commission in this investigation expressly identified the proper attribution of injuries as one of the purposes of its causality analysis, stating that it "examined whether the material injury suffered by the Community industry has been caused by the dumped imports and whether other factors might have caused or contributed to that injury, in order not to attribute possible injury caused by other factors to the dumped imports."[233] The European Commission first identified other factors that may be causing injury to the domestic industry.[234] In then evaluating each "other factor" individually, the European Commission determined that each factor's contribution to injury was insignificant (or, for one factor, not so much as to break the causal link between dumped imports and injury).[235] As a result, the European Commission concluded that dumped imports were causing material injury to the domestic industry, without consideration of whether the *collective* effects of the other causal factors

[232]We therefore agree with the Panel's statement that:

> 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. (original emphasis)

(Panel Report, para. 7.369)

[233]Provisional Regulation, recital 162.

[234]Panel Report, para. 7.367.

[235]*Ibid*., paras. 7.367-7.368.

undermined the causal relationship between dumped imports and injury.[236]

194. On appeal, Brazil does not contest the European Communities' *individual* separating and distinguishing of the effects of other factors. It relies instead on its argument that an investigating authority is also *required* under Article 3.5 to examine other causal factors collectively *in every investigation*. Aside from this legal argument, which we have rejected, Brazil has not identified how, under the facts of this case, the European Commission's failure to examine the collective impact of the other causal factors resulted in this case in the attribution to dumped imports of injuries resulting from those other factors. If Brazil viewed the analysis of the European Commission in this case to have attributed improperly to dumped imports the injuries caused by other factors, Brazil had the opportunity before the Panel to adduce evidence to this effect. As far as we are aware from the Panel Record, Brazil proffered no such evidence. Nor has the Panel made any factual finding in this regard. We find no basis, therefore, to find that the causality analysis of the European Commission in this investigation was inconsistent with the non-attribution obligation of the European Communities under Article 3.5 of the *Anti-Dumping Agreement*.

195. We therefore uphold the Panel's finding, in paragraphs 7.369 and 7.370 of the Panel Report, that the causality methodology applied by the European Commission in this investigation, which did not include an examination of the *collective* impact of other known causal factors, did not attribute the injuries caused by those other factors to the dumped imports.

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[236]The European Communities disagrees with the description by the Panel of the European Commission's evaluation of the factors as having been undertaken solely on an *individual* basis. (European Communities' appellee's submission, paras. 188-191) The European Communities points to the following paragraph as evidence of its consideration of the *collective* impact of other causal factors:

> It is therefore provisionally concluded that the dumped imports originating in Brazil, the Czech Republic, Japan, China, Korea and Thailand have caused material injury to the Community industry. Any other factors that may have contributed to the injurious situation of the Community industry, in particular imports from third countries, are such that *they* cannot be considered to break the causal link between the dumping and the material injury found in light of the strong increase in the imports [c]oncerned made at particularly low prices. (emphasis added)

(Provisional Regulation, recital 177) The European Communities, however, has not appealed the Panel's description of the European Commission's causality methodology as applied in this case.

XI. Findings and Conclusions

196. For the reasons set out in this Report, the Appellate Body:

(a) upholds the Panel's finding, in paragraphs 7.106-7.108 of the Panel Report, that the European Communities did not act inconsistently with its obligations under Article VI:2 of the GATT 1994 or Article 1 of the *Anti-Dumping Agreement* in imposing anti-dumping duties in this case following the devaluation of the Brazilian Real at the beginning of the fourth quarter of the period of investigation ("POI"). As the finding on this issue resolves Brazil's claim with respect to the impact of the devaluation of the Real on the European Commission's dumping determination, the Appellate Body does not consider it necessary to make a finding on whether, under Article 2.4.2 of the *Anti-Dumping Agreement*, the European Commission "could not have based its dumping analysis on the export prices relating to the period after the devaluation only";

(b) upholds the Panel's finding, in paragraphs 7.138 and 7.139 of the Panel Report, that the European Communities did not act inconsistently with Article 2.2.2 of the *Anti-Dumping Agreement* by including actual data from "low-volume" sales in determining the amounts for administrative, selling and general costs ("SG&A") and profits for the construction of normal value;

(c) upholds the Panel's finding, in paragraphs 7.234-7.236 of the Panel Report, that the European Communities did not act inconsistently with Articles 3.2 or 3.3 of the *Anti-Dumping Agreement*, even though the European Commission did not analyze the volume and prices of dumped imports from Brazil individually, pursuant to Article 3.2, as a pre-condition to cumulatively assessing the effects of the dumped imports under Article 3.3;

(d) upholds the Panel's finding, in paragraphs 7.46 and 7.47 of the Panel Report, that Exhibit EC-12 was properly before the Panel;

(e) reverses the Panel's finding, in paragraphs 7.348 and 7.349 of the Panel Report, and finds, instead, that the European Communities acted inconsistently with Articles 6.2 and 6.4 of the *Anti-Dumping Agreement*, by failing to disclose to the interested parties during the anti-dumping investigation the information on the injury factors listed in Article 3.4 that is contained in Exhibit EC-12;

(f) upholds the Panel's finding, in paragraph 7.311 of the Panel Report, that the European Communities did not act inconsistently with its obligations under Article 3.4 of the *Anti-Dumping Agreement* in respect of the injury factor "growth"; and

(g) upholds the Panel's findings, in paragraphs 7.362 and 7.369-7.370 of the Panel Report, that the European Communities did not act inconsistently with Article 3.5 of the *Anti-Dumping Agreement*, and, in particular,

(i) upholds the Panel's finding, in paragraph 7.362 of the Panel Report, that the difference in cost of production between the Brazilian exporter and the European Communities industry was not a "known factor[ ] other than the dumped imports which at the same time [was] injuring the domestic industry"; and

(ii) upholds the Panel's finding, in paragraphs 7.369 and 7.370 of the Panel Report, that the causality methodology applied in this investigation, which did not include an examination of the collective impact of other known causal factors, did not attribute the injuries caused by those other factors to the dumped imports.

197. The Appellate Body therefore recommends that the Dispute Settlement Body request the European Communities to bring its measure, which has been found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with its obligations under the *Anti-Dumping Agreement*, into conformity with that Agreement.

Signed in the original at Geneva this 7th day of July 2003 by:

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A. V. Ganesan
Presiding Member

_____ _____

Luiz Olavo Baptista
Member

Giorgio Sacerdoti
Member

ANNEX 1

WORLD TRADE ORGANIZATION

WT/DS219/7
29 April 2003

(03-2240)

Original: English

EUROPEAN COMMUNITIES – ANTI-DUMPING DUTIES ON MALLEABLE CAST IRON TUBE OR PIPE FITTINGS FROM BRAZIL

Notification of an Appeal by Brazil
under paragraph 4 of Article 16 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU)

The following notification, dated 23 April 2003, sent by Brazil to the Dispute Settlement Body (DSB), is circulated to Members. This notification also constitutes the Notice of Appeal, filed on the same day with the Appellate Body, pursuant to the *Working Procedures for Appellate Review*.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the Appellate Body's *Working Procedure for Appellate Review*, the Government of Brazil hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the panel report *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil* (WT/DS219/R) and certain legal interpretations developed by the Panel.

Brazil seeks review by the Appellate Body of certain Panel conclusions which are in error, and are based upon erroneous findings on issues of law and on related legal interpretations with respect to various provisions of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "*Anti-Dumping Agreement*") and the General Agreement on Tariffs and Trade 1994 ("*GATT 1994*"). These conclusions are:

(1) The Panel's conclusions that the European Communities has not violated its obligations under Article 1 of the Anti-Dumping Agreement and/or under Article VI:2 of the GATT 1994 in imposing anti-dumping duties following the devaluation of the Brazilian currency at the beginning of the fourth quarter of the investigation period ("IP"). This finding is in error, and is based upon erroneous findings on issues of law and on related legal interpretations contained in paragraphs 7.93 to 7.108 of the Panel's report, including:

a) the Panel's finding that the EC could not have based its dumping analysis on the export prices relating to the period after the devaluation only. This conclusion is based on an erroneous interpretation of Article 2.4.2, namely, that this Article generally requires that "data throughout the investigation period would necessarily consistently be taken into account" and that "an investigating authority would generally be precluded from limiting its dumping analysis to a selective subset of that data from only a temporal sub-segment of the IP" (at para. 7.104); and,

b) the Panel's finding that there is no foundation in the text of the Anti-Dumping Agreement or Article VI of the GATT 1994 for a requirement that the EC should have re-assessed its dumping findings in the light of the devaluation of the Brazilian Real during the IP and that, in any event, Article 9.3 provides for a corrective mechanism.

(2) The Panel's conclusion that the European Communities did not act inconsistently with Article 2.2 and the chapeau of Article 2.2.2 of the Anti-Dumping Agreement in constructing normal value using SG&A and profit data from sales of product types for which there were no representative sales in the domestic market of Brazil. This finding is in error, and is based upon erroneous findings on issues of law and on related legal interpretations contained in paragraphs 7.124 to 7.139 of the Panel's report, including:

a) the Panel's finding that a Member is not permitted to exclude actual data – on a basis other than not being made in the ordinary course of trade – from the calculation under Article 2.2.2 (at para. 7.138); and,

b) the Panel's finding that the ordinary meaning of "*sales in the ordinary course of trade*" of the chapeau of Article 2.2.2 "*includes the SG&A actually incurred and the profits actually realized in the category of production and sales explicitly specified in the Agreement*", and that therefore, the SG&A and profit data of low volume sales made in the ordinary course of trade necessarily have to be included when constructing normal values (at para 7.138).

(3) The Panel's conclusion contained in paragraphs 7.225 to 7.236 of the Panel's report that the European Communities has not violated Articles 3.1, 3.2 and 3.3 of the Anti-Dumping Agreement on the ground that an Article 3.2 analysis of the volume and price of the imports from each individual country is not a necessary pre-condition for cumulation under Article 3.3. This finding is in error and is based upon erroneous findings on issues of law and on related legal interpretations of the obligations regarding the determination of injury arising from Articles 3.1, 3.2 and 3.3 of the Anti-Dumping Agreement.

(4) The Panel's conclusion contained in paragraphs 7.302 to 7.345 combined with 7.42 – 7.47 of the Panel's report that the Panel is compelled to include Exhibit EC-12 in its examination of Brazil's claims under Article 3.4 even if there is no contemporaneous and verifiable written indication that this Exhibit actually existed during the time of the investigation. This finding is in error and is based upon erroneous findings on issues of law and on related legal interpretations, including:

(a) the Panel's erroneous legal interpretation of Articles 3.1 and 3.4 of the Anti-dumping Agreement and, in particular, of the notion of "positive evidence" contained in Article 3.1. On that basis, the Panel erroneously considered that the requirements of Article 3.1 and 3.4 were met by an internal document of which the contemporaneous nature is questionable and not verifiable.

(b) the Panel's finding that it can rely on a presumption of good faith of WTO Members in order to conclude that Exhibit EC-12 was made within the time period of the investigation thereby breaching the Panel's obligations under Article 11 of the DSU and Articles 17.5(ii) and 17.6(i) of the Anti-Dumping Agreement.

(5) The Panel's conclusion contained in paragraphs 7.309 to 7.311 of the Panel's report that the EC has not violated its obligations under Article 3.4 in its treatment of the factor 'growth' and that it at least addressed each of the listed Article 3.4 factors given that it addressed the factor 'growth' implicitly by addressing other injury factors. This finding is in error and is based upon erroneous findings on issues of law and on related legal interpretations, arising from Articles 3.1 and 3.4 of the Anti-dumping Agreement.

(6) The Panel's conclusion contained in paragraphs 7.346 and 7.349 of the Panel's report that the European Communities has not violated Articles 6.2 and 6.4 of the Anti-Dumping Agreement on the ground that the investigating authority can decide without further communication with the parties that the evidence contained in an internal document (Exhibit EC-12) does not have any "value added" to the substance of their investigation in the analysis of the injury factors listed in Article 3.4 of the Anti-Dumping Agreement. This finding is in error, and is based upon erroneous findings on issues of law and on related legal interpretations of the obligations arising from Articles 6.2 and 6.4 of the Anti-Dumping Agreement.

(7) The Panel's conclusion that the European Communities has not violated Article 3.5 of the Anti-Dumping Agreement. This finding is in error, and is based upon erroneous findings on issues of law and on related legal interpretations contained in paragraphs 7.354 to 7.416 of the Panel's report, including:

a) the Panel's finding that factors "known" to an investigating authority in the context of the dumping and injury analysis, are not "known" factors in the specific context of causality (at para. 7.361 and 7.362); and,

b) the Panel's finding that the methodology used by the EC which analyses each causal factor only individually did not infringe Article 3.5 (at para. 7.368 to 7.370).

Brazil respectfully requests the Appellate Body to reverse the above findings of the Panel, as well as the reasoning leading thereto, and to modify accordingly the recommendations of the Panel.

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